THE HUMAN LIFE BILL: PERSONHOOD REVISITED, OR CONGRESS TAKES AIM AT ROE V. WADE

INTRODUCTION

The Supreme Court's attempt in Roe v. Wade1 to quell the abortion controversy has proven largely unsuccessful. The arguable lack of a clear constitutional basis for the decision, combined with the sensitivity of its subject matter, has merely fueled a vigorous scholarly and public debate on abortion that has continued virtually unabated since 1973.2 At both the state and federal levels, various legislative assaults have been mounted on the qualified right the Roe Court recognized for the pregnant woman.3 While some of these attacks have been at least partially successful,4 the core of the abortion right has remained substantially inviolate.5

The Congress of the United States is at present considering legislation6 which takes aim at the core of the right to an abortion. The

1. 410 U.S. 113 (1973). For the purposes of this note, Roe and its companion case, Doe v. Bolton, 410 U.S. 179 (1973), will be considered together and referred to by citation to Roe alone.


4. See cases cited supra note 3.


"SECTION 1. The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.

"The Congress further finds that the fourteenth amendment to the Constitution
so-called Human Life Bill\(^7\) does not attempt directly to prohibit or restrict a woman’s abortion right; it instead purports to elevate to constitutional status a new and competing right—the right of previable fetuses to life. This bill thus raises constitutional issues with ramifications extending far beyond the abortion debate, such as the proper roles of Congress and the Supreme Court in interpreting constitutional text.\(^8\) Also present is the tension between the Court’s traditional role as the final arbiter of the Constitution and its more recent willingness to defer to congressional interpretations of factual information or policy considerations affecting its judgments.\(^9\) More specifically implicated is the notion that the fifth section\(^10\) of the fourteenth amendment gives Congress the power to extend rights conferred by section one\(^11\) of the amendment past limits previously set by the Court—in this case, to extend the scope of the word “person” to include the unborn.\(^12\)

This note will analyze the Human Life Bill and the fundamental constitutional issues which it raises. It will begin by examining
the Supreme Court's power to interpret constitutional text. It will then proceed to an analysis of the text and aims of the bill. The next section will present the arguments in support of the bill, including an examination of Congress' power under section five of the fourteenth amendment; this section will rely primarily on Stephen Galebach's article in The Human Life Review in which the bill was originally proposed. The final sections will criticize the bill and Galebach's arguments in support of it.

THE ROLE OF THE SUPREME COURT IN INTERPRETING THE CONSTITUTION

Judicial review—the power of the Supreme Court to invalidate as unconstitutional the acts of other branches of government—has been a settled doctrine of our system of government since the 1803 decision of Marbury v. Madison. While the question of whether the Constitution actually confers this power on the Court has not been undisputed, since Marbury judicial review has been established as a bedrock principle of our American constitutional system. A necessary corollary of this principle is Supreme Court power to issue final and binding interpretations of the constitutional text. Without this power, judicial review would be futile: A Court

14. See infra text accompanying notes 31-63.
15. See infra text accompanying notes 64-140.
17. See infra text accompanying notes 141-79.
19. 5 U.S. (1 Cranch) 137 (1803); see Cooper v. Aaron, 358 U.S. 1, 18 (1958); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).
21. See cases cited supra note 19. Professor Van Alstyne has observed: Marbury v. Madison, and Martin v. Hunter's Lessee, concretely established two propositions which are themselves the essence of the American constitutional system. The first is that in the adjudication of all cases and controversies arising under the Constitution, it is the judiciary's interpretation of the Constitution, rather than that of Congress, which is final. The second is that in the adjudication of all cases and controversies arising under the Constitution, it is the judiciary's interpretation of the Constitution, rather than that of the state legislatures or state courts, which is final.

22. See Cooper v. Aaron, 358 U.S. 1, 18 (1958); Marbury v. Madison, 5 U.S. (1
determination that another branch had exceeded constitutional limitations could simply be ignored by that other branch asserting the propriety of its own interpretation. To allow self-limitation would, therefore, be inconsistent with the doctrine of judicial review.  

This does not mean that the Court is the only organ of government that interprets the Constitution. Quite the opposite is true. On taking office, legislators and executive officers at both the federal and state levels swear to uphold the Constitution. Whenever some aspect of office takes them into constitutional territory previously unexplored by the Court, they must make their own judgments as to what limits this oath places upon them. One presumes, for example, that members of Congress would not vote to enact legislation that they believed clearly violative of some constitutional provision. When the Court declares federal legislation to be unconstitutional, therefore, it is not because Congress has no right to interpret the Constitution. It is because, in the Court’s opinion, Congress has misinterpreted the document in enacting that legislation, either as to the extent of the legislative power or the manner in which it may be exercised. In short, the Supreme Court has the last word in constitutional matters. Though its interpretations are not necessarily exclusive or flawless, they are final. Such interpretations may only be altered in two ways: The first is the Court’s power to overrule itself. The second is the power of Congress and the states to amend the Constitution.

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24. U.S. Const. art. VI, cl. 3; see Cooper v. Aaron, 358 U.S. 1, 18 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) at 180.


28. “We are not final because we are infallible, but we are infallible only because we are final.” Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).


The unlikelihood that Roe will ever be overruled has been acknowledged by one of abortion’s most prominent opponents. See 127 Cong. Rec. S10,195 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch).

