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## THE NEW PRO-LIFE LEGISLATION: PATTERNS AND RECOMMENDATIONS

JOSEPH P. WITHERSPOON\*

In its 1973 decisions of *Roe v. Wade*<sup>1</sup> and *Doe v. Bolton*<sup>2</sup> the Supreme Court of the United States held the Texas and Georgia anti-abortion statutes to be invalid. The decisional principle utilized in *Wade* also invalidated the anti-abortion statutes of most other states as well. The substantial response of the state legislatures to the Supreme Court's abortion decisions clearly reveals the widespread and deeply felt commitment to limiting, by legislation, the effect of these decisions in the interest of saving as many unborn human lives as possible. As evidenced by memorials addressed to Congress, the commitment seeks ultimately to reverse or modify *Wade* and *Bolton* by a constitutional amendment, usually referred to as the Human Life Amendment. The recent cases judicially reviewing the validity of this responsive legislation and similar but older legislation clearly reveals the tragic meaning and significance of these landmark decisions and the extraordinary havoc they have created for our societal and familial fabric. This article will examine some of the principal aspects of this legislation enacted in response to *Wade* with a view to evaluating its usefulness in the overall effort to protect the lives of unborn children, examining the principal or typical decisions reviewing the validity of this legislation, and making suggestions for its modification in the interest of making it more effective and useful.

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1. 410 U.S. 113 (1973).
2. 410 U.S. 179 (1973).

THE CONTENT OF THE SUPREME COURT'S  
ABORTION DECISIONS

*Wade* is the principal abortion decision for our purposes since only in that case did the Supreme Court focus upon the substantive validity of state anti-abortion legislation prohibiting all abortions except those performed for a purpose specified in that legislation. In *Wade* the Supreme Court held that the unborn child is not a person within the meaning and protection of the term "person" as utilized in the fourteenth amendment. This decision stripped the unborn child of all protection under the amendment for its life, liberty, and property, and probably all other constitutional protection, throughout the period of pregnancy from the time of its conception until its live birth.<sup>3</sup>

Since the Court was construing the fourteenth amendment, which it considered to be the source of the right of privacy of a pregnant woman insofar as it relates to the right of medical care, the Court had primary reference to the use of the term "person" in the due process and equal protection clauses of that amendment.<sup>4</sup> The Court also held that a pregnant woman has the right, as part of her constitutional right to privacy, to be free from interference by the state under a criminal abortion statute in obtaining an abortion from a consenting physician during the first two trimesters of pregnancy—approximately 26 weeks of gestation—with certain very limited exceptions.<sup>5</sup> Thus, the Court allowed the state the freedom to preclude by a criminal statute anyone but a physician from performing an abortion during and after the first trimester as well as to preclude by such a statute an abortion not conforming to conditions designed to protect the woman's health after the first trimester. Even in the period following the point at which an unborn child becomes "viable," the unborn child was left defenseless by the Court's decision under the Constitution, and thus has no protection at all unless the state enacts a statute prohibiting abortions after the point of viability.<sup>6</sup> The state's freedom to protect the viable unborn child was limited, however, since the Court held that the state could not

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3. *Roe v. Wade*, 410 U.S. 113, 156-59 (1973).

4. *Id.* at 152-53.

5. *Id.* at 152-54. Although characterized by the Court as a form of "medical care," the procedure actually involves the deliberate killing by a consenting physician of an unborn child in the womb. In the later stages of pregnancy—20 weeks of gestation and forward—an abortion involves the premature delivery of her live child and its subsequent death from prior injuries deliberately inflicted upon it by the physician or from its inability to survive at that point in the violence of an alien and unnatural environment.

6. *Roe v. Wade*, 410 U.S. 113, 163-65 (1973).

prohibit abortions of viable unborn children when performed to preserve a pregnant woman's health—a term given extraordinarily wide scope by the Court. Their definition authorizes and provides constitutional protection for an abortion for virtually any personal, social, economic, psychological, or other reason, including even the mother's "distress . . . associated with the unwanted child"<sup>7</sup> or of the "family [being] already unable, psychologically or otherwise, to care for it."<sup>8</sup>

In light of these basic holdings, the Supreme Court in *Wade* invalidated the Texas anti-abortion criminal statute and, due to the principle involved, most other state anti-abortion criminal statutes were also rendered nugatory. These statutes generally proscribed as a crime the performance of an abortion at any stage of pregnancy unless it was performed for the purpose of saving the life of the mother. Invalidation of the Texas criminal statute was necessitated by the fact that the statute interfered substantively with a pregnant woman's exercise of her newly recognized right to privacy to obtain medical care in the form of an abortion, as defined by the Court.<sup>9</sup>

Thus, in practical and actual effect, the Court in *Wade* granted a pregnant woman a constitutional right to direct a consenting physician to perform an abortion upon her mere demand or election; consequently, the physician was given the constitutional right to carry out this demand, with or without any reason whatsoever for the killing of the unborn child in the womb or causing its premature delivery and highly probable death. This was the view taken by Mr. Justice White in his dissent to *Wade* and *Bolton*.<sup>10</sup> This view has also been adopted by both physicians and lower courts since the decision in these cases.<sup>11</sup>

Finally, Mr. Justice Blackmun stated in a footnote to his majority opinion in *Wade* that "[n]either in this opinion nor in *Doe v. Bolton* . . . do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision."<sup>12</sup> But as a matter of logical inference from the Court's decision, from one point of view, and more especially, as a matter of the practical operation, the power of fathers to protect

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7. *Id.* at 153.

8. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

9. *Id.* at 182, 205-207. Also invalidated in principle were the more modern state anti-abortion statutes, such as the Georgia statute in *Bolton*, patterned after the *American Law Institute Model Penal Code* which specifies additional reasons for the performance of abortions. See ALI MODEL PENAL CODE § 230.3 (1962 Prop. Off. Draft).

10. *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973).

11. *Doe v. Hale Hosp.*, 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975).

12. *Roe v. Wade*, 410 U.S. 113, 165 n.67 (1973).



their unborn children from destruction by abortion was critically undercut and probably destroyed unless the Court subsequently acts to qualify the reasoning in the decision. A number of lower federal courts have already held that because, as the Supreme Court pronounced in *Wade*, the state cannot interfere with the pregnant woman's decision to obtain an abortion, a fortiori neither can the father of her unborn child.<sup>13</sup>

#### THE REACTION TO WADE AND BOLTON

*Wade* and *Bolton* have stirred the American populace as have few decisions of the Supreme Court since that institution came into being. Even *Dred Scott v. Sandford*,<sup>14</sup> decided in 1857, which held Blacks not to be citizens and slaves to be property rather than persons under the Constitution of the United States, probably generated less controversy than the abortion decisions have. While the *Dred Scott* decision was instrumental in contributing to the events that precipitated the War Between the States, it did not foist the slavery institution upon American society. The anti-slavery societies had long since engendered the debate that ultimately was to be resolved by war and political decision.

Erroneous and tragic as *Dred Scott* was, it was abhorred primarily by residents of the free states. By way of contrast, the abortion decisions have inserted the institution of abortion on demand deep into the American social fabric. They have institutionalized the wholesale destruction of human life. About 3,000,000 innocent unborn children have been killed by abortion under the authority of these decisions in the short period since they were handed down.<sup>15</sup>

In contrast to other controversial decisions of the Supreme Court, substantial opposition to the abortion decisions has developed in each of the 50 states. The "Right to Life Movement," which was somewhat underway before these decisions, has grown by leaps and bounds since their rendition so that there are today several interrelated national organizations actively working for a Human Life Amendment to the Constitution to reverse the decisions and for legislation to cut down the incidence of abortion in areas not reached or not yet held to be affected by them.

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13. *Coe v. Gerstein*, 376 F. Supp. 695, 699 (S.D. Fla. 1973), cert. denied per curiam, 417 U.S. 279 (1974); *Doe v. Rampton*, 366 F. Supp. 189 (C.D. Utah 1973). See also Annot., 62 A.L.R.3d 1097 (1975).

14. 60 U.S. (19 How.) 393 (1857).

15. Weinstock, Tietze, Jaffe & Dryfoos, *Legal Abortions in the United States Since the 1973 Supreme Court Decisions*, FAMILY PLANNING PERSPECTIVES, Jan.-Feb. 1975, at 23.

One of these organizations now has affiliates in each state, which in turn have numerous local affiliated organizations. Their members are drawn from an extraordinary spectrum of Republicans and Democrats; Catholics, Protestants, and Jews; members of the majority group and various ethnic minority groups; hawks and doves relative to American involvement in foreign wars; and housewives, professionals, business people, union members, and students.<sup>16</sup> What is significant is that they are becoming increasingly sophisticated and effective in their efforts to obtain state legislation proposed by them.

The criticism of the abortion decisions made by an enormous number of ordinary citizens reflects an intuitive civic response—one that proceeds both from a common sense judgment concerning what a human being is and from a judgment or belief that our American system of law was originally designed to protect all human beings. It is precisely because so many ordinary citizens intuit that the unborn child is a human being and affirm that human beings, and especially innocent children, are to be protected in our legal order that they recoil at the abortion decisions. In their intuitive response to the decisions, these citizens are not wrong, in my opinion. Indeed, I suggest that the proper central criticism to be made of the abortion decisions by lawyers is that the Supreme Court failed both to acknowledge what all science affirms—that the unborn child is a human being—and to confront the primordial political fact that the framers of the thirteenth and fourteenth amendments designed those amendments in 1865 and 1866 so as to protect all human beings, including unborn children, from action that would deprive them of their fundamental rights, and, especially of the right to life.

In my testimony before the United States Senate Judiciary Committee, Subcommittee on Constitutional Amendments, on April 11, 1975,<sup>17</sup> and before the United States House of Representatives, Subcommittee on Civil and Constitutional Rights, on February 4, 1976,<sup>18</sup> I fully set forth the evidentiary data that shows persuasively that Congress between 1860 and 1875 was fully aware of the nature of the unborn child as a human being at all stages of pregnancy. The data showed that during that

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16. WALL STREET JOURNAL, Aug. 2, 1973, at 1, col. 1.

17. *Hearings on S.J. Res. 6, 10 & 11 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., pt. 4, at 524 (1975).

18. *Hearings on Proposed Constitutional Amendments on Abortion Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976).

period the American Medical Association conducted a political campaign to persuade state and territorial legislatures and Congress to enact a recommended form of anti-abortion statute to protect the unborn child from abortion from the time of its conception until its live birth. This campaign was shown to have paralleled the anti-slavery movement of the same period. That testimony further showed that Congress acted by statute on four specific occasions between 1860 and 1873 to protect unborn children; two of those statutes dealt with the problem of abortion. Moreover, that data fully supports the fact that the framers of the thirteenth and fourteenth amendments considered that the persons and human beings for whose protection they proposed those amendments included unborn children from the time of their conception.

This data should have been investigated by the Supreme Court when it was examining the question of whether an unborn child is within the meaning and protection of the term "person" as used in the due process and equal protection clauses of the fourteenth amendment. It is well established, in this connection, that the Supreme Court in assigning meaning to a constitutional provision must do so by an examination of the legislative and contemporary history of the provision in question with a view to determining what those who conceived, shaped, and brought about the adoption of the provision had in mind with respect to the reasons or purposes for which they proposed its inclusion, the evils which they aimed to eliminate, and the objects which they sought to obtain.<sup>19</sup> Upon making these determinations, the Court must then assign such meaning to the provision as will give effect to these reasons or purposes behind the provision, eliminate the evils it was designed to suppress, and promote the objects it was constructed to obtain. Rather than examining the copious historical evidence upon the proper meaning to be assigned to the term "person" in the fourteenth amendment, Mr. Justice Blackmun, writing for the majority, engaged in a merely textual, verbalistic method of interpretation which involved the examination of how the term "person" had been grammatically used in the rest of the Constitution, including its Bill of Rights and the later amendments. Observing that "in nearly all these instances use of the word [person] is such that it has application only postnatally,"<sup>20</sup> Mr. Justice Blackmun

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19. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 429-34 (1968); *Duncan v. Louisiana*, 391 U.S. 145, 173-78 (1968) (dissenting opinion); *United States v. Brown*, 381 U.S. 437, 442 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951); *Ex parte Bain*, 121 U.S. 1, 12 (1887).

20. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

concluded without any supporting analysis that the term person in the fourteenth amendment “does not include the unborn.”<sup>21</sup>

The Court’s use of rhyme rather than the reason and the purpose lying behind the fourteenth amendment’s protection of “persons” in assigning meaning to its due process and equal protection clauses, was a repudiation of its obligation to maintain and respect the rule of law and justice. Mr. Justice Blackmun has in effect acknowledged that he discarded, in behalf of the Court, this obligation in order to reach the result that was reached in *Wade*. He has made the remarkable and candid public statement that *Wade* “will be regarded as one of the worst mistakes in the Court’s history or one of its great decisions, a turning point.”<sup>22</sup> In effect, Mr. Justice Blackmun has stated that in *Wade* the Court has essayed to legislate and to place in the Constitution what was not there in the first place, either in principle or in particular, and that it has done so out of its own view as to what is good for the country. He and the rest of the seven-judge majority forgot what the Court itself had so recently acknowledged in the death penalty cases: “The calculated killing of a human being by the State involves, by its nature, a denial of the executed person’s humanity. . . . [I]t is uniquely degrading to human dignity.”<sup>23</sup> The Court went on to observe that: “An executed person has indeed ‘lost the right to have rights.’ . . . His execution is a way of saying, ‘You are not fit for this world, take your chances elsewhere.’”<sup>24</sup> The fact that so many abortions are being performed each year “necessitates that the decision be free from any possibility of error.”<sup>25</sup>

The Supreme Court, I suggest, by losing sight of these principles in *Wade* and in holding that there is a constitutional right to exterminate innocent human life, cut itself off from what lies deepest in the American psyche. The ordinary citizens, when they recovered from the effects of their support of the Court over the years and realized what the Court had decreed in *Wade*, were bound to react as they have during the three years since it was rendered. The Court can no more expect the regime of wholesale destruction of life it instituted in *Wade* to stand than the regime of wholesale slavery it instituted in the free states in *Dred Scott*. Most ordinary citizens know intuitively what the Court

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21. *Id.* at 158.

22. Trinkaus, *Dred Scott Revisited*, 101 COMMONWEAL 390 (1975).

23. *Furman v. Georgia*, 408 U.S. 238, 290-91 (1972) (Brennan, J., concurring).

24. *Id.* at 288.

25. *Id.* at 316 (Marshall, J., concurring).

apparently did not know: The unborn child is “fit for this world”—undoubtedly more so than the rest of us. It has not sinned. This is the essential reaction of most ordinary citizens to *Wade*. And this is the reason for the extraordinary effort at obtaining legislation to restrict the incidence of abortion to the extent this is possible, despite *Wade*, and to obtain a human life amendment to reverse it.

There is clearly a general reaction to the *Wade* and *Bolton* decisions to the effect that the Supreme Court was wrong. For example, Professor John Hart Ely of Harvard Law School shares this view, even though he adheres to a pro-abortion point of view as a matter of legislative policy. Speaking of the obligation of the Court to draw decisional inferences only from values that the Constitution marks for special protection, he stated that “[*Roe v. Wade*] lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine.”<sup>26</sup> Professor Ely has aptly summed up the contention of all the opponents of *Wade*: “It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.”<sup>27</sup> The broader legal criticism of these decisions, however, is that they failed to ascertain and apply the underlying purpose of the thirteenth and fourteenth amendments. That purpose was to establish that all human beings, including unborn children, are persons protected by the Constitution in their fundamental rights to life, liberty, and property. Still further, there is the more general criticism by those who oppose abortion on policy grounds. Among those who oppose these decisions are individuals who are actively engaged in dealing with the problem created by *Wade* and *Bolton* and who have a central, single goal: a Human Life Amendment to restore to the unborn child its constitutional right to life.<sup>28</sup>

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26. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937 (1973).

27. *Id.* at 949.

28. Undoubtedly, from an intrinsic, long-range point of view this amendment is the most important goal of pro-life forces for many reasons: (1) the need to deal with the Court's destruction of the internal harmony of the Constitution; (2) the need to respond to the precise dislocation of that harmony by the Court's decision in *Wade*; (3) the securing of a permanent legal solution through an amendment rather than turning the matter over to the legislatures, state and federal, to deal with on an inconsistent, impermanent basis; and (4) the need for the people to reaffirm the great achievements of the people through the anti-slavery movement in the civil rights decade from 1865 to 1875 which culminated in the adoption of the thirteenth and fourteenth amendments.

