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## THE POWER OF CONGRESS TO CHANGE CONSTITUTIONAL DECISIONS OF THE SUPREME COURT: THE HUMAN LIFE BILL

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In *Roe v. Wade*<sup>1</sup> the United States Supreme Court held that the constitutional right of privacy guaranteed a woman the right, within certain limits, to choose whether or not to have an abortion.<sup>2</sup> Opponents of the right to abortion have undertaken, in part through legislation known as the Human Life Bill,<sup>3</sup> to change this ruling of the Supreme Court. This effort to alter constitutional law, without follow-

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This Article is based upon a statement submitted to the Subcommittee on the Separation of Powers of the Senate Committee on the Judiciary.

<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> *Id.* at 155.

<sup>3</sup> The Human Life Bill was introduced in the Senate by Senator Helms of North Carolina as S. 158, 97th Cong., 1st Sess. (1981). On July 9, 1981, the Bill was reported out of the Subcommittee on the Separation of Powers, with minor amendments, by a two to one vote. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1120 (1982) [hereinafter cited as *Human Life Bill Hearings*]. This article discusses that portion of the Bill, as reported out by the Subcommittee, which provides:

SECTION 1. (a) The Congress finds that the life of each human being begins at conception.

(b) The Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings.

SEC. 2. Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception, without regard to race, sex, age,

ing the procedure for constitutional amendment under article V,<sup>4</sup> raises several crucial questions which go to the heart of our constitutional structure.

The proposed Human Life Bill seeks to overturn the decision in *Roe v. Wade* by making two "findings of fact" and two declarations of law. The first "finding" is that "the life of each human being begins at conception," and the resulting declaration of law is that "for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception."<sup>5</sup> The second "finding" is that "the fourteenth amendment . . . protects all human beings,"<sup>6</sup> and the ensuing declaration of law is that the term "person" in the fourteenth amendment "includes all human beings."<sup>7</sup> The declarations of law are buttressed by the statement that Congress is hereby exercising "its power under section 5 of the fourteenth amendment,"<sup>8</sup> a section which gives Congress the authority "to enforce" that amendment "by appropriate legislation."<sup>9</sup>

The Human Life Bill raises several important constitutional issues, having to do both with the legal effect of congressional "findings of fact" and declarations of law and with the extent of congressional powers under section 5 of the fourteenth amendment. A consideration of the Bill thus poses at least three specific questions: (1) What is the effect of a congressional finding of fact that human life begins at conception? (2) What is the effect of a congressional declaration that a fetus is a "person" within the meaning of the fourteenth amendment? (3) Does section 5 of the fourteenth amendment give Congress the power to change the Supreme Court's interpretation of that amendment? This Article will address each of these questions. In so doing, it will examine recent commentary by proponents of the Human Life Bill, concluding not only that the Bill itself is unconstitutional, but also that the theories proffered in its behalf pose a serious challenge to the structure of our constitutional system.

### THE FINDINGS OF FACT

The premise of the Human Life Bill is that "human life," or more precisely a "human being," begins at conception.<sup>10</sup> This "human life,"

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health, defect, or condition of dependency, and for this purpose 'person' includes all human beings.

*Id.* at 1120-24.

<sup>4</sup> U.S. CONST. art. 5.

<sup>5</sup> *Human Life Bill Hearings*, *supra* note 3, at 1122.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> U.S. CONST. amend. XIV, § 5.

<sup>10</sup> *Human Life Bill Hearings*, *supra* note 3, at 1122. The second "finding"—that the fourteenth

according to the theory of the Bill, is endowed with the attributes of a human person, possessing a soul or at least entitled to the special status accorded human beings in our society. Without this premise the legislation would fall, for it would include in its protection all forms of life equally, including animal and vegetable.

This finding, upon which the Human Life Bill is based, does not rest upon any judgment subject to objective evaluation. All that empirical judgment teaches us is that "life" exists in numerous forms, including each individual cell, and that some of these have the genetic potential for becoming human beings under some circumstances. The precise point at which this biological form of life actually becomes a "human being," however, is a theological or philosophical conclusion. That judgment rests upon faith, religious dogma, or a fundamental value at the basis of a philosophical system. For most of us, the question of when human life begins is a matter of religious judgment.