THE BILL

We presume that members of Congress act in good faith to enact legislation they believe to be constitutional, and that the Supreme Court is the final arbiter of the constitutional text. The Human Life Bill seems, at first glance, to violate both presumptions. While the Supreme Court has clearly held that fetuses are not "persons" as that term is used in the fourteenth amendment,1 the bill's sole purpose seems to be to declare that fetuses are persons2 and thus to endow them with fourteenth amendment rights.3 Such a declaration is apparently an attempt to overrule Roe by legislative fiat, and is thus unconstitutional on its face. The bill's originator, however, is of the opinion that the bill is consistent with both Roe4 and Congress' powers under section five of the fourteenth amendment.5 Before this seeming contradiction can be explored, a closer look at the bill is necessary because it is the manner in which the bill reaches its conclusion that, according to its author,6 makes it constitutional.

The text of the bill is deceptively simple. Section one lists several "findings"7 and then reaches a logical conclusion based on those findings. The bill's approach, broken down into its component parts, can be simply summarized as follows:

1. All possessors of human life are persons.8
2. Fetuses possess human life from the moment of conception.9
3. Therefore, fetuses are persons, and entitled to fourteenth amendment protection from the moment of conception.10

The conclusion that fetuses are persons follows inescapably from the two premises set out above. It is clear that if Congress has au-

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1. Roe, 410 U.S. at 158.
3. Id.
5. Id. at 10-22. For a synopsis of Galebach's perspective, see infra notes 78-123 and accompanying text.
8. Id.
9. Id.
10. Id.; U.S. CONST. amend. XIV, § 1.
authority to enact this conclusion into law, the Court's holding in *Roe*\(^1\) will be effectively overruled. Thus, the premises upon which this conclusion is reached merit close scrutiny.

**All Possessors of Human Life Are "Persons"**

The bill asserts that possessors of human life (what it calls "human beings")\(^2\) are protected by the fourteenth amendment.\(^3\) Since the text of the amendment protects "persons,"\(^4\) what Congress would be saying by adopting the bill is that human beings are "persons." As a statement of existing law, this seems accurate. While the Court has never expressly stated that all human beings are persons protected by the fourteenth amendment,\(^5\) the legislative history of the amendment suggests that the framers intended the amendment to protect all human beings.\(^6\) In fact, one of the events which spurred the adoption of the amendment\(^7\) was the universally condemned\(^8\) Supreme Court decision in *Dred Scott v. Sandford*,\(^9\) in which Dred Scott, indisputably a living, breathing human being, was not entitled to constitutional protection.\(^10\) For the Court to hold that a human being might not be a person would be to repeat *Dred Scott*,\(^11\) a result clearly contrary to the intent of the framers of the amendment.\(^12\)

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41. 410 U.S. at 158.
43. *Id*.
44. U.S. CONST. amend. XIV, § 1.
45. The *Roe* Court, in the only case in which this could conceivably have been an issue presented since the amendment's passage, refused to consider it: "We need not resolve the difficult question of when life begins." 410 U.S. at 159.
46. *See* 127 CONG. REC. E1802 (daily ed. Apr. 10, 1981) (remarks of Rep. Dougherty) (citing Rep. Bingham in CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) and Sen. Howard in *Id.* at 2766). Rep. Dougherty concluded: "These statements reflect the intent of the framers to overcome a Supreme Court decision that had created a distinction between human beings and persons entitled to protection under the Constitution. That decision was [Dred Scott]." *Id.* (remarks of Rep. Dougherty) (citation omitted).
48. One commentator has compared the public debate which followed the *Dred Scott* decision to "an angry majority in a ball park crying 'kill the umpire' after a dubious decision against the home team." H. MEYER, THE AMENDMENT THAT REFUSED TO DIE 20 (1973).
49. 60 U.S. (19 How.) 393 (1857).
50. *Id.* at 404-05 (holding that Negroes are not "citizens," and so do not possess constitutional rights and privileges).
51. The Court would be denying to those human beings the protection of the fourteenth amendment, just as the Court in *Dred Scott* excluded blacks from constitutional protection by refusing to consider them "citizens." *See id*.
52. *See* sources cited *supra* notes 46-47.
Inasmuch as the Court has never held that the word *persons* does not include all human beings, it is unnecessary to consider whether Congress has the authority to make such a statement. As explained earlier,\(^5\) \(^3\) Congress is free to make its own interpretation of the Constitution, subject to final approval by the Court, where the Court has been silent. This particular interpretation is well-supported;\(^6\) it is inconceivable that the Court would disagree with Congress on this point.\(^5\) It can therefore be conceded that if fetuses are human beings, then they are entitled to fourteenth amendment protection.

*Fetuses Possess Human Life from the Moment of Conception*

This premise stems logically from two independent subpropositions: First, that “human life” is “x”—some quality or group of qualities that distinguishes human from nonhuman life; second, that fetuses have “x” from the moment of conception. To properly reach the premise which heads this paragraph, one must first establish the validity of both subpropositions. The bill, however, does not proceed in this manner. Instead, it telescopes these subpropositions into its initial finding that “present day scientific evidence indicates a significant likelihood that actual human life exists from conception.”\(^5\) We are not told what “actual human life”\(^5\) is, or what happens at conception to confer it upon the newly united sperm and ovum. Despite the use of the phrase “present day scientific evidence,”\(^5\) which suggests that this premise has a factual basis, no factual evidence of what human life is or when it begins is set out in the bill.\(^5\) In fact, the text of the bill only contends that there is a “significant likelihood” that actual human life exists from conception.\(^5\) Yet this pivotal point, though virtually unsupported, is the basis upon which the rest of the bill proceeds.\(^5\) It is not surprising that the bill’s assertion of the point at which human life begins is unsupported by factual data or scholarly evidence. The question of when human life begins