There are several basic models for a Human Life Amendment that continue to receive careful attention of pro-life forces and of legislators. These are set forth in Appendix A to this article. By and large, the memorials sent to Congress by state legislatures asking

On the other hand, the general reaction to the *Wade* and *Bolton* decisions has also taken the form of seeking state and federal legislation to deal with the problem of abortion. Pro-life forces have recognized that it may take a considerable time to obtain submission of a Human Life Amendment by Congress. This is true for a number of reasons: (1) the difficulty of formulating a Human Life Amendment proposal that will intrinsically and effectively respond to the problems created by the *Wade* and *Bolton* decisions; (2) the need for developing a consensus among pro-life forces upon what is the appropriate form of a Human Life Amendment; (3) the difficulty of getting an acceptable Human Life Amendment proposal through Congress; and (4) the process, perhaps seven years long, of obtaining ratification of the proposed amendment by state legislatures.

It took nearly forty years for the anti-slavery movement to achieve the goal of eliminating slavery through the thirteenth amendment. That movement was assisted by the resort of slavery forces to an overkill through their misuse of federal power and the institution of a disastrous war that destroyed the possibility that the slavery institution could continue as one that was legally sanctioned. Moreover, the federal government is thoroughly in the hands of pro-abortion forces in all branches and all levels, including even the United States Civil Rights

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for a submission of a human life amendment have not specified proposed terms for such an amendment. As the dialogue among pro-life forces has continued, however, the models have been narrowed down to perhaps five to eight principal examples. The author of this article was one of the principal authors of three of these models, which have been introduced again in the second session of the 94th Congress: S.J.R. 140, and H.J.R. 144, introduced by Senator James Buckley of New York and Representative Albert H. Quie of Minnesota, respectively; S.J.R. 141 and H.J.R. 132, proposed by the National Right to Life Committee, Inc. and introduced by Senator James Buckley and Representative James L. Oberstar of Minnesota, respectively; H.J.R. 121, introduced by Representative James A. Burke of Massachusetts. Two additional models for an amendment in the current session of Congress are S.J.R. 6 and H.J.R. 246, introduced by Senator Jesse Helms of North Carolina and Representative Gene Snyder of Kentucky, respectively, and S.J.R. 143, introduced by Senator Quentin Burdick of North Dakota. Professor Robert Byrn of Fordham was also one of the principal draftsmen of S.J.R. 140 and 141. His testimony before the Senate and House subcommittees previously mentioned in March of 1975, and February 5, 1976, is an excellent source material for those who wish to further investigate the various aspects of these amendments and their capacity to respond to various problems to which any human life amendment must respond. Byrn, *A Human Life Amendment: What Would it Mean?*, 1 HUMAN LIFE REV., Spring 1975, at 50. An appendix to the author's testimony on February 4, 1976, before the Senate subcommittee will also prove useful in this respect. Professor John Noonan is the author of one of the "State's Rights" type of human life amendments, S.J.R. 143. An abstract of his testimony before the House subcommittee supporting this proposal has been published. Noonan, *Why a New Constitutional Amendment?*, 1 HUMAN LIFE REV., Winter 1975, at 24, 110.

Commission.<sup>29</sup> With the extraordinary power and influence this control provides, pro-life forces face an up-hill battle to move Congress to submit a Human Life Amendment to the state legislatures. Before the effort to obtain this submission can be successful, there must be an understanding by the American people and its leadership of what *Wade* has done to the nation's orientation to the protection of human rights, of the moral wrong that has been perpetrated upon its unborn children, and of the breakdown in judicial administration of the rule of law by the nation's Supreme Court that made all of this possible.<sup>30</sup>

Meanwhile, the grass roots of the pro-life forces have sensed that they must begin the battle for life at home if they are to win it at all. It has been natural for them to turn to their state legislatures; there are great advantages and hardly any disadvantages for the pro-life forces in seeking state legislation to deal with the problem of abortion.

#### THE STATE RESPONSE

Thirty-two of our states have enacted legislation since the abortion decisions, in an effort to find a way to avoid their result, test their scope, or restrict the performance of abortions through formulas established under the state's regulatory or non-regulatory powers.<sup>31</sup>

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29. U.S. COMM'N ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILD BEARING (1975).

30. The positive factors working in behalf of pro-life forces for bringing about this understanding are the American abhorrence of violence as a technique for solving its problems, the American commitment to a system of fair play and justice, the American commitment to the rule of law and justice which is the foundation of the respect the Supreme Court of the United States has enjoyed in the past, and the American love of children. The negative factors working against this achievement by pro-life forces include: the enormous power and influence of the medical profession, despite the many within it who personally oppose abortion, and its participation, support, and toleration of abortion on demand; the apparently limitless funds available to pro-abortion forces; the pro-abortion persuasion of so many legislators and administrators, both federal and state; and the economic self-interest of those involved in making abortion possible, such as pharmaceutical houses, abortion clinics, referral agencies, and those who see the elimination of the children of the poor and minority groups as cutting down on welfare rolls and the tax burden.

31. ARIZ. REV. STAT. ANN. § 36-2301 (Supp. 1976); ARK. STAT. ANN. § 41-304 (Supp. 1975); CAL. HEALTH & SAFETY CODE § 25955 (Deering 1975); GA. CODE ANN. § 26-1201 (Supp. 1975); IDAHO CODE ANN. § 18-605 (Supp. 1975); ILL. REV. STAT. ch. 38, § 81-11 (1976); IND. ANN. STAT. 10-108 (1975); KY. REV. STAT. § 311.710 (Supp. 1974); LA. REV. STAT. § 40:1299.31 (Supp. 1975); ME. REV. STAT. ANN. tit. 22, § 1575 (Supp. 1975); MD. ANN. CODE art. 43, § 129A (Supp. 1975); MASS. GEN. LAWS ANN. ch. 112, § 121 (1975); MICH. STAT. ANN. § 47.57 (51) (Supp. 1975); MINN. STAT. § 145.412 (Supp. 1976); MO. REV. STAT. § 188.010 (Supp. 1976); MONT. REV. CODES ANN. § 94-5-613 (1974); NEV. REV. STAT. § 442.250 (1973); N.J. REV. STAT. § 2A:65A-1 (Supp. 1976); N.Y. PENAL LAW § 125.40 (McKinney 1975); N.C. GEN. STAT. § 14-45.1 (Supp. 1975); N.D. CENT. CODE § 14-02.1 (Supp. 1975); OHIO REV. CODE ANN. § 4731.91 (1973); PA. STAT. ANN. tit. 35, § 6001 (Supp. 1976); R.I. GEN. LAWS ANN. §

*The Rhode Island Statute of 1973*

The most noteworthy legislation enacted with the purpose of avoiding the *Wade* decision is that enacted by Rhode Island.<sup>32</sup> For the purpose of administration of its state anti-abortion statute, the Rhode Island General Council established the conclusive presumption

that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the constitution of the United States, and that miscarriage after the instant of conception caused by the administration of any poison or other noxious thing or the use of any instrument or other means shall be a violation of said section 11-3-1, unless the same be necessary to preserve the life of a woman who is pregnant.<sup>33</sup>

This legislation was obviously designed to compel the Supreme Court to examine the validity of an anti-abortion statute which was designed explicitly to protect the life of the unborn child. The Court had stated in *Wade* that there was considerable support for the view that the original purpose of anti-abortion statutes had been to protect the mother rather than her unborn child. Moreover, the statute was designed to compel this examination with respect to a statute in which the legislature had, upon the basis of compelling scientific evidence, established a conclusive presumption that human life began at the instant of conception. The Court in *Wade* stated that it "need not resolve the difficult question of when life begins" and that "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."<sup>34</sup> The statutes before the Supreme Court in *Wade* and *Bolton* did not contain such a presumption. Nothing the Court stated in those cases could fairly be construed to have dealt with the validity of a statute of this sort. The value of the Rhode Island approach to an anti-abortion statute was that it was a substantially different kind of statute from those involved in *Wade* and *Bolton* and that it required the courts to pass upon its validity in light of the rule that deference should be paid by courts to legislative judgments with respect to basic facts upon which the legislation is based.

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11-23-5 (Supp. 1975); S.C. CODE ANN. § 32-682 (Supp. 1974); S.D. CODE § 34-23A-1 (Supp. 1975); TENN. CODE ANN. § 39-301 (1975); UTAH CODE ANN. § 76-7-302 (Supp. 1974); VA. CODE ANN. § 18.1-62 (Supp. 1975); WIS. STAT. § 441.06(6) (1974); WYO. STAT. ANN. § 6-77.2 (Supp. 1975).

32. R.I. GEN. LAWS ANN. §§ 11-3-1 to 11-3-5 (Supp. 1975).

33. *Id.* § 11-3-4.

34. *Roe v. Wade*, 410 U.S. 113, 159 (1973).



When some institution of government, such as the Supreme Court, takes the position that it cannot resolve the important question of when human life begins, this does not mean and has not meant that some other government institution cannot resolve it. Indeed, when questions are so important, controversial, and "insoluble," this is precisely the kind of question which the legislative branch of the government was designed to resolve. This is the classic view of the role of the legislature,<sup>35</sup> and the Supreme Court has itself recognized and applied this view.<sup>36</sup>

The ultimate value of the Rhode Island approach to anti-abortion statutes following *Wade* was that a challenge to the statute would provide an opportunity for the state to place in the trial court record copious scientific and medical evidence supporting the view that human life begins at conception. Courts adhering to the traditional view concerning the role of a legislature in resolving controversial and judicially "insoluble" questions are required to examine this evidence and ascertain whether or not the legislature had a reasonable, substantial basis in scientific and medical evidence for establishing its conclusive presumption that human life begins at conception.<sup>37</sup> Of course, the Rhode Island approach left open other avenues for defending the constitutionality of its new statute that had not been employed in defense of the Texas and Georgia statutes involved in *Wade* and *Bolton*. One of these approaches was clearly that of relying upon the thirteenth amendment as

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35. T. SMITH, LEGISLATIVE WAY OF LIFE 28-29, 74, 91-93 (1940).

36. See *Dandridge v. Williams*, 397 U.S. 471 (1970) in which Mr. Justice Stewart, delivering the opinion for the Court, stated:

[W]e deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights. . . . For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the fourteenth amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' . . . That era long ago passed into history . . . .

*Id.* at 484. It is perhaps of significance to note that Mr. Justice Douglas, concurring in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), discussed the right of privacy without citing *Roe v. Wade*. Five weeks after the Court's decision in *Boraas*, Mr. Justice Douglas was the sole judge on the Court to take the position that certiorari should have been granted in *Israel v. Doe*, 416 U.S. 993 (1974).

37. The *Israel* case was the first one following *Wade* in which testimonial and documentary evidence was introduced to demonstrate that the unborn child is a human being. Among the many extraordinarily competent scientific and medical witnesses was Dr. Albert W. Liley of New Zealand, the father of the science of Fetology. These witnesses were unanimous in their statements that all relevant sciences affirm that the unborn human child is a human being at the moment of its conception. The plaintiff mothers put on no evidence to the contrary. Brief for Appellant at 74-113, 136-45, 226-78, 343-64, *Israel v. Doe*, No. 73-1177, -1178, -1184 (1st Cir., Nov. 14, 1973).

having been designed by its framers to protect all human beings, including unborn children, from both slavery or involuntary servitude and invasions of the fundamental rights to life, liberty, and property, which that amendment protected under the universal status of freedom it had established. Moreover, the approach was available in defending the statute of the state assisting the unborn child to present, by appointment of a guardian for it, various other constitutional and statutory based defenses in behalf of its life that the statute supported.

The Rhode Island statute did not long go unchallenged. In *Doe v. Israel*<sup>38</sup> three pregnant women attacked its validity by a class action suit, relying upon the *Wade* and *Bolton* cases as having established that the statute was unconstitutional.<sup>39</sup> Seeking to invalidate the statute in order to obtain abortions that were clearly abortions on demand, the plaintiffs sought to represent the class of all pregnant women in Rhode Island, whether their children were viable or non-viable.<sup>40</sup> The defendant was Richard J. Israel, the Rhode Island attorney general.

The unborn children of the plaintiff women sought to intervene by their state-appointed temporary guardian. By their petition attached to their motion to intervene, the children sought to protect their lives from their mothers' threat to abort them upon the basis of claims founded upon the thirteenth amendment. They further contended that the citizenship clause of the fourteenth amendment is applicable to viable and potentially viable unborn children, and they also relied on the ninth amendment to the Constitution, as well as various federal civil rights statutes<sup>41</sup> and certain state law provisions relative to protection of dependent and neglected children. The children's counterclaim and answer sought a declaratory judgment that they could not be aborted by their mothers without the informed consent of their fathers and an injunction restraining their mothers from aborting them in violation of the constitutional and statutory provisions relied upon. Clearly, the children raised

38. 358 F. Supp. 1193 (D.R.I. 1973), *aff'd mem.*, No. 73-1177, -1178, -1184 (1st Cir., Nov. 14, 1973), *cert. denied*, 416 U.S. 993 (1974).

39. Except as otherwise noted, the following statement of the facts in the *Israel* case is taken from the "Statement of Facts" contained in Petitioners' Brief for Certiorari, *Israel v. Doe*, 416 U.S. 993 (1974).

40. Although unknown to the defendant until depositions were subsequently taken, two of the plaintiffs obtained abortions in New York, one on the day the complaint was filed and the other a few days later and prior to the hearing on a preliminary motion. The unborn child of the absent third plaintiff was between 22-24 weeks of age at the time the trial court handed down its decision.

41. The guardian relied on 42 U.S.C. § 1988 (1970), as a vehicle for enforcing their rights under 18 U.S.C. §§ 241, 1548 (1970), and 42 U.S.C. §§ 1983, 1985(3) (1970).

by their pleadings extraordinarily important constitutional and statutory issues that had not been presented or resolved in *Roe v. Wade*.

The pleading of the defendant attorney general differed fundamentally from that of the unborn children. He relied upon none of the grounds of the counterclaim for supporting the statute and the children's right to life other than that the state had the authority to define the concept of person so as to cause it to include unborn children from the moment of their conception.

The Constitutional Right to Life Committee of Rhode Island also petitioned for intervention in the case. This committee had been organized in 1971 to resist all attempts at liberalizing the existing abortion laws, to provide an alternative to the woman who considers abortion as the only solution to her problems, to organize programs for accomplishing these objectives, and to institute or engage in litigation for these purposes. In its answer attached to its motion for intervention it relied upon the same basic grounds of defense as the state attorney general. It did not assert the much broader grounds of defense advanced by plaintiffs' unborn children.

Following the trial, 14 male citizens of Rhode Island who alleged themselves to be fathers of fetal children sought designation as a class of intervenors as the fathers of the unborn children of pregnant women in plaintiffs' class. They alleged in their motion and attached pleading that they possessed parental rights and interests in the fetal children and their marital status that were exposed to adjudication in the action. They also sought to defend their children's interests in their own lives by adopting the basic allegations of the plaintiffs' unborn children. In their motion for intervention, these fathers asserted that they had a crucial interest in the outcome of the action and that the members of their class were so situated that the disposition of the action might as a practical matter impair their ability to protect their interests, and that their private and individual interests were not adequately represented by existing parties.

The district court denied the motion of the unborn children.<sup>42</sup> The

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42. In denying the motion, the district judge stated:

How can she [the state-appointed guardian] do that when we have not recognized Child Doe, Roe, and Smith as persons within the meaning of the constitution? It's kind of putting the cart before the horse, isn't it? I will not grant such an appearance until such time as the issue is determined. That request is denied.

App. to Brief for Appellant at 21, *Israel v. Doe*, No. 73-1177, -1178, -1184 (1st Cir., Nov. 14, 1973).

court also denied a motion of the Rhode Island attorney general for the appointment of a guardian *ad litem* for the unborn children of plaintiffs for the same reason that it had denied the earlier-mentioned motion. The court finally denied the motion to intervene filed by the fathers who sought to represent the class of fathers in Rhode Island of the unborn children of plaintiffs' class. The basis of the denial was that the movants lacked standing as fathers to intervene.