There are, of course, many different views as to when human life is created. Some groups hold to the position that human life exists in each sperm and in each egg, and therefore that contraception destroys life. Others believe that human life begins at conception, either when the sperm first enters the egg or later, when it becomes firmly implanted. Others assert that human life begins when the fetus makes its first movement, at the time of quickening. Others place the origin of life at the point when the brain begins to function; still others when the fetus can live outside the womb. Over the centuries, most people probably have thought that human life begins at the moment of birth. Yet there are some who believe that life is never created, but merely passed on from prior generations.

All of these varied positions have one common characteristic: they are based not on empirically verifiable data, but upon faith, dogma, or deeply held philosophical beliefs. Hence any attempt to determine the issue of when life begins by making legislative "findings of fact" is wholly wide of the mark. In any event, the question of when human life begins is irrelevant to the constitutional issues raised in the interpretation of the fourteenth amendment. This conclusion is apparent from an analysis of *Roe v. Wade*, which sets forth the prevailing constitutional law upon the subject. The rationale of that decision is summarized in the following propositions:

(1) The constitutional "right of privacy" encompasses "a woman's decision whether or not to terminate her pregnancy."<sup>11</sup>

(2) This right "is not unqualified and must be considered against important state interests in regulation."<sup>12</sup> Since the right of privacy is a

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amendment "protects all human beings" as defined—is on its face a conclusion of law, and is considered in the next section of this Article. See *infra* notes 29-35 and accompanying text.

<sup>11</sup> 410 U.S. at 153.

<sup>12</sup> *Id.* at 154.

“fundamental” right,<sup>13</sup> however, only a “compelling” state interest is sufficient to overcome that right.<sup>14</sup>

(3) The state interests involved are twofold: the health of the mother,<sup>15</sup> and the protection of “potential human life.”<sup>16</sup>

(4) In weighing these interests, two conclusions are of crucial importance:

(a) the fetus is not a “person” within the meaning of the fourteenth amendment;<sup>17</sup>

(b) the Supreme Court “need not resolve the difficult question of when life begins.”<sup>18</sup> Whatever “theory of life” a state accepts, the state’s interest to be weighed against the individual’s privacy interest is its “interest in protecting the potentiality of human life.”<sup>19</sup>

(5) With respect to the state’s interest in the health of the mother, “the ‘compelling’ point . . . is at approximately the end of the first trimester.”<sup>20</sup> As regards “the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability”<sup>21</sup>—i.e., the “capability of meaningful life outside the mother’s womb.”<sup>22</sup> The Supreme Court therefore concluded that, “[i]n view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.”<sup>23</sup>

In an article published in the *Human Life Review*,<sup>24</sup> Stephen H. Galebach argues that, by refusing to decide when human life begins, the Supreme Court left open the question of whether “Fourteenth Amendment protection logically extends to unborn children,”<sup>25</sup> that the reason for this omission on the part of the Court was because “the judiciary has no suitable evidentiary standards to determine an answer,”<sup>26</sup> and that “[t]he result of *Roe v. Wade* would have been entirely different . . . if any branch of government had been able constitutionally to examine when life begins and to resolve the question in favor of

<sup>13</sup> *Id.* at 152.

<sup>14</sup> *Id.* at 155.

<sup>15</sup> *Id.* at 162-63.

<sup>16</sup> *Id.* at 162-64.

<sup>17</sup> *Id.* at 156-62.

<sup>18</sup> *Id.* at 159.

<sup>19</sup> *Id.* at 162.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 163.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 162.

<sup>24</sup> Galebach, *A Human Life Statute*, HUM. LIFE REV., Winter, 1981 at 5.

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 7.

unborn children."<sup>27</sup> Mr. Galebach is in error on all counts. As the above extracts from *Roe v. Wade* demonstrate, the Court explicitly held that the question of when human life begins is not relevant to the interpretation of the fourteenth amendment.<sup>28</sup> Moreover, the state interest involved is the protection of "potential human life," a concept very different from the notion that the fetus *per se* is deserving of absolute protection, in that the former invokes an image of immanent being which is not yet in existence. Lastly, whatever theory of life is adopted would not change the constitutional right of a woman to decide whether or not to terminate her pregnancy. In sum, a careful examination of *Roe v. Wade* makes clear that the findings incorporated in the Human Life Bill are wholly incapable of altering the constitutional protections enunciated in that decision.