\[\begin{align*}
53. & \text{See supra notes 24-27 and accompanying text.} \\
54. & \text{See, e.g., sources cited supra notes 46-47.} \\
55. & \text{See supra notes 46-51 and accompanying text.} \\
56. & \text{Bill, supra note 6, at 1, 127 CONG. REC. S287 (daily ed. Jan. 19, 1981).} \\
57. & \text{Id.} \\
58. & \text{Id.} \\
59. & \text{See id.} \\
60. & \text{Id.} \\
61. & \text{The words, “[u]pon the basis of these findings,” are used. Id. at 2, 127 CONG. REC. S287 (daily ed. Jan. 19, 1981).}
\end{align*}\]
is not factual; rather, it is a religious or philosophical question that the Supreme Court has held is almost impossible to answer.

SUPPORT FOR THE BILL: THE GALEBACH ARTICLE

The principal argument in support of the bill can be found in an article by Steven Galebach, that apparently inspired the bill's drafters. Galebach's thesis is that the courts should give great deference to a congressional finding that fetuses are among the persons protected by the fourteenth amendment. Once such a determination is made, therefore, the courts will be able to uphold state statutes prohibiting abortion, because the states will then have a compelling interest in protecting prenatal life. This interest, in itself, would be sufficient to override a woman's privacy-derived right to an abortion.

Galebach begins by discovering support for his position in the language of the Roe opinion. While the Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the
unborn,\textsuperscript{70} it went on to add the controversial passage already examined:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.\textsuperscript{71}

The Court noted only that the judiciary was not in a position to speculate as to the answer; it did not hold that no branch of government was in such a position. Galebach strongly believes that some governmental body must take responsibility for deciding when life begins,\textsuperscript{72} and that had such a determination been made before Roe, the Court would have decided the case differently.\textsuperscript{73} Clearly, after Roe, the judiciary cannot decide when life begins;\textsuperscript{74} nor can the states: Texas, in Roe, argued at length that the fetus was human.\textsuperscript{75} The Court rejected the argument: "[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."\textsuperscript{76} This leaves but one possibility—Congress.

Galebach believes that determining when life begins is an appropriate role for Congress.\textsuperscript{77} He asserts that Congress can decide when life begins pursuant to section five of the fourteenth amendment which empowers it to enforce the section one guarantees\textsuperscript{78}—in this case, the right not to be deprived of life without due process.\textsuperscript{79} His reading of the case law dealing with section five convinces him that the bill is consistent with the Supreme Court's view of congressional power under this section.\textsuperscript{80} Before considering this argument, the section five cases on which he relies must be examined.

\begin{itemize}
\item \textsuperscript{70} Roe, 410 U.S. at 158 (footnote omitted).
\item \textsuperscript{71} Id. at 159. For further discussion of this passage, see supra notes 62-63 and accompanying text.
\item \textsuperscript{72} Galebach, supra note 16, at 7-10.
\item \textsuperscript{73} Id. at 6-7.
\item \textsuperscript{74} See Roe, 410 U.S. at 158; see also supra notes 62-63 and accompanying text (arguing that the Supreme Court has clearly stated that the judiciary cannot decide the issue of when life begins).
\item \textsuperscript{75} Brief for Appellee at 29-54, Roe v. Wade, 410 U.S. 113 (1973); see also 410 U.S. at 159 (summarizing the argument of the state of Texas).
\item \textsuperscript{76} 410 U.S. at 162.
\item \textsuperscript{77} Galebach, supra note 16, at 8.
\item \textsuperscript{78} Id. at 7-8.
\item \textsuperscript{79} See U.S. Const. amend. XIV, § 1.
\item \textsuperscript{80} Galebach, supra note 16, at 10-21.
\end{itemize}
Galebach primarily focuses on what are known as the Voting Rights cases. The first of these was *Lassiter v. Northampton County Board of Elections*. In *Lassiter*, the Court held that literacy tests are generally not a per se violation of the fourteenth or fifteenth amendments in the absence of some evidence that they are actually discriminatory. Six years after *Lassiter*, Congress passed the Voting Rights Act of 1965. A part of the Act had the effect of striking down the New York State literacy test as applied to persons who had completed the sixth grade at an American flag school in Puerto Rico. Despite the apparent conflict between this section of the Act and the *Lassiter* holding, the Court upheld the Act's constitutionality in *Katzenbach v. Morgan*.

Justice Brennan, writing for the majority, articulated two justifications for the congressional departure from *Lassiter*, both grounded in Congress' power to reach state action under section five of the fourteenth amendment. First, the *Morgan* Court held that the challenged section of the Act could be upheld as action plainly adapted to ensuring the political power of Puerto Rican voters living in New York. This rationale places Congress' power, under section five of the fourteenth amendment, to enforce the section one guarantees—in this case, the equal protection clause—within the "other powers vested by this Constitution" in the necessary and proper clause of Article I. Congressional power to legislate under section five, therefore, is limited only by the necessary and proper clause test, originally articulated by Chief Justice Marshall in *McCulloch v. Maryland*. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist

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82. Id. at 50-53.
87. Id. at 652, 656.
88. Id. at 652.
89. See U.S. Const. amend. XIV, § 5.
90. U.S. Const. amend. XIV, § 1.
91. U.S. Const. art. I, § 8, cl. 18; see Morgan, 384 U.S. at 650.
with the letter and spirit of the Constitution, are constitutional."