The effect of the trial court's action on the motions to intervene filed by plaintiffs' unborn children and of the fathers was that the court precluded the introduction of evidence and argument relating to the constitutional and statutory issues raised by both sets of putative intervenors. Moreover, although the motion for intervention filed by the Constitutional Right to Life Committee was granted on a "limited status" basis, the court never defined this status except by *ad hoc* rulings made as the action proceeded. These rulings essentially prevented this intervenor from proceeding independently either in its own behalf or in behalf of the unborn children or the attorney general. Although the court based its denial of the guardian's motion to intervene in behalf of the unborn children in part upon its findings that "[t]he applicant's [*sic*] interest is adequately represented by existing parties,"<sup>43</sup> as well as upon the holding that they lacked standing because they were "non-persons" until proved otherwise, it is clear that the court's rulings on the lack of standing of fathers and the limited status of the committee, together with its rulings on evidence offered on issues sought to be litigated by the unborn children and their fathers, operated effectively to deny them an opportunity for representation by others in the case.<sup>44</sup> By its ruling on the lack of standing of the unborn children to defend their lives against their mothers on the ground that they must first be proven at the trial to be persons under the Constitution, the court precluded those children from participating at the trial for their lives. The court also prevented the fathers and the committee from intervening to demonstrate that the unborn children are persons protected by the Constitu-

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43. *Id.* at 158.

44. Typical of the district court's treatment of efforts by the intervenor committee to offer evidence in support of causes of action sought to be pursued by the plaintiffs' unborn children, who were denied intervention, is the following:

This is an action by Jane Doe versus Richard J. Israel, as Attorney General for the state of Rhode Island. I will hear from Mr. Allen. He is handling this case for the State, and if I want anything more, or if I feel that the intervenors [there was only one admitted, the others were denied intervention] can add anything, I will request the intervenors to participate.

*Id.* at 159.

tion under the thirteenth and fourteenth amendments, and by federal and state statutes. The case was thus confined by the court to one relating to the issue of whether the statute presented was essentially the same as the one involved in *Wade* and *Bolton*.

The Court of Appeals for the First Circuit affirmed the decisions of the trial court denying intervention to plaintiffs' unborn children by their state-appointed guardian and to the fathers of unborn children of women in plaintiffs' class, saying that the court's holdings were "either correct as a matter of law, or were within its discretion."<sup>45</sup> In light of the facts and results of the trial court's position, the First Circuit was clearly erroneous in stating that "the interests sought to be protected by a guardian were fully represented by the existing parties defendant."<sup>46</sup> A simple inspection of the pleadings filed by the guardian shows the court to be patently in error.

The court did not even dignify the parental interests of the fathers by reference to them or to their nonrepresentation. Most of the constitutional and statutory theories invoked by the guardian of the unborn children were not invoked by the Rhode Island attorney general or by the organizational intervenor because they were private interests or rights of these children rather than the public interests or rights being asserted by the attorney general and the organization. In essence, what the First Circuit did was to affirm the explicit holding of the trial court that whether unborn children, or anyone else seeking to protect their lives, have standing to sue in federal court depends upon whether they are persons under the fourteenth amendment. This was the holding even though the issues sought to be raised were not decided in *Wade* and other constitutional and statutory provisions were being relied upon, rather than the due process and equal protection clauses of the fourteenth amendment. The Supreme Court denied the petition for a writ of certiorari, with only Mr. Justice Douglas expressing the view that the petition should have been granted. That the court's treatment of the issue of standing of the unborn children and of the fathers of unborn children is a radical departure from the modern doctrine relating to standing to sue or to intervene in actions in federal courts has been demonstrated in another article.<sup>47</sup>

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45. Memorandum and Order, *Doe v. Israel*, No. 73-1177, -1178, -1184, (1st Cir., Nov. 14, 1973), set forth in Petitioners' Petition for Writ of Certiorari at 89-92, *Israel v. Doe*, cert. denied, 416 U.S. 993 (1974).

46. *Id.* at 92.

47. Witherspoon, *Representative Government, the Federal Judicial and Administrative Bureaucracy, and the Right to Life*, 6 TEX. TECH. L. REV. 363, 380-82 (1975).

Although the Supreme Court, by denying the petition for certiorari in the *Israel* case, avoided the necessity for resolving a whole spate of difficult questions relating to the rights of unborn children, their fathers, and society, the Rhode Island statute involved in that case represents a kind of anti-abortion statute that all states should adopt. At stake is the role of a state in the federal system in implementing the provisions of the thirteenth and fourteenth amendments. A state must remain free to assert that it was the purpose of the framers of these amendments to protect all human beings, including unborn children, with respect to the right to life. This is, in fact, what can be and has been demonstrated to have been the fact with respect to the purpose of the framers. Until the Supreme Court has confronted this issue and decided it, it is incumbent upon the states to continue to enact legislation that requires the Court to face these issues. The Rhode Island provision does this in a generalized way by virtue of its reference to scientific evidence of when human life begins and of its state legislature's conclusion that this evidence is accepted as the basis of the statute.

The Rhode Island statutory approach can be improved. It takes advantage of only a portion of the available justifications for an anti-abortion statute in reference to the Constitution. That approach only made reference to the fourteenth amendment and, by implication, only to its due process and equal protection clauses and even then, only insofar as the unborn child happens to be a human being in fact. There are other constitutional bases for protecting the unborn child, the principal one being the thirteenth amendment. Any anti-abortion statute should be explicitly based upon the amendment's imposition of a duty upon states both to prevent slavery or involuntary servitude within the state and to sustain the universal status of freedom for all human beings, including the provision of protection for the fundamental rights to life, liberty, and property. Moreover, it can be demonstrated that the framers of the thirteenth and fourteenth amendments not only wanted all who are in fact human beings to be within their protection but also considered unborn children to be human beings within the class of human beings they specifically wished to protect. In light of the foregoing, an improved version of the Rhode Island statutory approach would take advantage of the various aspects of the Constitution and its underlying purposes. Any anti-abortion statute of a state should contain an initial section similar to the following:

Section 1. The basis for this statute is the thirteenth and fourteenth amendments of the Constitution of the United States which

this Legislature understands, in light of prior decisions of the Supreme Court of the United States, to apply to all human beings. This Legislature has examined scientific and medical evidence with respect to when human life begins and has concluded that that evidence overwhelmingly demonstrates that human life begins at conception or fertilization and is present at every stage of biological development of the unborn offspring of human beings. Moreover, this Legislature has concluded that there is compelling evidence that the framers of these amendments judged such unborn offspring of human beings to be both human beings and persons within the meaning and protection of these amendments. Also, this Legislature has concluded that there is compelling evidence that the framers of these amendments had the purpose of protecting the parental interest in children, not only with respect to conceiving them but also to raising and caring for them. Finally, this Legislature has concluded that the framers of these amendments recognized that children, including unborn children, not only are persons and human beings in the constitutional sense, but also have, like adults, inalienable rights and that among these rights are the rights to life, liberty, and property. Each and all of the provisions of this statute and of other statutes relating to abortion are designed to give effect to these purposes and objects of the thirteenth and fourteenth amendments.

In order to deal with the matter of representation of the unborn child in any litigation that challenges the validity of an anti-abortion statute, the statute should provide for the appointment of a guardian for the unborn child, and provide funds for the adequate discharge of the duties of the guardian in the event the parent or parents of that child challenge the validity of that statute. Such a provision might read as follows:

Section 2. (a) Upon the filing of an action challenging the constitutional validity of this statute or any statute dealing with the subject of abortion, the Attorney General shall apply to a court of competent jurisdiction for the appointment of a guardian of the unborn child or children of the parents filing that action or affected by the action so filed as well as for the class of unborn children within the state.

(b) Upon the appointment of the guardian under subsection (a) the Attorney General shall provide the guardian with funds that are reasonably adequate for the fullest prosecution of the interests of the unborn children and the class of unborn children of which he or she is guardian in defense of the action to which subsection (a) is applicable.

These two sections will greatly assist in assuring that state and federal courts hearing challenges to state anti-abortion statutes will face the basic issues; it will also assure that these issues are properly raised and

presented to these courts by guardians of unborn children. These provisions clearly manifest to these courts the purpose of the legislature to support the Constitution and the basis under the Constitution for the legislation. They also manifest the special concern of the legislature that the private interests of the unborn children be represented by special counsel for them while the public interests of society in these children be represented by the attorney general of the state.

The proposed anti-abortion statute would be just as appropriate for the United States Congress to enact as for a state legislature. The central thesis of this presentation is that the thirteenth amendment protects all human beings with respect to the right to life and from the imposition of death upon an innocent human being under any form, including abortion. Congress has enacted anti-abortion legislation in the past. Enacting this legislation now, in light of the original purpose of the thirteenth amendment, would help to precipitate the decision by the Supreme Court of the important issues under the thirteenth and fourteenth amendments which it has not yet faced and resolved.<sup>48</sup>

#### THE REGULATORY APPROACH IN STATE LEGISLATION RESPONSIVE TO WADE

Contrary to Rhode Island, most states in their legislative responses to *Wade* have sought to test the scope of that decision, or to restrict the performance of abortions by regulatory provisions not presented to or passed upon by the Court in that case. The 1974 Missouri statute, several aspects of which have been sustained as valid in *Planned Parenthood v. Danforth*,<sup>49</sup> is typical of the legislation. It is generally a well-drawn statute and apparently was drawn after the model contained in a bill introduced in the Texas Legislature in 1973, which I drafted. The Missouri statute, which is set out in Appendix B, contains provisions prohibiting any abortion except one performed by a physician in the exercise of his best clinical medical judgment, for which the written

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48. Senator Charles Sumner gave advice as to what should be done to eliminate slavery that is just as applicable to the problem presented today with respect to the elimination of abortion. His advice, stated in 1864, was as follows:

How shall slavery be overthrown? The answer is threefold: first, by the courts, declaring and applying the true principles of the Constitution; secondly, by Congress, in the exercise of the powers which belong to it; and thirdly, by the people, through an amendment to the Constitution. Courts, Congress, people, all may be involved, and the occasion will justify the appeal.  
CONG. GLOBE, 38th Cong., 2d Sess. 1481 (1864).

49. 392 F. Supp. 1362 (E.D. Mo. 1975), *prob. juris. noted*, — U.S. —, 96 S. Ct. 31, — L. Ed. 2d — (1975).



consent of specified persons has been obtained, and which, subsequent to the twelfth week of pregnancy, is performed in a hospital. It also prohibits an abortion of a viable unborn child unless this is necessary to preserve the life and health of the mother. It prohibits, as murder, the taking of the life of an infant aborted alive and makes a live-aborted infant an abandoned ward of the state under the jurisdiction of the juvenile court in the jurisdiction of which the abortion occurred. It prohibits use of the method of abortion known as saline amniocentesis, and further prohibits any kind of experimentation upon the unborn child before or upon its being aborted alive except as necessary to protect its life or health. The statute also requires health facilities and physicians to keep records of abortions on forms provided by the state division of health. A practitioner of medicine, surgery, or nursing or other health personnel, who willfully and knowingly engages or assists in any action made unlawful by the act is made subject to having his or her license revoked by the appropriate state licensing board. Any person violating or aiding in the violation of the provision prohibiting performance of an abortion is stated to be guilty of a misdemeanor and upon conviction is to be punished as provided by law. A non-physician who performs or attempts to perform an abortion on another is stated to be guilty of a felony and, upon conviction, is subject to imprisonment.<sup>50</sup>

A 1973 Missouri statute is also typical of the so-called "conscience clause" statutes enacted by state legislatures which responded to the Supreme Court's abortion decisions. It provides that no physician or surgeon, nurse, midwife, or public or private hospital shall be required to treat or admit for treatment any woman for the purpose of abortion if this is contrary to the established policy of the hospital or to the moral, ethical, or religious beliefs of the health personnel. The statute also precludes the accrual of a cause of action against any individual or hospital on account of a refusal by either to perform an abortion for a reason specified by the statute. It also prohibits discrimination against a person or institution with respect to public benefits, assistance, or privileges or any employment on the ground that either refused to undergo or to advise or perform an abortion.<sup>51</sup>

### *The Rights of the Father of the Unborn Child and Others*

In *Planned Parenthood v. Danforth*, a three-judge federal district

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50. MO. REV. STAT. § 188.080 (Supp. 1976).

51. *Id.* § 197.032.

court upheld the Missouri statutory provision requiring the husband's consent to an abortion in order for it to be performed legally. The court took the position that a state has the right to regulate the status of marriage with a view to protecting the regularity and integrity of the marriage relation. Protection of this integrity extends to preservation of marital harmony with respect to the abortion decision. That harmony could only be preserved through the requirement that the husband be allowed to participate in that decision since it is one that affects the very essence of the marriage relationship. This essence, according to the court, includes procreation. The husband has an interest in seeing that a particular unborn child conceived by him and his wife is carried to term. The husband also has an interest in avoiding or at least acting in light of the results not unlikely to flow from the abortion decision and its effectuation. These results bear profoundly upon future reproductive capacity and include infertility, premature births, and stillbirths. These results also bear upon future children in the form of physical and mental defects caused by premature births.

While the lower court talked in terms of the right of the state to protect the husband's interest in the marriage relationship, it is clear that the court was really focusing upon the state's "considerable interest" or "legitimate concern" in protecting that relationship, as Mr. Justice Douglas once phrased it in another case,<sup>52</sup> which justifies the state's regulation in relation to the limitations of the fourteenth amendment. The court thus held that this interest of the state in the marriage relation is sufficiently compelling to justify the regulation or interference with a woman's abortion decision by the state, to the extent of providing that her husband be allowed to participate in that decision and to permit him to exercise a veto upon it. Thus, the *Danforth* court viewed the Supreme Court's *Wade* decision as not having established a principle based upon a woman's right of privacy which overrides the interest of the state in protecting the integrity of the marriage relationship and the co-equality of the husband with the wife in making basic decisions affecting that relationship and the achievement of its fundamental purposes.

The trial court in *Danforth* found ample support for the constitutional validity of the other consent requirements of the Missouri statute. So far as the pregnant woman was concerned, the court observed:

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52. *Estin v. Estin*, 334 U.S. 541, 546-47 (1948).

Given the fact that even with counseling the decision of whether to terminate a pregnancy is often a stressful one . . . it is imperative that a woman be well advised of the options available, and the physical and psychological ramifications of choosing a particular course of action. . . . The consent requirement of Section 3(2) insures that the pregnant woman retains control over the discretion of her consulting physician. . . . It is clear from the Court's opinion that although the abortion decision is to be made in consultation with a responsible physician, the ultimate decision is not the physician's to make.<sup>53</sup>

The court also discussed the rights of the parents or guardian of a pregnant minor.

The state's interest in safeguarding the authority of the family relationship would appear to this Court to be a compelling basis for allowing regulation of a minor's freedom to consent to an abortion . . . A person under the age of majority is deemed incapable of giving legal consent. We do not believe that the Supreme Court, in recognizing a woman's limited right to obtain an abortion in *Roe* and *Doe*, intended those decisions to have the effect of emancipating children in that respect . . . [or] to preclude the consideration of other fundamental state interests. The consent requirements of the Missouri abortion law are justified by such other compelling interests.<sup>54</sup>

In light of the Supreme Court's numerous decisions recognizing various aspects of the role of the family in the upbringing of children so far as the rights and duties of parents are concerned, it would be difficult to fault the reasoning in *Danforth*. Moreover, these interests do not vary according to the stage of pregnancy. They are directed toward a person who cannot be said to possess only potential human life. It is as important to assert these interests at one time as at another during the course of a pregnancy.

Other lower federal and state courts have generally reached results contrary to the decision in *Danforth* with respect to the right of the father or of others to participate in the abortion decision and to veto it. Thus, in *Doe v. Rampton*,<sup>55</sup> a three-judge federal district court held that a Utah statutory provision that required consent of the father of the unborn child prior to the abortion was invalid under the principles established by *Wade* "because it subjects exercise of the individual right

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53. *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1368-69 (E.D. Mo. 1975), *prob. juris. noted*, — U.S. —, 96 S. Ct. 31, — L. Ed. 2d — (1975).

54. *Id.* at 1370-71.

55. 366 F. Supp. 189 (C.D. Utah), *vacated and remanded*, 410 U.S. 950 (1973).

of privacy of the mother, in all abortions at all stages of pregnancy, to the consent of others.”<sup>56</sup> The Utah provision also required the consent of the parents or guardian of a pregnant woman to an abortion if she were unmarried and under 18 years of age. This aspect of the consent provision was invalidated upon the same basis. Also, in *Coe v. Gerstein*,<sup>57</sup> a three-judge federal district court held the Florida provision requiring consent of the husband before an abortion is performed upon his wife, with whom he is living, to be invalid under the principles established by *Wade*. It did recognize, however, the existence of some power in the state to deal with the matter of consent after the unborn child attains the status of viability.<sup>58</sup> The court read *Wade* as stating a principle equally applicable to the consent provisions.