### THE DECLARATIONS OF LAW

The second major proposition of the Human Life Bill—that Congress can change the Constitution by redefining the word "person" in the fourteenth amendment<sup>29</sup>—is also fallacious. The question of who or what is a "person" within the meaning of the fourteenth amendment is plainly a matter of constitutional interpretation. For example, the Supreme Court has held that a corporation is a "person" protected by the fourteenth amendment.<sup>30</sup> Unless we are to overrule *Marbury v. Madison*<sup>31</sup> and nearly two centuries of constitutional precedent, issues of constitutional law are to be decided by the judiciary, not the legislative branch of government. Hence a congressional finding or declaration that an embryo or a fetus is a "person" within the meaning of the fourteenth amendment cannot change existing law as enunciated by the Supreme Court.

Any other rule would mean an end to the whole constitutional structure of separation of powers. Surely Congress could not by majority vote overturn *Trustees of Dartmouth College v. Woodward*<sup>32</sup> by finding that a charter was not a "contract"; or overturn *Goldberg v. Kelly*<sup>33</sup> by finding that the right to welfare benefits was not "property"; or overturn *Pierce v. Society of Sisters*<sup>34</sup> by finding that the right of parents to send their children to private school was not a "liberty"; or overturn *Brown v. Board of Education*<sup>35</sup> by finding that black children were not

<sup>27</sup> *Id.* at 6-7.

<sup>28</sup> See *supra* text accompanying note 18.

<sup>29</sup> See *supra* note 3.

<sup>30</sup> *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886).

<sup>31</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>32</sup> 4 Wheat. 518 (1819).

<sup>33</sup> 397 U.S. 254 (1970).

<sup>34</sup> 268 U.S. 510 (1925).

<sup>35</sup> 347 U.S. 483 (1954), *reargued on issue of relief*, 349 U.S. 294 (1955).

“persons”. Unless we are prepared to jettison our traditional system of separate governmental powers, such decisions must be made by the Supreme Court.

JUDICIAL REACTION TO ATTEMPTS TO OVERRULE *ROE V. WADE*  
THROUGH LEGISLATIVE FINDINGS OF FACT AND  
DECLARATIONS OF LAW

The Human Life Bill does not represent the first time that an attempt has been made to circumvent *Roe v. Wade* by the device of making legislative findings or declarations of the type embodied in the Human Life Bill. Several such efforts have resulted in anti-abortion legislation on the state level. This legislation has been consistently invalidated by the courts.

Prior to the Supreme Court decision in *Roe v. Wade*, a Connecticut anti-abortion statute<sup>36</sup> was held unconstitutional by a three judge district court, Judge Clarie dissenting.<sup>37</sup> The Connecticut legislature then reenacted the statute, leaving its substantive provisions essentially unchanged, but adding the following declaration: “The public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception.”<sup>38</sup> The new Connecticut statute did not explicitly say that the embryo or fetus was a “person” within the meaning of the fourteenth amendment. Yet the statute’s basic declaration was the same as that in the Human Life Bill—that human life begins at the moment of conception.

Opponents of the Connecticut statute immediately filed a further suit in the same district court. The court—still prior to the Supreme Court’s decision in *Roe v. Wade*—declared that the new Connecticut statute was also unconstitutional, Judge Clarie again dissenting.<sup>39</sup> The State of Connecticut immediately appealed this decision to the Supreme Court, at the same time filing a motion to expedite the appeal.<sup>40</sup> In its Motion and Statement of Jurisdiction, the State of Connecticut placed major emphasis upon the statute’s declaration that human life commences at the time of conception:

The primary reason why this appeal merits plenary consideration by this Court is that this is believed to be the first case involving the constitutional issue of abortion wherein an evidentiary record has been made.

<sup>36</sup> CONN. GEN. STAT. § 53-30 (1975) (declared unconstitutional 1972).