Thus, under the first Morgan rationale, where state action apparently threatens or endangers a section one guarantee, Congress may do whatever is necessary and proper to protect that guarantee, \(^9\) so long as the remedy it chooses is "appropriate"\(^9\) and "plainly adapted"\(^7\) to that end. Perhaps the easiest way to understand this rationale is to picture two concentric circles. The inner circle or core consists of state action which directly violates the section one guarantees and which the Court would necessarily find unconstitutional, independent of any congressional action. Outside both circles lies an area in which the states could regulate or prohibit without federal intervention under the fourteenth amendment. The area between, which is within the outside circle, would contain state action which was not per se violative of a section one guarantee contained within the core. Nonetheless, if Congress found such state action threatening to core rights, it could constitutionally prohibit it. According to Morgan, the limit on this power is that the Court must "perceive a basis" for congressional prohibition of state action which falls within the outside circle.\(^8\)

While this view of Congress' section five power is fairly broad, the second Morgan rationale went even further: The Court theorized that Congress' promulgation of section 4(e) of the Voting Rights Act\(^9\) could have been an attempt to remedy what it perceived as invidious discrimination by New York against its Puerto Rican citizens.\(^10\) Congress could so legislate only after finding that as applied to Puerto Rican citizens, the New York literacy requirement violated the equal protection clause.\(^10\) The clear implication is that section five of the fourteenth amendment gives Congress the power to make independent interpretations of the scope of the section one protections,\(^10\) to which the Court would have to defer as long as it perceived a basis for them.\(^10\) In other words, Congress could expand

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94. Id. at 206. For subsequent applications of Justice Marshall's test, see Morgan, 384 U.S. at 650; Ex parte Virginia, 100 U.S. 339, 345-46 (1879).
95. Morgan, 384 U.S. at 650-51.
96. Id. at 651.
97. Id.
98. Id. at 653.
100. 384 U.S. at 653-54.
101. Id.
102. See id. at 653-56.
103. Id. at 656.
the core spoken of earlier, to encompass state action that the Court had not previously considered to be a per se violation of the amendment.

In view of the Supreme Court's traditional role as interpreter of constitutional text,\(^{104}\) the second Morgan rationale has potentially sweeping implications, a fact that Justice Harlan noted in his Morgan dissent:

> The question here is . . . whether . . . a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause of the Fourteenth Amendment. That question is one for the judicial branch ultimately to determine. Were the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments. . . . If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court.\(^{105}\)

Justice Brennan, in a footnote,\(^{106}\) responded directly to the fear Justice Harlan had expressed: "We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute those guarantees."\(^{107}\) This has been characterized by a number of commentators as the "ratchet theory"—that Congress may expand, but may not contract, the core of rights conferred in section one.

The question remaining after Morgan was, by what rationale would the Court determine the propriety of congressional expansion of fourteenth amendment guarantees. This question was addressed by a sharply divided Court in Oregon v. Mitchell,\(^{108}\) where certain challenged amendments to the Voting Rights Act were upheld.\(^{109}\)

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104. See supra notes 18-23 and accompanying text.
105. 384 U.S. at 667-68 (Harlan, J., dissenting).
106. Id. at 651 n.10.
107. Id.
108. See, e.g., Bohrer, Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 IND. L.J. 473, 491 (1981); Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 STAN. L. REV. 603, 606 (1975); see also Cox, The Role Of Congress In Constitutional Determinations, 40 U. CIN. L. REV. 199, 253-56 (1971); Nichol, An Examination of Congressional Powers Under § 5 of the 14th Amendment, 52 NOTRE DAME LAW. 175, 181-82 (1976) (both discussing the expansion/dilution theory but without the use of the "ratchet" terminology).
110. Id. at 117-18.
but a congressional attempt to lower the voting age to eighteen in all state elections was struck down. Justice Harlan and Brennan were again on opposite sides. Justice Harlan voted to strike down all but one of the amendments, which put him in the five-justice majority invalidating the state voting age requirement. Justice Brennan, joined by White and Marshall, voted to uphold all of the amendments, placing him in the minority regarding the state voting age. Harlan and Brennan agreed, however, on the rationale for allowing Congress to reinterpret the section one guarantees as part of its section five enforcement power. They both grounded Congress' section five enforcement power in its superior ability to make findings of fact to which the Court should defer in determining whether there is a basis for congressional action. Justice Brennan emphasized "proper regard for the special function of Congress in making determinations of legislative fact." Justice Harlan agreed that "judgments of the sort involved here are beyond the institutional competence and constitutional authority of the judiciary." This statement was an echo

111. Id. at 118.
112. Id. at 152-219 (Harlan, J., concurring in part and dissenting in part).
113. Id. at 229-81 (Brennan, White and Marshall, JJ., concurring in part and dissenting in part).
114. See infra notes 115-17 and accompanying text.
115. 400 U.S. at 240 (Brennan, White and Marshall, JJ., concurring in part and dissenting in part).
116. Id. at 206-07 (Harlan, J., concurring in part and dissenting in part). While both Justices Brennan and Harlan agreed that legislative factfinding is preferable to the judiciary's, they parted company as to which legislative body should make the findings of fact necessary to decide whether to extend the franchise to eighteen year olds in state elections.