In *Doe v. Doe*,<sup>59</sup> the Supreme Judicial Court of Massachusetts considered the rights of the father of an unborn child to prevent his wife from obtaining an abortion in the absence of a state statute dealing with the problem. In this case an estranged husband sought declaratory and injunctive relief against his pregnant wife with respect to her decision to obtain an abortion over his objection. He contended that he had a fundamental right, protected by the Constitution of the United States, to determine that his child not be aborted. A majority of the Massachusetts court held that the husband's rights were foreclosed by the principles enunciated in *Wade*, citing the *Gerstein* case. Two judges dissented in separate opinions upon the ground that the father has rights of a familial origin in his child.<sup>60</sup> Both justices saw the issue before the court as one of balancing two rights—the basic human or natural right of the father to protect the life of his unborn child, and the right of the mother enunciated in *Wade* to decide upon and arrange for the destruction of that child through abortion. Where the interests of the mother were in large measure temporary, and where the husband stood ready to assume at birth the responsibility for the care and raising of his child and of paying for all medical expenses of the pregnancy and the delivery, the dissenting justices asserted that the balance should be struck in favor of the husband. The short-term interest of the mother could not compare with the long-term loss of the father who will never experience the satisfaction, the comfort, the affection, or the sense of

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56. *Id.* at 193.

57. 376 F. Supp. 695 (S.D. Fla. 1973), *cert. denied*, 417 U.S. 279 (1974).

58. *Id.* at 697.

59. 314 N.E.2d 128 (Mass. 1974).

60. *Id.* at 133 (Hennessey, J., dissenting); *id.* at 134 (Reardon, J., dissenting).

fulfillment which might have been provided him by the birth and growing up of the child whose life he had petitioned the court to assure.

It is my position that the thirteenth amendment provides constitutional protection for the civil rights of a father of an unborn child to protect its life from a mother who seeks to have it destroyed through an abortion.<sup>61</sup> As stated by the majority in the *Civil Rights Cases*,<sup>62</sup> the thirteenth amendment was directed, of course, at the elimination of slavery and involuntary servitude, whether imposed by government or by private persons. But it was also directed toward the establishment of "universal civil . . . freedom throughout the United States"<sup>63</sup> and protection of all men, as included within that freedom, with respect to those fundamental rights which are the essence of civil freedom, and especially the rights to life, liberty, and property.<sup>64</sup> And since one who is a slave in some respects or who does not enjoy all the fundamental rights is a person who is to that extent in partial subjection, *de jure* or *de facto*, to the will of some other person or to society itself, the amendment was also directed toward elimination of partial slavery or involuntary servitude.<sup>65</sup>

In 1866, Senator Jacob M. Howard of Michigan, a leading member of the important Joint Committee on Reconstruction which reported out the final resolution for the fourteenth amendment, articulated the central purpose behind the thirteenth amendment as being one directed toward restoration of the rights of the family institution and especially the rights of the father. He stated:

Its intention was to make him the opposite of a slave, to make him a freeman. And what are the attributes of a freeman according to the universal understanding of the American people? Is a freeman to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home? What definition will you attach to the word 'freeman' that does not include all these ideas. The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?<sup>66</sup>

Moreover, the general understanding of the American people at the time of the adoption of this amendment to which Senator Howard referred

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61. See generally Witherspoon, *Impact of the Abortion Decisions upon the Father's Role*, 35 JURIST 32 (1975).

62. 109 U.S. 3 (1883).

63. *Id.* at 20.

64. *Id.* at 20-24.

65. CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866).

66. *Id.* at 504.

was reasonably precise with respect to the relationship between parents and their children. The general view at the time was that

the legal marriage relation establishes personal rights and personal interests which no legislative tribunal under our form of government, nor the parties themselves at their mere will and pleasure, can divest or destroy. The wife owes obedience to the husband and the husband protection to the wife, and both owe protection and care to their children. This relation lies at the very foundation of our whole social system. . . . [L]aw is to protect this relation; to protect the personal rights of husband, wife and children that grow out of it.<sup>67</sup>

Thus it seems clear that the framers of the thirteenth amendment had the purpose of protecting the father's interest in his children as well as his right to protect them from the time that they are conceived from those who would destroy them.

Whether the right of the father of an unborn child or the parents of a pregnant minor to participate in the abortion decision is based upon the *Danforth* compelling state interest idea, the *Doe v. Doe* dissenting thesis requiring a balancing of competing interests, or the thirteenth amendment, there are sound reasons for a state legislature enacting a law to require the obtaining of the consent of the husband, father, or the parents under appropriate circumstances. Until the Supreme Court has passed upon the validity of this type of requirement, these theses provide a sufficient ground for establishing it by statute.

### *The Rights of Live-Aborted Children*

Two types of state statutory provisions relating to protection of live-aborted children have been enacted. One type, typified by statutes enacted in Missouri<sup>68</sup> and Pennsylvania,<sup>69</sup> provides protection for the infant aborted alive without regard to whether at the time of the abortion it was a viable unborn child. Thus, the Missouri statute provides: "Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree."<sup>70</sup> The statute also makes the live-aborted infant an abandoned ward of the state, and parents consenting to the abortion are subject to divestment of their parental rights relating to the infant.

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67. CONG. GLOBE, 36th Cong., 1st Sess. 199 (1860).

68. MO. REV. STAT. § 188.010 (Supp. 1976).

69. PA. STAT. ANN. tit. 35, § 6001 (Supp. 1976).

70. MO. REV. STAT. § 188.035(2) (Supp. 1976).

Another type of statutory provision accords protection for the live-aborted child only after the twentieth week of pregnancy, as in Minnesota<sup>71</sup> and New York.<sup>72</sup> The Minnesota statute thus protects “a potentially viable fetus which is live born,” defining the status of potential viability as existing during the second half of the gestation period and making the child so aborted “fully recognized as a human person under the law” and requiring that “responsible medical personnel shall take all reasonable measures, in keeping with good medical practice, to preserve the life and health of the live born person.”<sup>73</sup> The New York statute also requires that a physician other than the physician performing the abortion be in attendance to take control of and to provide immediate medical care for the live aborted child. Like the Minnesota law, the New York statute extends protection of its laws, including its penal, social service, and civil rights statutes, to the child.

The occasion for this legislation has been the horrendous treatment frequently accorded live-aborted children by physicians and hospitals. In the case of *Israel v. Doe*,<sup>74</sup> unborn children of the plaintiff mothers were denied intervention in a suit to declare the 1973 Rhode Island anti-abortion statute unconstitutional. Counsel for their state-appointed guardian and for a state civil rights organization that had been granted a limited status as an intervenor sought to introduce testimony of nurses that would have shown that abortions are regularly performed up to at least 26 weeks of gestational age at the hospitals in which they serve.<sup>75</sup> Their testimony would also have shown that while these children are usually being aborted alive, they are, nevertheless, being allowed to die or are being destroyed without being given reasonable medical care to save their lives.

More recent reports indicate that a Pennsylvania hospital permits abortions as late as the eighth month of pregnancy.<sup>76</sup> Other evidence

71. MINN. STAT. § 145.412 (Supp. 1976).

72. N.Y. PENAL CODE § 125.40 (McKinney 1975).

73. MINN. STAT. § 145.412 (Supp. 1976).

74. 358 F. Supp. 1193 (D.R.I. 1973), *aff'd mem.*, No. 73-1177, -1178, -1184 (1st Cir., Nov. 14, 1973), *cert. denied*, 416 U.S. 993 (1974).

75. App. to Brief for Appellant at 305, *Doe v. Israel*, No. 73-1177, -1178, -1184 (1st Cir., Nov. 14, 1973).

76. *Pittsburg Press*, Sept. 29, 1974, at 1. Physicians at Magee Women's Hospital declined to perform an abortion upon the pregnant woman because the pregnancy was too far advanced. However, a physician at West Penn Hospital later performed the operation. One witness to the abortion told the *Press* representative that the baby began to move and to breathe after the abortion procedure was completed. Dr. Leonard Laufe, whose name appeared on the baby's death certificate which listed the baby as stillborn, had in his possession three and one-half movie films of the abortion.

introduced in this case placed the viability of unborn children at 20 weeks and predicted that viability very soon may be reached at an earlier week of gestation.<sup>77</sup> Still other evidence introduced showed that some children at 20 weeks of gestational age are capable of surviving with proper medical care and that children of 24 weeks or less of gestational age are rather consistently being kept alive at any reasonably good pediatric service.<sup>78</sup> Ten per cent of children between 20 and 24 weeks of gestation will survive. From 24 to 28 weeks the child's chances of survival upon being aborted alive are much greater.<sup>79</sup> The hysterotomy form of abortion is the one usually used after 20 weeks of gestational age of an unborn child. It is in reality a little Caesarian operation by which the uterine cavity is opened and the baby is extracted wholly intact. The umbilical cord is cut and then the baby is handed over to an assistant. Children are usually live-born by an hysterotomy form of abortion and some times by the saline method when the latter fails in its purpose of killing the child in the womb.<sup>80</sup>

Despite the 10 to perhaps 70 per cent chance of survival possessed by children aborted alive between 20 and 29 weeks of gestation if provided proper medical attention, these children have frequently not been provided this attention. Besides the statements of nurses referred to above, a Dr. Baker, who observed hysterotomies performed at Yale-New Haven Hospital, has described these live-aborted children and what happens to them in that hospital. In his affidavit he stated that these children upon being aborted were well-formed, had beating hearts, and made movements with their hands and feet. They were then placed in a "plastic

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77. App. to Brief for Appellant at 305, *Doe v. Israel*, No. 73-1177, -1178, -1184 (1st Cir., Nov. 14, 1973).

78. *Id.* at 98-99. It should be understood that gestational age of an unborn child is computed from the last menstrual period of the pregnant woman. Ordinarily, the age of the child measured from its conception subsequent to the last menstrual period is two weeks less than gestational age. The latter may be referred to as the conceptional age. The Supreme Court in *Wade* confused the concepts of gestational and conceptional age of unborn children. See Hopkins, *Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 TEMP. L.Q. 715, 735-36 (1974).

79. B. HEFFERNAN, *ABORTION AND SOCIAL JUSTICE* (1972). Recent studies show that in the 1964-1974 period better equipped hospitals had a survival rate of children at 25 weeks of approximately 10 per cent; at 26 weeks approximately 20 percent; at 27 weeks nearly 50 per cent; at 29 weeks nearly 70 per cent; at 32 weeks nearly 100 per cent. Behrman, *Report to the National Commission for the Protection of Human Subjects*, in *Hearings on S.J. Res. 6, 10 & 11 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., *Abortion*, pt. 4, at 317, 333 (1975).

80. App. to Brief of Appellant at 84-85, 87-98, *Doe v. Israel*, No. 73-1177, -1178, -1184 (1st Cir., Nov. 14, 1973).



container, sort of like a bucket" by or at the direction of the attending physician. Dr. Baker stated that he did not "go and look at it and wait to see how long it will take them [*sic*] to die."<sup>81</sup> Similar reports have been made by other physicians.<sup>82</sup>

While live-aborted children represent no more than two per cent of all children who are aborted, they nevertheless constitute a group of children indistinguishable in any significant aspect from other live human beings, including children whose births have been induced by physicians with a view to saving their lives at the request of their parents. Indeed, the United States Public Health Service has published a guideline relative to the registration of the birth of a child that is relevant on this point. It states that a birth should be registered as a live birth "[i]f a child breathes or shows any other evidence of life after complete birth (such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles) . . . ."<sup>83</sup> This same agency has stated that in 1968 there were a thousand live births of children under 20 weeks of gestation and over 18,000 live births of children between 20 and 27 weeks of gestation.<sup>84</sup>

The Minnesota and Missouri statutory provisions protecting live-aborted children have been challenged in the courts. In *Hodgson v. Anderson*,<sup>85</sup> a three-judge federal court invalidated the Minnesota provision. The court relied upon the statement of the Supreme Court in *Wade* that "viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."<sup>86</sup> The court took the position that this statement amounted to a rule of law concerning viability and that the state could not constitutionally protect the life of a live-born child resulting from an abortion occurring at 20 weeks, as the statute provided, or at any other time prior to viability. As justification for this astonishing position, the court offered the following reason:

[T]he statute as worded would take away from the physician his right to determine, in the exercise of his professional medical

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81. Affidavit of Dr. Baker, *Abele v. Markle*, Civil No. B-521 (D. Conn., July 27, 1972).

82. J. WILKE, *HANDBOOK ON ABORTION* 27 (1972).

83. U.S. PUB. HEALTH SERV., Pub. No. 593, *PHYSICIANS HANDBOOK ON DEATH AND BIRTH REGISTRATION* 24 (11th ed. 1958).

84. U.S. PUB. HEALTH SERV., 1 *VITAL STATISTICS OF THE UNITED STATES* 1-41 (1968).

85. 378 F. Supp. 1008 (D. Minn. 1974), *appeal dismissed for want of jurisdiction sub nom. Spennous v. Hodgson*, 420 U.S. 903 (1975).

86. *Roe v. Wade*, 410 U.S. 113, 160 (1973).

judgment under the technology and medical knowledge available to the profession, when a fetus is viable.<sup>87</sup>

One must take a long breath at such a monstrous exhibition of insensitivity to the application of law to a child born alive by an abortion who does not differ from a child born prematurely at the same age through natural or artificial means.

What the court seems to have clearly held is that the import of *Wade* is that the state must turn over to physicians the administration of an iron-clad rule of law with respect to when "viability" is attained, for the purpose of determining when an abortion may be performed, either without any limitations or only in conformance with statutory conditions. In addition, the court also seems to have held that the state cannot interfere with a physician's decision concerning the disposition of a live-born child of less than 24 weeks gestational age resulting from an abortion performed by that physician. In order for the state to be able to order that medical care be rendered a live-aborted child, the child must be "viable" as well as alive. It should be noted, however, that the court commented that the state had introduced no evidence to show that an unborn child is viable at up to 20 weeks of gestational age.<sup>88</sup>

What the court may have meant is that the life of a live-aborted child below the gestational age of 24 weeks depends solely upon the judgment of the physician who performed the abortion procedure upon its mother. If the physician judges that the child is viable, it is to receive medical care because the state statute prohibits abortions of viable children under specified circumstances, and by inference destruction of their lives, if they are aborted alive. If the physician judges that the live-aborted child is not viable, he need not provide it with medical care and may either destroy it or permit it to die. In all events, under the *Hodgson* interpretation of *Wade*, the physician becomes the arbiter of infant human life outside the womb as well as within it. Moreover, since the physician has made a determination that an unborn child is not viable in counseling an abortion for a mother whose life or health is not endangered by her pregnancy, one wonders if that physician is likely to change his opinion that the child is not viable when it is aborted alive.

The three-judge federal district court in the *Danforth* case sustained the Missouri statutory provision protecting the lives of live-aborted

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87. *Hodgson v. Anderson*, 378 F. Supp. 1008, 1017 (D. Minn. 1974), *appeal dismissed for want of jurisdiction*. *sub nom. Spennous v. Hodgson*, 420 U.S. 903 (1975).

88. *Id.* at 1016.

children irrespective of their gestational age. The court simply stated:

[I]t is obvious that the state can legislate to protect a live born infant . . . . The immediate concern must be for the care and protection of the infant. The fate of such a live born infant is surely of as much interest to the state as the interest in potential human life which the state can protect under *Roe*.<sup>89</sup>

Indeed, Planned Parenthood's complaint did not contest the constitutionality of the Missouri provision upon the basis that the Minnesota provision was challenged. Rather, it took the position that the summary termination of the rights of the parents consenting to the abortion provided for in the statute was a denial of procedural due process. The court did not agree with the contention, holding that the state was justified in assuming immediate temporary custody of the unwanted child. It interpreted the provision to permit the parents who might desire to regain custody of their aborted child to obtain a hearing with the usual due process safeguards for establishing their entitlement to this custody.

Surely, the decision in *Hodgson* is wrong and the decision in *Danforth* is right with regard to the right of a state to require that medical care be immediately provided a live-aborted child irrespective of its gestational age or viability as that term was interpreted in *Wade*. There is nothing "potential" about the actual life of a live-aborted child. Moreover, a stronger case can be made for that child than the court stated in *Danforth*. The latter reasoned that since *Wade* recognized that the state could protect potential human life under certain circumstances, the state, a fortiori, must have the power to protect actual human life outside the womb. In *Commonwealth v. Edelin*,<sup>90</sup> Dr. Kenneth C. Edelin was prosecuted for manslaughter for causing the death, by suffocation, of a child who had allegedly been aborted alive by the hysterotomy method. Dr. Edelin or other physicians had performed three previous abortions in the form of saline amniocentesis in an effort to destroy this child in its mother's womb. Each of these efforts was unsuccessful. The prosecution introduced evidence showing that the unborn child prior to the performance of the hysterotomy by Dr. Edelin was 24 weeks of gestational age. A colleague of Dr. Edelin, who witnessed the abortion, testified that the defendant performed the hysterotomy or "mini-Caesarean" by cutting into the woman's uterus, plac-

89. *Planned Parenthood v. Danforth*, 392 F. Supp. 1362, 1371 (E.D. Mo. 1975), *prob. juris. noted*, — U.S. —, 96 S. Ct. 31, — L. Ed. 2d — (1975).