<sup>37</sup> *Abele v. Markle*, 342 F. Supp. 800, 801 (D. Conn. 1972), *on remand from* 452 F.2d 1121 (2d Cir. 1971), *vacated*, 410 U.S. 951 (1973), *reh’g denied*, 411 U.S. 940 (1973), *aff’d*, 369 F. Supp. 807 (1973) (per curiam).

<sup>38</sup> CONN. GEN. STAT. § 53-31a (1975) (declared unconstitutional 1972).

<sup>39</sup> *Abele v. Markle*, 351 F. Supp. 224, 232 (D. Conn. 1972), *motion to expedite appeal denied*, 409 U.S. 1073 (1972), *vacated*, 410 U.S. 951 (1973), *reh’g denied*, 411 U.S. 940 (1973), *aff’d*, 369 F. Supp. 807 (1973) (per curiam).

<sup>40</sup> *Markle v. Abele*, 409 U.S. 1073 (1972) (motion to expedite appeal denied).

The evidence unequivocally supports the legislative finding that human life commences from the time a child is conceived. Under these circumstances, a very grave constitutional question is raised when such a law is stricken on the basis given by the lower court.<sup>41</sup>

The Supreme Court did not act upon this appeal until after its decision in *Roe v. Wade*. On February 26, 1973, the Court remanded the case "for further consideration in light of *Roe v. Wade*."<sup>42</sup> The state of Connecticut then filed a petition for rehearing of the remand order. In its petition, Connecticut again rested its case primarily upon the argument that "[t]he evidence conclusively demonstrates that an unborn child is an alive, separate and distinct human being from the time the child is conceived."<sup>43</sup> The petition summarized this evidence at length and concluded that the Court should "grant a rehearing of these cases on the grounds of the compelling interest of their state government in protecting the natural right to live."<sup>44</sup>

On April 16, 1973, the Supreme Court denied Connecticut's petition for rehearing.<sup>45</sup> The case was remanded to the district court, and on April 26 that court held a further hearing. Connecticut reiterated the position it had taken before the Supreme Court. On the same day, the district court issued its decision, Judge Clarie no longer dissenting: "Further consideration of this case in light of *Roe v. Wade* . . . requires the conclusion that Public Act No. 1 is unconstitutional."<sup>46</sup> Thus the federal courts were squarely presented with issues identical to those posed by the Human Life Bill. They directly rejected the attempt to overrule *Roe v. Wade* by vote of the legislature. No further appeal to the Supreme Court was undertaken.

The state of Rhode Island also attempted to adopt an anti-abortion statute<sup>47</sup> designed to overrule *Roe v. Wade*. Like the Human Life Bill, the Rhode Island statute declared that "human life and, in fact, a person within the language and meaning of the fourteenth amendment to the constitution of the United States, commences to exist at the instant of conception . . ." <sup>48</sup> A district court had no difficulty in holding this statute invalid, finding that the claim of constitutionality for the new statute was "frivolous" and "essentially fictitious".<sup>49</sup> The court stated:

It is sheer sophistry to argue as the defendant does that *Roe v. Wade*

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<sup>41</sup> Motion and Statement of Jurisdiction at 17.

<sup>42</sup> *Markle v. Abele*, 410 U.S. 951 (1973).

<sup>43</sup> Petition for Rehearing at 2.

<sup>44</sup> *Id.* at 54.

<sup>45</sup> *Markle v. Abele*, 411 U.S. 940 (1973).

<sup>46</sup> *Abele v. Markle*, 369 F. Supp. 807, 809 (D. Conn. 1973).

<sup>47</sup> R.I. GEN. LAWS §§ 11-3-1 to -5 (1973) (declared unconstitutional 1973).

<sup>48</sup> *Doe v. Israel*, 358 F. Supp. 1193, 1195 n.1 (D.R.I.), *stay pending appeal denied*, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (quoting R.I. GEN. LAWS §§ 11-3-1 to -5 (1973)).

<sup>49</sup> *Id.* at 1199.