Justice Harlan characterizes the dispute over voting age as one calling for the striking of a "balance between incommensurate interests." Id. at 206 (Harlan, J., concurring in part and dissenting in part). He considered whether "the immaturity and inexperience of the average 18-, 19-, or 20-year-old [are] sufficiently serious to justify denying such a person [the right to vote]." Id. (Harlan, J., concurring in part and dissenting in part). While agreeing that this balancing test is "beyond the institutional competence . . . of the judiciary," id. at 206-07 (Harlan, J., concurring in part and dissenting in part), he would leave the authority to strike that balance with the state, because it is better equipped than Congress "to take account of peculiar local conditions." Id. at 208 (Harlan, J., concurring in part and dissenting in part).

Justice Brennan, joined by Justices White and Marshall, noted that Congress was justified in concluding that state refusal to extend the franchise to 18-20-year-olds is "wholly unnecessary to promote any legitimate interest [of] the States." Id. at 280 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part). Thus Congress could extend the franchise to 18-20-year-olds under its section 5 enforcement power. Id. at 281 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part). The justification for allowing the congressional judgment to displace the state's was not made clear in Justice Brennan's opinion, but Justice Harlan thought it was to be found in the supremacy clause. Id. at 208 (Harlan, J., concurring in part and dissenting in part).

The other opinions are not inconsistent with the view that Congress' superior ability to
of his Morgan dissent: "To the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect."117 Brennan and Harlan thus imply that when, upon investigation, Congress finds a particular state action threatening to or directly violative of a section one guarantee, Congress may prohibit it, so long as the prohibition is based on a finding of legislative fact.

Galebach seems to adopt this legislative factfinding rationale to justify the Human Life Bill, although he only briefly mentions its development in Mitchell.118 After the review of Roe discussed earlier,119 Galebach explains that "[t]o decide when human life begins
involve[s] the sort of considerations that are appropriate for Congress but not the courts." 120 This statement appears to echo Harlan's reference in Mitchell to judgments which are "beyond the institutional competence . . . of the judiciary." 121 Galebach then enumerates other similarly difficult and complex questions which Congress must nonetheless decide: "[W]hether to tax one person to support another, whether to protect various species endangered by governmental or private activities, whether to require the use of safety precautions that protect people while causing them inconvenience." 122 These are, in fact, precisely the kind of questions entrusted to Congress; 123 their answers involve factfinding and balancing of competing policies which are the province of the legislature. It is hard to see, however, why deciding when life begins is such a question. Congress' ability to find facts would not aid it in answering this question; as already shown, the question of when human life begins must be preceded by a determination of what human life is, 124 and such a religious or philosophical inquiry will not turn on any particular set of facts. 125 It might be argued that Congress, which, as part of its function as a representative political body, reaches most of its policy decisions through a series of compromises and concessions, 126 is the worst possible arbiter of the question. The idea of compromise on the question of when human life begins seems somehow repugnant; it raises images of congressmen and senators bartering an extra month or two of nonhuman existence for support of a tax or appropriations measure.

Thus, when Galebach adopts the second Morgan rationale to argue that Congress should be able to expand the core right to life to include fetuses, 127 his argument fails. The Court must be able to perceive a basis for legislative action, 128 based on some factfinding or policy decision which Congress is better equipped than the Court to

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120. Galebach, supra note 16, at 8.
121. Mitchell, 400 U.S. at 206-07 (Harlan, J., concurring in part and dissenting in part).
123. See, e.g., U.S. CONST. art. I, § 8, cl. 1 (power to tax); U.S. CONST. art. I, § 8, cl. 3 (regulation of interstate commerce).
124. See supra text accompanying note 56.
125. See supra note 62 and accompanying text.
128. See Morgan, 384 U.S. at 656.
make.\textsuperscript{129} Yet, Congress is no better qualified than the Court to decide when life begins, because the very nature of the question renders it unanswerable.\textsuperscript{130} This would explain why the Court in \textit{Roe} found its answer irrelevant to the disposition of the case: "\textit{We need not} resolve the difficult question of when life begins."\textsuperscript{131} It would also explain why the Court gave no deference to the factfinding purporting to show that human life existed \textit{in utero}, which Texas presented in defense of its legislation.\textsuperscript{132}

Galebach's response is to argue that even if the beginning of life cannot be precisely determined, Congress should be able to decide that as a matter of policy, fetuses might possess human life.\textsuperscript{133} Congress should then be able to extend the protection of the fourteenth amendment's right to life to fetuses.\textsuperscript{134} This sounds like an application of the first \textit{Morgan} rationale.\textsuperscript{135} Returning to the use of concentric circles, Galebach envisions the inner circle as containing those who possess the core right not to be deprived of life—"persons"—including all human beings.\textsuperscript{136} Fetuses would be outside this core.\textsuperscript{137} They might possess human life, however, and abortion thus might be violative of the core right. To prevent the danger that the core right to life might be violated, Galebach concludes that Congress should be able to extend the protection of the amendment\textsuperscript{138} to fetuses.