90. No. 81823 (Mass. Super. Ct., Feb. 14, 1975).

ing his hands inside, and making a motion with his hands going around the uterine cavity, with sufficient force to sever the unborn child from the uterus. He further testified that the defendant then left his hand inside the uterus and stood looking at a clock for three minutes and that but for this action of the defendant the hysterotomy would have produced a live birth. Dr. J. F. Ward, a Pennsylvania pathologist, testified that the lungs of the baby showed that it had taken a breath. Another physician, Dr. Curtis, also testified that there was respiratory activity on the part of the baby outside the mother's body. The prosecution's theory was that the action of the defendant in holding the child in its mother's womb after severing it from the uterine cavity operated to cause its death by suffocation because the action cut off the child's oxygen upon which it had to depend after detachment from its pre-natal life support.

Judge McGuire of the Massachusetts Superior Court instructed the jury in the *Edelin* case with respect to its function. He stated that the abortion performed by the defendant was protected by the Supreme Court's decision in *Wade*, since the Commonwealth had no statute or laws in effect to regulate abortion. He also stated that in order to convict the defendant it was necessary for the jury first to determine that the child was a person:

In order for a person to exist, he or she must be born. Unborn persons, as I said, are not the subject of the crime of manslaughter.

Killing or causing the death of a person who is born alive and is outside the body of his or her mother may be the subject of manslaughter. In order for the defendant to be found guilty in this case, you must be satisfied beyond a reasonable doubt, . . . that the defendant caused the death of a person who had been alive outside the body of his or her mother. . . . if that death was caused by wanton or reckless conduct on the part of the defendant.<sup>91</sup>

While the court defined the term "viability" as referring to "the ability to live postnatally, that is, after birth,"<sup>92</sup> the charge explicitly made the jury's determination turn upon its decision as to whether the child when severed by the defendant from its mother's uterine cavity "showed any signs of life or had any respiratory activity outside of the body of its putative mother."<sup>93</sup> In effect, the court defined a person as one who

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91. The transcript of this part of the trial is contained in *Hearings on S.J. Res. 6, 10 & 11 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., Abortion, pt. 4, at 314 (1975).

92. *Id.* at 314.

93. *Id.* at 315.

had been “born alive.” Counsel for the defendant excepted to the instruction given by the court with respect to the essential condition for finding the defendant guilty of manslaughter—that the child be born alive—and requested the court to instruct the jury that they were not to find Dr. Edelin guilty “unless you find beyond a reasonable doubt that the fetus was capable of meaningful life outside its mother’s womb.”<sup>94</sup> The refusal of the court to give this instruction meant that it had recognized that a person exists, for purposes of the Constitution of the United States and state action in accordance with it, when a child is born or aborted alive, without more. If upon being aborted or prematurely born, it is alive, it is a person and entitled to protection of its life under the Constitution and by the state.

Whether protection of the child aborted alive be based upon the *Danforth* or the *Edelin* theory, both cases provide strong reasons for a state proceeding to enact a law that protects the life of this child.

#### *The Rights of Viable Unborn Children*

Previously, it was noted that the Supreme Court in *Wade* purported to recognize a state interest in “the potentiality of human life”<sup>95</sup> with the result that the state was permitted to prohibit the performance of an abortion where the unborn child is viable. At the same time, the Court held that the state must still permit an abortion where the unborn child is viable for the preservation of the life or health of the mother.<sup>96</sup> It was pointed out that the Court then proceeded to give the term “health” such a wide scope that, for all practical purposes, it permitted the pregnant woman to seek an abortion for virtually any reason or no reason at all. Despite this status of the Court’s holding with respect to the permissible state protection of viable unborn children, there are many good reasons why a state should enact legislation to protect these children from abortions.

In the first place, the Court in *Wade* did not have before it a viable unborn child, represented by a state-appointed guardian or a next friend seeking to defend its life against its mother’s effort to have it destroyed by an abortion. There are many well-grounded contentions looking to the protection of unborn children under the Constitution of the United States which these children could present to the Supreme Court and

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94. *Id.* at 315.

95. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

96. *Id.* at 160.

upon which it has not yet passed. The arguments in support of spousal consent provisions constitute one example of these. Another argument utilizes the citizenship clause of the fourteenth amendment. This latter argument is based upon the substantial similarity between a viable unborn child and a live-aborted child who may or may not have been viable at the time of an abortion. Clearly, the latter child is, under the *Edelin* theory, both "born" and "alive" so as to be a citizen of the United States and of the state in which it resides within the meaning of the citizenship clause. As a citizen of the United States, it is entitled to the protection of the privileges and immunities clause of the fourteenth amendment's first section. But what is the basic difference between the viable unborn child still in the womb and the live-aborted child who may or may not have been viable at the time of its abortion? Certainly, in terms of what makes them viable, they are indistinguishable regardless of whether the Supreme Court's definition of viability or another, and probably more scientifically justified, definition is utilized. Both children are alive. Both are possessed of the same basic potentiality for further life. If anything, the viable unborn child has a greater chance to survive. Moreover, the citizenship clause refers to "[a]ll persons born . . . in the United States." This clause is clearly subject to the interpretation that it is referring to a human being who at the moment of birth obtains a further protection under the Constitution represented by the status of citizenship.

The implication of this interpretation is that the unborn child is a human being or person prior to the moment of birth and, therefore, possesses an earlier kind of protection under the Constitution to which the citizenship clause adds, upon birth, the additional protection of the status of citizenship. This article advances as a principal argument that the unborn child is a human being from the time of its conception whom it was the purpose of the framers of the thirteenth and fourteenth amendments to protect as a person along with all other human beings. A narrower argument of this sort is that it is totally unreasonable to distinguish, with respect to the status of citizenship, between a viable unborn child and a live-born child who was or was not viable at the time of its abortion. Unless at least a viable unborn child is protected in its life, under the citizenship clause, this clause becomes a snare and a delusion for it with its citizenship status depending upon whether a state enacts a statute to protect it from abortion and upon whether, in the absence of such a statute, the physician performing an abortion procedure upon its mother utilizes a death-dealing type of abortion or one,

such as an hysterotomy, which almost always results in its live birth. Surely, the framers of the fourteenth amendment, who had the strongest concern for human beings and their inalienable human rights, did not intend the status of citizenship that was being conferred by the citizenship clause to depend upon the occurrence of chance or bizarre events to distinguish between two children who are basically indistinguishable: the one a viable unborn child and the other a live-aborted child who may or may not be viable.

If the Supreme Court begins to consider how it can retreat from its grossly erroneous decision in *Wade*, as it has retreated from other erroneous decisions in the past, the citizenship clause offers one of several available routes for accomplishing this result.<sup>97</sup> Viable unborn children could be protected in their prospective status of citizenship. Courts have long since recognized that they can act to preserve their prospective jurisdiction.<sup>98</sup> This doctrine is logically applicable in behalf of unborn children who are viable and altogether likely to be born alive if aborted or born prematurely, so as to permit courts to preserve their prospective jurisdiction over these children as citizens to protect them in their enjoyment of the privileges and immunities guaranteed to citizens. The enactment of legislation protecting the lives of viable unborn children more stringently than the Supreme Court indicated they could be protected by a state will serve to test the scope of that decision with respect to the "health" reasons for which it said a pregnant woman could still obtain an abortion. Additionally, such stringent legislation will provide the Court with an opportunity it may ultimately desire for retreating from the floodtide of the *Wade* decision.

In the second place, the Supreme Court probably did not, despite the contrary *Hodgson* decision, intend its statement concerning the viability of unborn children to operate as an iron-clad rule of law. Its deliberate exclusion of a rigid definition of viability from its summary of its holdings at the end of the *Wade* opinion is highly probative that the Court has either left the matter of the application of its definition of "viability" for determination by it in a later case or for resolution by reasonable state legislation.

There are good reasons for believing that the problem is one that the Court will consider appropriate for resolution by legislatures. There are

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97. Witherspoon, *Impact of the Abortion Decisions upon the Father's Role*, 35 JURIST 32, 47-51 (1975).

98. *Cf. Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942).

several methods available for determination of viability.<sup>99</sup> Each of these methods has advantages and disadvantages. Moreover, viability, viewed as the status of being "potentially able to live outside the mother's womb, albeit with artificial aid"<sup>100</sup> according to the Supreme Court, is basically a function of the sophistication of medical techniques and life-support instrumentalities. What is viewed as being viable will thus vary both over time and with respect to particular individual unborn children. Thus it would be exceedingly unwise for the Supreme Court to become the ultimate tribunal for resolution of the question of viability so far as the power of the state to protect viable unborn children from abortions is concerned. States probably have an excellent opportunity through appropriate legislation to deal with the problem of the definition of viability of unborn children and to have carefully drawn legislation sustained by the Supreme Court. By so doing, state legislatures will be able to save the lives of more unborn children than would otherwise be possible.

The most appropriate state legislation for dealing with the problem of defining viability of unborn children is legislation that both specifies, on the basis of current evidence, a maximum gestational age past which unborn children are deemed to be viable for the purpose of administering a prohibition against the abortion of viable children. It should also provide for the regular determination by an appropriate state agency, on the basis of current scientific evidence, whether a lower maximum gestation age should be established for the same purpose. Probably, the statute should also, under appropriate circumstances, require the determination in specific cases where an abortion is sought whether or not a particular unborn child is viable. If the state has the right to act to protect viable unborn children from abortion, as the Supreme Court recognized in *Wade*, it also has the right to make that protection effective in particular cases with respect to particular unborn children. To paraphrase the Supreme Court, the right to abortion it established in *Wade* is not absolute. *Wade* held that when the unborn child becomes viable, the interest of the state in it becomes paramount. The state is not compelled to pick some one gestational age or some one fetal weight as the standard of viability for all unborn children.

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99. See Behrman, *Report to the National Commission for the Protection of Human Subjects*, in *Hearings on S.J. Res. 6, 10 & 11 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., Abortion, pt. 4, at 317 (1975); Hopkins, *Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy*, 47 *TEMP. L.Q.* 715 (1974).

100. *Roe v. Wade*, 410 U.S. 113, 160 (1973).



THE NONREGULATORY APPROACH IN STATE LEGISLATION  
RESPONSIVE TO WADE

Some states, as well as the federal government, have enacted legislation responsive to *Wade* that is nonregulatory in character rather than regulatory. This is not to say that the legislation does not aim at preventing the performance of abortions. That is very much its aim and its effect. It is to say that this aim and effect are not achieved by a law that establishes a rule of law specifying that abortions are not to be performed as well as criminal or civil sanctions for its violation. The nonregulatory powers of government comprehend, among other governmental powers, the appropriative or spending power, the property control and disposition power, and the contract power. As is known by all sophisticated students of government, the nonregulatory powers of government are perhaps the most pervasive and effective powers government has for achieving its goals and objectives.<sup>101</sup> Also evident is the fact that the constitutional restrictions upon the utilization of these powers are relatively few.

The nonregulatory legislation responsive to *Wade* has cut off the use of government funds for performance, promotion, or subsidization of abortions. It has also cut off the use of government property for the performance of abortions. It has also employed the contract power of government to specify a contract condition that the contractor will not perform abortions. Even before *Wade*, in 1971 Congress provided in its Family Planning Services and Population Research Act that funds appropriated under the Act could not be used for support of family planning service "programs where abortion is a method of family planning."<sup>102</sup> Subsequently, in 1973 following the *Wade* decision, Congress provided that none of the funds it made available under the Foreign Assistance Act of 1973 "shall be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions."<sup>103</sup> Congress also acted through its Legal Services Corporation Act to prohibit use of any funds made available by the corporation established by the Act

to provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion, or to com-

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101. Miller & Pierson, *Observations on the Consistency of Federal Procurement Policies and Other Governmental Policies*, 29 LAW & CONTEMP. PROB. 277, 314 (1964); Weidenbaum, *The Effects of Government Contracting on Private Enterprise*, 35 GEO. WASH. L. REV. 378, 379 (1966).

102. 42 U.S.C. § 300a-6 (1970).

103. 22 U.S.C.A. § 2151i (Supp. 1976).

pel any individual or institution to perform an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution.<sup>104</sup>

Similarly, several states and local government agencies have prohibited use of state and local government funds for performance or reimbursement for performance of an abortion. Thus, Ohio in 1974 enacted the following prohibition:

[S]tate or local public funds shall not be used to subsidize an abortion unless the abortion is necessary to preserve the life or physical or mental health of the pregnant woman and this fact is certified in writing by the performing physician to the state or local agency providing the funds.<sup>105</sup>

Some states and local government agencies have acted to prohibit the use of public property for performance of abortions. For example, a 1975 Arizona statute provides:

No abortions shall be performed at any facility under the jurisdiction of the board of regents [of the University of Arizona] unless such abortion is necessary to save the life of the woman having the abortion.<sup>106</sup>

In 1973 the Board of Regents of the University of Nebraska adopted the following rule relative to abortions at the Medical Center of that University:

[N]o abortion except to protect the health and life of the mother or to meet the minimum requirements of a conservative medical teaching program shall be performed on or prescribed for any woman on the University of Nebraska premises.<sup>107</sup>

In 1973 the Board of Trustees of Hale Hospital, a public hospital owned by the City of Haverhill, Massachusetts, adopted a rule that an abortion would be permitted if, in the judgment of the hospital's therapeutic abortion committee, "continued pregnancy in the presence of serious disease constitutes a significant threat to the life or health of the mother."<sup>108</sup>

While private hospitals have frequently adopted similar rules prohibiting abortions from being performed on their premises, some of these

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104. 42 U.S.C.A. § 2996f(b)(8) (Supp. 1976).

105. OHIO REV. CODE ANN. § 5501.55(C) (1974).

106. ARIZ. REV. STAT. ANN. § 15-730 (1975). See also PA. STAT. ANN. tit. 35, § 6607 (Supp. 1976).

107. *Orr v. Koefoot*, 377 F. Supp. 673, 675 (D. Neb. 1974).

108. *Doe v. Hale Hosp.*, 500 F.2d 144, 145 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975).

hospitals have done so in circumstances that, under leading decisions of the Supreme Court, most probably cause their action to constitute state action as that term is utilized in the administration of the fourteenth amendment. Thus, the Orange Memorial Hospital of Orange County, Texas, adopted a policy against the performance of "elective" abortions.<sup>109</sup> The hospital was a nonprofit tax exempt corporation, leasing the land upon which it was located from Orange County for \$1 per year. The hospital had been built by the county with both county and federal funds, the latter having been obtained under the Hill-Burton Act.

In *Greco v. Orange Memorial Hospital Corp.*<sup>110</sup> the abortion policy of Orange Memorial Hospital was challenged by a physician who brought a declaratory judgment action alleging the policy to be unconstitutional. The Court of Appeals for the Fifth Circuit affirmed the dismissal of the suit by the district court, holding that, on the facts presented, there was no state action.

The involvement of the state with the hospital function and its performance by the hospital corporation in *Greco* is far greater than the involvement of the state with the restaurant function in a public parking facility and its performance by a restaurant operator held by the Supreme Court to constitute state action in *Burton v. Wilmington Parking Authority*.<sup>111</sup> Moreover, the provision of hospital services for the indigent of the county, once having been undertaken by the county government, and then transferred together with a county hospital corporation to a private hospital would seem to be altogether indistinguishable in importance from the conduct of primary elections by a county political party held by the Supreme Court to constitute state action in *Terry v. Adams*.<sup>112</sup> Circuit Judge Clark recognized the striking similarity between *Burton* and *Greco* in his concurring opinion:

I remain convinced that Orange County and this hospital enjoy precisely the sort of symbiotic relationship defined in *Burton*. To

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109. *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873, 876 (5th Cir.), cert. denied, — U.S. —, 96 S. Ct. 433, — L. Ed. 2d — (1975).