. . . can be nullified by the simple device of a legislative declaration or presumptions contrary to the court's holding. Indeed it is a surprising attempt by one independent branch of government to invade and assume the role of the other.<sup>50</sup>

The state of Rhode Island then applied to the United States Court of Appeals for the First Circuit for a stay pending appeal. That court, addressing itself to the merits, denied the request for a stay, saying: "We regard plaintiffs' expectation of prevailing on the merits so clear that we see no purpose in discussing other issues sought to be raised by the defendant."<sup>51</sup> The Supreme Court denied a petition for certiorari.<sup>52</sup> Similar claims, resting on findings that human life begins at the moment of conception and that a fetus is a "person" within the fourteenth amendment, were made and rejected in Missouri and Louisiana.<sup>53</sup>

While it is true that these cases involved state statutes, not a federal statute, the constitutional issues decided in them were essentially the same as those raised by the Human Life Bill. In these cases the courts held that (1) a legislative finding that human life begins at the moment of conception is irrelevant to the constitutional issue, and (2) the question of whether a fetus is a person within the meaning of the fourteenth amendment is a matter of constitutional interpretation for the courts, not for a legislative body. The Supreme Court has consistently refused to review these decisions.

#### SECTION 5 OF THE FOURTEENTH AMENDMENT

Although the federal courts have repeatedly dealt with the constitutional issues presented by anti-abortion legislation, the Galebach article ignores the above cases.<sup>54</sup> Galebach argues at length, however, that section 5 of the fourteenth amendment authorizes Congress to overturn *Roe v. Wade* through the findings and declarations embodied in the Human Life Bill. Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>55</sup> On its face, the Human Life Bill clearly does not "enforce" the provisions of the fourteenth amendment, but instead drastically alters them, and thereby deprives millions of citizens of rights to which the Supreme Court has held they are entitled. That section 5 was intended to achieve any such result is inconceivable.

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<sup>50</sup> *Id.* at 1201-02.

<sup>51</sup> *Doe v. Israel*, 482 F.2d 156, 159 (1st Cir. 1973).

<sup>52</sup> *Doe v. Israel*, 416 U.S. 993 (1974).

<sup>53</sup> *See Rosen v. Louisiana Bd. of Medical Examiners*, 380 F. Supp. 875, 877 (E.D. La. 1974), *on remand from* 412 U.S. 902 (1973); *Rodgers v. Danforth*, Civ. Action No. 18360-2 (W.D. Mo. May 18, 1973), *aff'd*, 414 U.S. 1035 (1973).

<sup>54</sup> Galebach, *supra* note 24. Galebach does cite *Abele v. Markle* on another issue. *Id.* at 29-30 & n.111.

<sup>55</sup> U.S. CONST. amend. XIV, § 5.

Galebach's argument begins with the assumption that, if Congress decides that human life exists from conception, then it "follows logically" that "unborn children" are "persons" within the meaning of the fourteenth amendment.<sup>56</sup> Yet it does not "follow logically" that, because a single cell is "human life," or, more properly, "potential human life," such cell is a "person" within the meaning of the fourteenth amendment. The Supreme Court has, of course, held otherwise.<sup>57</sup> Indeed, Galebach concedes that his position "collides with the Supreme Court's holding in *Roe v. Wade*,"<sup>58</sup> and hence "raises serious constitutional questions."<sup>59</sup> He is compelled, therefore, to proceed to his main contention, which is that Congress has power under section 5 to "apply . . . Fourteenth Amendment terms in ways that differ from and even contradict Supreme Court interpretations."<sup>60</sup>

This position is fatally flawed. The power granted Congress in section 5 is the power to "enforce"—to implement, to provide remedies for—the rights protected by the fourteenth amendment, not to change or diminish those rights as they have been interpreted by the courts. The presence of section 5 in the fourteenth amendment is explained by the fact that Congress performs a function very different from that performed by the courts in securing fourteenth amendment rights. The function of the courts is to state what those rights are and to give them effect through judicial procedures. The power of the courts to enforce the provisions of the fourteenth amendment is thus limited to the "self-executing" features of the amendment. Congress, on the other hand, has wider powers of implementation. It can appropriate funds, establish police and prosecuting machinery, create administrative procedures, and undertake comprehensive fact-finding to probe the depths of a problem and to seek the best solutions. In this sense, Congress has powers which go beyond those of the courts, and the courts will uphold the exercise of those powers. But Congress cannot reject, or "contradict," the Supreme Court's interpretation of the fourteenth amendment, much less take away constitutional rights the courts have held to exist.