\begin{itemize}
  \item \textsuperscript{129} See supra notes 115-17 and accompanying text.
  \item \textsuperscript{130} See \textit{Roe}, 410 U.S. at 159. For further discussion of this issue, see supra notes 62-63 and accompanying text.
  \item \textsuperscript{131} 410 U.S. at 159 (emphasis added).
  \item \textsuperscript{132} See supra notes 75-77 and accompanying text.
  \item \textsuperscript{133} Galebach, supra note 16, at 22-23.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} For further discussion of the first \textit{Morgan} rationale, see supra notes 95-98 and accompanying text.
  \item \textsuperscript{136} See supra text accompanying notes 97-98.
  \item \textsuperscript{137} U.S. CONsT. amend. XIV, § 1.
  \item \textsuperscript{138} See supra notes 43-55 and accompanying text.
  \item \textsuperscript{139} This assumes that they are not "human beings."
  \item \textsuperscript{140} Galebach, supra note 16, at 22-23. He also argues, earlier in the article, that the first \textit{Morgan} rationale should allow Congress to protect the unborn to "prevent the risk that individuals may be deprived by the state of an opportunity to enjoy a right to post-natal life guaranteed by the Fourteenth Amendment." Id. at 16. The problem with this approach is that it confuses Congress' power to protect a presently existing right from being endangered—which is the first \textit{Morgan} rationale—with \textit{creating} a present right to ensure that a future right will vest. That the state interest in protecting potential life from conception cannot override a woman's right to an abortion until the third trimester—the point of viability—was made eminently clear in \textit{Roe}, 410 U.S. at 163-64. Galebach does not explain how, after \textit{Roe}, Congress, pursuant to section five, may constitutionally do what the state cannot, especially
\end{itemize}
It is unclear, however, what Galebach believes is endangered. If fetuses have a fourteenth amendment right not to be deprived of life, abortion does more than endanger that right. Inasmuch as it results in the destruction of the fetus, abortion would clearly violate the unborn child's right to life. If fetuses have no such right, then equally clearly, it cannot be endangered. What Galebach is saying is that Congress should be able to create the fiction that fetuses are human, even if it cannot be certain that they are, just as Congress was able to prevent New York's use of its literacy test under the first *Morgan* rationale, even though Congress was not sure the literacy test violated the equal protection clause.\(^1\)\(^4\)\(^1\) Calling fetuses human, and so persons for fourteenth amendment purposes, would, however, be an application of the second *Morgan* rationale\(^1\)\(^4\)\(^2\)—allowing Congress to extend the core to include fetuses, combined with the first rationale permitting Congress to act where it is uncertain.\(^1\)\(^4\)\(^3\) This would be torturing *Morgan* beyond recognition. It would be combining the two rationales to validate congressional action which goes beyond either justification considered individually.

The confusion that this analysis generates results from a central flaw in Galebach's assumptions which is fatal to the bill. He speaks throughout the article of the fourteenth amendment right to life,\(^1\)\(^4\)\(^4\) arguing that Congress should be able to extend that right to fetuses.\(^1\)\(^4\)\(^5\) Fourteenth amendment rights, however, do not exist in a vacuum. The amendment confers those rights upon *persons*;\(^1\)\(^4\)\(^6\) if

\(^{141}\) Galebach, * supra* note 16, at 22; see * supra* notes 95-97 and accompanying text.

\(^{142}\) See * supra* note 16, at 15.

\(^{143}\) See * supra* note 16, at 22.

\(^{144}\) See, * e.g.*, * supra* at 5, 7, 8, 10, 16, 24.

\(^{145}\) * Id.*

\(^{146}\) See U.S. CONST. amend. XIV, § 1. In fact, there is no need for Congress, the courts or anyone else to define the word "life" in the amendment. The threshold question is whether a particular individual is a "person." See * Roe*, 410 U.S. at 158. If the answer is affirmative, the next question must be whether that person is being deprived of life,—i.e., killed—or if that person's life is being threatened with deprivation. If the answer is negative, however, the fourteenth amendment inquiry *ends*, and "we pass on to other considerations." * Id.* at 159. Galebach, however, confuses protecting persons from deprivation of life with creating a new category of persons whose life would then be protected. For example, he equates a congressional determination of when human life begins with Congress' "*[r]egulating the use of new, relatively untested drugs, regulating or refusing to regulate the use of tobacco, requiring
there are no such persons, no rights exist. Pursuant to section five, Congress may protect such persons from actual or threatened violations of their rights. In Morgan,\(^1\) for example, Congress protected Puerto Rican citizens from a threatened violation of their equal protection right.\(^1\)\(^4\)\(^8\) In the absence of persons, however, there are no fourteenth amendment rights for Congress to enforce. There was no dispute in Morgan as to whether Puerto Rican citizens had a right to equal protection;\(^1\)\(^4\)\(^9\) the central issue the bill confronts, however, is whether fetuses possess any fourteenth amendment rights\(^1\)\(^5\)\(^5\)----in other words, whether fetuses are persons.\(^1\)\(^6\) Thus, resort to the Voting Rights cases for support is inappropriate.\(^1\)\(^8\) To determine whether fetuses are persons, we need only look to Roe: "[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn."\(^1\)\(^8\)\(^3\)

That the bill, supposedly legislation pursuant to the section five enforcement power,\(^1\)\(^8\)\(^4\) attempts to bring fetuses under the persons rubric of the amendment\(^1\)\(^8\) evidences a strange process of circular reasoning. Because Congress has no power to enforce fourteenth amendment rights unless those rights exist,\(^1\)\(^8\)\(^6\) and because Roe decided that fetuses have no such rights,\(^1\)\(^8\)\(^7\) the bill is an attempt to create the very right that would allow the bill to be enacted by Congress. In fact, the bill is not an attempt to enforce any preexisting right; it is simply a legislative attempt to overturn the Court’s holding in Roe that fetuses are not “persons."\(^1\)\(^8\)\(^8\)

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147. See supra notes 95, 101 and accompanying text.
149. See id. at 641.
151. Id.
152. There was no dispute in any of the Voting Rights cases over whether the plaintiffs were “persons.” For a discussion of these cases, see supra notes 81-117 and accompanying text.
153. 410 U.S. at 158.
155. Id.
156. See supra note 146 and accompanying text.
157. 410 U.S. at 158.
158. Id. The bill, for example, does not expressly prohibit any state action whatsoever, see Bill, supra note 6, 127 CONG. REC. S287 (daily ed. Jan. 19, 1981), while the Voting Rights Act, § 4(e), 42 U.S.C. § 1973b(e) (1976), prohibits states from requiring literacy tests, before voting, of Puerto Rican citizens or other persons who have completed the sixth grade at a public or accredited private school in Puerto Rico. Galebach defends Congress’ ability to
A bill which finds so little support in constitutional case law would, logically, bring forth many critics. This is precisely what has occurred; legal scholars of virtually every conceivable viewpoint have united in opposition to this bill.  