110. *Id.*

111. 365 U.S. 715 (1961). Under the terms of the lease the hospital corporation agreed: (1) to operate the hospital as a nonprofit institution and to furnish the general public medical and surgical care; (2) to carry out the assurances required of the county in order to obtain federal funds; (3) to conduct an inventory of equipment and supplies as prescribed by the county; (4) to dispose of specified equipment only on prior approval of the county; (5) to accept indigent patients certified by the corporation subject to the prior obligation to receive emergency cases; (6) to relieve the county of the responsibility and expense of operating a hospital; and (7) to be responsible for the expense and maintenance of the hospital.

112. 345 U.S. 461 (1953).

their mutual advantage the county furnished land, buildings and facilities while operation and supervision by the hospital board and medical staff provided the general county community with health services and provided priority medical care for the county's indigent citizens.<sup>113</sup>

It is highly significant that in *Burton* the private corporation paid the governmental parking authority for the privilege of operating a restaurant facility and service in that authority's parking facility. In *Greco* the county paid the private corporation for rendering priority medical care for the county's indigent citizens in a hospital that had been built with governmental funds and leased at a nominal, noncompensatory rental to the private corporation for the express purpose of relieving the county of the necessity for rendering those services by governmental personnel, but not of the necessity for paying for the rendering of that care by the private corporation. It appears that it would be most unreasonable to hold that the Orange Memorial Hospital Corporation was not engaged in state action to which the fourteenth amendment is applicable.

The Supreme Court of the United States denied a writ of certiorari to the Fifth Circuit which had refused to hold that Orange County's relationship with Orange Memorial Hospital Corporation described above constituted state action. The Court denied the petition in the face of decisions by the Sixth and Fourth Circuits squarely to the contrary of the Fifth Circuit's no state action holding.<sup>114</sup> The Court also denied the petition in the face of a plethora of lower federal court decisions that state action involving a refusal to perform abortions on demand or elective abortions in state- or local-owned and operated hospitals, or a refusal to permit state or local funds to be used for the performance of abortions or the subsidization of abortions was a violation of the *Wade* decision.<sup>115</sup> Ordinarily a denial of certiorari is of little import. But in

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113. *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873, 882 (5th Cir.), *cert. denied*, — U.S. —, 96 S. Ct. 433, — L. Ed. 2d — (1975).

114. *Christhilf v. Annapolis Emergency Hosp. Ass'n*, 496 F.2d 174 (4th Cir. 1974) (receipt of Hill-Burton funds causes hospital to be government instrumentality); *O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140 (6th Cir. 1973). *Contra*, *Doe v. Bellin Memorial Hosp.*, 479 F.2d 756 (7th Cir. 1973).

115. *Doe v. Mundy*, 514 F.2d 1179 (7th Cir. 1975); *Doe v. Hale Hosp.*, 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); *Doe v. Rose*, 499 F.2d 1112 (10th Cir. 1974); *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974), *cert. denied*, 419 U.S. 891 (1975); *Doe v. Westby*, 383 F. Supp. 1143 (W.D.S.D. 1974), *vacated*, 420 U.S. 968 (1975); *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974); *Doe v. Wohlgenuth*, 376 F. Supp. 173 (W.D. Pa. 1974); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972).

view of the circumstances, this denial is hardly insignificant. The Supreme Court was well advised to deny the petition for certiorari since, had it granted certiorari, it would have been compelled to hold the action in refusing to permit abortions to be state action. It also would have been exceedingly difficult to justify its overruling of a long line of its decisions concerning the almost limitless scope of the public spending, property, and contract powers of both the federal and state governments.

I agree with Mr. Justice White that the Court should have granted certiorari and provided the nation with a clear cut decision on the questions presented in *Greco*. Argument before the Supreme Court would have resulted in an opinion explaining why it allowed the Fifth Circuit decision to stand. That opinion in light of the decisions on the scope of the nonregulatory powers of federal and state governments would have had to agree with the concurring opinion in *Greco*:

*Doe* [*v. Bolton*] and *Roe* [*v. Wade*] teach that a state cannot forbid certain types of abortions but they do not create any duty on Orange County's part to furnish facilities for such operations. Just as the Eagle Coffee Shop in Wilmington's parking garage could not have been forced to furnish kosher food or serve fish on Friday, so the Orange County Hospital cannot be compelled to allow its facilities to be used for elective abortions.<sup>116</sup>

There was a similar theme in *Doe v. Wohlgemuth*.<sup>117</sup> "State money makes it easier and more convenient to obtain an abortion," Judge Weis wrote, "but that is not a legitimate basis for creating a constitutional mandate."<sup>118</sup> Comparing the contention that the state should subsidize abortions to the notion that the state should furnish obscene materials to those who cannot afford them, he observed in the dissenting opinion:

While a person may have a fundamental right of privacy to have obscene materials in his home . . . , there have been no serious contentions that the State must furnish such material for the indigent. The fundamental rights of freedom of speech and of the press impose no duty on the State to purchase public address systems or printing presses for those unable to pay for them.

[*Wade*] does not transform what is an elective into a medically necessary operation. . . . [R]easoning that dictum in *Roe v. Wade*, . . . makes all abortions elective or not, into medically necessary ones is logically and factually erroneous.<sup>119</sup>

116. *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873, 882-83 (5th Cir.), cert. denied, — U.S. —, 96 S. Ct. 433, — L. Ed. 2d — (1975).

117. 376 F. Supp. 173 (W.D. Pa. 1974).

118. *Id.* at 193 (dissenting opinion).

119. *Id.* at 194-95.

The Supreme Court in *Wade* and *Bolton* dealt only with the question of the constitutional right of a woman to have her unborn child destroyed by an abortion and the right of the physician to perform it in the context of a state anti-abortion criminal law penalizing the performance of abortions. The Court dealt only with an exercise of the regulatory power of state government through the utilization of criminal sanctions to enforce the criminal rule of law established. The criminal statutes involved were directed at regulating private action. Indeed, in determining that the alleged constitutional rights of a pregnant woman and her physician did exist, the Supreme Court in *Wade* utilized the concept of the right of privacy and asserted that these private rights were protected against interference from public or regulatory governmental action utilizing criminal sanctions. The Court did not have before it, in either case, the issue of whether a woman had the incredible constitutional right to compel the government to provide, at public expense, public hospital facilities and government-paid physicians to destroy her unborn child by an abortion, or to provide governmental funds to reimburse private physicians and hospitals for performing an abortion upon her.

While *Bolton* is not to be distinguished from *Wade* in the analysis just made of the import of the decisions, *Bolton* did involve a statutory facet not presented in *Wade*. In *Bolton* the plaintiff pregnant woman had challenged the validity of the Georgia anti-abortion criminal law as applied to the refusal of Grady Memorial Hospital in Atlanta, Georgia, to permit the performance of a "therapeutic abortion" sought by her, the refusal being on the ground that her situation was not one within the scope of the challenged law. This hospital was one serving indigent residents in Fulton and DeKalb Counties, and was a unit of the local government in Georgia maintained, controlled, and funded by the local government.<sup>120</sup> In the course of discussing the question of the validity of the statutory requirement for advance approval by a hospital abortion committee before an abortion could be performed in a hospital and not be subject to the sanctions of the criminal law drawn in question—Section 26-1202(b)(5) of the Criminal Code of Georgia—the Court observed that despite its invalidation of this part of the anti-abortion criminal law

[t]he hospital itself is otherwise fully protected. *Under § 26-1202(e) the hospital is free not to admit a patient for an abortion.*

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120. Brief for Appellee at 12, *Doe v. Bolton*, 410 U.S. 179 (1973).

It is even free not to have an abortion committee. Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. *Section 26-1202(e) affords adequate protection to the hospital . . .*<sup>121</sup>

While the Georgia law was drawn, as the Court suggests, in order to protect the individual and denominational hospital, the Court also necessarily concludes that the statute was drawn generally so as to include Grady Memorial Hospital, a county-owned, operated, and maintained hospital. The effect of the Court's statement is to recognize explicitly and clearly the traditional power of government to control the use of its own property, employees, and tax funds and to exercise that control in such manner as it sees fit with respect to permitting or directing a government-owned, operated, and maintained hospital to refuse to admit patients for an abortion.

In recognizing this traditional power of government to control and dispose of public property as well as tax funds and to regulate the conduct of its employees, the Supreme Court was following a long line of previous decisions. The exercise of congressional power to contract or to control or dispose of public property "does not represent an exercise of *regulatory power*."<sup>122</sup> The same is true of the congressional spending power.<sup>123</sup> It was only the *regulatory* power of government that was drawn in question in *Wade and Bolton*. The *spending*, *property*, and *contract* powers of government are different and far more extensive powers of government than its regulatory powers.<sup>124</sup>

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121. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973) (emphasis added).

122. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 129 (1940) (emphasis added).

123. See *Flemming v. Nestor*, 363 U.S. 603 (1960); *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950); *Oklahoma v. United States Civil Serv. Comm'n.*, 330 U.S. 127 (1947); *Helvering v. Davis*, 301 U.S. 619 (1937); *United States v. Butler*, 297 U.S. 1 (1936).

124. With respect to the contract power, the Supreme Court stated:

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

*Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). With regard to the property power, the Supreme Court has stated:

The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation' . . . 'For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the powers of the proprietor therein.' 'Congress may deal with such lands precisely as an ordinary individual may deal with farming property. It may sell or withhold them from sale'. . . . Article 4, Section 3, Cl. 2 of the Constitution provides that 'The Congress shall have power to dispose of and make all needful

The scope of governmental spending power is indicated by the Supreme Court's decision in *Oklahoma v. United States Civil Service Commission*.<sup>125</sup> In that case the federal commission held that a state official had engaged actively in political management and in political campaigns, warranting that official's removal from his office. That order was to be followed, if the state official was not removed from office, by a further order of the federal commission to the appropriate federal agency that certain grants-in-aid for highway construction to Oklahoma should be withheld in an amount equal to two years of compensation of that state official. These grants-in-aid had been made subject to the condition stated in the Hatch Act that

[n]o officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall . . . take any active part in political management or in political campaigns.<sup>126</sup>

This condition formed a part of the arrangement by which the grants-in-aid had originally been made and was contractual in nature. Although this condition reached deeply into conduct of state and local government and impinged frontally upon private activity normally protected by the fifth amendment against federal action, the Supreme Court sustained the congressional exercise of this nonregulatory power relating to appropriations and spending. The Court distinguished this nonregulatory power of Congress from its regulatory power:

While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.

We do not see any violation of the state's sovereignty in the hearing or order. Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion . . . . The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual.<sup>127</sup>

The Court cited in support of its basic propositions a scholarly article by

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Rules and Regulations respecting the Territory or other Property belonging to the United States.' *The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'*

Alabama v. Texas, 347 U.S. 272, 273-74 (1954) (emphasis added).

125. 330 U.S. 127 (1947).

126. *Id.* at 146 n.1.

127. *Id.* at 143-44.



Professor Edward S. Corwin which analyzed the federal appropriative power and the long history of its exercise by Congress in conditioning grants-in-aid upon terms and conditions deemed essential for subserving the general welfare.<sup>128</sup> This article in particular provided an interpretation of the Supreme Court's decision in *United States v. Butler*,<sup>129</sup> involving grants-in-aid to private individuals. This interpretation was to the effect that the Supreme Court validated in that case the Hamiltonian thesis with respect to the federal appropriative power and that grants-in-aid to private individuals could be made upon any terms and conditions deemed essential by Congress for subserving the general welfare. Professor Corwin took the position that the Court's decision in *Butler*

turned on the proposition that the proposed beneficiaries of Federal largess were not free to reject it on account of the sharp competitive relation in which they stood to each other.<sup>130</sup>

So far as the test of the validity of particular exercises by Congress of the appropriative power, it seems clear that rarely, if ever, can a case be presented in which that exercise can be invalidated by the Supreme Court. The test has been stated by the Court in the following terms:

The line must still be drawn between one welfare and another, between particular and general. . . . The discretion, however, is not confined to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.<sup>131</sup>

The language is familiar to constitutional law scholars and practitioners. It means that unless the congressional judgment can be faulted on the ground that reasonable legislators could not have concluded that a given grant-in-aid together with the conditions and terms upon which it was to be granted was promotive of the general welfare, the congressional judgment must be sustained by the courts. As a practical matter, then, the congressional judgment must be sustained by the courts in the overwhelming preponderance of the cases, if not all.

The Supreme Court's treatment of the power of states to exercise their nonregulatory powers for the promotion of their general welfare as seen by their legislatures has been substantially the same. Indeed, the original recognition by the Supreme Court that there is a contract power in the federal government was based upon the notion that state govern-

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128. Corwin, *National-State Cooperation*, 8 AM. L. SCHOOL REV. 687, 698 (1937).

129. 297 U.S. 1 (1936).

130. Corwin, *National-State Cooperation*, 8 AM. L. SCHOOL REV. 687, 703 (1937).

131. *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

ments possessed the inherent power to contract.<sup>132</sup> In the *Oklahoma* case previously cited, the Supreme Court also cited, in support of the enormous scope of the federal appropriative power, its prior decision in *United States v. Bekins*.<sup>133</sup> That case concerned primarily the power of a state to enter into a consensual arrangement or contract with the federal government affecting corporate entities within the state. In that case, the Supreme Court stated:

It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. . . . The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority.<sup>134</sup>

The Supreme Court's citation of the *Bekins* case in the context of its decision in *Oklahoma* can only mean that the State is free to make contracts with individuals and establish terms and conditions upon grants-in-aid made under them and can insist upon compliance with these terms and conditions in the same way that the federal government can.

Thus, the position articulated by the Supreme Court in the *Bolton* case recognizing the validity of a government authorization or direction to a government-owned, operated, and maintained hospital to refuse to admit patients for abortions was in line with long-standing decisions of unquestioned precedential value. Indeed, it has been generally recognized that the power of the United States and of a state to exercise the nonregulatory power of controlling and disposing of public property, of contracting, and of spending for subserving the public interest has today become an institution playing a major part in the economic, social, and political life of the nation. It is one of the truly significant governmental inventions of this century. For all of these reasons, it is submitted that the lower federal court decisions in cases like *Doe v. Hale Hospital*<sup>135</sup> and *Doe v. Westby*<sup>136</sup> to the effect that the cutting off of the use of state government property and funds for the performance of abortions on demand is unconstitutional involves a fundamental error. They failed to distinguish between the invalidation in *Wade* and *Bolton* of an exercise of the regulatory power of government through the use of criminal sanctions to penalize private action in obtaining and performing

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132. *United States v. Tingey*, 30 U.S. (5 Pet.) 97, 107 (1831).

133. 304 U.S. 27 (1938).

134. *Id.* at 51-52.

135. 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975).

136. 383 F. Supp. 1143 (W.D.S.D. 1974), *vacated*, 420 U.S. 968 (1975).

abortions prohibited by a criminal statute and the almost universal sustaining of exercises of the nonregulatory powers of government involved in the spending, property, and contract powers.

#### CONCLUSION

Because the national and state legislatures have what the Supreme Court has explicitly recognized to be virtually unlimited power in these nonregulatory fields of public action, it becomes important for Congress and the states to assume an extensive role in cutting off the use of public property and funds and the making of public contracts for the purpose of abortions other than those done to prevent the death of the mother. This is a role which Congress and the state legislatures can perform immediately by way of supporting the achievement of the real and actual purposes of the framers of the thirteenth and fourteenth amendments. It is a role that can be most effective also for this purpose. It is a role that when performed prevents persons who oppose abortion from being made parties to the destruction of human lives.

This presentation has outlined the steps that Congress and state legislatures may take to deal with the problem of abortion created by the Supreme Court's decisions in *Wade* and *Bolton*, brought about by a grossly erroneous application of the fourteenth amendment. It has pointed out the great need for a statute addressing the standing of unborn children and their fathers to sue and defend in federal courts in order that those most directly affected in an adverse way by those decisions may once more seek to obtain the proper application of all constitutional and statutory provisions bearing upon their respective interests. It has suggested the role that Congress can play in exercising its power to legislate under the thirteenth amendment by way of protecting the interest of fathers in their unborn children and by way of protecting the lives of unborn children in a direct manner. It has finally suggested that Congress and state legislatures have all along possessed the set of powers with respect to spending public funds, controlling the use of public property, and making public contracts that can confine abortion to the private sector and prevent it from spilling over into the public sector until *Wade* and *Bolton* have been reversed by a constitutional amendment. All the developments in the law—both judicial and legislative—since *Wade* and *Bolton* reviewed in this presentation point toward the need for implementing these suggestions.