Galebach consistently fails to make this crucial distinction between the powers of the courts and the powers of the legislature in the enforcement of the fourteenth amendment. He would thus give Congress the power to "contradict" the Supreme Court. The outcome would work a revolution in our constitutional structure. Moreover, the cases cited by Galebach do not support his position. On the contrary, those are fully consistent with the traditional view of the constitutional structure set forth above.

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<sup>56</sup> Galebach, *supra* note 24, at 10.

<sup>57</sup> *Roe v. Wade*, 410 U.S. at 156-59.

<sup>58</sup> Galebach, *supra* note 24, at 10.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 10-11.

In *South Carolina v. Katzenbach*,<sup>61</sup> the Supreme Court upheld a provision of the Voting Rights Act of 1965<sup>62</sup> which abolished literacy tests in all states and counties where less than fifty percent of the voting-age residents had voted in prior elections.<sup>63</sup> Previously the Court had held that, while literacy tests were capable of being employed in a discriminatory fashion, they did not necessarily violate the equal protection clause of the fourteenth amendment or the right-to-vote guarantee of the fifteenth amendment.<sup>64</sup> The Voting Rights Act thus substituted a general prohibition, in certain areas, for a case-by-case adjudication as to whether a literacy test had resulted in an abridgement of the right to vote. The Court ruled that, since Congress had found individual adjudication to be "inadequate to combat widespread and persistent discrimination in voting,"<sup>65</sup> the new remedy was an "appropriate means of combatting the evil."<sup>66</sup> *Oregon v. Mitchell*<sup>67</sup> upheld the congressional suspension of literacy tests on a nation-wide basis under the same reasoning.<sup>68</sup> In neither case did the legislature "contradict" the previous ruling of the Supreme Court. Instead, Congress was operating within the framework of the Supreme Court's determination that literacy tests could violate the fourteenth amendment, and was simply supplying a more effective remedy than the courts could provide.

Galebach's main reliance is on *Katzenbach v. Morgan*.<sup>69</sup> In that case, the Supreme Court dealt with section 4(e) of the Voting Rights Act of 1965, which stipulated that no person who had successfully completed the sixth grade in a Puerto Rican school could be denied the right to vote in any election because of inability to read or write English.<sup>70</sup> In a companion case,<sup>71</sup> the Court declined to hold that a New York statute requiring literacy in English was a violation of the "self-executing" provisions of the equal protection clause of the fourteenth amendment.<sup>72</sup> Nevertheless, the Court in *Katzenbach v. Morgan* upheld Section 4(e) under section 5 of the fourteenth amendment.<sup>73</sup> Justice Brennan, writing for the majority, placed primary reliance upon an

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<sup>61</sup> 383 U.S. 301 (1966), cited in Galebach, *supra* note 24, at 11, 13, 19, 22.

<sup>62</sup> 42 U.S.C. §§ 1971-1974 (1981).

<sup>63</sup> *South Carolina v. Katzenbach*, 383 U.S. at 337.

<sup>64</sup> *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959).

<sup>65</sup> *South Carolina v. Katzenbach*, 383 U.S. at 328.

<sup>66</sup> *Id.*

<sup>67</sup> 400 U.S. 112 (1970), cited in Galebach, *supra* note 24, at 13, 14, 18, 19.

<sup>68</sup> *Oregon v. Mitchell*, 400 U.S. at 131-34.

<sup>69</sup> 384 U.S. 641 (1966), cited in Galebach, *supra* note 24, at 12-18, 21, 22, 24.

<sup>70</sup> 42 U.S.C. § 1973b(e) (1981).

<sup>71</sup> *Cardona v. Power*, 384 U.S. 672 (1966).

<sup>72</sup> Although the Supreme Court did not pass on the issue, the equal protection issue was clearly presented in the case. See *Cardona v. Power*, 16 N.Y.2d 639, 640, 209 N.E.2d 119, 120, (1965). See also *Cardona v. Power*, 384 U.S. at 659, 676.