One prominent critic, Professor William Van Alstyne, concludes:

There is virtually unanimity among professors of constitutional law requested to comment on the [Human Life] bill. The unanimity is unprecedented in my experience, as the range of individuals frankly covers the ideological map: persons different as Kurland, Bork, Griswold, and Wright are (uniquely) in agreement with persons such as Tribe, Brest, Cox, Ely, and Michaelman.

Van Alstyne views the bill as

both unconstitutional and wholly unworthy of Congress. Its presuppositions respecting the power of Congress to impose its own definitions upon the words in the Constitution are naive and incorrect. Its additional presumptuousness in attempting to revive criminal statutes already adjudicated by the Supreme Court as violative of fundamental personal rights is unprecedented and unsound.

In the face of such overwhelming opposition from respected constitutional scholars, Congress may still proceed with this bill for a number of reasons. First, the constitutionally permissible course—the amendment process—requires the kind of supermajority, both in Congress and among the states, that makes it long and

“achieve its ends by declaration” without specific enforcement provisions. Galebach, supra note 16, at 27-28. He compares declaring that human life exists from conception with the declaration in the Voting Rights Act of 1965 of “Congress's belief that poll taxes violate the Constitution.” Id. at 28; see 42 U.S.C. § 1973h (1976). This latter declaration, however, was merely a restatement of the obvious; the twenty-fourth amendment, adopted in 1964, expressly declared that poll taxes violated the Constitution. U.S. Const. amend. XXIV. Congress merely decided to let the courts enforce the Constitution's prohibition. See 42 U.S.C. § 1973h (1976). Declaring that human life exists from conception is certainly not a simple restatement of the fourteenth amendment; thus the comparison fails.


162. See U.S. Const. art. V.

163. The amendment process requires that an amendment be proposed by a two-thirds
difficult. Although an amendment is currently being considered by Congress, the foes of abortion admit that a constitutional amendment has little chance of passage. The Human Life Bill, however, requires only a simple majority of both houses of Congress and the president’s signature. It could therefore become law far more quickly and easily.

A second reason might be the hope that Congress’ statement of its opinion on when the fetus becomes a human being will influence the Court, should it have occasion to reconsider the Roe issue on the merits. The Human Life Bill would then become an amicus curiae brief in favor of the rights of the unborn. If this is the purpose of the Human Life Bill, its constitutionality would be irrelevant, because the aim of its sponsors would simply be to have the Court take notice of the bill, which could be accomplished even as it was struck down.

The first reason is not very persuasive—the mere fact that the bill may survive its journey through Congress does not make it any vote in both houses of Congress. It must then be ratified, within the period specified, by either three-fourths of the state legislatures or by conventions in three-fourths of the states. U.S. Const. art. V.

164. See 127 Cong. Rec. S10,194-98 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch, introducing S.J. Res. 110). The proposed amendment provides “A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern.” Id. at S10,198 (text of proposed amendment).

Senator Hatch has himself expressed the opinion that an amendment is the only constitutionally permissible way to overrule Roe:

I recognize . . . that, under our structure of Government, it is the duty of the Court to “say what the law is” . . . . There is no alternative . . . that [sic] a constitutional amendment to overcome this result [in Roe]—except to wait for the slim possibility that the Court may someday . . . overturn on its own the abortion cases. Id. at 10,195 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).


166. See U.S. Const. art. I, § 7, cl. 2.


168. See Rees, supra note 165.
more likely that it will survive in the courts. The slim chance that it might be upheld, however, combined with whatever intangible benefits might be derived from its persuasive effect as Congress' opinion, could be sufficient to convince legislators who are against abortion to vote for the bill. Before they do so, they should consider that there is a good chance that the bill would cause actual harm. The Supreme Court depends in great measure on the confidence and trust of the public in accepting its decisions; lacking military might or monetary control, the Court must rely on public respect for its decisionmaking. One commentator calls this "institutional capital," which the Court must spend each time it makes a difficult or unpopular decision. A decision would be particularly costly when it strikes down a product of the political process—a bill approved by a majority of those chosen to represent the people of this country. Declaring the Human Life Bill unconstitutional may be viewed by the public as Supreme Court approval of abortion, despite the contrary will of a political majority. Such a decision could erode the public respect and trust on which the Court must depend. One need only recall the hue and cry generated by Roe v. Wade to envision public reaction to the almost certain rejection of this bill by the Court.