Set out in Appendix C are two statutory proposals for implementing the basic suggestions in this article. State Right to Life Bill "A" is

designed to utilize the state's nonregulatory powers, which were not affected by *Wade*, to the fullest extent to implement the traditional anti-abortion policy of states in this nation by cutting off the use of state funds, property, and privileges by those who perform abortions except where necessary to prevent the death of the mother or child. State Right to Life Bill "B" is designed to utilize the state's regulatory powers to the fullest extent possible despite *Wade* for the purpose of saving many lives of unborn children until that decision is overturned either by a human life amendment or by the Supreme Court. An important feature of the bill is that once enacted it will automatically revert the state's law to the traditional form of anti-abortion law when *Wade* is overturned. It will not be necessary to enact any further law after that happy event.

Congressman John A. Bingham, the author of the first section of the fourteenth amendment, once said, "A people to be great must be just."<sup>137</sup> Our American people want to be just toward unborn children. Congress can assist our people to treat them justly by submitting a constitutional amendment such as S.J.R. 141 (H.J.R. 132) S.J.R. 140 (H.J.R. 144), H.J.R. 121, or S.J.R. 6 (H.J.R. 246), for ratification and by enacting measures to protect their lives and their fathers' interest in them. Authority for the latter is clearly present in the Constitution. State legislatures can assist our people to treat unborn children justly by ratifying a constitutional amendment when submitted to them and by enacting measures such as State Right to Life Bills "A" and "B." For this, too, they have ample constitutional authority.

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137. CONG. GLOBE, 42d Cong., 1st Sess. 509 (1871).

APPENDIX A

JOINT RESOLUTIONS PROPOSING AN AMENDMENT TO THE  
CONSTITUTION OF THE UNITED STATES RELATIVE TO  
THE RIGHT TO LIFE OF THE UNBORN: "HUMAN  
LIFE AMENDMENT"

S.J. RES. 141, 94th Cong., 2nd sess.  
H.R.J. RES. 132, 94th Cong., 1st sess.

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

'ARTICLE—

'SECTION 1. With respect to the right to life, the word "person", as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

'SEC. 2. No unborn person shall be deprived of life by any person: *Provided, however,* That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

'SEC. 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.'

This Human Life Amendment proposal was introduced in the Senate by Senator James Buckley, Republican of New York, and in the House by Representative James L. Oberstar, Democrat of Minnesota. It was developed and supported by the National Right to Life Committee.

S.J. RES. 140, 94th Cong., 2nd sess.

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

'ARTICLE—

'SECTION 1. With respect to the right of life, the word "person", as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function, or condition of dependency.

'SEC. 2. This article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

'SEC. 3. Congress and the several States shall have power to enforce this article by appropriate legislation within their respective jurisdictions.'

This Human Life Amendment proposal also was introduced in the Senate by Senator James Buckley and is known as the "Buckley Amendment." It was developed from a draft by Professor Joseph P. Witherspoon of the University of Texas Law School, with Professor Robert M. Byrn of Fordham University Law School also acting as one of the principal draftsmen. These two professors were also two of the principal draftsmen of the National Right to Life Committee proposal.

H.R.J. RES. 121, 94th Cong., 1st sess.

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

‘ARTICLE—

‘SECTION 1. With respect to the right to life, the word “person”, as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function, or condition of dependency.

‘SEC. 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a reasonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring.

‘SEC. 3. Congress and the several States shall have power to enforce this article by appropriate legislation within their respective jurisdictions.’

This Human Life Amendment proposal was introduced in the House by Representative James A. Burke, Democrat of Massachusetts. It was drafted by Professor Joseph P. Witherspoon, as legal consultant to the Policy Committee of the National Right to Life Committee, Inc., and submitted to its Executive Committee by memorandum of August 14, 1973. It formed the basis for the NRLC Legal Advisory Committee deliberations that resulted in the NRLC adoption of the proposed amendment introduced as S.J. Res. 141, above.

S.J. RES. 6, 94th Cong., 1st sess.

H.R.J. RES. 246, 94th Cong., 1st sess.

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States guaranteeing the right of life to the unborn

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

‘ARTICLE—

‘SECTION 1. With respect to the right to life guaranteed in this Constitution, every human being, subject to the jurisdiction of the United States, or of any State, shall be deemed, from the moment of fertilization, to be a person and entitled to the right to life.

‘SEC. 2. Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.’

This Human Life Amendment proposal was introduced in the Senate by Senator Jesse Helms, Republican of North Carolina, and in the House by Representative Gene Snyder, Republican of Kentucky.

APPENDIX B  
THE MISSOURI ANTI-ABORTION LEGISLATION OF 1973 AND 1974  
ABORTION  
H.S.C. HOUSE BILL NO. 1211

AN ACT relating to abortion with penalty provisions and emergency clause. *Be it enacted by the General Assembly of the State of Missouri, as follows:*

SECTION 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

SECTION 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) "Abortion", the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Viability", that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) "Physician", any person licensed to practice medicine in this state by the state board of registration of the healing arts.

SECTION 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment.

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

SECTION 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

SECTION 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

SECTION 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

SECTION 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant

shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

SECTION 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

SECTION 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

SECTION 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

SECTION 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

SECTION 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

SECTION 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

SECTION 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

SECTION A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

SECTION B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of the Act are declared to be severable.



[ACT 90]  
ABORTION—REFUSAL OF TREATMENT—PHYSICIAN ETC.—  
NON-LIABILITY

H.S.C. HOUSE BILLS NOS. 731 & 793

AN ACT relating to abortions.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

SECTION 1.

No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes.

SECTION 2.

No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.

SECTION 3.

Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress.

## APPENDIX C

## 1976: STATE RIGHT TO LIFE BILL "A" (Revision 4)

## A BILL TO BE ENTITLED

AN ACT relating to the protection of unborn children from certain abortifacient acts by prohibiting such acts in governmental hospitals, hospitals receiving tax exemptions and governmental assistance, and hospitals enjoying the protection of governmentally conferred corporate status; the granting or utilization of governmental assistance for such acts; providing for the revocation of such exemption, assistance, or status; and providing criminal sanctions; and declaring an emergency.

## BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. BASIC POLICY CONCERNING THE RIGHT TO LIFE. (a) It is the solemn declaration and finding of the Legislature, in reaffirmation of the long-standing policy of this State, that the unborn child is a human being from the time of its conception and, therefore, a person entitled from and after that time to the full protection of the rights of the person under the constitution and laws of this State. The right to life is a paramount right of the person, and, therefore, of the unborn child. It has long been the policy of this State to protect the life of unborn children from and after their conception so as to prohibit an abortifacient act except where such an act is necessary to prevent the death of the mother or of her unborn child. It has applied this policy both in the private sector and in the public sector. The Legislature would affirmatively continue to apply this policy fully in both the private and public sector but for the decision of the Supreme Court of the United States invalidating the law of the State relating to abortion. However, that decision applied only to right of privacy of a pregnant woman and the included right of that woman to obtain an abortion in the private sector from a consenting physician. Neither that decision nor any subsequent decision of that Court has affected the right of the people and of their government to control the appropriation and expenditure of tax funds and the grant or use of public property, or privileges which are well-established constitutional non-regulating powers of the State government.

(b) Since this State is now without a statute governing abortifacient acts and since it is a paramount interest of this State that neither its tax funds nor its public property or privileges be used to destroy the lives of unborn children, this Legislature reaffirms the long-standing policy of this State, with respect to protecting the lives of unborn children from the time of their conception and reestablishes its prohibition of abortion in the public sector to the extent of prohibiting the grant or use of tax funds, public property, or public privileges, or the granting or utilization of governmental assistance in connection with the performance of abortifacient acts that are not in conformance with this Act.

(c) One basis for this statute is the Thirteenth and Fourteenth Amendments of the Constitution of the United States which this Legislature understands, in light of prior decisions of the Supreme Court of the United States, to apply to all human beings. This Legislature has examined scientific and medical evidence with respect to when human life begins and has concluded that that evidence overwhelmingly demonstrates that human life begins at conception or fertilization and is present at every stage of biological development of the unborn offspring of human beings. Moreover, this Legislature has concluded that there is compelling evidence that the framers of these Amendments judged such unborn offspring of human beings to be both human beings and persons within the meaning and protection of these Amendments. Also, this Legislature has concluded that there is compelling evidence that the framers of these Amendments had the purpose of protecting the parental interest in children, not only with respect to conceiving them but also to raising and caring for them. Finally, this Legislature has concluded that there is compelling evidence that the framers of these Amendments recognized that children, including unborn children, not only are persons and human beings in the constitutional sense, but also have, like adults, inalienable rights and that among these rights are the rights to life, liberty, and property. Each and all of the provisions

of this statute and of other statutes relating to abortion are designed to give effect to these purposes and objects of the Thirteenth and Fourteenth Amendments.

Sec. 2. DEFINITIONS. In this Act:

(1) "Unborn child" means the unborn offspring of human beings from the time of its conception throughout pregnancy until its live birth.

(2) "Conception" means the union of the sperm of a male human being and the ovum of a female human being.

(3) "Abortional act" means an act committed upon or with respect to a woman, whether directly upon her body by the use of an instrument or other thing whatsoever, or by the administering, taking, or prescription of drugs or any substance whatsoever, or by any other means, with intent to cause the death of an unborn child or the expulsion or removal of an unborn child from the womb of the woman other than for the principal purpose of producing a live birth or removing a dead fetus.

(4) "Hospital" means any hospital, medical clinic, or any other medical facility whether or not licensed by the State Board of Health.

(5) "Medical staff" means that physician or group of physicians who by action of the governing body of a hospital are privileged to work within and use the facilities of a hospital for or in connection with the observation, care, diagnosis, or treatment of individuals who are, or may be, suffering from any disease or disorder, mental or physical, or any physical deformity or injury.

(6) "Physician" means any person licensed to practice medicine in this state.

(7) "Governmental assistance" includes federal, state, and political subdivision grants, loans, and all other forms of financial aid from any level of government or from any governmental agency.

(8) "Political subdivision" includes an incorporated city or town, whether operated under a home-rule charter or under the general law, a county, a hospital district, or any other political subdivision of the State, and any agency or authority of the foregoing.

(9) "State" includes any agency of the State.

(10) "Agency" includes any authority, and members, employees, and agents of an agency.

Sec. 3. APPOINTMENT OF GUARDIANS FOR UNBORN CHILDREN. (a) Upon the filing of an action challenging the constitutional validity of this statute or any statute dealing with the subject of abortion, the Attorney General shall apply to a court of competent jurisdiction for the appointment of a guardian of the unborn child or children affected by that action so filed as well as for the class of unborn children within the state.

(b) Upon the appointment of the guardian under subsection (a) the Attorney General shall provide the guardian with funds that are reasonably adequate for the fullest prosecution of the interests of the unborn children and the class of unborn children of which he or she is guardian in defense of the action to which subsection (a) is applicable.

Sec. 4. PROHIBITION OF ABORTIONAL ACTS IN GOVERNMENTAL HOSPITALS. (a) No person shall authorize or perform an abortional act in a hospital owned, maintained, or operated within the State by the State or any political subdivision of the State, unless such act is an abortional act specified in Section 8 of this Act.

(b) A person who violates this section commits an offense that is a first-degree felony if the woman upon whom the abortional act is performed or her child dies as a result of such act or, if neither die, an offense that is a second-degree felony.

Sec. 5. PROHIBITION OF ABORTIONAL ACTS IN HOSPITALS RECEIVING TAX EXEMPTIONS OR GOVERNMENTAL ASSISTANCE. (a) No person shall authorize or perform an abortional act in a hospital which receives any tax exemption or governmental assistance from the State or any political subdivision thereof, unless such is an abortional act specified in Section 8 of this Act.

(b) If any member of the medical staff of a hospital specified in sub-section (a) performs an abortional act in violation of that subsection and the governing body of that

hospital either authorized that act or fails within a reasonable time after that act to remove such person from its medical staff, the tax exemption or governmental assistance being received by that hospital shall be terminated upon the entry of an order of the State Board of Health after the Board has determined, upon giving reasonable notice and a fair hearing in accordance with the procedures of Section 9, Texas Hospital Licensing Law, General Laws, 1957, Fifty-Sixth Legislature, Ch. 223, pp. 505, 507-508, as amended by General Laws, 1962, Fifty-Seventh Legislature, Third Called Session, Ch. 32, p. 92 that this Section has been violated.

(c) Upon receiving a copy of the final decision and order of the State Board of Health under sub-section (b) of this section, any officer or agency of this State or of any political subdivision thereof that has cognizance of tax matters or that has extended governmental assistance to the hospital is bound by the finding of violation and shall take appropriate action to terminate the tax exemption or to terminate or refuse to grant or continue governmental assistance to the hospital.

**Sec. 6. PROHIBITION OF ABORTIONAL ACTS IN HOSPITALS ENJOYING CORPORATE STATUS.** (a) No person shall authorize or perform an abortional act in a hospital that is incorporated under the laws of this State or, being incorporated under the laws of another State of the United States, has received a permit to do business under the laws of this State, unless such act is an abortional act specified in Section 8 of this Act.

(b) If any member of the medical staff of a hospital specified in subsection (a) of this section performs an abortional act in violation of that subsection and the governing body of that hospital either authorized that act or fails within a reasonable time after that act to remove such person from its medical staff, the Attorney General of the State of Texas shall take steps in accordance with Article 4408, Revised Civil Statutes of Texas, 1925, as amended, to seek a forfeiture of the corporate charter or permit to do business of the hospital.

(c) No corporate charter or permit to do business may be issued if the corporation in question is organized to perform or permit the performing of abortional acts unless such acts are abortional acts specified in Section 8 of this Act. The purpose of performing or permitting the performance of abortional acts in violation of this subsection is hereby declared to be an impermissible and unlawful purpose of a corporation.

**Sec. 7. PROHIBITION OF USE OF GOVERNMENTAL FUNDS AND OF THE GRANT, RECEIPT, AND USE OF GOVERNMENTAL ASSISTANCE FOR THE PERFORMANCE OF ABORTIONS.** (a) No governmental funds, from whatever source and whether held in trust or otherwise by the government, shall be utilized by an agency of the State or of any political subdivision and no governmental assistance shall be granted by any such agency to any person for performing or promoting the performance of abortional acts or conditioned upon the submission to such acts that are not abortional acts specified in Section 8 of this Act.

(b) An offense under this section is a third-degree felony.

**Sec. 8. ABORTIONAL ACT.** (a) A person performs an abortional act under this Act that does not violate its policy when that person is a duly licensed physician who, after administering a pregnancy test to a woman indicating that she is pregnant, performs an abortional act upon her on the basis of the best medical judgment of a physician to prevent the death of that woman or her unborn child.

(b) If subsection (a) of this Section should be declared unconstitutional by any court, then upon that judgment becoming final without an appeal or upon the judgment of any court upon further appeal of the former decision becoming final, this Legislature declares and establishes that, for the purpose of the administration of this Act, no abortion is within the policy of this Act and the prohibitions of this Act in its other Sections shall be administered as if they made no reference to this Section.

**Sec. 9. SEVERABILITY.** If any section, subsection, subdivision, sentence, or clause of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the Act.

Sec. 10. **EMERGENCY.** The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

1976: STATE RIGHTS TO LIFE BILL "B" (Revision 4)

AN ACT relating to the declaration of a basic policy concerning the right to life; regulating the conduct of certain abortifacient policies, practices, and acts and conduct regarding human fetuses; relating to the distribution of certain abortifacients; making certain findings; prescribing certain criminal penalties and civil sanctions; amending Section 1.07(a)(17) and Section 19.02(a), Penal Code and further amending the Penal Code by adding Section 1.07(a)(37)-(40), Section 9.34(c), Sections 19.08-19.11, and Sections 22.09 and 22.10; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

Section 1. **BASIC POLICY CONCERNING THE RIGHT TO LIFE.** (a) It is the solemn declaration and finding of this legislature, in reaffirmation of the long-standing policy of this state, that the unborn child is a human being from the time of its conception and, therefore, a person entitled from and after that time to the full protection of the rights of the person under the constitution and laws of this state. The right to life is a paramount right of the person, and, therefore, of the unborn child. It has long been the policy of this state to protect the life of unborn children from and after their conception so as to prohibit an abortion except by or with the advice of a physician to prevent the death of the mother. The legislature would affirmatively and positively apply this policy but for the decision of the Supreme Court of the United States invalidating the laws of this state relating to abortion, but permitting a state to protect the lives of viable unborn children and to take certain other action relative to abortions.

(b) Since this state is now without a statute governing abortions and since it is a paramount state interest to save as many lives of unborn children and their mothers as is constitutionally possible until the United States Constitution has been amended so as to protect the unborn child as a person in its right to life under that constitution, or to give the several states the power to provide similar protection for the unborn child, or until the Supreme Court reverses or modifies its decision to the contrary with respect to such protection, this legislature finds and declares in this Act when an unborn child is a viable human being and provides protection for its life from and after that point from those who would destroy it by an unjustifiable abortifacient act and prohibits certain additional unjustifiable abortifacient acts.

Sec. 2. Subdivision (17), Subsection (a), Section 1.07, Penal Code, is amended to read as follows:

"(17) 'Individual' means a human being who is alive[.], including a living unborn child or a child who has been born alive prematurely, whether as a result of natural causes, an abortifacient act, or otherwise."

Sec. 3. Subsection (a), Section 1.07, Penal Code, is amended by adding Subdivisions (37), (38), (39), and (40) to read as follows:

"(37) 'Unborn child' means an unborn offspring of human beings from the time of its conception throughout pregnancy

"(38) 'Viable unborn child' means an unborn child who possesses the capacity to live outside its mother's womb upon its premature birth, whether resulting from natural causes, an abortifacient act, or otherwise, and whether that capacity exists in part due to the provision or availability of natural or artificial life-supportive systems. The legislature finds and declares that an unborn child is viable at the gestational age of 22 weeks because there is substantial evidence that such a child has a substantial chance to survive with the aid of services of a well-equipped pediatric service; however, the state Board of Health is empowered to and shall establish by regulation an earlier age at

which an unborn child becomes a viable unborn child for the purposes of this definition if it determines, after investigation, that an unborn child is, in fact, viable at that earlier age.

“(39) ‘Abortional act’ means an act committed upon or with respect to a woman, whether she is pregnant or not, whether directly upon her body through the use of an instrument or other thing whatsoever, or by administering, taking, or prescription of drugs or any substance whatsoever, or by any other means, with intent to cause the death of an unborn child or the expulsion or removal of an unborn child from the womb of the woman other than for the principal purpose of producing a live birth or removing a dead fetus.

“(40) ‘Conception’ means the union of the sperm of a male individual and the ovum of a female individual.”

Sec. 4. Section 9.34 of the Penal Code is amended by adding Subsection (c) to read as follows:

“(c) A person does not violate subsection (a), Section 19.02, of this code if that person performs an abortional act

“(1) upon a woman carrying an unborn child who is viable when that person is a duly licensed physician who, after a pregnancy test indicating she is pregnant, performs an abortional act upon her on the basis of the best medical judgment of a physician that that act is necessary to prevent the death of the woman or her viable unborn child or a grave impairment of the health of the woman and the medical practice used is one which, in the best medical judgment of that physician, will give the unborn child the best chance of survival unless the necessity for preventing the death or grave impairment of the health of the woman prevents its use; however, this subdivision becomes null and void when subdivision (3) of this subsection becomes operative.

“(2) upon a woman carrying an unborn child who is not viable when that person is a duly licensed physician, who, after a pregnancy test indicating she is pregnant, performs an abortional act upon her on the basis of the best medical judgment of a physician that that act is necessary under all attendant circumstances; however, this subdivision becomes null and void when subdivision (3) becomes operative;

“(3) upon a woman, when the Constitution of the United States has been amended so as to protect the unborn child as a person in its right to life under that constitution or to give the several states the power to provide similar protection for the unborn child or when the Supreme Court of the United States has reversed or modified its decision to the contrary with respect to such protection, only when that person is a duly licensed physician who, after administering a pregnancy test indicating she is pregnant, performs an abortional act upon her on the basis of the best medical judgment of a physician that that act is necessary to prevent the death of the woman or her unborn child. When this subdivision of this subsection becomes operative under its terms, Subdivisions (1) and (2) of this subsection become inoperative and of no legal effect so that only that abortional act is not violative of subsection (a), Section 19.02, of this code only if it is performed in accordance with the terms of this subdivision.”

Sec. 5. The State Board of Health shall adopt a regulation determining the gestational age at which an unborn child is a “viable unborn child” in accordance with Section 1.07(a)(38), Penal Code. The board shall investigate at least once a year the available evidence respecting the viability of unborn children.

Sec. 6. Subsection (a), Section 19.02, Penal Code, is amended to read as follows:

“(a) A person commits an offense if he:

“(1) intentionally or knowingly causes the death of an individual;

“(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

“(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual; or

*“(4) commits an abortifacient act upon a woman that causes the death of that woman or of her unborn child unless that act is an abortifacient act specified in Subsection (c) of Section 9.34 of this code as not in violation of this section.*

Sec. 7 Chapter 19, Penal Code, is amended by adding Sections 19.08, 19.09, 19.10 and 19.11 to read as follows:

*“Sec. 19.08. ABORTIFACIENT ACTS. (a) A person commits an offense if he commits an abortifacient act upon a woman, unless that act is an abortifacient act specified in Section 9.34(c)(3) of this code.*

*“(b) An offense under this section is a felony of the first degree if the abortifacient act results in serious injury to the woman or her child and a felony of the second degree if the act does not result in such an injury.”*

*“Sec. 19.09. REGULATION OF ABORTIFACIENT ACTS. (a) Except in an emergency requiring immediate action no abortifacient act specified in Section 9.34(c) of this code may be performed upon a woman unless:*

*“(1) the written informed consent to the performance of the abortifacient act of the proper person or persons, as required by Subsections (b), (c), (d), and (e) of this section, has been delivered to the physician performing the abortifacient act; and*

*“(2) if the abortifacient act is performed during or after the twelfth week of pregnancy, it is performed in a hospital duly authorized to provide facilities for general surgery.*

*“(3) if a person whose written consent to an abortifacient act is required under Subsections (b), (c), (d), or (e) of this section, files a written complaint with the State Board of Health and serves it upon the physician about to perform an abortifacient act, which alleges that the unborn child of that woman is viable or that the physician is about to perform an abortifacient act not specified by Subdivision (1) or (3), Subsection (c), Section 9.34, of this code, a determination of the matters alleged in the complaint is made by the State Department of Health pursuant to the procedures specified for determining ‘contested cases’ in the Administrative Procedure and Texas Register Act, Tex. Laws 1975, ch. 61, at 136, all of the provisions of which are applicable to this provision, including those providing for judicial review of the Department’s determination.*

*“(b) If the woman specified in Subsection (a) of this section is less than 18 years of age and has not married, the written consent of both the woman and her parents to performance of an abortifacient act is required. If one or both of the woman’s parents refuse such consent, consent may be obtained by order of a judge of a district court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.*

*“(c) If one of the parents has died or has deserted his or her family, the written consent of the remaining parent to performance of an abortifacient act upon the woman specified in Subsection (b) of this section is sufficient. If both parents have died or have deserted their family, the written consent of the woman’s guardian or other person having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient.*

*“(d) The written consent of a woman to the performance of an abortifacient act upon her is required.*

*“(e) The written consent of the woman’s spouse at the time of the conception of the unborn child carried by the woman upon whom an abortifacient act is to be performed or by the father of that child to the performance of that act is required, unless he cannot be reached after a reasonable effort to find him or has died.*

*“(f) The term ‘written consent’ as used in this section means a written statement, voluntarily entered into by the woman upon whom an abortifacient act is to be performed, whereby she specifically consents thereto, or such statement made by a person specified in Subsection (b), (c), (d), and (e) of this section. Such consent shall be deemed informed consent only if it affirmatively appears in the written statement signed by the person by whom the consent must be given that she or he has been advised (i) that*

there may be detrimental physical and psychological effects which are not foreseeable, (ii) of possible alternatives to the abortifacient act, including childbirth and adoption, and (iii) of the medical procedures to be used. Such statement shall be signed by the physician or by a counselor authorized by him and shall also be made orally in readily understandable terms insofar as practicable.

"(g) If the physician performing an abortifacient act under this code is not the physician who made the medical judgment required for such an act, he shall obtain before performing that act from the physician making such judgment a written statement setting forth the basis of his judgment that the abortifacient act is specified in Subsection C, Section 9.34 of this code.

"(h) The physician performing the abortifacient act specified in Subsection (g) of this section shall retain this written statement and attach it to the file copy of his report required by Subsection (n) of this section.

"(i) When an abortifacient act specified in Subsection (c), Section 9.34 of this code, is to be performed after the 20th week of gestation or upon a woman carrying a viable unborn child, the governing board of the hospital in which that act is to be performed shall require a physician other than the physician performing that act to be in attendance to take control of and to provide immediate medical care for a child aborted alive as a result of that act. During the performance of the abortifacient act the physician performing it, and subsequent to it, the physician required by this subsection to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the aborted child. Such steps shall include the provision and presence of life-supporting equipment, as defined by the State Board of Health, in the room where the abortifacient act is to be performed.

"(j) If the physician required to be in attendance under Subsection (i) of this section is not present during or subsequent to the abortifacient act, the physician performing this act shall perform all the duties specified in that subsection.

"(k) A child aborted alive as a result of an abortifacient act shall be immediately accorded legal protection under the laws of this State and is hereby declared in light of that fact to be abandoned under the provisions of Section 15.02, Family Code, and the State Department of Public Welfare is initially designated as the suitable temporary institution for caring for the child in the event that the abortion results in that child being live-born, which child is at that time declared to be a ward of the State Department of Public Welfare.

"(l) The medical records of all life-sustaining efforts put forth for a child aborted alive, and of their failure or success, shall be kept by the physicians required to perform the duties specified in Subsections (i) and (j) of this section.

"(m) The State Board of Health shall by regulation provide for the humane disposition or burial of the bodies of children whose death was caused by an abortifacient act or occurred after their having been aborted alive. In the preparation and revision of such regulation the board shall consult with agencies having a similar duty under the law of other states. The board shall also permit any individual or organization so requesting to hold memorial services to honor such children before disposition of their bodies under this subdivision.

"(n) Within 30 days after the performance of an abortifacient act resulting in the death of a child or its mother, the physician performing that act shall file with the commissioner of health on a form prescribed by him the following information:

"(1) his statement, or that of the physician specified in Subsection (g) of this section, setting forth the basis of the physician's judgment that the abortifacient act is one specified by Subsection (c), Section 9.34, of this code.

"(2) the method used to perform the abortifacient act;

"(3) whether the woman survived the abortifacient act;

"(4) if the woman did not survive the abortifacient act, the cause of her death;

"(5) the details of any morbidity observed in the woman;

"(6) the gestational age of the child;



*"(7) the weight and crown-rump length of the child, if determinable;*

*"(8) whether the unborn child was alive when removed or expelled from the womb, and if so, the steps taken to preserve its life and health;*

*"(9) the length of time the child lived after the abortifacient act; and*

*"(10) the name and location of the hospital or other facility in which the abortifacient act was performed.*

*"(o) The physician performing an abortifacient act shall retain in his files for seven years after that act a copy of the report specified in Subsection (n) of this section to which he should attach or otherwise add the name of the woman upon whom the act was performed. The original report filed with the commissioner shall not contain the name of that woman and shall be maintained by the commissioner as a public record. The commissioner shall prepare from these reports such statistical tables and reports with respect to maternal health and deaths; abortifacient procedures; the number of abortifacient acts by city and county hospitals; the complications resulting from abortifacient acts; the unborn child and the aborted child as is necessary to inform the public adequately concerning the nature, scope, methods, and results of abortifacient acts upon human life. The commissioner shall make such reports at least annually and upon such other occasions as he deems appropriate. The commission may establish advisory committees to study and report upon the matters of the type specified in this subsection.*

*"(p) Any person violating Subsections (a), (b), (g), (h), (i), (j), (k), and (l) of this section commits an offense that is a felony of the third degree. Any person violating Subsection (n) and (o) of this section commits an offense that is a Class B misdemeanor."*

*"Sec. 19.10. EXPERIMENTATION ON HUMAN FETUSES. (a) No person shall use any live human fetus, whether before or after expulsion from its mother's womb, for scientific, laboratory, research, or other kind of experimentation. This section shall not prohibit procedures incident to the study of a human fetus while it is in its mother's womb, provided that in the best medical judgment of the physician, made at the time of the study, said procedures do not substantially jeopardize the life or health of the fetus, and provided said fetus is not the subject of a planned abortion. In any criminal proceeding the fetus shall be conclusively presumed not to be the subject of a planned abortion if the mother signed a written statement at the time of the study that she was not planning an abortion.*

*"(b) This section shall not prohibit or regulate diagnostic or remedial procedures the purpose of which is to determine the life or health of the fetus involved or to preserve the life or health of the fetus involved or the mother involved.*

*"(c) A fetus is a live fetus for purposes of this section when, in the best medical judgment of a physician, it shows evidence of life as determined by the same medical standards as are used in determining evidence of life in a spontaneously aborted fetus at approximately the same stage of gestational development.*

*"(d) No experimentation may knowingly be performed upon a dead fetus unless the consent of its mother and father has first been obtained, provided however that such consent shall not be required in the case of a routine pathological study. In any criminal proceeding, consent shall be conclusively presumed to have been granted for the purposes of this section by a written statement, signed by the mother or father, who is at least 18 years of age, to the effect that she or he consents to the use of the fetus for scientific, laboratory, research, or other kind of experimentation or study; such written consent shall constitute lawful authorization for the transfer of the dead fetus.*

*"(e) No person shall perform or offer to perform an abortion where part or all of the consideration for said performance is that the fetal remains may be used for experimentation or other kinds of research or study.*

*"(f) No person shall knowingly sell, transfer, distribute, or give away any fetus for a use which is in violation of the provisions of this section. For purposes of this subsection, the word 'fetus' shall include also an embryo or neonate.*

*"(g) Whoever violates the provisions of this section commits an offense that is a felony of the third degree."*

*"Sec. 19.11. RIGHT TO REFUSE TO ALLOW OR TO PERFORM OR PARTICIPATE IN ABORTIONS. (a) No hospital, clinic, institution, or any other facility, public or private, shall be required to admit any patient for the purpose of performing an abortion nor required to allow the performance of an abortion therein. No cause of action shall arise against any hospital, clinic, institution, or other facility for refusing to perform or allow an abortion.*

*"(b) No hospital, clinic, institution, or any other facility, either public or private, shall ever be denied governmental assistance or be otherwise discriminated against or subjected to coercion in any way for refusing to permit its facilities, staff, or employees to be used in any way for the purpose of performing an abortion.*

*"(c) Any person who violates Subsection (b) of this section commits a Class A misdemeanor.*

*"(d) No person shall be required to perform or participate directly or indirectly in any abortion, and the refusal of that person to participate in any abortion shall not be a basis for civil liability to any person. No hospital, governing board, or other person or association shall terminate the employment or alter the position of, or prevent the practice or occupation of, or impose any other sanction or otherwise discriminate against any person who refuses to participate in an abortion, or to counsel same, or participate in the abortion process in any way.*

*"(e) Any person who violates Subsection (d) of this section commits a Class A misdemeanor."*

Sec. 8. The legislature finds that the method or technique of abortion known as saline amniocentesis is seriously deleterious to maternal health.

Sec. 9. Chapter 22 of the Penal Code is amended by adding Sections 22.09 and 22.10 to read as follows:

*"Sec. 22.09. SALINE PROCEDURE OF ABORTION. (a) No person shall employ the method or technique for performing an abortifacient act known as saline amniocentesis in performing an abortifacient act after the first twelve weeks of pregnancy.*

*"(b) 'Saline amniocentesis' is a method or technique of performing an abortifacient act whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose and with the usual effect of killing an unborn child and artificially inducing labor.*

*"(c) An offense under this section is a felony of the third degree.*

*"Sec. 22.10. DISTRIBUTION OF ABORTIFACIENTS. (a) No person shall distribute an abortifacient.*

*"(b) The distribution of an abortifacient is the intentional: (1) distribution, sale, offer for sale, possession with the intent to sell, advertisement or display for sale of any drug, potion, instrument or article for the purpose of procuring an abortion; or (2) publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females for producing abortion or miscarriage unless: (1) the distribution is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or (2) the distribution is made upon prescription or order of a physician; or (3) the possession is with the intent to distribute as authorized in paragraphs (1) and (2) of this section; or (4) the advertisement is addressed to persons named in paragraph (1) of this section and confined to trade or professional channels not likely to reach the general public.*

*"(c) An offense under this section is a felony of the third degree."*

Sec. 10. EMERGENCY. The importance of this legislation and crowded condition of the calendars in both houses creates an emergency and an imperative public necessity, that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this act shall take effect and be in force from and after its passage, and it is so enacted.