<sup>73</sup> *Katzenbach v. Morgan*, 384 U.S. at 652.

analogy to the “necessary and proper clause.”<sup>74</sup> Section 4(e), he said, “may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.”<sup>75</sup> In other words, “enhanced political power” resulting from the right to vote “will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community.”<sup>76</sup> This theory, it is important to note, is a purely remedial one. While it recognizes Congress’s power to implement the fourteenth amendment, it does not recognize any congressional power to reject or reinterpret the Supreme Court’s decision as to the meaning of the equal protection clause.

Justice Brennan went on to state, as a second ground for the decision, a proposition that is somewhat more ambiguous. He argued that Congress, in its “general appraisal of literacy requirements for voting . . . to which it brought a specially informed legislative competence,”<sup>77</sup> might have had a basis for predicating a “judgment that the application of New York’s English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause.”<sup>78</sup> While there may be some basis for construing this language as recognizing a congressional power to find a violation of the equal protection clause where the Court had not, essentially Justice Brennan was simply saying that the enhanced fact-finding capacity of Congress had unearthed a factual basis for discovering discrimination which was not apparent to the Court when it considered the New York statute by itself. Certainly it is not conceivable that Justice Brennan meant to overturn constitutional history and to hold that section 5 of the fourteenth amendment empowers Congress to reject the Supreme Court’s authority to determine the legal meaning of the fourteenth amendment.

In any event, Justice Brennan’s language in *Katzenbach v. Morgan* can give no comfort to the proponents of the Human Life Bill. Justice Brennan made it entirely clear that his views on Congress’s power under section 5 did not authorize that body to abrogate the fourteenth amendment rights of individuals as previously secured by Supreme Court decisions. Using a footnote, apparently on the assumption that the proposition was so obvious as not to require elaboration, he stated that “Congress’ power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power

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<sup>74</sup> *Id.* at 650-53. See U.S. CONST. art. 1, § 8, cl. 18.

<sup>75</sup> *Katzenbach v. Morgan*, 384 U.S. at 652.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 655-56.

<sup>78</sup> *Id.* at 656.

to restrict, abrogate, or dilute these guarantees.”<sup>79</sup> Since the Human Life Bill would abrogate the constitutional rights of a large group of citizens, Justice Brennan’s opinion in *Katzenbach v. Morgan* has no application here. Galebach asserts that the Human Life Bill “would exert a collateral effect on the right to privacy, but it would not abrogate or infringe that right as the Supreme Court has interpreted it.”<sup>80</sup> This statement is disingenuous. The Bill is intended to remove present fourteenth amendment privacy protections, namely the right of a woman to terminate a pregnancy.

Further support for the above interpretation of Justice Brennan’s *Katzenbach v. Morgan* opinion can be found in *Oregon v. Mitchell*.<sup>81</sup> In addition to upholding the ban on literacy tests, this case dealt with provisions of the Voting Rights Act Amendments of 1970 which prohibited denial of the vote to citizens who had reached the age of eighteen.<sup>82</sup> The Supreme Court, by a five to four vote, upheld the statute as applied to federal elections but found it invalid as applied to state elections.<sup>83</sup> A majority of the Court thus ruled that section 5 of the fourteenth amendment did not empower Congress to find that withholding the right to vote from eighteen-year-olds constituted a violation of the equal protection clause.<sup>84</sup> In a dissenting opinion, joined by two other Justices, Justice Brennan argued that Congress could “undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists” and, if it did not find such a factual basis, Congress could “remove the discrimination by appropriate means.”<sup>85</sup> It seems clear that Justice Brennan was thinking in terms of a factual determination by Congress as to whether discrimination existed, not in terms of a legal determination of what forms of discrimination were prohibited by the equal protection clause. Furthermore, Justice Brennan reiterated, again in a footnote, his previous statement that section 5 “does not grant Congress power to . . . enact ‘statutes so as in effect to dilute equal protection and due process decisions of this Court.’”<sup>86</sup> Thus it is highly inappropriate for advocates of the Human Life Bill to cite Justice Brennan’s *Katzenbach v. Morgan* opinion in support of their position.

Galebach also relies heavily upon the recent decision of the Supreme Court in *City of Rome v. United States*.<sup>87</sup> This case concerned the validity of a provision in the Voting Rights Act of 1965 which pro-

<sup>79</sup> *Id.* at 651 n.10.

<sup>80</sup> Galebach, *supra* note 24, at 24.

<sup>81</sup> 400 U.S. at 112. See *supra* text accompanying note 67.

<sup>82</sup> 42 U.S.C. § 1973bb (1981).

<sup>83</sup> *Oregon v. Mitchell*, 400 U.S. at 119-31.

<sup>84</sup> *Id.* at 126-30.

<sup>85</sup> *Id.* at 248.

<sup>86</sup> *Id.* at 249 n.31 (quoting *Katzenbach v. Morgan*, 384 U.S. at 651 n.10).

<sup>87</sup> 446 U.S. 156 (1980), cited in Galebach, *supra* note 24, at 14, 15, 18, 19, 22.

hibited changes in the electoral structure of a city without prior approval of the United States Attorney General, when the purpose or effect of the change would be to deny or abridge the right to vote on account of race.<sup>88</sup> There was no evidence that the purpose of the change in *City of Rome* was to deny or abridge voting rights, but there was evidence that such was the effect.<sup>89</sup> The Court, assuming that the “self-executing” features of the fifteenth amendment would invalidate only purposeful discrimination, nevertheless held that the prohibition based upon effect was valid under section 2 of the fifteenth amendment.<sup>90</sup> Galebach cites this decision as an example of Supreme Court approval of Congress’s authority to alter rights under the fifteenth amendment by virtue of its section 2 enforcement powers.<sup>91</sup>

The majority opinion in *City of Rome*, however, was meticulously framed to make it clear that the statute did nothing more than implement the rights created by section 1 of the fifteenth amendment. The Supreme Court never suggested that section 2 authorized Congress to create new rights or alter existing rights under the fifteenth amendment. The core of the decision was stated as follows:

Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. . . . We find no reason, then, to disturb Congress’ considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from “undo[ing] or defeat[ing] the rights recently won by Negroes.”<sup>92</sup>

It is thus clear that the Supreme Court has no intention of straying from the principle that section 5 of the fourteenth amendment grants only remedial or implementing powers to Congress, and was never intended to confer upon Congress the power to initiate substantive changes in the basic rights secured by the fourteenth amendment.

It might be argued that the Human Life Bill undertakes to protect the interests of the fetus and in that sense expands, rather than contracts, the substantive rights granted by the fourteenth amendment. There are two dispositive objections to this position. Since the fetus is not a “person” within the meaning of the fourteenth amendment—as the Supreme Court held in *Roe v. Wade*—it does not possess any fourteenth amendment rights to balance off against the right of the woman

<sup>88</sup> See 42 U.S.C. §§ 1973a-1973c (1981).

<sup>89</sup> *City of Rome v. United States*, 446 U.S. at 183-86.

<sup>90</sup> *Id.* at 177.

<sup>91</sup> Galebach, *supra* note 24, at 14, 15. Section 2, like section 5 of the fourteenth amendment, authorizes Congress to “enforce the Amendment by appropriate legislation.” U.S. CONST. amend. XV, § 2.

<sup>92</sup> *City of Rome v. United States*, 446 U.S. at 177-78 (quoting *Beer v. United States*, 425 U.S. 130, 140 (1976)) (citations omitted).

choosing to have an abortion. Moreover, even if the fetus were considered to have fourteenth amendment rights, Congress would have no power to declare that the fetus's rights have priority in the face of a contrary holding by the Supreme Court. Were Congress able to exert such power, it could also, for example, overrule *Brown v. Board of Education*<sup>93</sup> by asserting that racial segregation in the public schools is constitutional because the right of association overcomes the right to equal protection of the laws. Clearly such an authority cannot be supported within our system of separate governmental powers.

#### CONCLUSION

The constitutional implications of the Human Life Bill are ominous. The devices embodied in that legislation—the finding of pseudo fact, the assertion of the ultimate power to declare what the Constitution means, and the use of section 5 of the fourteenth amendment to change substantive rights—completely undermine the historic powers of the courts to protect our system of individual rights against legislative encroachment.

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<sup>93</sup> 347 U.S. 483 (1954), *reargued on issue of relief*, 349 U.S. 294 (1955).