In addition, given the responsibility placed on each legislator by his or her oath of office, the promise to uphold the Constitution should strongly discourage any legislator from voting for a bill which he or she does not believe to be constitutional, no matter what positive effect it might have on the Supreme Court. The pressure on an elected representative to respond to the demands of his or her constituents is admittedly great. A particular legislator whose constituency is anti-abortion may see a vote for this bill as a way to appease the voters and shift the blame for the abortion issue to the courts. This attitude, however, runs counter to the promise each elected official makes in taking the oath of office. It also encourages,

169. See supra notes 167-68 and accompanying text.
171. Id. at 138; see The Federalist No. 78 (A. Hamilton).
172. J. Choper, supra note 170, at 139.
173. See id. at 129-70.
174. See sources cited supra note 2.
175. See supra note 24 and accompanying text.
176. See supra notes 167-68 and accompanying text.
177. See L. Hand, supra note 20, at 12.
in fact it forces, the courts to take a more active role in policing the legislature,\textsuperscript{178} and that surely cannot be the desire of elected officials in an era of growing concern for judicial restraint.\textsuperscript{179}

**CONCLUSION**

The constitutional infirmities of the Human Life Bill,\textsuperscript{180} combined with the institutional concerns expressed above,\textsuperscript{181} make it virtually certain that this bill would have no positive effect, but might instead have serious negative consequences. Congress should therefore consider very carefully before enacting the Human Life Bill. For those who oppose abortion, there is still the amendment process. While long and difficult, it has one powerful advantage over the Human Life Bill—it is the constitutional way.

*John G. Ferreira*

\textsuperscript{178} It will put the courts on notice that the legislation that comes before them will not have been drafted with the Constitution in mind, making it correspondingly more likely that it violates some constitutional provision.


\textsuperscript{180} See supra notes 118-58 and accompanying text.

\textsuperscript{181} See supra notes 170-79 and accompanying text.
APPENDIX A

S. 158

To provide that human life shall be deemed to exist from conception.

IN THE SENATE OF THE UNITED STATES

JANUARY 19 (legislative day, JANUARY 5), 1981

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide that human life shall be deemed to exist from conception.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

"CHAPTER 101

"SECTION 1. The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception.

"The Congress further finds that the fourteenth amendment to the Constitution of the United States was intended to protect all human beings.

"Upon the basis of these findings, and in the exercise of the powers of the Congress, including its power under section 5 of the fourteenth amendment to the Constitution of the United States, the Congress hereby declares 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, human life shall be deemed to exist from conception, without regard to race, sex, age, health, defect, or condition of dependency; and for this purpose 'person' shall include all human life as defined herein.

“Sec. 2. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions.

“Sec. 3. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.”
A BILL

To protect unborn human beings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

"CHAPTER 101

"SECTION 1. The Congress finds that—

"(a) the American Convention on Human Rights of the Organization of American States in 1969 affirmed that every person has the right to have his life protected by law from the moment of conception and that no one shall be arbitrarily deprived of life;

"(b) the Declaration of Human Rights of the United Nations in 1959 affirmed that every child needs appropriate legal protection before as well as after birth;

"(c) the Nuremburg International Military Tribunal for the trial of war criminals declared the promotion of abortion among minority populations, especially the denial of the protection of the law to the unborn children of Russian and Polish women, as a crime against humanity;

"(d) the Federal Constitutional Court of the Federal Republic of

Germany in 1975 ruled that the life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution and the state's duty to protect human life before birth forbids not only direct state attacks, but also requires the state to protect this life from other persons;

"(e) the Declaration of Independence affirmed that all human beings are endowed by their Creator with certain unalienable rights among which is the right to life;

"(f) as early as 1857 the American medical profession affirmed the independent and actual existence of the child before birth as a living being and condemned the practice of abortion at every period of gestation as the destruction of human life;

"(g) before 1973, each of the several States had enacted laws to restrict the performance of abortion;

"(h) agencies of the United States continue to protect human life before birth from workplace hazards, the effects of dangerous pharmaceuticals, and other hazardous substances;

"(i) it is a fundamental principle of American law to recognize and affirm the intrinsic value of all human life; and

"(j) scientific evidence demonstrates the life of each human being begins at conception.

"Sec. 2. No agency of the United States shall perform abortions, except when the life of the mother would be endangered if the child were carried to term.

"Sec. 3. No funds appropriated by Congress shall be used directly or indirectly to perform abortions, to reimburse or pay for abortions, or to refer for abortions, except when the life of the mother would be endangered if the child were carried to term.

"Sec. 4. No funds appropriated by Congress shall be used to give training in the techniques for performing abortions, to finance research related to abortion, or to finance experimentation on aborted children.

"Sec. 5. The United States shall not enter into any contract for insurance that provides, directly or indirectly, for payment or reimbursement for abortions other than when the life of the mother would be endangered if the child were carried to term.

"Sec. 6. No institution that receives Federal financial assistance shall discriminate against any employee, applicant for employment, student, or applicant for admission as a student, on the basis of that person's opposition to abortion or refusal to counsel or assist in the performance of abortions.

"Sec. 7. Upon the basis of the findings herein, 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, health, defect, or condition of dependency, and for this purpose 'person' includes all human beings.

"Sec. 8. Congress further recognizes that each State has a compelling interest, independent of the status of unborn children under the fourteenth amendment, in protecting the lives of those within the State's jurisdiction whom the State rationally regards as human beings.

"Sec. 9. Any party may appeal to the Supreme Court of the United States from an interlocutory or final judgment, decree, or order of any court of the United States regarding the enforcement of this Act, or of any State law or municipal ordinance based on this Act, or which adjudicates the constitutionality of this Act, or of any such law or ordinance. Any party to such case shall have a right to direct appeal to the Supreme Court of the United States on the same terms as govern appeals pursuant to section 1252 of title 28, United States Code, notwithstanding the absence of the United States as a party to such case.

"Sec. 10. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination."