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THE POPULATION SLOWDOWN

A CHALLENGE TO THE MILITARY

by
Colonel Robert X. de Marcellus, FA FARNG

ABOUT THE AUTHOR

Colonel Robert X. de Marcellus received his B.S. degree in Industrial Management from the Georgia Institute of Technology in 1951.

During the Korean War he served as an infantry rifle platoon leader with the 2nd Infantry Division. Colonel de Marcellus holds the Combat Infantry Badge, the Silver Star and the Purple Heart. He is presently assigned as Inspector General of the Florida Army National Guard with the rank of Colonel.

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This paper was originally published as a USAWC essay by Colonel de Marcellus in October 1975 under the title "The Population Slowdown - A Challenge to the Military." Its purpose was to draw attention to the impact of the West's falling birth rate on our nation's defense capabilities. As a result of the presentation of the paper to the Strategic Studies Institute, the SSI recommended that the Department of the Army conduct an official study into the ramifications of the decline of manpower on national defense. [Note: The views expressed in this paper are those of the author and do not necessarily reflect the views of the Department of Defense or any of its agencies.]

Colonel Robert X. de Marcellus

In civilian life, Colonel de Marcellus is an advertising and marketing executive and a director of the American Birthright Trust mutual fund. He resides in Palm Beach, Florida with his wife Mildred and six children, ages 4 through 16.

INTRODUCTION

"The terrifying fact is that societies refusing to give birth to new generations are doomed to share the fate of so many vanished civilizations of history." •

• Robert de Marcellus October 29, 1977
America "Failure in the West: A Demographic Insight

In 1972 the United States birth rate fell for the first time below the "replacement level" total fertility of 2.1 children per family and is now at a historic low of 1.9.[1]

Drastic re-evaluations of population projections have been made by the Bureau of the Census and nongovernmental demographers.

Equally drastic are the revisions of the projected age composition of the population for the next decades. Based on the declining number of births, an increase of 40% in that portion of the population over sixty-five is projected to take place within the next twenty-five years,[2] (from 12 million in 1950, 20 million in 1975, 26 million by 1985, to approximately 30 million by 2000).[3] See Table 1.

These fundamental changes in the population will have a far-reaching effect, beginning within the next 25 years, on the nation's defense posture and will require extensive reassessment of national objectives and defense strategy.

To speak in terms of twenty-five years may seem almost irrelevant to the moment, so pressing are the problems of today. It is vitally important, however, that the impact of population change on defense be approached in a long term manner since the consequences are irreversible in the short run and profound in their effect.

Within only twenty-five years, that time separating us from the Korean War, low birth rates will already have critically affected defense. Any matter that can so affect national security in such a time span should claim the attention of defense leadership today.

The following questions are considered in this paper:

1. Is a significant reversal of the decline in fertility probable?
2. What effect will the current birth rate have on the nation's demography?
3. What are the implications of such demographic change for the economy?
4. How will defense spending, as a percent of governmental expenditure, be affected?
5. What are the implications for defense planning and strategy?

Past Census Bureau projections have pictured an exceedingly fast growth. This is because the Bureau's figures are what the name implies - projections, not predictions.[4] For this reason, transient factors such as the postwar baby boom were projected by the Bureau in 1963 to population forecasts of 259 million by 1980.[5] Today these projections have dropped to between 220 and 225 million by that year.

Demographers are generally agreed that the nation has undergone dramatic change in its fertility. Differences of opinion are between those who foresee a continuation of the present fertility of 1.9 children per woman (family), with a possible further decline to a 1.7 level, and those who expect a gradual return to a fertility of 2.1, at which time the population would stabilize and be able to reproduce itself in the long term. In either case, a change of great magnitude will have taken place from the U.S. fertility of 3.5 children per woman that marked the 1950's.

BABY BOOM OR BUST?
Current Projections and Future Trends

Three series, or population projection ranges, have been projected by the Census Bureau for the remaining part of the century. Series I projects a population based on a total fertility (births per woman) of 2.7, Series II of 2.1 births, and Series III of 1.7 births.[6] See Table 2.

Series II of 2.1 births per woman was selected by the Census Bureau in projecting a declining population growth culminating in a stable population (Zero Population Growth) within seventy years. This series, 2.1 children per woman, is the "replacement level" needed to maintain a population at a constant figure. When the fertility falls below this figure, a nation must eventually have an ever decreasing population.[7]

The fertility rate in 1974 dropped to 1.9. The current fertility rate, coupled with indications that social norms have changed, indicates that Series III, or a fertility of 1.7, is the most realistic base upon which to project future U.S. population patterns. If this choice is correct, it heralds economic and defense problems of extreme magnitude. However, use of Series II also implies major problems of crucial importance which will rival and complement the oil shortage in its consequences.[8] The validity of using Series II as a projection is reinforced by a comparison of U.S. fertility trends with that of other Western World nations in Table 3.

A long term falling trend in the fertility of developed nations, including the United States, is a historical fact.[9]

Muddying the picture for demographers has been the postwar baby boom. One school of thought believes in cyclical fluctuations, which can be mathematically computed.[10] According to this school, phenomena such as the baby boom will reoccur. Changes in society and their effect on national fertility would indicate, however, that the falling trend in fertility of developed nations is a true trend and that a repetition of the postwar baby boom will not again take place without an unlikely repetition of the conditions by which it was produced.[11] See Table 4.

It is evident that nations such as West Germany, whose fertility drops to 1.5 and whose population shrinks in absolute numbers annually, cannot produce a new baby boom if it remains in this position long.[12]

The baby boom period was marked by early marriages and a reduction of the mean age at which women had their second babies, from 27 to 24.[13] Earlier marriages and first babies born to younger mothers prevented women from entering nondomestic life and increased the exposure to another pregnancy.

Evidence exists in the National Fertility study of 1955 that of those women interviewed who intended not to have any more children, one-third admitted to having at least one unwanted child. This figure is considered an understatement due to the psychological and emotional factors in such an admission.

In "The Family in Developed Countries", Norman B. Ryder states the opinion that the baby boom resulted from increased exposure to risk of pregnancy and relaxed contraceptive vigilance during a time when good economic conditions implied that the family standard of living would not be affected by another birth. Long exposure to pregnancy by early marriages and lack of motivation for vigilant use of the contraceptive means of the day appear, therefore, to have been a major cause of the baby boom.[14] In effect, the baby boom appears to have consisted of unplanned children or "marginally" unwanted children.

The dramatic fall in the birth rate today would seem to be explained by an extension of the same reasoning. Economic conditions have not become easier for the family and an increasing number of families require double incomes to maintain the standard of living they feel suitable to their station in life. Furthermore, the "motivational" requirement in preventing unwanted births has been removed by new technologies in birth control.[15] The unwanted or "unplanned" child today is not being born and the consequence is shown in the national birth rate.

Table 1.

PROJECTION OF THE U.S. POPULATION BY BROAD AGE GROUPS

Year	Population (in thousands) as of July 1				65 and over as—	
	Under 20	20 to 64	65 and over	Total	Percent of total	Ratio of 20 to 64
1985	70, 754	141, 512	26, 741	239, 006	11.2	0. 189
1990	71, 929	147, 457	28, 789	248, 176	11.6	.195
1995	74, 264	152, 261	30, 015	256, 540	11.7	.197
2000	76, 333	157, 038	30, 214	263, 585	11.5	.192
2005	76, 349	162, 970	30, 580	269, 898	11.3	.188
2010	76, 222	167, 432	32, 662	276, 316	11.8	.195
2015	76, 990	168, 840	36, 917	282, 747	13.1	.219
2020	78, 561	167, 873	42, 061	288, 494	14.6	.251
2025	80, 030	165, 608	47, 448	293, 087	16.2	.287
2030	80, 768	164, 636	51, 227	296, 632	17.3	.311
2035	81, 202	166, 502	51, 879	299, 583	17.3	.312
2040	81, 989	169, 501	50, 806	302, 296	16.8	.300
2045	83, 213	172, 462	49, 257	304, 931	16.2	.286
2050	84, 462	173, 843	49, 352	307, 657	16.0	.284

The Social Security projection is based on the assumption that the birth rate will rise to replacement level of 2.1 children per woman and remain at that level for fifty years and that mortality would decrease another 15%.

Source: 1975 Annual Report of the Board of Trustees of the Federal Old Age and Survivors Insurance and Disability Insurance Trust Funds.

Table 2.

CENSUS BUREAU PROJECTIONS BASED ON THREE ASSUMED FERTILITY RATES

Year	Series I	Series II	Series III
ESTIMATES			
1970		204,875	
1974		211,909	
PROJECTIONS			
1975	213,641	213,450	213,323
1980	225,705	222,769	220,356
1985	241,274	234,068	228,355
1990	257,663	245,075	235,581
1995	272,685	254,495	241,198
2000	287,007	262,494	245,098
2005	303,144	270,377	247,926
2010	322,049	278,754	250,193
2015	342,340	286,960	251,693
2020	362,348	294,046	251,884
2025	382,011	299,713	250,421

Projection of U.S. Population (in thousands) using three different fertility estimates.

Source: Current Population Reports Series P-25, No. 541, February 1975.

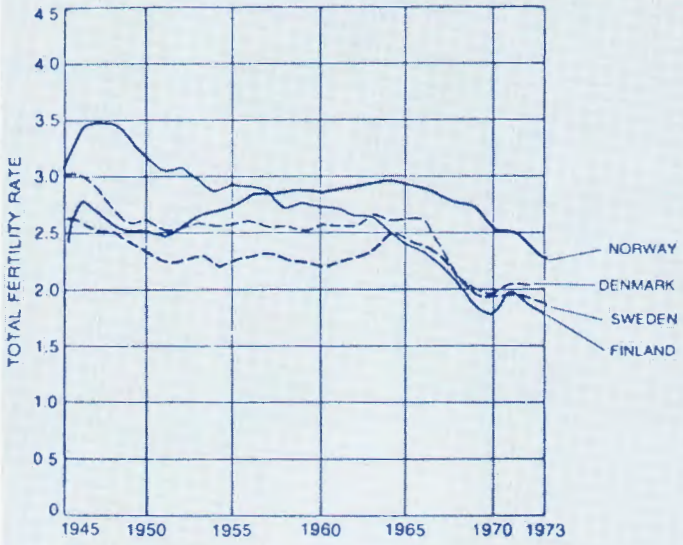
The validity of this conclusion seems borne out by the impact of legalized abortion as a "backup" to contraception.

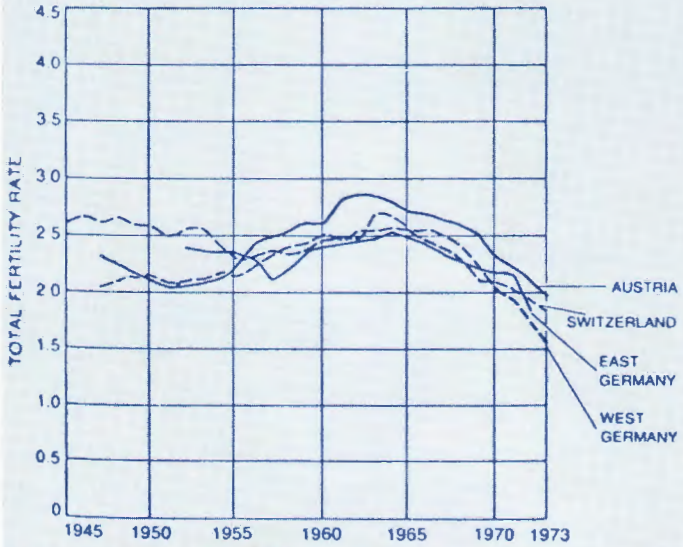
The approximately 900,000 aborted births in the United States in 1974[16] (unreported early abortions probably add considerably to this figure), reduced by one quarter the number of children who would otherwise have been born. Had these births taken place, the national birth rate would have been over 19 per thousand instead of 14.9 (or a fertility of approximately 2.7).[17]

June Sklar and Beth Berkov assert the belief that a new baby boom may be in the making.[18] Their assertion is based on study of California statistics that show a 1974 leveling of the downward trend in the birth rate and even a 3% gain. This leveling out of the decline in Californian birth rate is considered by them to be a "bottoming out" process prior to a new rise.

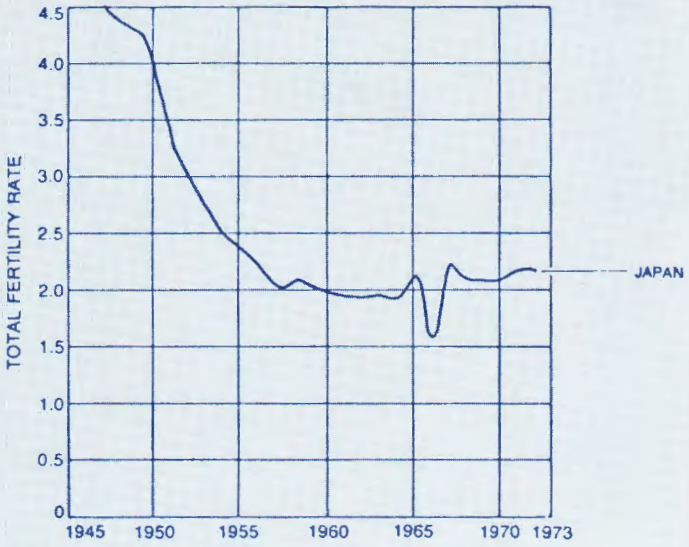
The two California demographers theorize that the all time low in birth rates came about because women postponed having children to a later age and that now, if they are going to have them, they must have them soon, thus starting a "catching up process" while new waves of women enter childbearing age behind them. These latter women would be the girls born in the baby boom of the fifties.

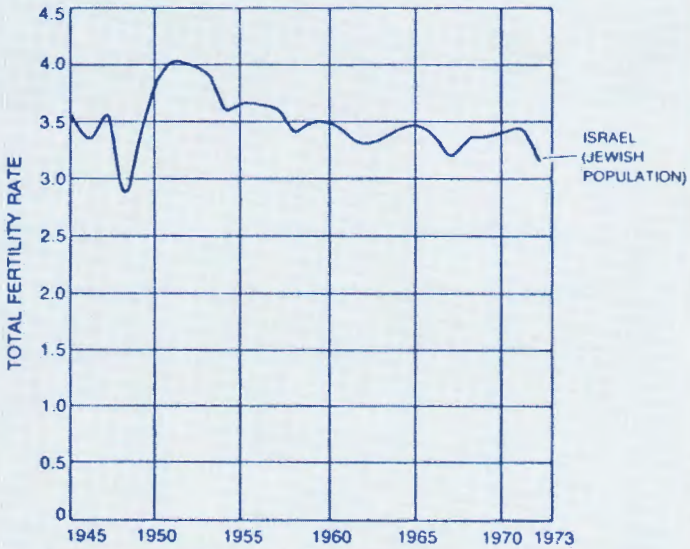
Table 3. POPULATION TRENDS IN DEVELOPED COUNTRIES



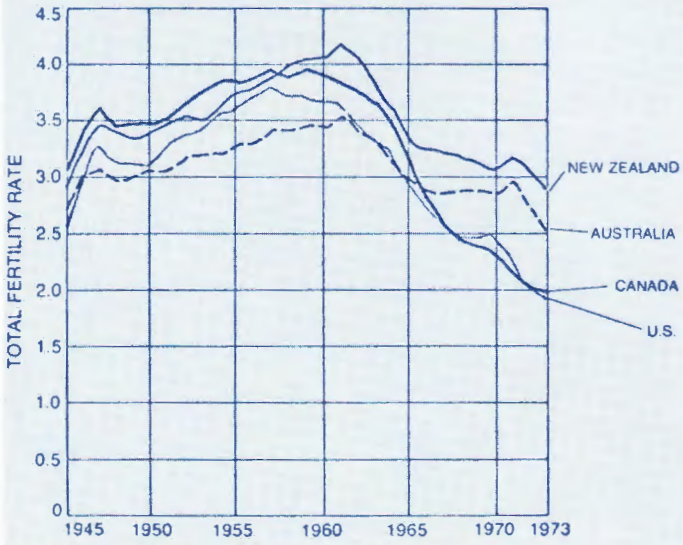


SCANDINAVIAN COUNTRIES *(top)*, except for Sweden, showed a brief postwar surge in fertility. The decline since then has been sharpest in Finland. Countries of Central Europe *(bottom)* have followed a fertility pattern similar to that of Western Europe. West German fertility is now the lowest among all developed countries.

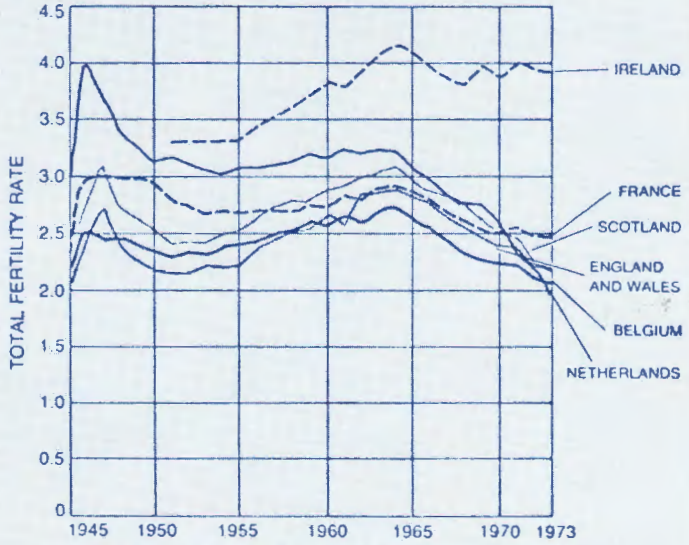




TWO NEWLY DEVELOPED COUNTRIES, Japan *(top)* and Israel *(bottom)*, show markedly different fertility patterns. Drop in Japanese fertility followed the adoption of a permissive abortion law. The curve for Israel applies only to Jewish population. Fertility of the Arabs in Israel is currently more than twice as high.

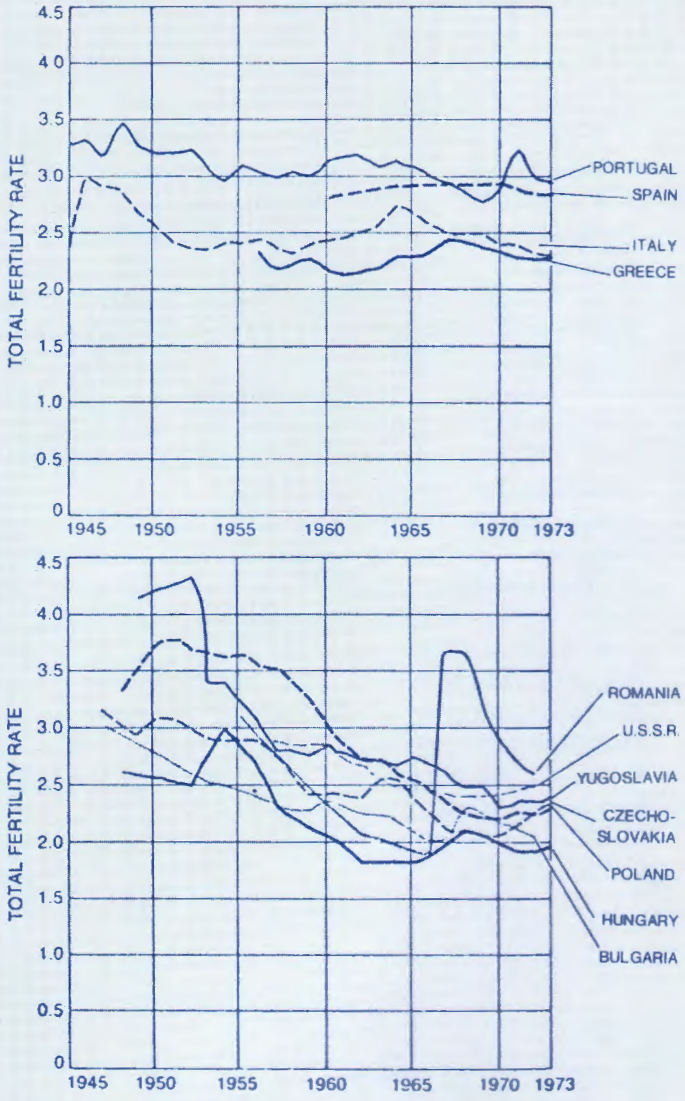


POSTWAR "BABY BOOM" was most pronounced among overseas English-speaking populations *(left)*. Sharp declines began in the 1960's. The post-war surge in fertility in Western Europe *(right)* was brief.



Fertility fell sharply, climbed again slowly and has been declining for 10 years. Fertility in Ireland is quite different.

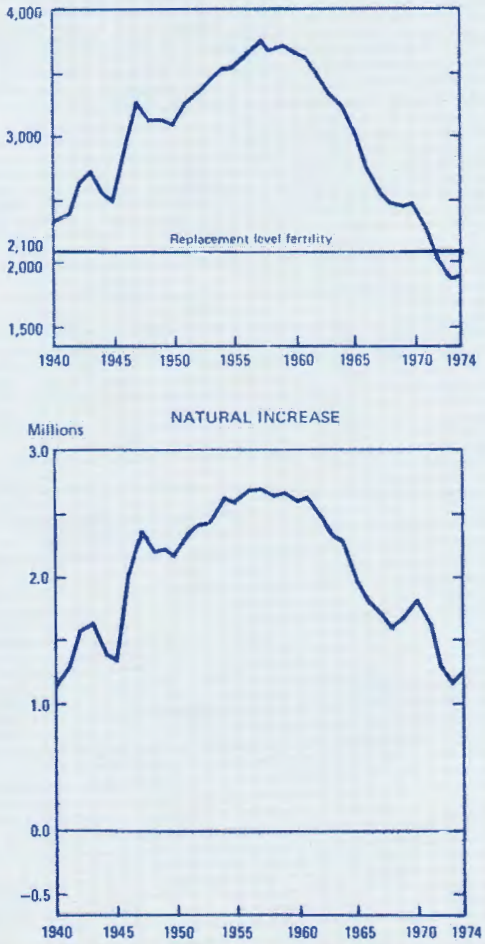
Table 3 Continued



SLOW DECLINE IN FERTILITY seems to be taking place in Portugal and Italy *(top)*. There is no clear trend in Spain and Greece but data are limited. In Communist countries of Eastern Europe *(bottom)* fertility has generally been falling, except for a brief sharp rise in Romania when abortion law was tightened in 1967.

Table 4.

TOTAL FERTILITY RATE AND NATURAL INCREASE: 1940 to 1974



Source: Current Population Reports, Series P-25, No. 545, April 1975.

The reasoning of Sklar and Berkov is based on the following points:

1. The "bottoming" indication is in spite of high abortion rates.
2. It occurred in spite of economic downturn.
3. It occurred without an increase in marriage rate.

This development is possible and would be welcome news to those grappling with the problems faced by the Social Security Administration. However, in view of the longterm experience of all other developed Western nations and of the effect on birth rates when the "unplanned" child is precluded by recent developments in contraception, such an upturn in fertility appears a slim possibility.[19]

The assumption that childless women will try to "catch up" has yet to be demonstrated. Since the declining rate is due in part to the decreased proportion of children born to women over 30 years of age, it would appear optimistic to think that childless women approaching that age will decide to "catch up". In the past it has been shown that cohorts of women that put off childbearing for an unusually long time seldom make up the child deficit later.[20] During the low birth rates of the '30's, it became apparent that many of the children demographers thought were being "postponed" actually were never born.

ABORTION AS A POPULATION SUPPRESSOR

There is also the fact that abortion is a new and fast rising trend. While an estimated 892,000 abortions were performed in 1974, 745,000 took place in 1973, 587,000 in 1972, 480,000 in 1971 and 193,000 in 1970. It can be anticipated that abortions will take an increasing toll of the birth rate for several years. The Alan Guttmacher Institute estimates that an additional one half to one million women would have had an abortion had it been feasible.[21] The Institute says that between 1.3 and 1.8 million women "needed" abortions but were unable to get them due to inadequate services. This figure is projected from New York and California figures. Had the higher number been performed, the U.S. birth rate would have sunk another 33% for a total fertility of approximately 1.26. Such a development would ultimately almost halve the U.S. population at each generation.

Any scientific breakthrough enabling parents to determine the sex of their child would also have a lowering effect on birth rates as parents no longer "try again" for the desired boy or girl.[22]

Indications that the lower fertility is a result of basic changes in society appear in the results of surveys taken throughout the Western nations. The number of children desired in 1970 by women married 20 years was 3.5, but those married five years or less desired only 2.5.[23] By 1972 a further decline to 2.2 showed in surveys.[24]

These declines are consistent with the decline that actually has taken place in fertility. (Table 4) While it is possible that the actual number of children will be higher than the number desired due to unplanned pregnancies, it is doubtful that this will take place in the face of new methods of birth control. In the United States sterilization has become the most favored method of birth control for wives between 30 and 44 and legalized abortion is increasingly reducing the number of unplanned children.[25] A new baby boom is deemed most unlikely in the foreseeable future by most demographers.[26]

SUBGROUP EFFECT

Seldom mentioned in projections of population figures is the effect of subgroups within a population. An historic example of this effect occurred in Europe over the last century with France moving from a nation with the lowest fertility to one of the highest. A major reason for the shift is due to pronatal governmental activity and financial subsidies for families with children, but probably of greater importance has been the gradual replacement over a century of one population by another. Family oriented Catholic gentry continued a high birth rate over several generations as the unchurched majority produced an extremely low birth rate.[27]

While the geometric pyramiding of a high birth rate is often observed, it is seldom noted that it also occurs negatively as soon as fertility falls below replacement level. It can be expected that subgroup action will have a similar effect to some degree in the United States. Whether the subgroup maintains its characteristics or absorbs the value system of the majority and is, in turn, affected by the same trends remains to be seen. The black birth rate, for instance, has been much higher than the white. However, evidence indicates that blacks are copying the value system of the white majority and the black birth rate is falling at a pace approximately equal to that of the white.[28] (from 25.1 births per thousand in 1970 for N.Y. State to 19.8 in 1974).[29]

Subgroup emergence as a majority, however, is not without costs. While in France it was the more educated classes that maintained the high birth rate, the reverse is true in the U.S. Certain elements of the U.S. population are an endangered species and

others will rapidly become extinct, statistically speaking, unless their declining birth rate is reversed. The Jewish community within the U.S. is one of the latter. In view of the extremely great contribution that this sector has made to American scientific and economic progress, it is questionable whether the United States can maintain its lead in these areas without their contribution.

New York City is of interest since as an urban center it projects national trends that may result from increased urbanization. The city had an overall birth rate of 16.7 in 1971. However, a breakdown by major race and religion reveals the extremely low combined "WASP" and Jewish birth rate. See Table 5.

Table 5.

1971 NEW YORK CITY FERTILITY by MAJOR SUBGROUP

	Total White	Catholic	White non-Cath.	Non-White
Population	6,048,841	1,800,000	4,248,841	1,846,021
Births	91,480	48,750	42,730	40,440
Rate/1000	15.1	27	10.05	21.9

Source: Figures for White and Non-White population from Department of Health, The City of New York, **Summary of Vital Statistics** *1971, pp. 2 and 8. Catholic figures from "General Summary," The Official Catholic Directory 1972" p. 2. White non-Catholic figures computed from the above by author. Note: Black Catholic figure is discounted due to non-availability of figure; however, the figure is nominal and would not appreciably affect fertility rates computed.*

Table 6.

1974 NEW YORK CITY FERTILITY by MAJOR SUBGROUP

	Total White	Catholic	White non-Cath.	Non-White
	11.91	20	8.4	19.8

Source: Logrillo, Letter to Author.

While later New York City figures are not yet available for 1974, an extension using the New York State non-white birth rate indicates that the births per thousand for that year in New York City would be as shown in Table 6.

Such crude birth rates would indicate a fertility for the white non-Catholic population of approximately one (1) and a fertility for all whites of about 1.4. Overall total fertility would be approximately 1.6.[30] This estimated fertility roughly coincides with the Census Bureau's national report of indicated family size among young women of 1.8.[31]

Part of the very significant drop in fertility in New York City is explained by the number of abortions. In 1971 while there were 131,920 live births, there were 202,435 abortions. Of these, 69,517 were residents of the city.[32] This means there was one resident abortion for every 1.89 births.

In New York City, at current birth rates, 10 English-speaking whites will be represented by only 1.27 persons in 5 generations. The same trends, though less advanced, are perceived in figures for the United States as a whole. See Table 7.

Table 7.

1973 U.S. FERTILITY by MAJOR SUBGROUP

	Total Pop.	White non-Cath.	Catholic	Black
Population	208,671,161	137,783,862	48,214,729	22,672,5??
Births	3,109,199	1,687,408	916,564	489,7??
Rate/1000	14.9	12.2	18.9	21.?
Fertility	1.9	1.55	2.2	2.4

Source: White and Non-white figures from "Summary Report Final Natality Statistics, 1973" **Vital Statistics Report** *p. 3, Catholic figures from "General Summary," The Official Catholic Directory, 1974, p. 4. Non-white Catholic figures are discounted because of unavailability, but their small number and the similarity between fertility of Catholics and Non-Whites would preclude their effecting fertility figures materially.*

Nationally the non-Catholic whites show a birth rate 12.20 per thousand or an approximate total fertility of 1.55 children per woman. Whether or not the Catholic and non-white population can maintain their 1974 birth rate and counter-balance the low fertility of non-Catholic whites in order to maintain the present national fertility of 1.9 is problematical. Both the Catholic and the non-white birth rates have dropped markedly during the last decade.[33]

Characteristics of the population will shift very fast. Those young who enter the work force will increasingly be from groups who have not hitherto been considered the most productive. Will the minorities acquire the productivity that has been so long associated with the "WASP" and Jewish population?

SOCIAL SECURITY ADMINISTRATION PROJECTION

During the remainder of the century the number of young people in the population base will remain approximately constant due to the growth of the total population "programmed" by the baby boom following World War II. The number of people over 65 however, will increase dramatically, from 21,815,000 today to 30,214,000 by the year 2000, and will finally constitute 16.2% of the population with 47,448,000 senior citizens by 2025.[34] (The percentage increase will be much larger if the fertility does not rise again to 2.1). During the next 25 years the expenditures for old age survivors under the Social Security System in the U.S. will exceed taxes scheduled in the present law under all economic assumptions.[35] The spread between expenditures and tax rate as a percent of income will increase under the best economic assumptions.

Conclusions of the Board of Trustees of the Federal Old Age and Survivors Insurance and Disability Insurance Trust Funds (OASDHI) are that "The long range actuarial cost estimates indicate that for every year in the future the estimated expenditures will exceed the estimated income from taxes. This excess increases with time and is estimated to average about 1.3 percent of taxable payroll over the next 25 year period (1975-1999). All reasonable alternative actuarial assumptions indicate that over the remainder of this century the financing of the old age, survivors, and disability program will need additional revenues equivalent to about 1.3 percent of taxable payroll." [36]

The Bureau points out that if the economic and fertility conditions of the past few years remain constant, the long-range actuarial deficit in the old age, survivors and disability program would exceed even its least optimistic projection.[37]

Table 8 shows the projected annual awards per individual assuming current eco-

Table 8.

PROJECTED ANNUAL AVERAGE BENEFIT AWARDS

(In Thousands)

Calendar year	Retired workers and dependents			Survivors of deceased workers				
	Old-Age	Wives[2]	Children	Mothers	Children	Widows[3]	Parents	Total
Actual data (as of June 30):								
1970	13,066	2,651	535	514	2,673	3,151	29	22,619
1971	13,604	2,673	556	523	2,745	3,287	28	23,416
1972	14,181	2,706	578	536	2,847	3,433	27	24,308
1973	14,880	2,756	602	548	2,887	3,575	25	25,273
1974	15,589	2,806	619	565	2,908	3,620	24	26,131
Projection (as of June 30):								
1985	21,243	2,892	518	765	3,035	3,686	15	32,154
1990	23,319	2,897	387	777	3,030	3,610	15	34,035
1995	24,589	2,898	310,	824	3,253	3,514	15	35,403
2000	25,172	2,766	311	849	3,526	3,452	15	36,091
2005	26,310	2,528	345	855	3,662	3,417	15	37,132
2010	29,077	2,352	416	832	3,636	3,394	15	39,722
2015	33,623	2,317	496	815	3,614	3,345	15	44,225
2020	39,120	2,302	577	819	3,679	3,339	15	49,851
2025	44,427	2,288	623	834	3,777	3,326	15	55,290
2030	47,655	2,247	619	843	3,833	3,327	15	58,539
2035	48,513	2,121	590	836	3,842	3,262	15	59,179
2040	47,506	1,969	552	823	3,853	3,225	15	57,943
2045	46,689	1,841	551	829	3,906	3,153	15	56,984
2050	47,020	1,809	577	837	3,978	3,070	15	57,306

[1] Excluding the effect of the railroad financial interchange provisions.

[2] Including dependent husband beneficiaries.

[3] Including dependent widower beneficiaries.

Source: 1975 Annual Report of the Board of Trustees of the Federal Old Age and Survivors Insurance and Disability Insurance Trust Funds.

Table 9.
PROJECTED BENEFICIARIES

Calendar year	Average annual retirement benefit		Ratio of increase in retirement benefits to increase in earnings	
	Awards	In current payment	Awards	In current payment
1975	2,750	2,603	1.000	1.000
1985	5,921	5,001	1.060	.946
1990	8,020	6,832	1.066	.960
1995	10,832	9,280	1.074	.972
2000	15,206	12,643	1.126	.989
2005	21,517	17,521	1.191	1.024
2010	29,769	24,504	1.231	1.070
2015	41,038	34,136	1.268	1.114
2020	56,399	47,218	1.302	1.152
2025	77,431	65,014	1.336	1.185
2030	106,166	89,316	1.369	1.217
2035	145,696	122,569	1.404	1.248
2040	198,435	167,970	1.429	1.278
2045	269,841	229,422	1.452	1.304
2050	366,258	312,401	1.473	1.327

[1]Based on the central set of economic assumptions of annual increases of 4 percent in CPI and 6 percent in earnings and somewhat higher increases before 1981. The benefits refer only to those payable to retired workers. The figures in the column entitled "In current-payment" refer to the average benefits for all retired workers who are receiving benefits, while those in the column entitled "Awards" refer to the average benefits for those workers retiring in the particular year.

Source: 1975 Annual Report of the Board of Trustees of the Federal Old Age and Survivors Insurance and Disability Insurance Trust Funds.

nomic trends and benefit increases.[38] Table 9 shows the projected increase in the number of beneficiaries.[39] Projected total disbursements for any year can be computed by multiplying the number of projected beneficiaries in Table 9 by the projected amount of the annual award for the same year from Table 8.[40]

Although originally set up under the concept that it would operate with sizeable reserves, the OASDHI actually operates on a near pay-as-you-go basis of transfers of current real resources from the working population to the retired one. At present the trust fund represents only about one year's obligation. In effect, the OASDHI system is a transfer of resources from one demographic group to another. Changes in composition of the two groups will exert great leverage and economic pressures. The above figures indicate that in the future monies from new sources must be used to pay the OASDHI benefits already mandated by law. The economic consequences of this aging population is now receiving close study by some economists.

ECONOMIC CONSEQUENCES

Assuming a return to a fertility of 2.1 and a replacement level birth rate, the ratio of the aged population to those economically active will have increased from .188 to .281 - an increase of 49% by 2050. However, if trends towards early retirement at reduced benefits continue, or if the legal retirement age is lowered (to age 60) the ratio of aged to active would move to .42. This is a rise of 123% in the burden of providing for the aged that the young must carry. Boone A. Turchi, of the Carolina Population Center, computes that a rise of 50% in the ratio of retired to economically active would call for an increase in real per capita income of 1/2% annually between 1970 and 2050. However, if the trend towards earlier retirement continues and retirement at age 60 becomes law, the real per capita increase in income would have to be 1.01% annually. If the history of the OASDHI system is a guide, benefits will be increased because of the policy of attenuating the drop in real income of newly retired workers. Turchi computes that to achieve an increase in real benefits per capita of 1% a year would require a growth rate in per capita income of 2.01%. Actually, real monthly social security benefits between 1950 and 1972 grew at the annual rate of 3.52% which would require a growth rate of 4.53% in personal income.[41] It is imperative, therefore, that real income grow significantly in order that the working members of the population be able to support the retired. Such growth is questioned by economists.

POPULATION REINVESTMENT

John C. Suerth of Gerber's was featured by **Business Week** in an article discussing the detrimental impact of the baby dearth on some businesses.[42] In spite of Gerber's problems, many business analysts see an even greater cornucopia opening to Americans as a result of the lower birth rate. It is pointed out that Gerber's can shift to adult prepared foods as the babies of the baby boom move into the most productive adult years unencumbered by the costs of child rearing.

Monies not spent on larger families will be saved for investment, thereby aiding the capital market, and public expenditures on schools and other child-support services will be reduced. **The Kiplinger Letter** states: "Some managers and investors see declines in the birth rate and conclude that the future sales and profits will nosedive. Wrong. Markets will CHANGE, not die. Many are getting bigger. In face, slower population increases actually will boost living standards."[43] This view is correct, of course, **in the short run.** It is as true for the population as a whole as it is for the individual family. However, **the long-term consequence** of "living off one's human capital" without reinvestment for the future is economic collapse when the burdens of supporting a proportionally extremely large aged population becomes intolerable.

It is argued by some business analysts that the GNP can continue to grow in spite of ZPG and that for this reason the economy will continue to prosper and individual wealth will grow. A closer analysis of GNP is required than this. Social Security payments to the retired and their subsequent expenditure of these monies for food and lodging add to the GNP, but these transfer payments do not create wealth since retired senior citizens are non-productive.[44]

ZPG will certainly bring about a major change in the ratio of the retired to the economically active citizens. Turchi summarizes that the impact will be to increase the relative transfer of current goods and services from the young to the retired with a reduction in the relative level of personal savings vis-a-vis consumption. **This implies a decline**

in the economic growth potential of the nation while at the same time requiring an increase in the rate of economic growth if the older population is to be supported without increasing the real burden on the younger population. The history of the OASDHI indicates that benefits will rise and so will the real burden.[45]

It is probable that an increasingly inflationary economy will place ever heavier burdens on the economically active portion of the population, while the older, non-productive portion gain increasing political strength and press for ever greater benefits to meet higher living costs.[46] These pressures will certainly stress the economy and government budgets far beyond the problems faced today. It can be safely presumed that these stresses will result in budget cuts in other areas, such as defense.[47]

Of particular interest are the implications of the following theories concerning the economy in a ZPG environment:

1. Population mobility will be curtailed in a stagnant population, both vertically in occupational categories and horizontally between them.[48] Reduction in economic mobility of the population will take place precisely when it is most needed to compensate for major shifts brought about by demographic change (manufacture of rockers instead of baby buggies).[49]

2. A stationary population is likely to be composed of less favorable social and economic selection if, as is now the case, those most able to provide for family and social requirements are in the smallest fertility groups and must be made up for by those portions of the population least able to provide.[50]

3. Profit prospects will be adversely affected by worsening expectations that reduce the incentives to invest; particularly in science, innovation and new activities.[51]

4. Decision making will tend to pass to older people with shorter perspectives.[52]

5. When a critical ratio of that portion of the population working to that portion that is retired is reached, further benefits for the retired will be paid for by deficit financing which will intensify inflation.

6. Taxes will absorb more potential savings.[53]

7. The return on capital inputs will fall.[54]

8. The rate of increase of production will diminish unless the rate of technological change increases.[55]

9. As the population becomes older it will in general be less adaptable, bringing about less than optimal distribution of labor.[56]

10. Growth rate of aggregate savings will decline.[57]

11. The demand for satiable goods will stabilize.[58]

12. Maintenance of a high level of activity without the stimulus of population growth will be more difficult.[59]

13. Fractional unemployment will rise.[60]

14. Capital formation in the private sector will decline.[61]

15. Income distribution will become increasingly unequal if the middle and upper income families have the lowest fertility.[62]

16. A marked decline in population growth will result in a decline in technological progress, investment and employment with multiplier effects.[63] (Had Space Program funds been spent in support of the aged, technological advance would have been greatly retarded).

17. Increasing the amount of capital per worker in order to compensate for the shortage of workers is limited by the law of diminishing returns, and as more capital is added its marginal effect or profitability decreases.[64]

Historically the national economy has been a voracious devourer of manpower. In its precedent-breaking growth from the Civil War until World War I, growth in the American economy was fueled by millions of immigrants. Starting with World War I, industrial growth used up the millions of small farm families until by 1966 only 5.9 of the U.S. population was still agriculture.[65] Today 48% of American women are employed, a figure that appears close to the maximum.[66]

Unquestionably, any further increase in the proportion of women working would further diminish the national fertility.[67]

A stagnant or shrinking population being a new experience for the developed nations, the various economic theories on its

effect have yet to be proven by events. However, given the fact that the dramatic growth of Western economies developed concurrently with population growth, it would be rash not to suspect a causative relationship and the effects of a declining population.

Particularly is this true when linked to other problems such as the developing energy crises. Considering that economic growth has been directly linked to energy use, curtailment of economic growth by energy shortages might further impair the ability of the economically active to support the retired element.[68]

Enke attributes economic growth during this era to compounded technological advance and increase in investment per head. He appears to discount growth in aggregate demand and presents what appears to be an incomplete explanation for economic growth of the period.[69]

By 1995 pension beneficiaries will increase by 212%.[70] An increasing number of retired persons in the population has already brought about the broadening of benefits for the aged.

In addition to social security benefits, greatly increased expenditures for all forms of medical care for the aged and others are taking place and probably will continue to expand.[71]

EFFECT ON DEFENSE

What will be the effect on defense if fertility remains below or even at replacement level for a long period of time? Assuming an increase of the birth rate to the maintenance level and assuming there is no increase in the political influence by the larger elderly group, it is clear from Social Security administration projections that present tax revenues cannot possibly meet social security obligations. Additionally, the impact of retirement benefits due to military and civilian government workers hired since World War II has been felt in only a partial manner. Where will these additional funds come from?

The questions raised for the long-term defense planner are these: Is there any evidence to warrant confidence that the U.S. birth rate will regain or rise above replacement level? If U.S. fertility does not recoup, can we expect real economic growth to continue in the face of a stagnant or decreasing labor force and with increasing outlays for the non-productive portion of the population? What factor will take the place of the apparent historical requirement in our economy for an ever larger labor force? Is it reasonable to expect defense spending to remain at the present proportion of national budget? Is there any valid reason to assume that the British model of cutting defense spending to finance social security would not be followed in the United States?

THE BRITISH MODEL

A study of changes in British government spending is illuminative. Britain, because of an earlier decline in its birth rate, has felt the impact sooner of a proportionately larger elderly population.[72] British Old Age Social Security benefits in 1951 were 11.8% of public expenditures while defense was 24.1%. By 1973 old age benefits had climbed to 17.3% and defense had fallen to 12.6%.[73] Other areas of governmental spending experienced only minor change. That defense should bear the brunt of a "re-ordering of national priorities" is not surprising in view of the inflexibility of most of the remaining budgetary items and the increasing influence of that proportion of the population with short-term interests.

If European economic and military strength collapses due to an inability to carry the burdens of aged populations, what new problems in Western defense strategy will face the United States? What new policies and strategies should be considered to harness the potential of Latin American manpower? Should defense planning envisage governmental efforts to increase the U.S. birth rate?

Whether or not the United States can regain a fertility above replacement level is one of the most important factors in assessing the nation's future on its 200th anniversary.

It is probably prudent to predict that real economic growth, in the face of slowing population growth (aggregate demand) and energy constraints, will not set new records; and that if the defense budget becomes a markedly smaller percentage of national expenditures the nation's defense posture will decline.

Using the experience of Britain as a model, one can ask what would have been the effect on today's defense posture had the U.S. experienced over the last 22 years increasing expenditures for old age benefits on the same scale as Britain's?

GNP figures for Britain in 1951 were not reported as they are now. However, national revenue of £ 3,700,014,000 in 1951 had increased by 1973 to £ 22,801,000,000[74], an increase that indicates a comparable growth in GNP. Such a growth, however, did not result in a "larger pie" from which a reduced percentage of defense spending could be taken sufficient to maintain comparable combat strength, nor did it result in a healthier or more flourishing economy. A marked growth in GNP is not a panacea for the economy or defense potential when weighed down by an ever increasing non-productive population.

Such a quick appraisal of the United Kingdom's experience does not consider other economic factors, nor does it refute the fact that if an economy experienced true growth in its productivity, a smaller proportion of the budget could continue to buy a constant amount of defense potential (assuming no inflation in the economy or increase in the complexity of weapons). Such an overall view of the United Kingdom's experience does, however, indicate the end result of constantly increasing expenditures for old age benefits and provides a very important "crystal ball" for assessment of U.S. trends.

"Fortress America?" AN APPRAISAL OF FUTURE STRATEGY

Structuring a defense force with half of today's dollars would involve fateful decisions, and may require a strategy that involves the following:

1. A pull-back from Europe; hopefully with negotiated reductions in Pact forces; if not, then unilaterally.
2. Fast-declining reliance on European allies who, for the most part, will be faced with a similar and larger problem and who may opt for a neutral position when U.S. troops depart.
3. Increased reliance on "massive retaliation" as the "cheapest" form of defense rather than on the conventional force capability of "flexible response."

Brazil may emerge as the most powerful economic and military ally of the United States. In the Pacific, the U.S. may have to retrench to the island perimeter of the Western Pacific.

Increasingly the security of the United States would lie in the balance of power between the USSR and the People's Republic of China.

The low birth rate of Eastern Europe and European Russia will be an offsetting factor to low fertility in the U.S., Japan and Western Europe. While the overall birth rate of the USSR is still high because of their non-European peoples, an internal demographic imbalance may in itself cause stresses within the USSR.[75]

The United States would be unable to afford Middle East strife. Combined with a worsening energy crisis, the economic constraints of our aging population would force increasing support of Arab positions. Africa would not be considered an area for defense activities, nor would South Asia.

In short, were the United States forced to adopt within two decades a defense budget proportional to only half of today's, drastic revisions in strategic thought would be required. "Fortress America" and a completely nuclear strategy may well be the only defense the United States can afford.

The U.S. armed forces two decades from now may be very similar to those of the United Kingdom's today - strategic nuclear deterrent forces backed by a very small Army force. A U.S. active Army of a half dozen or fewer divisions with a larger force of National Guard units may be the structure of tomorrow's Army. The smaller cost of Guard forces will become increasingly attractive. The Navy, as it is no longer called upon to project its force to world-wide commitments, and in the face of drastic budget cuts, may retire its carriers in favor of its nuclear and ASW role. These would appear the unattractive outlines that defense spending cuts will force on strategy.

Today's birth rate and the historical falling trend in fertility are a stark fact; its harmful economic consequences are conjectural but very probable; the implied consequences for defense grave.

A partial alternative to such Draconian changes in strategy exists. The volunteer military can be replaced by universal national service. When privates draw only that money needed for PX sundries, it will also make possible lower pay scales across the board.

A return to compulsory service would be more palatable if all were required to serve through a program wherein youth choose the form of national service they were to perform, in the military, other governmental, or non-governmental public service institutions. Such a program would also pump new and economical labor into hospitals, police forces and other public service agencies, relieving the demand for government funds in support of programs such as law enforcement, Medicare and Medicaid.

It seems clear that a combination of revised strategy and low-pay military will be required.

These, then, are the quandaries of the defense planner as the nation enters its third century. Prudence suggests that worldwide commitments be trimmed in all but the most critical areas, while plans are made for requiring American youth to serve the nation at nominal pay. For this is the heart of the matter; as the proportion of aged in the nation rapidly increase, the young must shoulder an increasing burden.

FOOTNOTES

1. Norman R. Ryder, "The Family in Developed Countries", **Scientific American,** September 1974, p. 125.

2. U.S. Congress. House Ways and Means Committee. 1975 Annual Report of the Board of Trustees of the Federal Old Age and Survivors Insurance and Disability Insurance Trust Funds, 1975 p. 48. (hereafter referred to as "Congress, **1975 OASIDITF Report**").

3. "Manpower A.D. 2000", in **Occupational Outlook Quarterly,** Summer 1973, p. 19. See also George H. Brown, "The New Demographic Profile", **Reports,** 15 September 1975, p. 9.

4. Stephen Enke, "Population Growth and Economic Growth", **The Public Interest,** p. 86.

5. "Trends in Marriages, Births and Population", **Health, Education, and Welfare Indicators,** 1963, p. xxx.

6. "Population Estimates and Projections", **Current Population Reports,** February 1975, Series p-25, No. 541, p. 3.

7. "Population Estimates and Projections", February 1975, p. 3.

8. Charles M. Weis, "Population - Energy Requirements, Environmental Effects", ed. by Joseph J. Spengler, p. 119.

9. The historical pattern of Western fertility is not only of vital interest to the United States in predicting its own population pattern, but also presents grave additional implications for Western Defense. The questions raised in this paper not only apply to Western European allies, but, due to the earlier date of the fall in their birth rates, will apply at a much earlier date.

For example, Western Germany, the most capable ally of the U.S. in Western Europe, has reached the demographic point at which each year the nation will experience a greater number of deaths than births: a point the United States may not reach until the next century. The question then must be raised how soon will Western Europe become a defense liability rather than a defense asset?

10. Ronald Lee, "The Formal Dynamics of Controlled Populations and the Echo, the Boom and the Bust", **Demography,** November 1974, pp. 582-583.

11. Paul C. Glock, "Some Recent Changes in American Families", **Current Population Reports,** Special Studies, p. 3.

12. As the total number of women of childbearing age continues to shrink, the base of fertile women required for a baby boom also shrinks at an ever increasing rate, Westloff, p. 112. Coupled with adverse economic conditions, a below zero population growth might exert a cummulative downward pressure on fertility, Spengler, p. 2. Within the last fifteen years the fertility rates of the United States and Canada have dropped by more than 50%. If the below replacement level birth rate continues, U.S. and Canadian population increase will have stopped in less than two generations (not 70 years as forecast by the Census Bureau, using a fertility of 2.1). If the 1973 fertility rate is continued - even with continuing immigration at present levels - the population will ultimately decline. Westloff, p. 111.

13. Glick, p. 3.

14. Ryder, p. 126.

15. Westloff, p. 127.

16. **Provisional Estimates of Abortion Need and Services in the year following the 1973 Supreme Court Decision: United States, Each State, and Metropolitan Area,** New York 1975.

17. In Rumania the birth rate moved from less than two children to more than 3.7 per woman in 1965 when legal abortion was ended after a period in which Eastern Europe had more abortions than live births. Since then, as other birth control means have taken the place of abortion, fertility has dropped again. In Japan the birth rate dropped from a total fertility of 4.5 to 2.0 in one decade followjng legalization of abortion.

18. June Sklar and Beth Berkow, "The American Birthrate: Evidences of a Coming Rise", **Science,** 29 August 1975, pp. 695-697.

19. Ryder, p. 132.

20. Glick, p. 1.

21. **Provisional Estimates of Abortion Need and Services in the year following the 1973 Supreme Court Decision,** p. 8.

22. Enke, p. 89.

23. Ryder, p. 127. Comparably low values are found in other developed nations. Belgium 2.2, Czechoslovakia 2.2, Poland 2.2, France 2.1, Yugoslavia 2.1, Hungary 1.9 and England 1.8. Westloff, p. 113.

24. Westloff, p. 113.

25. Westloff, p. 113.

26. Glick, p. 3.

27. A simple model demonstrating the effect of such a minority on long range national patterns can be constructed with five couples (10 people) averaging one child per family for 5 generations and one couple (2 people) averaging 4 children per family over the same period of time. At the fourth generation the five couples would be represented by .625 of a person while the one couple would be represented by 32 people.

28. Sklar and Berkow, p. 698.

29. Computed from 1970 birth rate and subsequent birth and death statistics, Vito M. Logrillo, Department of Health, State of New York, letter to author, 4 September 1975.

30. Total fertility refers to the number of children born to each woman computed by groups of women in five year increments. The ratio of change in total fertility to change in the birth rate (number of births per thousand population) will vary as the age distribution of the childbearing women changes, "Population Estimates and Projections", **Current Population Reports,** April 1975 p. 2.

31. "Manpower A.D. 2000" p. 17.

32. Department of Health, The City of New York. Summary of Vital Statistics, pp. 2 and 5.

33. In 1964 the Catholic birth rate was 29.5 per thousand, "General Summary", **The Official Catholic Directory** 1974, p. 4.

34. An increase of over 25 million people in the over 65 age group within 50 years is not conjectural. Rather, these are the citizens 40 years and older who are alive today.

The number of pension beneficiaries will increase in the next 20 years from 9,647,000 to 30,067,000 of which 23,319 will be on social security (part of the increase is due to broader coverage of social security). By 2025, 44,427 will be on social security. This information from Vito Natrella, U.S. Internal Revenue Service, letter to author, 17 September 1974 and Congress, **1975 OASIDITF Report,** p. 50.

35. Congress, **1975 OASIDITF Report,** p. 42.

36. **1975 OASIDITF Report,** p. 44.

37. Despite the fact that disbursements will exceed current trust fund income projections, it is interesting to note that an individual earning $13,200 in 1974 paid more than double the social security tax he paid in 1970 and over 65% more than he paid in 1972, Boone A. Turchi, "Stationary Populations: Pensions and the Social Security System" in **Zero Population Growth: Implications,** ed. by Joseph J. Spengler, p. 80.

38. **1975 OASIDITF Report, p. 52.**

39. **1975 OASIDITF Report,** p. 51.

40. For example, the year 2,000 would give a total projected awards payment of $382,765,000 and the year 2025 of $3,440,027,037,000. As a spokesman of the actuarial office of the social security administration stated, such figures are "meaningless", Lotte Lisle, Office of Actuaries, Social Securities Administration, Telcon, 6 October 1975. It should again be emphasized that these distressing figures are based on current benefit payments and the assumption that after decreasing to a total fertility rate of 1.7 in 1977 that the birth rate will go back up to a level of 2.1 and remain there. No allowance is made in them for either increased political pressure from an enlarged senior element in the population for a "reordering of priorities", or a failure of the birth rate to rise. Turchi, p. 82.

41. Turchi, p. 83.

42. "Marketing", **Business Week,** 13 April 1973, pp. 45-50.

43. "The Kiplinger Shop Talk Letter", August 1975, p. 1.

44. In discussion of the falling birth rate in the popular press and many government publications, it is usually pointed out that the total number of births will increase in the next decade (as a result of the "War Babies" having children). This is true only in the short run, not after the turn of the century.

45. Turchi, pp. 83-89.

46. Turchi, p. 83.

47. Turchi holds that demographic change is such a pervasive matter, that short-run neo-Keynesian analyses or long run neo-classical growth models are both inappropriate attacks on the problem.
"... Much of what is assumed to be 'structure' in a short run model is in fact variable in the longer run demographic context. Likewise the impact of demographic change on the economic system is likely to be so pervasive that the highly aggregated neo-classical models are likely to obscure many interrelationships of interest. Moreover, population is likely to have a strong impact both on aggregate prices and on the level of unemployment and government intervention in the economy..."
The pervasiveness of demographic change and the different aspects of its effect are demonstrated by the impact on the housing industry. Zero population growth will, by depressing the level of savings as resources are transferred from the young to support the old, result in a lower supply of funds for the mortgage market. However, at the same time it will be severely restricting the demand for housing. Thus, this major area of aggregate demand will be affected from two different directions, but both stemming from a lower birth rate. Turchi, p. 88-91.

48. Joseph J. Spengler, **Zero Population Growth: Implications.** p. 7.

49. William J. Serow, "The Economics of Stationary and Declining Populations: Some Views from the First Half of the Twentieth Century" in **Zero Population Growth: Implications,** ed. by Joseph J. Spengler, p. 19.

50. Spengler, p. 11.

51. Spengler, p. 10.

52. Spengler, p. 10.

53. Turchi, p. 89; Spengler, p. 10.

54. Spengler, p. 10.

55. Serow, p. 18.

56. Serow, p. 19.

57. Serow, p. 19.

58. Serow, p. 20.

59. Serow, p. 20.

60. Serow, p. 20.

61. Serow, p. 22.

62. Serow, pp. 24-25.

63. Alan R. Sweezy, "The National History of the Stagnation Thesis", in **Zero Population Growth: Implications,** ed. by Joseph J. Spengler, p. 35.

64. Weiss, p. 119.

65. Theodore W. Baner, **Natural and Energy Resources,** p. 41.

66. Judith Blake, "The Changing Status of Women in Developed Countries", **Scientific American,** September 1974, p. 139.

67. IRS estimates a total increase by 1995 from 19,289,000 working wives to 25,163,000, a gain proportional to the increase in employment which is forecast by the Department of Labor Statistics to rise from 86,-696,000 to 110,986,000 by 1995, Vito Natrella, U.S. Internal Revenue Service, letter to author, 17 September 1975.

68. Weiss, p. 119.

69. Enke, p. 91.

70. Natrella, letter to author, 17 September 1975.

71. Vira R. Kevett, "Characteristics and Needs of an Aging Population in a Southern Metropolitan Area", ed. by Joseph J. Splenger, p. 137.

72. Nissel and Lewis, p. 75.

73. Nissel and Lewis, p. 199.

74. **World Almanac** 1973, p. 608; also see **The Statesman's Year Book** 1953, p. 84.

75. "Russia Alarmed at Falling Birth Rate", **Miami Herald,** 1 August, 1968, p. 18-H; see also Eric Bourne. "Births Low, Communist Nations Restrict Divorce and Abortion as Population Lags", **Christian Science Monitor,** 1 November 1966, p. 2; and Reinhard Meier, "Soviet Population Problems", USAWC A-4, p. 73. Reprinted from **Swiss Review of World Affairs,** August 1974, pp. 7-9.

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(ABORTION)

(BY WESLEY G. PIPPERT)

WASHINGTON (UPI) -- SPOKESWOMEN FOR THE NATIONAL ABORTION RIGHTS ACTION LEAGUE SAID TODAY THEY ARE HOPEFUL ANTI-ABORTION LEGISLATION WILL NOT GET OUT OF CONGRESSIONAL COMMITTEES THIS YEAR -- PARTLY BECAUSE PRESIDENT REAGAN HASN'T "LIFTED A FINGER" TO SUPPORT IT.

"AT THIS POINT, WE HAVE REASON TO BE HOPEFUL," NANETTE FALKENBERG, WHO BECAME EXECUTIVE DIRECTOR OF THE 150,000-MEMBER LEAGUE LAST WEEK, TOLD REPORTERS.

THE SENATE JUDICIARY COMMITTEE IS CONSIDERING A CONSTITUTIONAL AMENDMENT PROPOSED BY SEN. ORRIN HATCH, R-UTAH, TO GIVE CONGRESS AND THE STATES POWER TO RESTRICT ABORTIONS, AND A BILL SPONSORED BY SEN. JESSE HELMS, R-N.C., TO GIVE FETUSES FULL CONSTITUTIONAL RIGHTS.

FALKENBERG SAID THERE ARE REPORTS REAGAN'S ADVISERS ARE TELLING HIM THE ABORTION ISSUE IS A "NO-WIN SITUATION" FOR HIM THIS YEAR.

SUELLEN LOWRY, A LOBBYIST FOR THE LEAGUE, SAID "THUS FAR, I HAVEN'T SEEN A SIGN HE'S LIFTED A FINGER ON CAPITOL HILL" IN SUPPORT OF ANTI-ABORTION LEGISLATION, DESPITE STATEMENTS AT A RECENT PRESS CONFERENCE AND NATIONAL PRAYER BREAKFAST CONDEMNING ABORTION.

"IF HE WERE, THE LEGISLATION WOULD BE MOVING FASTER ON CAPITOL HILL THAN IT IS," SAID MARGUERITE BECK-REX, THE LEAGUE'S NEWS COORDINATOR.

THE CONTROVERSY OVER WHICH WAY THE JUDICIARY COMMITTEE SH
OULD
PROCEED HAS CAUSED A PUBLIC SPLIT AMONG THE ANTI-ABORTION GROUPS, WHICH FALKENBERG SAID "CLEARLY IS HELPFUL."

SHE SAID SIX UNCOMMITTED MEMBERS OF THE 18-MEMBER JUDICIARY COMMITTEE HOLD THE BALANCE: SENS. JOSEPH BIDEN, D-DEL.; ROBERT BYRD, D-W.VA.; HOWELL HEFLIN, D-ALA.; ROBERT DOLE, R-KAN.; ALAN SIMPSON, R-WYO., AND ARLEN SPECTER, R-PA.

LOWRY SAID LEAGUE LOBBYISTS HAVE VISITED THE OFFICES OF ALL 100 SENATORS. FALKENBERG SAID THE LEAGUE HAS TARGETED 17 STATES FOR THE NOVEMBER ELECTIONS AND WILL SPEND $400,000 TO $750,000 IN OTHER STATES AS WELL.

SHE LISTED NORTHERN CALIFORNIA, OREGON, WASHINGTON, ARIZONA, COLORADO, TEXAS, IOWA, KANSAS, MICHIGAN, MONTANA, CONNECTICUT, MARYLAND, MASSACHUSETTS, NORTH CAROLINA, NEW YORK, VERMONT AND WEST VIRGINIA.

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ABORTION-ELECTIONS

WASHINGTON (AP) -- A PRO-ABORTION GROUP, STUNG BY THE DEFEAT OF MANY OF ITS CONGRESSIONAL SUPPORTERS AT THE POLLS IN RECENT YEARS, WILL SPEND UP TO $750,000 AND OFFER CAMPAIGN HELP THIS FALL, IN AN EFFORT TO MAKE THE 1980 ELECTION LOOK LIKE ''AN ABERRATION,'' ITS NEW EXECUTIVE DIRECTOR SAID TODAY.

Fertility and National Power

Col. Robert de Marcellus

NATIONAL POWER IS often defined in terms of men, money and material resources. In the past, the strength of Western nations has usually rested on all three, but today the low fertility of the West's industrialized nations foreshadows a rapid decline in manpower which will make difficult the manning of armies without the impairment of industrial potential; supporting a vastly larger number of aged citizens will deeply cut defense and Research and Development (R & D) budgets; economic growth will slow, and many areas of technological development, such as any future space programs, will be severely limited.

The implications of current demographic trends have not yet been widely recognized by either the public or government, in part because of the great publicity given to the *opposite* demographic problems of the developing world. There, the introduction of modern medicine and sanitation greatly extended life expectancy, causing the doubling-up of generations and the much-discussed "population explosion." Undoubtedly the lack of historical experience that the United States has had with stable, declining, or vanishing populations is also a reason for our seeming blindness to the danger now facing us.

Unfortunately, our official and semi-official bodies as well as the press mostly speak in terms of *world* demography, a "world population explosion," thus obscuring the fact that if current fertility trends in the West continue, Western nations will instead suffer within a few decades a population *implosion*, and a radical loss of power. Some of the misunderstanding concerning demographic trends in Western nations must also be attributed to the vested interests of groups that have for many years crusaded for lower birth rates.

Any appraisal of Western power in terms of demographic trends is indeed bleak. Every major industrial nation of the Western world is failing to reproduce its current population. To remain at a stable

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population over the long term, the so-called "Zero Population Growth" (ZPG), a nation must achieve a fertility rate of approximately 2.1 children per woman. This replaces the parents, plus a fraction to make up for children who die without progeny. In the West today, neither the United States nor any of its major allies has a fertility rate that high. Western Germany has approximately 1.4, Scandanavia 1.7, Britain, France, Japan, and the U. S. 1.8. The implications of these fertility figures are frightening. They mean, for instance, that West Germany (our principal NATO ally), with no *further* decline (but the rate dropped again this year), will not only lose 25% of its population at each twenty-year generation, but also must divert an increasing proportion of dwindling national capability to support a burgeoning number of retired elderly. If current trends continue, West Germans, numbering some 61 million today, will number only 52 million in 20 years, and only 35 million in 2030. Our other NATO allies will also suffer debilitating losses of population and a constant growth in the number of elderly, at only a slightly slower rate.

For the United States, not only is the problem facing the nation as a whole critical, but an analysis of the United States population by minority groups shows that many of the most productive and creative segments of our population are already in a demographic position as critical as West Germany's. For example, the so called "WASP" (White Anglo-Saxon Protestant) shows a fertility rate of about 1.5, while the American Jewish community's fertility is almost as low as West Germany's (and thus on the road to demographic extinction). Reflection on the immense scientific, artistic, financial and commercial contribution of this community to the U. S. during the past century underscores the critical loss involved. Other minorities in our population that have hitherto maintained a higher fertility than that of the WASP and Jew, such as American Catholics and blacks, show a rapid decline as they adopt the values of their WASP and Jewish neighbors.

The future fertility of our nation and its major allies, then, must be of paramount concern to those planning Western security for the opening decades of the next century. The men and women who, during that period, will man our armies, form our economic and industrial base, and pay for the support of today's working population must be born in the next decade. Present indications are that Western fertility will certainly not increase and may very well con-

tinue to decrease, unless public policy changes. Avowedly, projecting fertility and population size is a hazardous undertaking. Some reputable demographers still profess to see an upturn in fertility ahead. However, given the long-term historical down-trend of Western fertility and today's economic and social environment, one must assume that the future of Western fertility is not promising.

The drop in Western fertility has been hidden until now by several factors. First, even though our fertility has fallen far below the replacement level, our overall population will continue to increase for several decades due to the increase in life expectancy and the large "hump" of population with a number of years still to live. Second, the popular press has been filled with predictions of standing-room-only population because many writers and misinformed VIP's have projected *past* population growth as a straight line projection into the future, regardless of fertility trends. Manifestly, a nation whose fertility is far below the replacement level cannot replace present generations, let alone increase, in the long term. Thirdly, the difference between birth rate and "fertility" is not fully understood. Birth rate is the number of children born per unit of population in a period of time. Fertility is the number of children born to each woman in her life time. If, for example, the daughters born in the "baby boom" each had a child this year, in the long-heralded but not forthcoming "ripple effect," a great upsurge in the birth rate would result for this year. However, if these mothers never bore any more children, the long-term fertility would be 1, and the population would halve itself at the next generation.

Estimates of our population growth during the last 20 years have always erred on the side of overestimation. Past Census Bureau projections have pictured an exceedingly fast growth. This is because the Bureau's figures are what their name implies — projections, not predictions. For this reason transient factors such as the post-war baby boom were projected by the Bureau in 1963 to population forecasts of 259 million by 1980. Today, these projections have dropped to 220-225 million. Within the last decade, estimates which projected the population of the United States at over 300 million — even as high as 362 million — by the year 2000, have now been reduced, in recent Census Bureau estimates, to *262* million. Even this figure, based on an assumption of a return to replacement-level fertility of 2.1, is high. No rationale is offered for this assump-

tion. If present fertility trends continue, the figure may well be as low as 245 million.

Demographers are generally agreed that the nation has undergone dramatic change in its fertility. Differences of opinion are between those who foresee a continuation of the present fertility of 1.8 children per woman (family), with a possible further decline to a 1.7 level, and those who expect a gradual return to a fertility of 2.1, at which time the population would stabilize and be able to reproduce itself in the long term. In either case, a change of great magnitude will have taken place from the fertility of 3.5 children that the U. S. had in the 1950's.

Three "series,"or population-projection ranges, have been projected by the Census Bureau for the remaining part of this century. Series I projects a population based on a total fertility (births per woman) of 2.7, Series II of 2.1 births, and Series III of 1.7 births.

Series II (2.1 births per woman, the replacement level) was selected by the Census Bureau in projecting a declining population growth culminating in a stable population (Zero Population Growth) within seventy years. The current fertility rate of 1.8 coupled with indications that social norms have changed, suggests that Series III, or a fertility of 1.7, is the most realistic. If so, it heralds economic and defense problems of extreme magnitude. It also implies major problems of critical importance which will rival and complement the fuel shortage in its consequences. The validity of using Series III as a projection is reinforced by a comparison of our fertility trends with those of other Western nations.

A long-term falling trend in the fertility of developed nations, including the U. S., is an historical fact. Muddying the picture for demographers has been the post-war baby boom. One school of thought believes in cyclical fluctuations, which can be mathematically computed. According to this school, phenomena such as the baby boom will recur. Changes in society and their effect on national fertility would indicate, however, that the falling trend in fertility of developed nations is a true trend and that a repetition of the post-war baby boom will not again take place without an unlikely repetition of the conditions which produced it.

Evidently, nations such as West Germany, where fertility is dropping to just above one child per family, will not only shrink in absolute numbers, but cannot *produce* a new baby boom if they remain in this position long. The nation's "breeding stock" of young

women becomes too small; only immigration can replenish the population. The baby-boom period was marked by early marriages and a reduction of the mean age at which women had their second babies, from 27 to 24. Earlier marriages and first babies born to younger mothers prevented women from entering non-domestic life and increased the exposure to another pregnancy.

Evidence exists in the National Fertility study of 1955 that of those women interviewed who intended not to have any more children, one third admitted to having at least one unwanted child. This figure is considered an understatement due to the psychological and emotional factors in such an admission.

In "The Family in Developed Countries," Norman B. Ryder states his opinion that the baby boom resulted from increased exposure to pregnancy (i.e., early marriage) during a time when good economic conditions implied that the family standard of living would not be affected by another birth. The dramatic fall in the birth rate today would seem explainable by an extension of the same reasoning. Economic conditions have become harder, and an increasing number of families require double incomes to maintain the standard of living they want. Furthermore, the unwanted or "unplanned" child today is not being born and the consequence is shown in the national birth rate. The validity of this conclusion seems borne out by the impact of legalized abortion as a "backup" to contraception.

The million-plus abortions in the U.S. in 1978 (unreported early abortions probably add considerably to this figure) reduced by one third the number of children who would otherwise have been born. Had these births taken place, the national birth rate would have been over 19 per thousand instead of 14.9, or a fertility rate of approximately 2.7.

June Sklar and Beth Berkov, California demographers, have asserted the belief that a new baby boom may be in the making. Their assertion is based on study of California statistics that show a 1974 leveling of the downward trend in the birth and even a 3% gain. This leveling out of the decline was considered by them to be a "bottoming out" process prior to a new rise. They theorize that the all-time low in birth rates came about because women postponed having children to a later age and that now, if they are going to have them, they must have them soon, thus starting a "catching up process" while new waves of women — the girls born in the baby boom

of the fifties — enter childbearing age behind them. The reasoning of Sklar and Berkov is based on the following points:

1. The "bottoming" indication appeared despite high abortion rates.
2. It occurred despite economic downturn.
3. It occurred without an increase in the marriage rate.

This development is possible and would be welcome news to those grappling with the problem faced by the Social Security Administration. However, in view of the long-term experience of all other developed Western nations and of the effect on birth rates when the "unplanned" child is precluded by recent developments in contraception, such an upturn in fertility appears a slim possibility.

Since the declining birth rate is due in part to the decreased proportion of children born to women over 30 years of age, it would appear optimistic to think that childless women approaching that age will decide to "catch up." In the past it has been shown that cohorts of women who put off childbearing for an unusually long time seldom make up the child deficit later. During the low birth rates of the '30's, it became apparent that many of the children demographers thought were being "postponed" actually were never born.

Abortion is a new and fast-rising trend. Well over a million abortions were performed in 1978 (the 1979 estimates are even higher), as compared to an estimated 193,000 in 1970. It can be anticipated that abortions will take an increasing toll of the birth rate for at least several more years. The Alan Guttmacher Institute claimed in 1975 that an additional half million women would have had an abortion had it been available. The institute said that between 1.3 and 1.8 million women "needed" abortions but were unable to get them due to "inadequate services." This figure is projected from New York and California figures. Had the higher number been performed, the United States birth rate would have sunk another 33% for a total fertility of approximately 1.26. Such a development would ultimately almost halve the United States population at each generation.

Scientific breakthroughs enabling parents to determine the sex of their child will also have a lowering effect on birth rates as parents no longer "try again" for the desired boy or girl.

Indications that our lower fertility is a result of basic changes in society appear in the results of surveys taken throughout the Western world. The number of children desired in 1970 by women mar-

ried 20 years was 3.5, but those married five years or less desired only 2.5. By 1972 a further decline to 2.2 showed in surveys. Today it is lower still — and these declines are consistent with the decline that actually has taken place in fertility. While it is possible that the actual number of children will be higher than the stated number desired due to unplanned pregnancies, it is doubtful, given new methods of birth control. More, in the U. S., for women between 30 and 44, *sterilization* has become the most favored method of birth control, and legalized abortion is increasingly eliminating such "unplanned" children as still happen.

The most persuasive explanation for fertility trends since World War II is that advanced by William P. Butz and Michael P. Ward in their RAND study conducted for HEW. They correlated the prospering economic climate which would seem to have been suitable for a high birth rate with the increasing economic opportunities for women in the work force. Their work clearly indicates that as the market value for women's abilities has increased, fertility has fallen. Only when this value decreased (during recessions of the past two decades) has there been a marked upturn in fertility. This suggests that baby-raising is not only a consequence of the family's overall economic well-being, but is also closely linked to how the baby affects the added material well-being that the mother's work can bring. Women apparently opt for jobs over motherhood if the market for their talents is high, regardless of how well the family is already doing.

This study corroborates the experience of France. Enfeebled by a century of low birth rates and the blood-letting of World War I, France established a complex system of cash payments for the birth of children, child maintenance payments, paid vacations for child-bearing, and strong pro-natal policies in private industry. Initiated in the late 1930's, these pro-natal policies brought about a radical turnabout in France's demographics, giving it both the youngest population in Europe as well as the highest fertility, which in 1950 reached 2.6. These programs, however, did not keep pace with rapidly-increasing standards of living and national economic growth. As the financial rewards of motherhood became dwarfed by those offered the mother in the work force, French fertility began an alarming fall. Professor Pierre Channu states that family subsidy payments fell from 22% of the family income in the '40's to 6.4% in

1974. As motherhood increasingly became less financially rewarding, ever-larger numbers of women opted for jobs.

Professor Charles F. Westoff of Princeton, writing in the December 1978 issue of *Scientific American*, states: ". . . nothing on the horizon suggests that fertility will not remain low. All recent evidence on trends in marriage and reproductive behavior encourages the presumption that it will remain low."

Robert L. Clark of the University of North Carolina also believes fertility will remain below the replacement level. He cites such social phenomena as falling marriage rates, rising divorce rates, deferred childbearing, the upswing in single parent, two-wage-earner or individual households, higher education levels, increased work experience among young women, their greater career opportunities, the high cost of rearing and educating children, and the ever-increasing usage of birth control. Clark could have added the huge number of abortions and the rapidly-increasing number of sterilizations.

These trends are quantified by the Census Bureau as follows:

a. Among women 20 to 24 who had ever married, the proportion who were childless in 1977 was 43%, compared to 36% in 1970.

b. The proportion of women in their early twenties who had *never* married increased from 36% to 45% between 1970 and 1977.

c. Unrelated couples of the opposite sex living together increased 83% to just under one million couples.

d. The number of children under 14 fell 6.4 million since the start of the decade.

Yet reference is often made by those writing on fertility trends that "fertility will have to rise." And this assumption is echoed in Government projections showing a return to replacement fertility and a maintenance of that level afterwards. But history shows that this does not necessarily happen; indeed, it is replete with examples of peoples who simply ceased to exist, their civilizations dying or being absorbed by more vital peoples. The Greece of antiquity is a notable example. Strabo wrote that Greece was "a land entirely deserted, the depopulation begun since long ago continues, the Roman soldiers camp in the abandoned houses, Athens is peopled by statues." Plutarch said "One would no longer find in Greece 3000 Hoplites" (Infantrymen). Polibus (Vol. 37): " . . . one remarks nowadays over all Greece such a low birth rate and in a general manner such depopulation that the towns are deserted and the field lying fallow, although this country has not been ravaged by war or epi-

demics . . . the cause of this harm is evident, by avarice or by cowardice the people if they marry will not bring up children that they ought to have. At most they bring up one or two . . . it is in this manner that the scourge before it is noticed has rapidly developed. The remedy is in ourselves, we have but to change our morals." His warning came too late and was not heeded. Under Christianity Greece was repeopled, not with the blue-eyed, fair-haired Greek of antiquity, but with new peoples, and it took 16 centuries. Probably the major cause for the end of the Roman Empire was a similar failure to reproduce new generations. Towards the middle of the second century B.C., religious marriage was replaced by civil marriage in order that they might be more easily dissolved. It was said that "Women no longer count the years by the consuls but by their husbands." The rate at which Roman fertility fell is startling. However, it is even more startling to realize that the present drop in Western fertility is *far faster*.

Our falling fertility took its toll on the elementary school population some years ago. Today the toll has reached the men of military age. Defense department projections indicate that the military manpower pool of 18-year-olds will decline by 15% of present size by 1985 and 25% by 1990. While the military is less manpower-intensive than it was in earlier periods, this short-fall will still be most detrimental — e.g., it will be exceedingly difficult to continue present Volunteer Army policies. Not only will there be fewer volunteers, but the developing labor shortage will "bid up the market." A Volunteer Army will become increasingly expensive, with a significant decline in *quality*. A return to the draft would ease the problems of quality and cost, but would in no way ease the crises in the labor market, thus causing added resistance to a draft.

The services are today trying to replace a large proportion of their normal manpower with educationally or physically less qualified men, or turning to women to fill the ranks. The latter tactic is, of course, a stop-gap which in itself must add yet another depressant to the national fertility, and worsen the long-term outlook. Such short-sightedness is apparent in press reports, e.g., former Army General Counsel Jill Wine-Banks advocating that self-paid abortions, for women on active duty and military dependents, be allowed to be performed by military physicians — to prevent recruitment losses (it would hardly lead to increased birth rates). Worse, the defense problems stemming from a lack of men of military age, already

severe, are far exceeded by those that will flow from drastic cuts in Western defense budgets that will occur due to our falling fertility.

A decade ago payments to the elderly and federal retirees amounted to $46 billion or 23% of a $201 billion federal budget. The 1979 administration budget allocated $203 billion in an array of programs for the elderly or *40%* of a $500 billion budget. This was to be spent on the approximately 24 million elderly citizens over 65 years of age in 1979. Apparently some 38% of an estimated $584 billion 1981 budget will be spent on the elderly, which would mean $222 billion.

Within the next 20 years, however, the number of elderly is expected to grow by some 30%, to over 30 million. If their slice of the budget gets the same proportionate increase, it would rise by 12% from the current 40% to 52% of the budget. However, since the 23% increase in the number of elderly in the last ten years produced a *74%* increase in their share of the budget (from 23% to 40%) it is likely that their actual percentage would significantly *exceed* 52%. In fact, if the elderly's share of the budget increased at the same rate as over the past ten years, it would account for 100% of the budget by the end of the century.

Even the conservative view (that the elderly's share will be "only" 52% in twenty years) suggests that the additional 12% will come mainly from the current 24% allocated to defense, since defense monies constitute the largest source of discretionary funds. We must, therefore, anticipate that defense spending could be reduced to some 12% of the budget in two decades. Only a very rapid increase in the real per-capita income and rate of economic growth could so enlarge the national wealth that the proportion of the budget devoted to defense could be maintained in the face of the mounting costs of the elderly. A crystal ball is not necessary to see what will take place; one has only to look at the national budgets of Western nations further along the demographic path of below-replacement fertility.

The manner in which the division of the British budget has changed over the years is illuminating. In 1951 defense spending in Britain accounted for 24.1% of the budget and social security for 11.8%. By 1973 these figures had almost reversed: 12.6% of the budget was devoted to defense and 17.3% to social security. This change, prophetic of the change taking place in our own country, came as a result of the increased support requirements for an ever-

larger elderly population. The drastic changes in America's future economic and military strength that will take place if fertility does not increase are evident in the following fact: *for every retired American today there are five working Americans, but fifty years from now there will be only two.*

The consequences of an aging population are finally beginning to receive close study by some economists. Even assuming a return to a fertility of 2.1 and a replacement-level birth rate, the ratio of the aged population to those economically active will show an increase of 49% by 2050. And, if trends towards early retirement should continue, or the legal retirement age be lowered, the ratio of aged to active would move higher. Boone A. Turchi, of the Carolina Population Center, computes that a rise of 50% in the ratio of retired to economically active would call for an increase in real per capita income of (at least) 1/2% annually between 1970 and 2050. But if the history of the social security system is a guide, benefits will be increased because of the policy of attenuating the drop in real income of newly-retired workers. Turchi computes that to achieve an increase in real benefits of 1% a year would require a growth rate in per capita income of 2.01%. *Actually*, real monthly social security benefits between 1950 and 1972 grew at the annual rate of 3.52% which would require a growth rate of 4.53% in personal income. It is imperative, therefore, that real income grow significantly in order that the working members of the population be able to support the retired. Such growth may be possible, but is it likely?

As of now, it seems more probable that an increasingly-inflationary economy will place ever-heavier burdens on the economically-active portion of the population, while the older, nonproductive portion gains increasing political strength and presses for ever-greater benefits to meet higher living costs. Theories about the economy in a ZPG environment are outlined (by Joseph P. Spengler, William J. Serow, Alan R. Sweezy and Charles R. Weiss) in *Zero Population Growth: Implications.* Some examples: 1) Population mobility will be curtailed in a stagnant population, reducing economic mobility precisely when it is most needed to compensate for major shifts brought about by demographic change (e. g., making rocking chairs instead of baby buggies); 2) a stationary population will likely be composed of "less favorable" social and economic elements — those most able to provide for family and social requirements will be in the smallest fertility groups and will have to "be

made up for" by those elements of the population least able to provide; 3) Profit prospects will be adversely affected by worsening expectations that reduce the incentives to invest (particularly in science, innovation, and other new ventures); 4) Decision-making will tend to pass to older people with shorter perspectives; 5) When a critical ratio of working/non-working population is reached, further benefits for the retired will be paid for by deficit financing which will intensify inflation.

As the authors point out, this will mean that taxes will absorb more potential savings, the return on capital inputs will fall, the rate of increase of production will diminish (unless the rate of technological change somehow increases), and, as the population becomes older, it will be less adaptable in bringing about optimal distribution of labor. The growth rate of aggregate savings will decline. The demand for satiable goods will stabilize. As maintenance of a high level of activity without the stimulus of population growth becomes more difficult, frictional unemployment will rise; capital formation in the private sector will decline; income distribution will become increasingly unequal if the middle and upper income families have the lowest fertility.

A marked decline in population growth which results in a decline in technological progress, investment, and employment will have multiplier effects. For instance, increasing the amount of capital per worker in order to compensate for the shortage of workers is limited by the law of diminishing returns, and as more capital is added its marginal effect or profitability decreases.

Historically our national economy has been a voracious devourer of *new* manpower. In its precedent-breaking growth from the Civil War until World War I, growth was fueled by millions of immigrants. Starting with World War I, industrial growth used up the millions of small-farm families until by 1966 only 5.9% of the United States population was still agricultural. Today 48% of American women are employed, a figure that appears close to the maximum. Unquestionably any further increase in the proportion of women in industry or the military would further diminish the national fertility.

A stagnant or shrinking population being a new experience for the developed nations, the various economic theories on its effect have yet to be proved by events. However, given the fact that the dramatic growth of Western economies developed concurrently

with population growth, it would be rash not to suspect a causative relationship to the effects of a declining population.

Particularly is this true when linked to other problems such as the developing energy crises. *Considering that economic growth has been directly linked to energy use, curtailment of economic growth by energy shortages might further impair the ability of the economically active to support the retired element.*

In addition to social security benefits, we also have greatly increased expenditures for all forms of medical care for the aged and others, and these probably will continue to expand. If today's outlay for the aged is 40% of our budget, what then of the year 2000? As a shift takes place, from dollar investment in new technology, construction and expanding industry, to transfer payments for the upkeep of the retired, our national strength, including our military capability, must be seriously affected.

Space exploration, for example — despite its obvious defense/security implications — cannot be expected to be highly prized as a national priority by retirees battling to keep their social security benefits commensurate with inflation and newly arrived immigrants from undeveloped countries fighting to gain a higher rung on the social and economic ladder.

It is highly probable that the moon explorations of the sixties will appear in retrospect as the achievements of a golden age. In fact, the know-how, technological competence and personnel teams that permitted Apollo flights may well be lost — as were so many of the Roman Empire's engineering capabilities, and for many of the same reasons. "Greypower" will become an increasingly strong political force and short-term interests will take precedence.

What the West will increasingly witness is a wholesale change in its social, genetic, and political make-up. Today, Western Europe is already host to some 13,000,000 "guest workers" who have come to take up some of the manpower slack. But with these new people come major economic and social problems. Large ghettos have sprung up in major West German cities in which the children of the newcomers run in gangs. Unaccepted as Germans, unable to speak the language of their parents, these children create major social problems as they grow. In Britain, racial prejudice has flared as the British population tries to cope with the influx of blacks and Orientals. This influx of new people represents the modern counterpart of the Germanic tribes that settled the depopulated areas of Roman

Europe. The new peoples will come, because without them the economies of Western nations will founder, but they will bring about profound changes in thought, Western values and political realities.

The new peoples of the United States will doubtless be Latin Americans, predominantly Mexicans, as the Wetback of yesterday becomes the major source of tomorrow's manpower. These new populations will have different priorities. (The United States will need between 15 and 30 million immigrant workers by the year 2000, according to Dr. Wayne Cornelius, Director of the U.S.-Mexican studies program at the University of California at San Diego.)

NATO has served the West well. It has preserved a free Western Europe for a quarter century. Today it is being refurbished in the light of Soviet military buildups and NATO strategy is being rethought and updated. But will these efforts assure long term survival for NATO members? If current fertility trends continue unchanged, today's efforts to bolster Western defenses will prove to be a short-term effort that must inevitably fail. Unless radical change in the West German birth rate takes place, during the next twenty-five years our principal NATO ally will lose 25% of its population. More importantly, the loss will be in German youth. National efforts currently placed in the defense sector will have to be shifted to support of a far larger population of retirees; retirees who may well see political accommodation with Soviet pressure more to their benefit than defense appropriations for measures planned to take place long after their death. Britain, our other principal NATO ally, will continue to use an increasingly large portion of its budget for the support of a growing elderly population.

Consider these facts: the population of Britain has dipped below the 56 million reached in 1974; the "new towns" built to hold the overflow from the older cities are full, but huge gashes of abandoned housing, empty of all but the poorest, are now appearing in London, Liverpool and Glasgow; London, which had almost eight million people in 1960, is expected to have well under six million by 1990.

In Austria, where the population of some 7.5 million is also below the 1974 level, Finance Minister Annes Androsch recently warned that the state can no longer guarantee an automatic increase in old-age pensions when living costs go up. Austrian state spending on social services has doubled since 1970.

France, with a fertility of 1.84, while still holding the highest fertility of any Western industrialized nation, has shown an alarming decrease which has sparked violent debate. Some predict that the population will number only 14 million in 50 years (from 53 million today). Scandinavia, like West Germany and Britain, will hardly have viable economies. As population expert Erland Hofsten of Stockholm stated ". . . a nation with a fertility of 1.57 such as Sweden, will lose 25% of its population at every generation and will cease to exist as a viable nation in 100 years."

The Soviet Union and Eastern Europe have experienced many of the same problems. In fact, the demographic plight of Eastern Europe has become so severe that its governments have launched campaigns to try to bring about a demographic turn-around.

In East Germany cash grants are given to encourage larger families, and a $2500 loan to couples getting married. The loan, to be paid back in five years, is reduced by $500 for each child born. Working women are furloughed with full pay six weeks before and 20 weeks after giving birth. On the birth of the second or subsequent child, the mother can stay home from work for a year with full pay for 20 weeks and 70% after that. Her job is guaranteed. (These programs triggered a rise in births for 1977 of 223,152.)

The European peoples of the Soviet Union also have very low fertility, but this failure is balanced by the high fertility of its Mongolic peoples. By the year 2000 it is estimated by the United States Department of Commerce that European Russians will be only 44% of the Soviet population. This imbalance between European and Mongolic Soviet birth rates poses a possible cause for internal social strife, yet the prospect of a predominantly Mongolic Soviet Union cannot increase Western feelings of security or make easier any *rapprochement* with the West. Rather, it summons to mind visions of a latter-day Ghengis Khan destroying an enfeebled Europe.

The questions raised for a long-term defense planner are these: Is there any evidence to warrant confidence that the United States birth rate will regain or rise above replacement level? If United States fertility does not recoup, can we expect real economic growth to continue in the face of a stagnant or decreasing labor force and increasing outlays for the non-productive portion of the population? What factor will take the place of the apparent historical requirement in our economy for an ever larger labor force? Is it reasonable to expect defense spending to remain at the present proportion of

the national budget? Is there any valid reason to assume that the British model of cutting defense spending to finance social security would not be followed in the United States? If European economic and military strength collapses due to an inability to carry the burdens of aged populations, what new problems in Western defense strategy will face us? What new policies and strategies should be considered to harness the potential of Latin American manpower? Should defense planning envisage governmental efforts to increase the U. S. birth rate?

Whether or not we can regain a fertility above replacement level is one of the most important factors in assessing the nation's future.

It is probably prudent to predict that real economic growth, in the face of slowing population growth (aggregate demand) and energy constraints, will be very slow (and may even decline), and that if the defense budget becomes a markedly smaller percentage of national expenditures, the nation's defense posture will rapidly deteriorate.

An Appraisal of Future Strategy

Structuring a defense force with the equivalent of half of today's defense dollars as a consequence of falling fertility would involve fateful decisions, and may require a strategy that involves the following:

- A pull-back from Europe, ideally with negotiated reductions in Warsaw Pact forces — but if not, then *unilaterally*.
- Fast-declining reliance on European allies who, for the most part, will be faced with a similar but larger problem and who may opt for a neutral position when our troops depart.
- Increased reliance on "massive retaliation" as the "cheapest" form of defense rather than on the conventional-force capability of "flexible response."

Brazil and Mexico could emerge as our most powerful economic and military allies. In the Pacific, we may have to retreat to the island perimeter of the Western Pacific. Increasingly our security will lie in the balance of power between the USSR and Communist China. We will be unable to afford Middle East strife. Combined with a worsening energy crisis, the economic constraints of our aging population will force increasing support of Arab positions. Africa could not be considered an area for defense activities, nor could South Asia.

In short, were the United States forced by the fertility-related

economic problems outlined to adopt within two decades a defense budget proportional to only half of today's, drastic revisions in strategic thought would be required. "Fortress America" and a completely nuclear strategy may be the only defense we can afford. And our problems will be exacerbated by the continued "technological inflation" which will drive up weapons costs over and above monetary inflation.

The U. S. armed forces two decades from now may be very similar to those of Britain's today — strategic nuclear deterrent forces backed by a very small Army. The Navy, no longer called upon to protect world-wide commitments, and in the face of drastic budget cuts, will retire its carriers in favor of its nuclear role. These would appear to be the unattractive options that defense-spending cuts will force on strategy.

Today's birth rate and the historical falling trend in fertility are a stark fact; its harmful economic consequences are conjectural but almost certain, and the implied consequences for defense grave. A partial alternative to such draconian changes in strategy exists. The volunteer military could be replaced by universal national service. When privates draw only that money needed for PX sundries, it will also make possible lower pay scales across the board. A return to compulsory service would be more palatable if all were required to serve through a program wherein youth chose the form of national service they were to perform, in the military, other governmental, or non-governmental public service institutions. Such a program would also pump new and economical labor into hospitals, police forces and other public service agencies, relieving the demand for government funds in support of programs such as law enforcement, Medicare and Medicaid. Although "unthinkable" now, such a combination of revised strategy and low-pay universal service may soon receive serious consideration.

Today's strategist and policy maker must lift his thoughts higher than the budgetary considerations of the next fiscal year. He must face the disheartening but evident fact that Western fertility is already far below the replacement level and all present indications are that — without major public programs to bring about an increase — it will either remain at this level or sink lower. United States taxpayers today annually provide at *least* 60 million dollars (some put the figure much higher) to support planned-parenthood-type activities which exert a continuous depressant on national fer-

tility. We must realize that just as there is neither perpetual motion nor a cornucopia of plenty, a continuing rapid decline in the numbers of young, and an equally rapid increase in the number of old, unproductive citizens, must entail economic, military and social consequences of extreme magnitude. We must realize that there is nothing immortal about our nation or civilization and that if the infertility of the West continues, Western society and power *cannot*.

Unless our fertility is restored, we Americans shall, like so many nations before us, give way to younger, more vital peoples.

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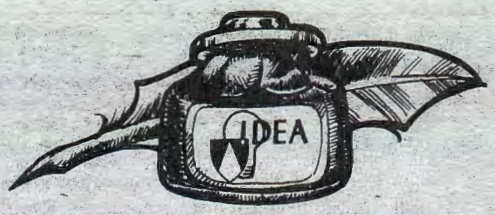

VOLUME I NUMBER ONE — SPECIAL HATCH PRO-LIFE FEDERALISM AMENDMENT ISSUE

PUBLISHED BY INFORMATION FROM THE DOMINICAN EDUCATIONAL ASSOCIATION

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In the Lord of all life,

Charles Fiore, OP

Father Charles Fiore, O.P.
President

Information from the Dominican Educational Association

What Is The Hatch Human Life Federalism Amendment?

Senator Orrin Hatch (R-Utah) talks about S.J. 110 -- the Hatch Human Life Federalism Amendment. (From his introductory remarks, inserted into the Congressional Record, September 21, 1981.)

Mr. President, I am proposing an amendment to the Constitution today -- the human life federalism amendment -- that would overturn the infamous decision of the U.S. Supreme Court in *Roe v. Wade* 420 U.S. 113 (1973). This amendment would restore to the representative branches of government the authority to legislate with respect to the practice of abortion.

Whatever one's perceptions about abortion, it is difficult to argue with the proposition that Roe against Wade has created a regime of abortion on demand, a national policy of abortion without restrictions of any significant kind. It is this status quo that would be overturned by the proposed human life federalism amendment.

Apart from the national policy of abortion that it spawned, the Roe decision has been criticized broadly as an exercise in jurisprudence by observers of varying political persuasions and varying perspectives on abortion. In dissent in the Roe and Doe cases, Justice White observed:

> I find nothing in the language or history of the Constitution to support the Court's judgment. This Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing State abortion statutes. 410 U.S. at 221.

Justice White in his Roe dissent aptly

Continued on Page 2

The Hatch Amendment: New Hope for a Pro-Life Strategy

by Professor William H. Marshner

We believe in principle. We believe in "having of government those laws by which our lives and our goods may be most our own." And unlike sophists, we acknowledge that our lives *began* in a mother's womb. We think it illogical to ask legal protection for ourselves, while denying such protection to young ones *identical* to what we ourselves once were.

If this basic principle is clear, it must yet be balanced by another. The intimate relation between mother and unborn child is unique in human affairs. A mother risks her life in giving life. In the past 40 years, medical science has reduced this risk almost to the vanishing point, yet the principle remains: *two* lives are potentially in conflict, where human life is transmitted. For this reason, the moral and legal handling of abortion has always required mature, balanced and delicate judgment.

The tradition of our Civilization bears witness to such judgment, and the legislative process of our own country, over the years from 1820 to 1900, had reached a magnifi-

Continued on Page 3

Contents:

What Is Hatch Amendment?

Continued from Page 1

characterized the majority decision when he observed:

> The upshot is that the people and the legislatures of the fifty States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against the spectrum of possible impacts on the mother on the other hand.

It is this result that the proposed human life Federalism amendment is intended to overcome. The proposed amendment would restore to the States -- as well as invest in Congress -- the authority to legislate with respect to abortion.

In removing the abortion controversy from the Federal judicial branch, the proposed amendment would place the debate within those institutions of government far better equipped to deal with the issue. By its very nature, the judiciary is the wrong forum to resolve the enormously difficult problem of abortion. Because they cannot control the specific types of cases that come before them, and because they are limited in their ability to fashion compromise solutions to difficult issues, the courts are entirely the wrong place within which to argue about abortion.

Let me conclude by saying to those who would argue that this amendment represents a concession to, or a compromise with, a morally indefensible policy. I do not believe that this is true. Not only would the proposed amendment overturn Roe against Wade, but it would, arguably, go further by clarifying that Congress, as well as the States, possesses authority with respect to abortion. It would restore the status quo prior to the Roe decision -- and then some.

While I would personally prefer that we go further, there can be absolutely no doubt in anyone's mind that there is not currently the kind of consensus for this action -- either in the country or in Congress -- that would permit this to be done. Nor is such a consensus imminent. The longer that abortion on demand continues, the more that it becomes institutionalized. I do not believe that we can permit this to happen.

Once, however, we can establish in the Constitution the principle that abortion is not an ordinary, routine medical operation, I believe that we can begin to reeducate all the American people to the cruel realities of abortion. Acceptance of this principle in the organic law of our land will better enable us to carry on education and information efforts.

The law is, in fact, a teacher. We must give it that opportunity before it is too late, before the lesson goes permanently unlearned.

I urge the support of my colleagues for the proposed amendment -- not only those who share the full extent of my concern about abortion, but those as well who are uneasy at any aspect of the structure that has been erected by the Supreme Court, those who are hesitant at the process by which the abortion revolution has been wrought, and those who recognize the social divisions that have been caused in this country by a Court that ignored the strengths of the democratic, representative processes of government in resolving differences among citizens.

Senator Orrin Hatch

About This IDEA . . .

I.D.E.A., Inc. (Information from the Dominican Educational Association, Incorporated), is a non-profit, tax-exempt 501 (c)(3) organization wholly engaged in religious, educational and charitable works upholding pro-life and pro-family values.

Organized in 1971, I.D.E.A. has provided educational films, books, pamphlets, slides/cassette programs and other materials to schools, organizations and individuals at discounts. It has also from time to time assisted in organizing emergency pregnancy counseling services in the United States and abroad.

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Hope for Pro-Life Strategy

Continued from Page 1

cent solution. Except where the mother's life itself was directly in peril, abortion was everywhere banned by criminal statute; yet the penalties were humane and were aimed at the abortionist rather than the unfortunate mother. It was this solution which the Supreme Court, in a fit of ideological feminism, overthrew in 1973.

In the years since that terrible decision, a strong Pro-life Movement has sprung up, has found its natural alliances with Conservatism, and has matured its own thinking on the Constitutional protection of unborn life. As not all conservatives are fully abreast of that thinking, let me take a moment to summarize it, especially since it is politically important. Conservatives friendly in general to the pro-life cause must realize that no pro-life legislation can be passed which is not in harmony with the mature thinking of the Pro-life Movement, as reflected in the strong, grass-roots organizations. I think I can summarize their thinking in five points.

The Pro-Life Movement seeks a Constitutional Amendment which does the following things:

(1) applies to unborn children at every stage of their existence and development, from fertilization onward, without exception, and

(2) makes all of those to whom it applies legal "persons" in the Constitution, for purposes of the right to life, without necessarily making them legal persons for purposes of other rights, and

(3) thereby requires the state legislatures and/or the Congress to protect the life of the unborn, and

(4) hence empowers the legislatures and/or the Congress to pass criminal statutes establishing penalties for abortion and for abortion-related activities, including the manufacture and sale of abortifacient drugs and devices, and

(5) so overthrows *Roe v. Wade* and eliminates from the Constitution the right-to-privacy for abortional acts, which the Court invented in *Roe v. Wade*.

In the light of these, the Movement's requirements for a definitive Human Life Amendment (HLA), consider the following language, which Sen. Orrin Hatch introduced as S.J. Res. 110, on September 21, 1981, under the title, "Human Life Federalist Amendment":

> 1. A right to abortion is not secured by this Constitution.
>
> 2. The Congress and the several States have the concurrent power to restrict and prohibit abortion: Provided, that a law of a State which is more restrictive than a law of Congress shall govern.

It is plain that this language fulfills three of the Movement's five requirements for a HLA. It applies to all of the unborn without exception; it empowers Congress and the states to pass criminal statutes, and it overthrows *Roe v. Wade* with its invented right-to-privacy in terminating pregnancy. Still, there are two requirements which it does not fulfill: it does not establish the legal personhood of the unborn, and (hence) it does not require or obligate the legislatures to protect them.

These two defects are of unequal value. The mere failure to create, in so many words, a Constitutional *obligation* on the states to act in a certain way, is of little practical importance. The reason is that the legislatures cannot be compelled to act against their will in any case. No federal court has ever ordered a state legislature (much less the Congress) to pass a statute. Therefore, even the strongest Constitutional provision is a dead letter, unless the legislatures are in fact *willing* to pass the implementing legislation. But here the failure to obligate is combined with the failure to establish legal personhood, and the two things together are very serious. For, so long as the unborn are not recognized as persons, the danger of overly liberal, overly permissive statutes remains.

For this reason, it is clear to almost all pro-life leaders that the Hatch Amendment is *not* a definitive HLA. Nevertheless, this point is not decisive for one's political judgment, unless one is making a further assumption, namely, that our immediate political business is to secure a definitive Amendment. It is *this* assumption which I, and a growing majority of pro-life leaders, have come to reject. Ever since *Roe v. Wade*, our strategy has called for a one-shot solution through a definitive Constitutional Amendment. But now our strategy is changing; we are beginning to see the necessity of wisely chosen *interim* measures. The Pro-life Movement has begun to learn what the Conservative Movement has known ever since the French Revolution in Europe and ever since the New Deal in America: once the cake of custom is broken, once the Revolution has done its damage, there is no easy way back to the *status quo ante*. Distempered States require a prudent medicine. In what follows, then, I have two aims: first, to explain the grounds on which I have come to reject the older, one-Amendment strategy, and, second, to defend the Hatch language as the appropriate choice for Amendment I of a two-Amendment strategy. I propose to begin with a historical analogy.

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Abortion and slavery, Dred Scott and *Roe v. Wade:* how many times have we used that comparison? We have used it for the moral light it sheds on the pro-life cause. May I suggest that it also sheds historical light? I think it illuminates our political position.

Because the abortion "liberty" is of such recent vintage, people tend to think (at least, I used to think) that slavery must have been far more entrenched in American society, in its day, than abortion is today. Hence we imagine that abortion can be turned back and abolished more easily than slavery was. A decade's work, a Republican Senate, a definitive Amendment, and *voilà*. Let me puncture that illusion.

The first and best measure of how entrenched an evil is in a society is the number of families involved in the practive of it. In 1860 there were roughly 7 million white, nuclear families in the United States, of which less than 1.5 million lived in the deep South. Among the Southern and Border-State whites, slightly less than 384,000 persons owned one or more slaves in 1860, and of course it tended to be the same families which owned slaves year-in and year-out. It was a rather static institution. So, if we make the generous assumption that the number of *different* families involved in the slave-holding evil was the same as the number of slave holders, we are talking about an evil in which, in its heyday, no more than one American family in twenty was involved.

Now look at abortion. It is not a static practice, tending to involve only the same families year after year, but a spreading epidemic. There are roughly 50 million American families today, and there have been over 10 million "legal" abortions in the eight years since Black Monday, 1973. If we make the generous assumption that fully half of these abortions have been repeat performances on women who had already had at least one abortion during the same eight years (and I think one-third would be a better guess, but let's concede the higher one), it remains the case that over 5 million *different* women have had abortions in these eight years, involving close to 5 million different nuclear families. That is one American family in ten, or 10% of the total *already*, and the number is going up every year. If it takes us just another seven years, until 1988, to ratify a Human Life Amendment, it is not improbable that abortion will have been embraced and practiced by a full fourth of all American families by the time it is outlawed. So by this measure, abortion is already a more entrenched evil in our societ than slavery was in 1860.

In a moment, I want to look at another measure of an evil's entrenchment. But first I want to explain why it is illuminating to look at *family* involvement in a bad practice. Bound together by blood or marriage, family members are the persons most likely to justify one another's behavior. It must have been hard to be a fiery abolitionist, if your brother owned a slave. It is now hard to think of abortion as murder, when your sister has had one. As a result, the network of family sympathy is a growing network of abortion-sympathy in today's America.

And the sheer extent of the thing is not the worst of it. What really scares one about this spreading sympathy is just the fact that it is *not* ideological. It is not feminism which is spreading (that's dead), nor gnosticism, nor any of those other "isms" which, by their very nature, are the sort of thing only a minority ever believes in. What is spreading is the concrete and convenient conviction that, in a sad case, like my niece's case, like my cousin's case, an abortion is the right thing. To such thoughts majorities are seduced. And no other kind of thought -- no higher, deeper, or more consistent thought -- is needed to doom the politics of our Amendment.

Now look at another measure of abortion's entrenchment. If the weakness of an evil is the strength of the forces arrayed against it, slavery was weak. The power of opinion was against it. From the print media to the pulpits, abolitionism dominated the nation's intellectual, literary and moral elites. Pro-life sentiment enjoys no such advantage; quite the contrary. Also, the Republican electoral victory of 1860 was the victory of a party whose very *raison d'être* -- not a mere plank of whose platform -- was abolition. If 1980 were a pro-life analog to 1860, Ellen McCormack would be in the White House today, not Ronald Reagan. In short, the forces arrayed against slavery were *gargantuan* compared to the forces now arrayed against abortion.

And still slavery proved intractable. It took a war, a confiscation, an armed occupation, and three Constitutional Amendments to get rid of it. Look only at the latter: it took one Amendment just to abolish slavery as a legal status (the Thirteenth), so as to bring the Constitution into line with the reality already created by the Union army; it took another Amendment (the Fourteenth) to prevent the covert re-introduction of slavery under other names; and it took a third Amendment (the Fifteenth) to give freed men the means of defending their gains at the ballot box. None of which Amendments would have been ratified, historians tell us, without the solid bloc of 10 states which were held at gunpoint, that is, forced to ratify or face indefinite occupation as conquered territory.

What a *procession* of drastic steps! Do they not tell us something about the cure of entrenched evils? Do they not suggest, and more than suggest, the futility of a one-punch solution?

Let me come at this same lesson from another angle, a very different historical analogy. Until well past the middle of the 19th Century, there was very little beer brewed in this country, wine had to be imported at great expense, and the water was of suspect quality in many places. As a result, the popular American drink was whiskey, to an extent almost unimaginable to us today. At a nickel a gallon, the stuff was used to wash down every meal, to season the cuisine, and to cure all ills. The resulting social evils were staggering, and the Temperance movement arose as a response to them. It took five decades of work before the Temperance crusaders had produced enough dry states to try for total victory, a Constitutional Amendment. In the meantime certain social realities had changed: clean water had become the rule, and the European immigrants, with their milder brews and home vineyards, had introduced some less harmful drinking habits at popular prices. But the Temperance people were not interested in these nuances; their political ideal of enforced total abstinence had been formed in the harsher climate of the 1850s. They pushed for a single, definitive Amendment, and in 1919 they got it. What turned their victory to ashes just 14 years later was a flood-tide of opposition which need never have existed, if they had not made the mistake of going after an entrenched practice with an all-in-one Amendment. If they had approached the matter in stages, e.g., if their first Amendment had eliminated only hard liquor, their work might have won a broader consensus, stood the test of time, and paved the way for further steps towards their ideal.

I admit that this analogy is dangerous because it is easily misunderstood. I am not suggesting that having a drink is at all like having an abortion. For one thing, there are no "milder" forms of murder. Pro-life people, therefore, do not have the moral luxury of being able to compromise or settle for half-a-loaf "in the interim." So the "stages" which I recommend for pro-life victory *cannot* be stages in which some abortions are explicitly tolerated, some children left cruelly unprotected. I am arguing for stages, rather, in which different Amendments do different jobs, *each* Amendment being exception-free, and *each* stage being morally acceptable, exactly as our ancestors eliminated slavery. The Prohibition analogy merely illustrates how an entrenched practice can defeat the best intentions of an overhasty, one-Amendment strategy.

Continued on Page 6

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The Hatch Human Life Federalism Amendment

Senate Joint Resolution 110

House Joint Resolution 372

"A right to abortion is not secured by this Constitution. The Congress and the several States shall have concurrent power to restrict and prohibit abortion: Provided, that a provision of a law of a state which is more restrictive than a conflicting provision of a law of Congress shall govern."

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Father Charles Fiore Supports the Hatch Amendment

(Testimony of Father Charles Fiore, Chairman, National Pro-Life Political Action Committee, Before U.S. Senate Judiciary Subcommittee on the Constitution, Dec. 7, 1981)

Mr. Chairman and Members of the Subcommittee:

Thank you for allowing National Pro-Life Political Action Committee to participate in these important hearings.

National Pro-Life PAC endorses SJR 110 -- the "Hatch" or "Federalist" Amendment to the U.S. Constitution -- as a practical and effective way of providing Congress and state legislatures with a means to regulate and prohibit abortions: rights which *de facto* and by constitutional precedent were the states' before January, 1973, and which, in the opinion of many, the Supreme Court "usurped" in its broad and unprecedented *Roe vs. Wade* and *Doe vs. Bolton* decisions.

Above all, what SJR 110 attempts is to *put the issue of abortion before the Congress and the state legislatures for debate and action* -- nothing more, nothing less.

It is true that SJR 110 does not address the many real and substantive issues which are of great concern to pro-lifers and, I expect, to all men and women of good will, not the least of which concerns the point at which human life begins *in utero*. It ignores these issues, not because they are unimportant, or because the author and proponents of SJR 110 are unconcerned with them, but because in the eight years since the Supreme Court's "raw use of judicial power" (as in his dissent, Justice White characterized *Roe vs. Wade*) Congress has yet to re-assert the constitutional prerogative of the legislative branch over this (literally) "life and death" issue.

This constitutional amendment is both simple and forthright in what it attempts. At the very least it would take the matter of abortion out of the Courts' grasp, and return its regulation and/or prohibition once again to the legislative branch where historically and, most maintain, constitutionally it rightly belongs. I find it encouraging that in recent weeks, the Attorney General of the United States, Mr. Smith, has added his voice to the growing chorus of Americans who suggest that the federal courts withdraw from the business of judicial activism.

I for one want the abortion issue in all its stark and terrifying ugliness to be thoroughly debated on the floors of the Senate and House, uncomplicated by the matter of whether the taxpayers should be required to pay for it.

I think that annual reports of at least 1,500,000 unborn, conceived by human parents and so -- by common wisdom -- human (even if some experts will not agree), make this issue more vital to our national well-being and interest than any other, even the admittedly serious problems of the national defense and economy. The human individual is unique and irreplaceable. The "blood-dimmed tide" of abortions which now has this "home of the brave" awash in innocent blood represents a precious and sacred resource for which the national conscience becomes increasingly responsible each passing day that its leaders refuse to deal with it.

It is fashionable, forty and fifty years after the Nazi devastation of lives and property in Europe, to condemn with clear hindsight what they did, and piously to ask "How could it happen? Why didn't more leaders, in and outside of Germany, speak out and oppose the Nazis and their madness?"

What will they say of this generation of Americans, and this epoch in our national history in whatever future remains for us? And, if I may be allowed the religious reference, on the last day when each of us (even members of the A.C.L.U., N.O.W., N.A.R.A.L. and R.C.A.R.) stand exposed before the Just Judge, He will not interrogate us first of all on the kilotonnage in our nuclear stockpiles, on whether we worked to reduce the balance-of-payments deficit, or to preserve "freedom of choice." Rather, as He has already warned us, He will ask us *what we chose with our freedom* for one another: "Whatsoever you did to the least of these, my brethren, behold you did it to Me!"

I understand very well, Senators, what the campaign managers and political experts advise in candidates' seminars: that abortion is a "hot potato," it is a "no win" issue that "cuts both ways." All of that, I think, is true.

But let me add one codicil -- it is *not* going to go away until all innocent human life, and each innocent human life is once again protected by the laws of the land. We are not going to allow this issue to be banished to the outskirts of the public consciousness (as on January 23, 1973, so many editorial writers benignly advised). And the sooner it is settled to the benefit of the dependent unborn and born, all of them our brothers and sisters, the better all of the rest of us (perhaps including public officeholders) will like it, and will breathe easier.

I founded National Pro-Life PAC in 1977. It was the first, and remains the most successful right-to-life political action committee in the nation. Since 1967, however (before the pro-life "movement" as such was organized, and five years before *Roe vs. Wade*), I travelled the country lecturing in what is now called pro-life/pro-family education.

I know that humane solutions to human problems are available. Abortion does not

Continued on Page 5

Father Fiore Supports Hatch

Continued from Page 4

solve the grinding poverty and depression of a family whose breadwinner is jobless. Abortion does not alleviate the dead-end lifestyle of a mother who is a school dropout, or of an adolescent father who shuns responsibility. Abortion does not heal the trauma and hurt of the victim of rape or incest. And abortion does not tap the pofential for greatness of the children of the poor who, like millions before, can overcome their human and social deficits to become the political leaders, the writers, the entertainers, the doctors, scientists, engineers and businessmen, religious leaders and teachers whom we always need. Do the next generation's geniuses necessarily come from the ranks of the so-called "wanted," or society's privileged?

Abortion is figuratively and literally destroying our nation from within. It is a dead end at life's beginning. It slams the door on hope. It does not build up; it tears down. It responds to human suffering with clinical coldness that lacks real compassion or understanding for mother, father and child.

The "Hatch/Federalist" Amendment can be the first legislative step in halting the carnage which has become a symbol of our growing moral bankruptcy and an international disgrace; one that says more about our attitude towards the poor and human suffering than any grand public utterance and program of aid or relief.

Specifically what would SJR 110 accomplish?

It would give our *elected* representatives the means to regulate and prohibit abortions. Under the current Supreme Court edict, abortions are permissible with relatively few restrictions throughout the nine months of pregnancy. SJR 110 would *empower* an elected (and, presumably, representative) Congress and state legislature -- not the Courts -- to establish regulations and standards in these matters.

But law is more than simply a guide for human behavior. It also *teaches,* i.e., it *forms* that "public morality" which ethically underlies a civilized society and which, apart from religious or sectarian tenets, provides a basis for the common good.

SJR 110 can be the first step, therefore, in re-establishing in the public consciousness (but especially in the minds of the impressionable young) that innocent human life is not a negotiable commodity, that it is not disposable at the carrier's convenience, and that true compassion and charity must react with revulsion at the increasing violence in our hospitals and clinics, as on our streets.

SJR 110 conforms to majority opinion in virtually every reputable opinion poll, in which Americans indicate that unrestricted abortion is not desirable.

I especially want to emphasize that SJR 110 does *not* represent the "imposition of a particular religious view on a pluralistic society." First of all, it says nothing about public, much less religious, morality as such. Its only objective, as we have noted, is to *empower legislators to legislate* in an area usurped by "the imperial judiciary."

Furthermore, the assertion argued by Ms. Copeland before the Supreme Court in *Harris vs. McRae* (1980) that opposition to abortion is necessarily a religious point-of-view, elicited open laughter from the Justices, and was subsequently specifically denied by the Court in upholding the constitutionality of the Hyde Amendment.

SJR 110 would, by act of Congress and ratification of three-fourths of the states, overturn the Supreme Court's elevation of a newly-devised "right" -- the "right to privacy" -- over another right specifically enunciated in the Declaration of Independence and in centuries of Western jurisprudence, the "right to life."

Mr. Chairman and Members of the Subcommittee, I want to especially emphasize here, and for some of my pro-life brethren, who have criticized this Amendment because in its simplicity it does not *ipso facto* prohibit abortions, that *all constitutional amendments* -- not just this one -- *require the passage by the several states of enabling legislation.* SJR 110 speaks, however, of a *national* standard which Congress could pass and which would require the President's signature, and "concurrent" state standards, provided that although state standards might further restrict abortions within a given jurisdiction, they could not be broader or less restrictive than the national standard set forth by Congress.

But it is not a fair criticism of SJR 110 to maintain it is deficient because it requires states to pass enabling legislation, when such a requirement is true of all constitutional amendments and the Human Life Statute.

And this is why I also find it difficult to comprehend the furor from abortion advocates over SJR 110.

What are they afraid of -- public debate in Congress and the statehouses; an up-or-down vote by our elected representatives? For years abortion advocates have been telling Americans that a majority of us "favor" abortion-on-demand. Now, when SJR 110 would prove their point and, presumably, settle the matter democratically, in open and thorough debate and voting, the cry goes up that pro-lifers are attempting to "impose their morality" on the democratic masses, or somehow to scuttle "the American Way"!

I regret that there are also some in the pro-life movement who similarly are descrying SJR 110 as a "sell-out" of movement hopes or, because this Amendment does not speak to the personhood of the unborn (a vital matter dealt with in separate legislation, the so-called Human Life Statute or Bill), as simply unacceptable.

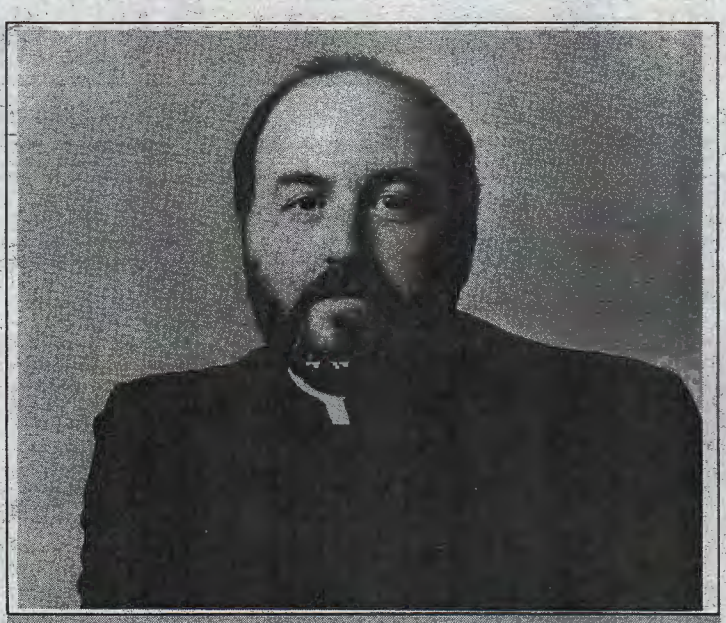
First of all, I can assure you, Mr. Chairman and Members of the Subcommittee, that this opposition is louder than its numbers suggest. Unfortunately, some pro-life opponents of SJR 110 attempted to "poison the well" of public opinion even before Senator Hatch had finally formulated and introduced this legislation. An Associated Press news release which received wide circulation, characterized SJR 110 before it was in final form and before it was introduced, in a manner calculated to upset pro-lifers. I believe that that AP story remains responsible for much of the misunderstanding among pro-lifers about the Amendment still. I am surprised and angered at such "disinformation" tactics by a few in the movement. They are disreputable and cynical, and are unworthy of the members of the movement who have devoted so much of their substance and their years to our goals.

National Pro-Life PAC sees SJR 110 as an ideal first step, precisely because of its simplicity (it simply *authorizes* the legislative branch to legislate regarding abortion), without encumbering the debate and vote on this fundamental constitutional issue with the real and substantive issues of when life begins, what constitutes personhood, and more which are not so readily considered, and about which there is less unanimity in Congress and the states. Nevertheless these issues and others will be addressed by Congress and the legislatures in due course.

Parenthetically, I must add, Mr. Chairman and Members of the Subcommittee, that in the light of opposition by a few pro-lifers to SJR 110, I am greatly encouraged and pleased that Congressmen Hyde and Dougherty -- both staunch pro-life leaders and advocates of the Human Life Statute or Bill -- have indicated that they will co-sponsor and work for the passage of SJR 110.

What SJR 110 does, in parliamentary language, is to "divide the question" of legislative authority over abortion from the more substantive questions of life, personhood and their protection. To so divide the question is, we believe, logical, wise, and *in no way a dereliction of pro-life principles.*

Please permit me a moment more to note my gratitude and pride at the recent, virtually unanimous vote of the National Council of Catholic Bishops in favor of SJR 110. I believe it was a sign both of their mature understanding of the political process and realities, and of the old scholastic axiom, *primum in intentione est ultimum in executione,* i.e., the first thing intended is the last thing achieved.



"SJR 110 conforms to majority opinion in virtually every reputable opinion poll, in which Americans indicate that unrestricted abortion is not desirable."

-- Father Charles Fiore

The Bishops have consistently maintained that they favor "the strongest amendment *achievable.*" Certainly, as they have stated, they would prefer passage of a single human life amendment incorporating all the objectives of pro-lifers everywhere. But they have coupled their determination to protect human life with the principled pragmatism that, although not abandoning those objectives, nevertheless takes realistic stock of the times, the make-up of the legislative branch, and more.

They know that the movement's objective or "intention" may, realistically, have to be its *final* constitutional achievement, not its first. The Bishops' recent public debate and vote, which some observers now are characterizing as a "sell-out" of pro-life principles, deserves praise -- not scorn. It was not a retreat of any kind, but their admission that the new approach that SJR 110 represents may in fact *save more lives sooner* than another, ideal human life amendment that has no chance of passage now or in the foreseeable future.

I am, I repeat, proud of our Bishops and grateful to them. And I know that our many Protestant and Jewish brethren too welcome this initiative.

SJR 110 confronts the issue of "whose country is it, anyway?" -- the Court's or the people's. It addresses the question too long avoided in this nation, of the separation of powers between the legislative and judicial branches of government, i.e., the issue of rampant judicial activism.

In all candor, Senators, and with apologies to you, Mr. Chairman, SJR 110 is so innocuous in its attempt to remove abortion from judicial *fiat* and return it to the legislative process where it properly belongs (and where it was being dealt with before *Roe vs. Wade* in the statehouses), that I believe only a confirmed abortion advocate could logically refuse to send it to the floor of the Senate for debate.

If a Senator wishes to uphold the Court's judicial activism in this matter of abortion, let him or her vote against SJR 110 *on the floor of the Senate,* on the record, where constituents and the nation may see the votes and listen to the rationales. But give us all the opportunity to *have* the debate and, as is our right as voters whose representatives you are, to judge your thinking and your votes according to our own lights.

The people have that right to accountability. And they have the right to demand that their public servants go on record before November, 1982.

Mr. Chairman and Members of the Subcommittee, once again National Pro-Life PAC thanks you for your invitation to testify.

Hope for Pro-Life Strategy

Continued from Page 3

I turn now to another illusion which feeds the idea that we can eliminate abortion through a single Amendment.

Dred Scott was a narrowly conservative decision. It overthrew a gentlemen's agreement called the Missouri Compromise, but it altered absolutely nothing in the meaning of the Constitution, as it was then understood. *Roe v. Wade,* by contrast, was an aberrant decision, inventing a "right" which no one ever knew existed, and departing from long-settled Constitutional principles with respect to the protection of the unborn child. So, people are tempted to think (at least, I always was) that it will be a lot easier to correct an isolated mistake, like *Roe v. Wade,* than it was for our ancestors to alter a deep pattern of the Constitution. Therefore one Amendment will be enough.

What is overlooked in this illusion is how bad a mistake *Roe v. Wade* was. A hundred and thirty years ago, stricter anti-abortion laws began to spread among the several states and territories *at roughly the same time as* people began to absorb the scientific discoveries about fertilization, the starting-point of human life. This rough simultaneity had an odd consequence: the Courts never had to deal explicitly with the unborn child's status *as a person.* Since its life was already protected *de facto,* as were certain property rights, beyond which the unborn child had no practical interests, the Courts did not have to face the personhood question. Thus, for 110 years, from the 1850s to the 1960s, the status of the unborn child in American law was secure in practice but ambiguous in theory. Was it *legally* a person, or wasn't it? Were the states *obligated* to protect it (e.g. under the 5th and 14th Amendments), or weren't they? The Courts never directly said. Then came the crisis. In the late 1960s, certain states began to liberalize their abortion laws, with the result that fetal lives lost all effective protection in those states.

Now we all know what *should* have happened. The *liberalized* laws should have been challenged as unconstitutional (e.g. under the 5th and 14th Amendments). It was hard for pro-lifers to get standing to sue, but the federal courts *should* have accepted such suits, and the upshot *should* have been a Supreme Court decision doing three things: (1) acknowledging the facts of life, (2) interpreting "person" to include the unborn, and so (3) striking down the liberalized statutes. Of course, none of that ever happened. But in order to appreciate the gravity of what did happen, it is necessary to think about another outcome which might have happened.

Suppose the same sort of challenge to a liberalized law had reached the Supreme Court, and suppose the court had once again (1) acknowledged the facts of life, so as to acknowledge that the state had a compelling interest in protecting fetal life from conception onward, *if it wanted to;* but suppose the court had (2) declined to hold that the unborn were "persons" in the legal sense of the 5th and 14th Amendments, so that the state was not obligated to protect them, *if it didn't want to;* and suppose that the court had therefore (3) let stand the liberalized law. Now such a decision would have been bad enough! In fact, it would have *created* for abortion just the same sort of legal situation as *Dred Scott* inherited and re-affirmed for slavery. One and the same class of human beings would have been treated as persons in some states and as non-persons in others.

How much worse than *Dred Scott,* therefore, was the real *Roe v. Wade*! By (1) ignoring the facts of life and (2) rejecting the claim of legal personhood, the court was able to (3) invent a Constitutional right-to-privacy, thanks to which (4) all state and federal legislative bodies were *denied permission* to protect unborn life in virtually all circumstances. So *Roe v. Wade* was not a single mistake, easily undone, but four huge mistakes very complicated to undo in a single Amendment.

Now to tie all of these thoughts together: what conclusion do I draw from the slavery-abortion analogy? It is that we need to recognize two things. First, the overthrowing of an entrenched evil requires a stepwise approach, and second, the correction of *Roe v. Wade*'s mistakes will require two Amendments rather than one. We need an initial Amendment which will restore *legislative authority* to protect unborn life by outlawing abortion, and which will locate this authority primarily in the Congress of the United States. This Amendment will undo the third and fourth mistakes of *Roe v. Wade,* and it will do so on the national level, as a matter of policy to which *all* states must conform. A second and definitive Amendment is also needed, such as the NRLC Amendment or the Helms-Dornan "Paramount," which will undo the first two mistakes of *Roe v. Wade,* specifying, and grounding in their status as human beings, the nation's *obligation* to protect the unborn.

Such a strategy not only has what it takes to meet the complexity of the moral and Constitutional crisis manufactured by *Roe v. Wade* but also, and more importantly, has what it takes to arrest, roll back, and eliminate the entrenched evil unleashed and fostered by *Roe v. Wade.* I mean, the two-Amendment strategy will maximize our political strengths, minimize the enemy's and dis-entrench abortion in such a way that our definitive Amendment, when it comes, will not be a pyrrhic victory like the 18th but a solid victory like the 14th.

Let me now argue for each of these contentions. I have done with historical analogies; I turn to contemporary facts.

First fact: the best demonstrated strength of the pro-life movement is in Congressional politics. In a remarkable number of states, we have enough grass-roots organizations, enough dedicated volunteers, to tip the scales in favor of the otherwise viable candidate who endorses our position. To speak of the Senate alone, we have made the crucial difference in the elections of Humphrey, Jepsen, Grassley, Denton, D'Amato, East, Symms, and many other Republicans. We even saved two Democrats: Eagleton and Hart. This is the sort of thing we do well, and from that fact I draw a very simple criterion for what our overall, long-range strategy ought to look like. It is this: *the more our strategy allows us to approach our final goal by rewarding and punishing, electing and defeating members of Congress, the better our strategy matches the real talents and resources of our movement.*

Neither the one-Amendment strategy, nor the interim plan based on pushing the Human Life Bill alone, meets this criterion. Both would have the effect of removing the substantive abortion issue from Congress altogether, after a single initial vote. Suppose, by a miracle, that our definitive Amendment succeeded in winning two-thirds support in both Houses of the present Congress. Then, for the next seven years, our Congressional friends and contacts would be largely useless to us, as the battle shifted to the 99 Houses of the state legislatures, where our opponents would need to do nothing more than delay and hold 13. And suppose, by another miracle, that the Human Life Bill not only passed the Congress but survived an initial round of Court challenges. Then again our Congressional friends and contacts would be useless to us, as the battle shifted to the Courts, where a savage struggle would have to be waged over the Bill's scope.

By contrast, the two-Amendment strategy assigns a crucial and on-going role to Congressional politics. Our initial Amendment would be a "federal powers" Amendment, giving to Congress (and concurrently to the states) Court-proof authority to protect unborn life and to prohibit abortion by simple majorities. Hence the number and quality of our friends in Congress would be crucial not only after the Amendment is ratified but also *while it is being ratified.* Nervous or undecided state legislators could be briefed and lobbied by pro-life members of Congress, who would be in a position to give assurances, and to make deals, as to what sort of abortion legislation Congress would be likely to pass, in the event of ratification. And no doubt, many deals would be made. But as long as the deals garnered votes for ratification, I would not shed a single tear over them. For with ratification once secured, Congress again would be under pressure *from us.* Year after year we would be back to tighten the language and to close every loophole in the national standard of protection, until the ground was prepared for the final Amendment.

In sum: the other strategies use our best talents and resources solely for an initial vote, after which they become useless to us. But the two-Amendment strategy uses them beyond the initial, Congressional vote on Hatch to meet three further needs: (1) to help sucure the Amendment's ratification, (2) to put the abortionists out of business through the passage of Court-proof national legislation, and finally, (3) to prepare the way in Congress and in the country for our definitive, second Amendment.

Next fact: our string of electoral victories is out of all proportion to our organized strength. NOW also has its grass-roots chapters; the NEA can turn out an army of volunteers; but their left-liberal positions are *unpopular* with the voters. The liberal-Democratic coalition of which *they* are a part is in eclipse. We, however, have been fortunate in the choice of our coalition partners, to the popularity of whose issues we have been able to add the popularity of our own. Our ability to make the difference in anyone's election depends upon the *rest* of that coalition, and we shall continue to be welcome in the coalition only so long as our issue remains, on the whole, an asset to its candidates, that is, only so long as our pro-life position remains higher in popularity than the *perceived* alternative to it. In this respect, too, we have been fortunate. So long as the perceived alternative to pro-life was radical feminism, our popularity was assured. The people were solidly with us, too, in our fight to cut off the federal funding of abortions. But now things are changing. When the High Court upheld the Hyde amendment, the irritant value of the funding issue disappeared from the public mind. In about a year, when the ERA finally dies, the feminist organizations will melt from the national scene (and from the national memory) like dirty snow in a spring thaw. The days are coming, if they are not already here, when the perceived alternative to pro-life action will be nothing but the permissive *status quo,* supported by popular pseudo-ethics (situationism) and by that family network of abortion-sympathy which I mentioned earlier. What will happen to our popularity then? In our kind of politics, it can be dangerous to outlive the ugliest of one's enemies.

From all of which I derive a second simple criterion: *the more our strategy allows us to act now, while our popularity survives and our coalition is riding high, AND the more it allows us to act in ways which the whole coalition supports, the better strategy it is.*

By this criterion also the two-Amendment strategy is superior to its one-Amendment rival. As of this writing, and for the foreseeable future, the total Conservative Movement is far more willing to accept a Hatch-type federal powers Amendment than it is to accept a definitive Amendment of the kind satisfactory to us hard-core members of the Pro-life Movement. The reason is quite well-known: Congressional support for exception clauses for rape, incest, fetal deformity, and perhaps maternal "health" is so strong that neither the Paramount Amendment nor the NRLC Amendment has a ghost of a chance at passage in clean form. Neither in this session nor in any foreseeable session will a definitive Amendment come out of Congress without one or

Continued on Page 7

Hope for Pro-Life Strategy

Continued from Page 6

more of these crippling and morally indefensible attachments. But the Human Life Federalist Amendment invites no exceptions and needs none. It can garner a wider spectrum of support *now* and still come out clean. It tends to unite us with our coalition partners instead of dividing us from them as isolated "purists." (And frankly, given the Hill's current mood of hostility against the social-issues conservatives, following the O'Connor debacle, we could use a little fence-mending.) Then *after* passage, the initial-Amendment strategy gives us seven more years (or however long ratification takes) to educate, influence and improve Congressional thinking on the subject of exceptions; whereupon, when we do ratify, we will be able to fight exception-clause batttles with a simple majority, instead of the two-thirds majority which the one-Amendment stategy requires us to amass in order to get a clean ideal Amendment.

Which brings me to my third fact: only one part of our total position has consistently enjoyed majority or near-majority support in the polls, namely, the part about abortion-on-demand. Yet even there the public is so confused that everything seems to depend upon the precise wording of the quesiton. We have all watched with amazement the dizzying swings in reliable polls. 70% of the electorate will deny that a woman should have the right to an abortion upon demand, while the same 70% will agree that an abortion ought to be a decision between a woman and her doctor alone, apparently unaware that the purport of the two propositions is exactly the same. What is worse, every poll shows the public to be anywhere from 80% to 90% against us when the question concerns one of the "hard cases" of rape, incest, fetal deformity, or even the mother's mental health. The pinch of this particular shoe in Congress will be as nothing compared to its pinch in the ratification battles in the several states. The lesson to be drawn from these dismal numbers, however, is not the lesson of cowardice or moral compromise. In fact, the numbers prove that, if we were so foolish as to grant even one of these exceptions in our proposed Amendment, the general public would *eat us alive* for not granting them all. An exception-free Amendment is our only chance of retaining public respect! Nevertheless, these numbers do carry a lesson of sobering realism. I formulate it in a third criterion: *the more our strategy positions us to fight the ratification battle on our own ground, i.e., on the basic issue of ending a wholesale slaughter, rather than on the enemy's ground of hard cases, the better strategy it is.*

A one-Amendment strategy has no hope of meeting this criterion. Any definitive Amendment which we could in conscience support, if it were reported out in the present climate of opinion, would run into a withering fire of media outrage. Planned Parenthood, NOW and the ACLU would step-up their campaign of full-page ads, which are already having a serious effect. Within the last few months, survey research done for a state-wide race in New Jersey has revealed grim slippage in our support. If the data are to be believed, 68% of the people oppose a Human Life Amendment, while only 12% support it, in this heavily Catholic state. We cannot hope to ratify a definitive Amendment under these conditions. A one-Amendment strategy gives us no choice but to go down in flames, or else to wait and wait, delay and delay, in the hope of better times, while the helpless millions die.

"...through the Hatch Amendment, we can create the conditions which will make it possible for us to win every exception-clause battle by simple majority."

— Professor William H. Marshner

The two-Amendment strategy offers real hope. It presents to the state legislatures but a single issue: yes or no, should abortion be subject to reasonable regulation? Shouldn't unlimited abortion, demand-abortion be stopped? That is the sole point in question. The hard cases are excluded from the debate. Handling them will be the responsibility of Congress and the states, after the Hatch Amendment is ratified, and we (we aver with a beatific smile) trust to the wisdom of the democratic process. This is the only way to handle an entrenched evil. Such an evil *generates* sympathies which are morally obtuse. Those sympathies cannot be damped down, nor the moral vision restored to clarity, while the evil itself is in full operation. *First* the evil must be checked, its *widespread* practice curtailed, its institutions disrupted, its profits dried up, and *then* the nation is ready for a definitive cure. This is the lesson of social realism, and the two-Amendment strategy is the only one which respects it.

My positive case is done. My only further task is to answer two often-heard objections. The first runs like this:

In objective fact, an unborn human being *is* a person. In the *true* meaning of the Constitution, such persons are already protected under the 5th and 14th Amendments, and hence the state and federal governments are *obligated* to ban abortion. The lies and fictions of *Roe v. Wade* can obscure this truth but cannot change it. Therefore, an acceptable pro-life Amendment must be one which simply declares the truth, that is, one which recognizes and re-invigorates the already *objectively existing obligation* of the states to protect the unborn. In this light, one can see that the essential flaw of a states-rights type of Amendment is not the glaring one which lies on the surface (namely, that under it some states would predictably remain abortion Meccas) but rather the deeper flaw that such an Amendment *declares no obligation*. It is permissive. Even if every state were likely to pass a strict law, the Constitutional status of those laws would be nothing but the option-status. Hence nothing in a states-rights Amendment could prevent a new abortion crisis from occurring in the future. Now, this same deep flaw attaches to the Hatch-type federal powers Amendment, which is Amendment I of the two-Amendment strategy. Since it merely *permits* Congress and the states to legislate, it implicitly denies their obligation to do so. For us to advocate such an Amendment "would deny us the essential ability to argue that the Constitution *requires* that unborn life be protected." Indeed, for us to ratify such an Amendment would be to write into the Constitution "the principle that innocent life can be subjected to destruction at the discretion of legislative majorities." Hence, at the theoretical level, a federal powers Amendment is really no better than a states-rights Amendment, since both are subversive in the same way of the true meaning of the Constitution. Finally, on the practical level too, this merely permissive character is disastrous. We could work ourselves to the bone, get Amendment I ratified, only to have Congress refuse to act. The hapless unborn could end up with an Amendment in their honor and no protection!

Thus far the objection. I answer it with three points on the theoretical level and two more on the practical.

(1) The objection assumes that there is some sort of incompatibility between permission to legislate and obligation to do so, such that to affirm the former is to deny the latter. This assumption, as a matter of pure logic, is flatly false. My proof lies in the fact that, *in a consistent system* of law or ethics, there cannot be an obligation to do what is forbidden. Rather, whatever is obligatory is *also* permitted at least. And from this it follows that *some* permitted things are also obligatory. As a result, there is no contradiction whatsoever in saying that anti-abortion legislation shall be permitted under one article of the Constitution, while holding it to be obligatory under another.

(2) The objection derives much of its moral force from a confusion of *moral* obligations and permissions with *legal* obligations and permissions. In fact, the two are quite different. Unborn children, by virtue of their human dignity, lay the state under a *moral* obligation to protect them. This obligation has always existed and always will. But a *legal* obligation of the state to protect them (I mean: to pass laws protecting them) has never existed in real life. I grant that it *should* have existed; the 14th Amendment, for instance, should have been construed as implicitly containing that obligation. But it never was. Rather, until *Roe v. Wade*, the states were legally permitted to protect. *And* so long as one is legally permitted to do what one is morally obliged to do, there is no contradiction between the Constitution and the Natural Law. But *Roe v. Wade* forbade the Congress and the states to protect the unborn; it thereby introduced a contradiction between the Constitution and the Natural Law. *That* is what must be undone by our initial Amendment.

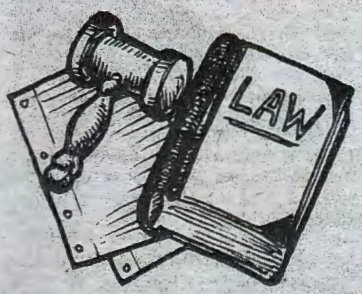
(3) Those who make this objection have, so far as I can see, just one way to avoid the charge that they confuse legal with moral obligations. They can say that the objectively existing obligation of the states to protect the unborn, of which they speak, is itself already a legal obligation, contained not merely in the Natural Law but in *the true meaning* of the 14th Amendment. I observe that this move commits one to an odd theory about the "true meaning" of legal documents. The theory seems to identify what *is* the meaning of the Constitution with what *ought to be* its meaning. Then, the theory seems to say that the Supreme Court,

Continued on Page 10

The Hatch Amendment: a Legal Analysis

(Testimony presented before the Subcommittee on the Constitution of the United States Senate Committee on the Judiciary, November 16, 1981)

by Victor G. Rosenblum, Esq., Professor of Law and Political Science at Northwestern University, Chicagor, Illinois and Vice-Chairman of the Board of Directors of Americans United For Life.



My name is Victor G. Rosenblum. For identification purposes, I have been a professor of law and political science at Northwestern University in Illinois for some twenty years. Is should be made clear at the outset that I am in no way appearing today on behalf of or under the auspices of the University. I testify on my own personal behalf and in my capacity as Vice-Chairman of Americans United for Life Legal Defense Fund, the only public interest law firm in the nation that devotes its full-time efforts to prolife matters. It was in this capacity that I had the opportunity to argue orally the case for the Hyde Amendment and similar state abortion funding restrictions before the Supreme Court.[1]

As I begin my testimony, which is intended primarily to convey the analysis of Americans United for Life Legal Defense Fund concerning the legal meaning and effect of S.J. Res. 110, the Hatch Amendment, I recall an involvement as amicus, together with the National Institute for Education in Law and Poverty, in the case of *Goldberg v. Kelly*.[2] The amicus argued that when a state terminates public assistance payments to a recipient it must afford him or her an evidentiary hearing before doing so in order to comply with the Due Process Clause of the Fourteenth Amendment.[3] It was gratifying that the Supreme Court was convinced that welfare benefits are not merely a gratuitous privilege extended to the poor which may be taken away at will but, once there is an entitlement, something to which the poor have a right that may not be arbitrarily infringed. Stressing the importance or "the very means by which to live," the Supreme Court noted, "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."[4]

I mention this, Mr. Chairman, because I am greatly disturbed at the increasing tendency to characterize support for the life of the unborn as a concern exclusively of conservatives or of the so-called "New Right."

I take pride in being a lifelong Democrat who has tried to devote a portion of my legal and political energies to the causes of the disadvantaged and the disenfranchised in our society: the poor, the handicapped, and the victims of prejudice in many forms. My concern for the unborn is an outgrowth of this commitment. The mark of a humane society is, in my view, its attention to the protection of the weak, the dependent, the helpless, the victims of discrimination. The mark of a civilized and liberal nation is not willingness to cast off those who are dependent for their lives and well-being on those of us who are more fortunate, but rather a readiness to share the fruits of our privilege. Certainly, advocacy of abortion as a way to reduce the welfare rolls is the last position anyone who claims to be liberal should take, and yet is it not the very people who charge prolifers with being conservative who, so often, point to the "billions in welfare payments" which "the children of teen-agers cost" in the context of asserting a need for "the essential alternative of abortion," as did a *New York Times* editorial on November 1?[5]

It seems to me that the exclusion of the unborn from membership in human society and from the protection it entails is among the worst contemporary instances of discrimination. When that claim is based, as it often is, upon precisely the point that an unborn child is dependent on another human being, it inverts the whole order of national and compassionate principles of justice.

I feel very comfortable, therefore, in appearing before this distinguished Subcommittee to advance what I feel is the essentially liberal cause of restoration of legal protection to the unborn child. While I might have preferred to see a Constitutional Amendment which contains on its face a ringing reaffirmation of the equality of all members of the human race, including the unborn, I believe that your proposal, Mr. Chairman, nobly and effectively advances that cause.

I say this because, from a legal point of view, the unborn would not be treated differently from other human beings in the Constitutional text were your Amendment to be adopted. Throughout the Constitution, including its Amendments, the legislature is often prohibited from legislating with particular effects and often empowered to legislate on particular subjects, but, except for duties related to the operation of the government itself (such as apportioning the number of House members for each State[6] and determining their pay[7]), the legislature is never *required* to legislate.

It is important to note that *any* Constitutional Amendment will need state and federal legislative support. This is so because the federal Constitution, even when it contains provisions that restrict private conduct such as are found in the Thirteenth Amendment, is not a criminal code nor a regulatory statute. Even when a provision is seemingly self-executing, the Constitution prohibits but does not punish and therefore does not compel conduct. As Chief Justice Marshall reminded us so eloquently in *McCulloch v. Maryland*, "We must never forget that it is a *constitution* we are expounding. . . . [P]rovision[s] made in a constitution [are] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[8] Thus, implementing legislation is always needed to adapt the broad and sweeping formulations of the Constitution to the needs of everyday law.

With this as a background, let me proceed to an analysis of the Amendment's language.

The Effect of the First Sentence: Reversal of *Roe*, Its Holdings and Its Progeny

The first sentence of S.J. Res. 110 reads,

Continued on Page 9

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[1] Williams v. Zbaraz, 100 S.Ct. 2694, 2696 (1980); Harris v. McRae, 100 S.Ct. 2671 (1980).

[2] Goldberg v. Kelly, 397 U.S. 254, 255 (1970).

[3] U.S. Const. amend. XIV, §1.

[4] Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970).

[5] *They Want to Be Babied Themselves*, N.Y. Times, Nov. 1, 1981, at 20 E.

[6] U.S. Const. art. I, §2, cl. 3.

[7] U.S. Const. art. I, §6, cl. 1.

[8] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis added).

A Legal Analysis

Continued from Page 8

"A right to abortion is not secured by this Constitution."

This sentence would reverse *Roe v. Wade,*[9] its companion case, *Doe v. Bolton,*[10] and their progeny, which declared that constitutional protection of privacy includes a "decision whether or not to terminate...pregnancy"[11] free of "unduly burden(some)"[12] "governmental restriction on access to abortions."[13] The right of privacy under the Fourteenth Amendment[14] would no longer include protection of access to abortion. Nor would any other section of the Constitution include such a right. No court could find a right to an abortion expressly or impliedly under the Constitution. The explicit intent of the Amendment, as announced by its sponsor,[15] establishes that the Amendment eliminates any such right, however formulated, as a constitutional matter. This should be reiterated in the Committee Report.

The words "right to an abortion" are used in their broadest sense and therefore include all lesser legal concepts. Since that right would no longer exist under the Constitution, any lesser formulation of that right would likewise no longer exist under the Constitution.

S.J. Res. 110 is modeled on the Thirteenth Amendment in the sense that it applies to abortion as an institution,[16] just as the Thirteenth Amendment applied to slavery as an institution, including all its badges and incidents.[17] Thus, *any* purported constitutional right which is conceived to place obstacles in the way of the legal prohibition of abortion is intended to be no longer secured under the Constitution.

The concern has been expressed that, because the words of the Amendment do not track precisely the words employed by the Supreme Court in formulating the right to privacy on abortions, the Amendment might be construed by the Court to leave some or all of those formulations intact, despite the clear intent of its framer.

An attempt to cure this reputed imperfection might well lead to the result it sought to avoid. Were the amendment to be tied to any technical formulation, the Court might well escape it simply by altering the formulation it gives to the right. It is important to recall that, unlike statutes, a constitutional amendment is necessarily broad and sweeping in its wording. By using the generic term "right to abortion," the entire field of possible aspects or reformations of any abortional liberty is encompassed more thoroughly than would be the case were the amendment to tie itself to specific language quoted from *Roe, Doe,* or one of their progeny. Both literally and in terms of the framer's intent, S.J. Res. 110 ends any and all constitutional support for abortion.

In 1795 the Eleventh Amendment was adopted[18] in response to a Supreme Court decision, *Chisholm v. Georgia,*[19] which held that a state could be sued by a citizen of another state. Its text denied federal jurisdiction of "any suit...against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."[20] The Supreme Court later held that it operated also to bar federal jurisdiction of a suit brought against a state by one of its *own* citizens, relying on a close examination of the history of the adoption of the Eleventh Amendment.[21] It noted the strong public reaction against *Chisholm,* and drew on the discussion of the decision and of the Amendment during the period between *Chisholm* and the Amendment's ratification to conclude that the people strongly believed that the *Chisholm* majority opinion was wrong in denying, and the dissenting opinion was correct in asserting, that suing a state, without its consent, was unknown in law and unauthorized by the Constitution.

By similar analysis, any future court would have to conclude that the Hatch Amendment was intended to overturn *Roe* and its progeny. Certainly, it could not rationally conclude that the Amendment was designed merely to reaffirm the decision already established in *Maher* and *Harris* that there is no "unqualified 'constitutional right to an abortion' " such that the government must pay for the abortion of indigents.[22] It would be utterly absurd to assume that the people would have gone to the lengths necessary to adopt a Constitutional Amendment only in order to secure a confirmation of those decisions.

Let me also point out that the first sentence will have to be considered together with the second sentence, which provides for a plenary power to "restrict and prohibit abortion," a power which clearly could not be interdicted by any antecedent abortional liberty.

While this is the clear intent and effect of the language as drafted, it should be altered slightly to stress that intent:

"No right to abortion is recognized by this Constitution."[23]

"No" emphasizes that any such rights are comprehensively denied. "Recognized" is preferable to "secured" because "secured" has too "benign a flavor," as Professor John Noonan has testified.[24] It is also preferable to "conferred" because the latter term could conceivably be construed not to cover putative Ninth Amendment rights and Tenth Amendment powers, which are not conferred by the Constitution, but merely "retained by" or "reserved to the people."[25] In addition, it would be well to stress in the Committee Report that the Hatch Amendment is intended to preclude reliance on Ninth and Tenth Amendment reserved rights and powers.

It follows from the first sentence that any holding in any federal or state case that relied upon recognition of a federal constitutional "right to abort" would be reversed to the extent that the existence of such a "right" was a necessary predicate of the holding.

Thus, for example, the Supreme Court's decision in *Planned Parenthood of Missouri v. Danforth,*[26] declaring that the state cannot grant husbands and parents of minor children "veto power" over the abortion decisions of wives and children would be implicitly vacated. Since abortion would no longer be a "constitutional right" under the Hatch Human Life Amendment, it could not be claimed as a basis on which statutory provisions such as the spousal and parental consent provisions at issue in *Danforth* might be stricken. (Of course, *Danforth*'s invalidation of the ban on saline abortions and its refusal to allow the imposition of a standard of care to preserve the life and health of the fetus would also be reversed.) *Colautti v. Franklin,*[27] striking another standard of care provision, and *Bellotti v. Baird II*[28] which held unconstitutional a parental/judicial consent law and which set forth rigid rules for determining the constitutionality of such laws, would also be reversed. In addition, to the extent that the nonphysician abortion case (*Connecticut v. Menillo*[29]), the case abstaining from judgement on a parental consent law, (*Bellotti v. Baird I*[30]), the abortion funding cases (*Maher v. Roe*[31] and *Harris v. McRae*[32]), the public hospital case (*Poelker v. Doe*[33]), and the parental notice case (*H.L. v. Matheson*[34]) contain reaffirmations of the tenets of *Roe, Doe, Danforth* and *Colautti,* the reaffirmations would be vacated. Any cases decided between now and the Hatch HLA's ratification would be reversed to the extent they rely upon or expand the holdings in these cases. In addition, any other cases that cite or otherwise rely upon such holdings would stand only to the extent they could retain vitality independent of the support drawn from reliance on those authorities. The numerous lower cases dependent on any of the Supreme Court's abortion holdings would also fall. The slate would be wiped clean: as far as judicial precedent is concerned, it would be as if *Roe* and its progeny had never existed. Such questions as those of the relative rights of parents and children or husbands and wives in the context of abortion would be restored to where they stood before the adoption of *Roe* and the subsequent decisions dependent on it.

What of ancillary questions decided in these cases, such as issues of standing, procedural holdings, and the like? They would have the same precedential status as the holdings in the many cases which are frequently cited as "reversed on other grounds."[35]

An interesting question is what would become of the holding in *Roe* that the unborn are not "persons" under the Fourteenth

Continued on Page 11

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"Both literally and in terms of the framer's intent, S.J. Res. 110 ends any and all constitutional support for abortion."

[9]Roe v. Wade, 410 U.S. 113 (1973).

[10]Doe v. Bolton, 410 U.S. 179 (1973).

[11]Roe v. Wade 410 U.S. 113, 153 (1973).

[12]Maher v. Roe, 432 U.S. 464, 474 (1977).

[13]Harris v. McRae, 100 S.Ct. 2671, 2688 (1980).

[14]*See* Roe v. Wade, 410 U.S. 113, 154 (1973), and the cases cited therein.

[15]126 Cong. Rec. S10194, S10196 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch).

[16]For abortion as an institution comparable to slavery, *see* J. Noonan, A Private Choice: Abortion in America in the Seventies 1-3, 80-89 (1979).

[17]Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-43 (1968).

[18]Congressional Research Service, Library of Congress, The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92nd Cong. 2d Sess. 28 n.3 (1973).

[19]Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1973).

[20]U.S. Const. amend. XI.

[21]Hans v. Louisiana, 134 U.S. 1, 10-12, 15, 18-19 (1890).

[22]Maher v. Roe, 432 U.S. 464, 473-74 (1977). *Accord,* Harris v. McRae, 97 S.Ct. 2671, 2688 (1980).

[23]This language has been recommended by Professor Richard Stith of the School of Law, Valparaiso University.

[24]Pending Constitutional Proposals and Their Legal Impact: Hearings on S.J. Res. 110 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. -- (1981) (statement of John Noonan at 13).

[25]U.S. Const. amends. IX, X.

[26]Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

[27]Colautti v. Franklin, 439 U.S. 379 (1979).

[28]Bellotti v. Baird II, 443 U.S. 622 (1979).

[29]Connecticut v. Menillo, 423 U.S. 9 (1975).

[30]Bellotti v. Baird I, 428 U.S. 132 (1976).

[31]Maher v. Roe, 432 U.S. 464 (1977).

[32]Harris v. McRae, 100 S.Ct. 2671 (1980).

[33]Poelker v. Doe, 432 U.S. 519 (1977).

[34]H.L. v. Matheson, 101 S.Ct. 1164 (1981).

[35]Colum. L. Rev., Harv. L. Rev. Ass'n, U. Penn. L. Rev., & Yale L.J., A Uniform System of Citation 46 (12th ed. 1976); *see* Hartford Life Insurance Co. v. Blincoe, 255 U.S. 129, 134-36 (1921).

Hope for Pro-Life Strategy

Continued from Page 7

despite its recognized authority to construe the Constitution, does not *in fact* construe it, when it misconstrues it. In other words, the theory seems to hold that misconstructions are not bad legal moves but non-moves, nullities. Obviously, such a theory faces many difficulties, but nothing in my posiiton obliges me to quarrel with it. In fact, I have chosen not to quarrel with it. I have chosen to accept the view that there is a "true meaning" to the 14th Amendment which includes unborn children, and hence I accept the view that an obligation to protect them already exists in the law *in principle* or *in theory*. I concede all of that. What I utterly reject is the attempt to confuse this realm of theory with the practical realm of fact, in which the views we have been discussing have no color of reality. *In practicality*, the 14th Amendment means, alas, what the Court says it means. *In practicality*, babies die by the millions while the state is forbidden to protect them, in what is a real-life contradiction between our law and God's. Therefore, what is needed *in practicality* is precisely a Court-proof *permission* to bring the slaughter to an end. Given this context of *practicality*, it is surely whimsical (I am tempted to say "perverse") to insinuate that the Hatch Amendment's assertion of permission denies the 14th Amendment's implicit assertion of obligation, when its obvious force is rather to deny *Roe v. Wade*'s assertion of non-permission.

(4) Now that we are on the level of practicality, the objection can be put in a slightly different way. Suppose my point, that obligation implies permission, is conceded. Then the objection is: if we believe in the obligation, why don't we assert it? Why ratify an Amendment which *only asserts* permission and so invites the misinterpretation that *permission at most* is what has been asserted? In other words, regardless of the logic and the practical context, wouldn't we, by ratifying Amendment I, be giving a hostage to the Court's perversity? Wouldn't we be giving the Court an opportunity to interpret Amendment I as saying that anti-abortion legislation is *at most permitted* under the Constitution, hence not obligatory -- an opportunity for the Court to write into the Constitution that hideous principle "that innocent life is subject to destruction at the discretion of legislative majorities"? So stated, the objection before us is a perfectly reasonable one. It presents a fear which, though I don't lose sleep over it, I so share. But so stated, the objection has a simple and practical anwer. Senator Hatch's language is not going to appear in a vacuum. When the Senate Judiciary Committee reports it out, the proposed Amendment will be accompanied by a careful statement of legislative intent, which every Court is bound to follow. As Sen. Hatch and his staff have said repeatedly, this report will make it clear that the Human Life Federalist Amendment is not intended to deny that the unborn are persons within the meaning of the 14th Amendment; Congress will go on record as saying that it finds the Supreme Court's reading of the 14th in *Roe v. Wade* unpersuasive. Thus, since the Hatch Amendment is proposed only in the *absence* of a satisfactory construal of the 14th, the Courts will be forewarned not to interpret it as blocking the restoration of such a construal in the future. Armed with such a record of legislative intent, Amendment I will leave intact any and all obligations arising under the 5th and 14th Amendments, while still doing its own distinctive job of overthrowing *Roe v. Wade* and (let us not forget) federalizing the protection of the unborn.

To anyone who persists on this point, alleging that the Hatch Amendment carries a dangerous implication with or without such a record of intent, I reply with a *tu quoque*. Even a definitive Amendment, precisely because it *is* an Amendment, carries the implication that we are "changing" the Constitution and so suggests that, until we *have* the Amendment, the Constitution fails to require the protection of the unborn! To see the point better, picture this. We ratify the NRLC Amendment, and 12 years later it is rescinded. What legal scholar would *then* say that nothing at all has changed, that the unborn are still obligatorily protected under the true meaning of the 14th Amendment? Seriously, to persist in this line of argument is to reason oneself into a box in which, logically, one can do nothing at all but wait for the Court to change its mind!

(5) By contrast, the further practical fear that we could work ourselves to the bone, ratify the Hatch Amendment, and then get nothing out of Congress, is politically absurd. The only way such a thing could happen is if the Pro-life Movement itself collapsed as a political force somewhere towards the end of the ratification process, giving us a paper victory and no muscle to make use of it. Why would such a thing happen? Why would a movement, marching to victory from state to state, suddenly fall apart? We couldn't just lose some key leaders, because we have never been all that tightly centralized -- a fact which has always been a part of our strength. So I don't see it. Either we shall not have the strength to ratify anything, or else we *shall* have that strength, in which case we shall also have the strength we have already demonstrated so often, the strength to get favorable legislation out of Congress.

On these five grounds, the first and principle objection to a two-Amendment strategy fails.

The second objection is a very much simpler affair. It runs like this:

The two-Amendment strategy is a wild and crazy gamble. We are supposed to dedicate our energies to the passage and ratification of an Amendment *whose incompleteness is acknowledged*. Then, we are supposed to convince the Congress and the people that yet another Amendment is required. The truth is that neither the people nor the politicians have any such patience with our issue. "The first Amendment we get will be the last Amendment we get." Or else, in the very best of possible worlds, our definitive Amendment would be decades, maybe generations, away. Why settle for such deferment? Why consign our true ideals to a far, far future? Why not work for them now?

I think that I have been answering this objection all along. It assumes that we have two real ways of working towards our goal, the one direct and sure, the other (mine) indirect and chancey. I have tried to show that this assumption is false, because the "direct" way is illusory. We have an entrenched evil in full swing, booming with profits, every year losing more of its old stigma among more and more people, as more and more cousins, nieces, sisters, and families-next-door resort to it. In the teeth of that massive and growing reality, the "direct" route requires us to amass a two-thirds majority in both Houses of Congress for a definitive Amendment so tight that it doesn't even allow an exception for rape. Indeed, the "direct" route requires us to win every exception-clause battle by a two-thirds majority, when, to this day, we cannot win some of them by simple majority. Is this good strategy? Is it even common sense, when, instead, through the Hatch Amendment, we can create the conditions which will make it possible for us to win every exception-clause battle by simple majority? *Good* strategy yields opportunities, not impotence.

Or is it alleged that, despite our present shortage of votes, things will look up? I ask why, and I ask when. First the "why": what cause is turning things more in our favor? Is the AMA turning against its abortion profits? Are the women's groups turning against "choice"? If not, then what is going to change the minds of hitherto anti-life members of Congress who are not up for re-election in 1982 or who, if up, are in no real danger of being defeated by us? Which brings me to the "when": look at the list of those likely to be unseated in 1982; it is numerically impossible to turn our present vote-deficit into a two-thirds majority for a definitive Amendment by winning '82 elections. Look at '84: in that year, for the first time, more pro-life Senators will be up for re-election than anti-life Senators; so we will be thrice blessed if we hold our own in '84. So again I ask: when? In another decade? In two? Who now is talking of the far, far future?

Of course, there is no guarantee that we can soon pass the Hatch Amendment either, or ratify it if we pass it. It will take every fibre we have, and then some. But I observe that every *pessimistic* assessment of our chances on Hatch is an *a fortiori* argument against the one-Amendment strategy, and that every charge of *chanceyness* against Hatch is an *a fortiori* argument against pushing the Human Life Bill alone. For though I accept completely the intellectual case which the Bill makes, I would not bet cab fare that the Supreme Court will acknowledge its cogency. What makes the Bill vulnerable is not Constitutional law but predictable judicial perversity.

Let us now face the final worry contained in this objection. Suppose we had the Hatch Amendment in place, and suppose we had a mixed record, ups and downs, on getting satisfactory prohibitions out of Congress. Could we end up stuck in a halfway house, never able to get our definitive Amendment, struggling forever over every loophole, never able to rest?

It is hard to play the prophet, but I invite you to consider a fascinating possibility. I have said very little in these pages about the Human Life Bill, except to reject the idea of pushing the Bill alone to the exclusion of the Hatch Amendment. But now let us think about the Bill as an answer to this final worry. With the Hatch Amendment in place, the Human Life Bill, passed by simple majority, would restore the 14th Amendment personhood which Hatch omits. At the same time, the Hatch Amendment would strengthen immensely the Supreme Court's likelihood to accept the Constitutionality of the Bill. Try to look at the situation from Mr. Justice Blackmun's point of view. *Without* the Hatch Amendment, the Bill is trying to enforce the 14th Amendment by making a finding of fact about a class of beings (unborn children) which the Constitution (according to Blackmun) not only excludes from the 14th Amendment but actually includes in a woman's sphere of privacy, so that she has a right to abort them. *With* the Hatch Amendment in place, however, this sphere of privacy disappears from the Constitution (Hatch's first clause sees to that), with the result that no countervailing right any longer stands in the way of including these children under the 14th Amendment; their inclusion becomes again an open possibility for the Court -- and the Congress, *because* it has the Constitutional power *both* to protect these children *and* to enforce the 14th Amendment, can make a decisive finding of fact about that very possibility. Indeed, the Justices would know that the very ratification of the Hatch Amendment reflected a national judgment in favor of the pro-life position, whose very core is the conviction that abortion violates the rights of a human person. So in the presence of the Hatch Amendment, the Supreme Court would be forced to see the Congress' fact-finding in the Bill as a confirmation of the whole nation's finding. So Hatch *plus* the Bill is a combination powerful enough to allay all reasonable fears of a halfway deadlock. In a two-Amendment strategy, it could well turn out that our second and definitive Amendment will be one which is in the Constitution already, waiting only to be enforced by a Human Life Bill.

On these grounds, the second objection to a two-Amendment strategy fails.

I therefore commend the Hatch Amendment, and the new strategy which it implies, as our best course of action.

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A Legal Analysis

Continued from Page 9

Amendment.[36] Nullification of the judicial abortion doctrine discredits the steps in the logic, expressed as subsidiary holdings, which led to the concluding holding creating the abortional liberty. The Court itself recognized that its holding that the unborn lack Fourteenth Amendment personhood was necessary to its decision.[37] Arguably, therefore, with the adoption of the Hatch Amendment the constitutional character of the unborn would be returned to pre-*Roe* -- that is, unsettled -- status. It would therefore be possible for those who have maintained that the unborn are in some sense "persons"[38] under the Constitution to renew their legal claims since the personhood of the unborn would again be an open question. Moreover, if it vacates the personhood holding of *Roe*, the Hatch HLA would remove a highly significant legal impediment to a federal declaration of unborn personhood, such as that in the Human Life Bill (HLB) presently before the Congress.[39] Since this Amendment would at least call into question the validity of the Supreme Court's prior declaration of fetal nonpersonhood, it would implicitly require courts examining an HLB or otherwise confronted with a claim of unborn personhood in the wake of its passage to reevaluate carefully the logic by which the unborn were previously denied constitutional status. (It is certain, however, that the Hatch Amendment would not, of itself, make the unborn "persons.")

On the other hand, it is possible that the interpretation of the word "person" in the Fourteenth Amendment to exclude the unborn could conceivably be considered by the Supreme Court as extraneous to its creation of the abortional privacy right and, therefore, as unaffected by this Amendment. In other words, the Court might hold, when interpreting the Hatch Amendment, that even though the abortional right of privacy is no longer secured by the Constitution, the unborn are still not persons "in the whole sense"[40] under the federal Constitution because its framers did not intend them to be. Such a conclusion would be erroneous, as I sought to demonstrate last year in testimony before the Subcommittee on Separation of Powers.[41] After the adoption of the Hatch Amendment, however, states would unquestionably be free to make the unborn persons under their constitutions and laws.

Even apart from the second sentence of the Amendment, the nullification of the "right to abortion" accomplished by the first sentence would allow legislative proscription of abortion. In the absence of such a "right," various governmental entities, acting within their traditional spheres of jurisdiction,might legitimately proscribe or regulate abortion practices on behalf of their continuing, already judicially recognized, legitimate interest in the protection of fetal life.[42] This means that those laws that proscribe abortion which remain codified could be revived,[43] and that new laws could be enacted within traditional spheres of jurisdiction to proscribe and to restrict abortion should the various legislatures choose to do so.

Given the existence of the second sentence, however, the most important legal impact of the first sentence, apart from its removal of a blot upon our jurisprudence, is that it assures that laws enacted by Congress and the states in accordance with the second sentence would be subject only to the "rational relationship" test and not to the more exacting "strict scrutiny" test.

Previously proposed Human Life Amendments tended to focus on assuring the legal status of unborn children by declaring them constitutional "persons," thus providing the State with a "compelling state interest" in the protection of unborn life sufficient to overcome the woman's "fundamental right" to choose an abortion. ("Where certain 'fundamental rights' are involved, [such as the abortion liberty[44]] the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest' . . .and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[45]) Because the abortional right remains intact despite the personhood of the unborn, however, governmental regulations intended to protect the unborn could continue to be "strictly scrutinized" by the courts and it is possible that "personhood" alone would not ensure the validity of fully restrictive governmental legislation. The rights of the unborn would be balanced against the privacy right of the woman and, at least in some circumstances, the latter might be held to prevail.[46] Although the States would probably have a "compelling state interest" in the protection of the unborn once they were "persons," it is noteworthy that in *Roe* the Court recognized such a "compelling state interest" in the unborn after viability, yet still required that post-viability abortion be legal when done "to preserve the life or health of the mother."[47] Previously proposed amendments have attempted to meet this problem without specifically denying the existence of a constitutional abortional right by stating particular circumstances under which abortions would be permitted and proscribed[48] or by stating that the right to life of the unborn dominates or is "paramount" to any other contrary right which might be asserted.[49]

The Hatch Human Life Amendment meets

Continued on Page 12

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[36] Roe v. Wade, 410 U.S. 113, 158 (1973).

[37] *Id.* at 156-57.

[38] *See* Steinberg v. Brown, 321 F.Supp. 741, 746-47 (N.D. Ohio 1970); R. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford L. Rev. 807, 839-57 (1973).

[39] S. 1741, 97th Cong., 1st Sess., 126 Cong. Rec. S11528 (daily ed. Oct. 15, 1981).

[40] Roe v. Wade, 410 U.S. 113, 162 (1973).

[41] V. Rosenblum, *Abortion, Personhood and the Fourteenth Amendment* (Americans United for Life Studies in Law and Medicine No. 31, 1981).

[42] Harris v. McRae, 100 S.Ct. 2671, 2692 (1980); Poelker v. Doe, 432 U.S. 519, 520-21 (1977); Maher v. Roe, 432 U.S. 464, 478-79 (1977); Beal v. Doe, 432 U.S. 438, 445-46 (1977); Roe v. Wade, 410 U.S. 113, 162 (1973).

[43] This would depend upon principles of state law.

[44] Roe v. Wade, 410 U.S. 113, 152-53 (1973).

[45] *Id.* at 155.

[46] J. Bopp, *Examination of Proposals for a Human Life Amendment*, §§II(2), II(3), in Restoring the Right to Life: The Human Life Amendment (J. Bopp ed. 1982).

[47] Roe v. Wade, 410 U.S. 113, 163-64 (1973).

[48] *E.g.*, S. J. Res. 17, 97th Cong. 1st Sess. (1981).

[49] S. J. Res. 19, 97th Cong., 1st Sess. (1981).

What They're Saying About the Hatch Amendment. . .

". . . I expect to co-sponsor Senator Hatch's Human Life Amendment as yet another expression of my efforts to protect the life of the pre-born. . ."

Congressman Henry Hyde (R-Illinois)

"I support the Hatch Amendment because it would strike down the Supreme Court-created 'abortion liberty' and permit enactment of tough anti-abortion laws by both Congress and the states. With sufficient support from pro-life groups. . . the Hatch Amendment can be passed and ratified."

Dr. J.C. Willke, President, National Right to Life Committee

"This is in no way a 'moderate' proposal. It is an attempt to restrict our reproductive rights by giving authority to regulate abortion to the Congress and the state legislatures. . . The amendment would overturn the 1973 Supreme Court ruling in *Roe v. Wade* and destroy our constitutionally protected right of privacy when deciding whether to terminate a pregnancy. It would give Congress and state legislatures the authority to outlaw all abortions, even those in cases of rape, incest, severe health risk or life endangerment to women."

Kathy Wilson, Chairwoman, National Women's Political Caucus

"In my view, SJR 110 would, on balance, be as effective as any means so far proposed in assuring potential use of the law to protect the youngest members of the human family."

Dennis J. Horan, Esq., Chairman, Americans United for Life

"As soon as the Hatch Amendment passes, Step 2 is waiting in the wings -- enactment of federal laws to outlaw abortion. . . Once Step 2 is completed, and the 'right to lifers' eliminate the right to abortion in America, they will press on to their final goal -- the passage of their cherished Human Life Amendment."

Patricia A. Gavelt, Executive Director, Religious Coalition for Abortion Rights

"We are committed to the defense of all unborn human lives. In light of this commitment, we support the Hatch Amendment as a realistic step which makes it possible to restore legislative protection to the unborn."

Terence Cardinal Cooke, Archbishop of New York; Chairman, Bishops Committee for Pro-Life Activities

"This amendment is extraordinarily simple and extraordinarily direct. It denies that the Constitution contains the kind of right which fiat created nine years ago. In one stroke it demolishes *Roe v. Wade* . . .It restores to Congress and to the states the power to protect life."

John T. Noonan, Jr., Professor of law, University of California; author, A Private Choice

"We believe this is the gravest threat to abortion rights since the 1973 Supreme Court decision."

Karen Mulhauser, former Executive Director, National Abortion Rights Action League

"The only people who should be unhappy with Senator Hatch's proposal will be the judiciary. S.J. 110 would take much of the arbitrary power to rule on abortions away from the courts, from those unelected judges who represent no one but themselves, and give it to our freely elected legislators in Congress and in the states. . . Most Americans would agree that no one has an absolute right to abortion. The Hatch Amendment would put that sort of logic into the Constitution where even the Supreme Court couldn't change it."

Peter B. Gemma, Jr., Executive Director, National Pro-Life Political Action Committee

A Legal Analysis

Continued from Page 11

this problem directly by simply denying the existence of the abortional right that lies at the very heart of constitutionally protected abortion. It would not have been necessary for the *Roe* Court to have found the unborn to be "persons" in order to hold that governmental proscriptions on abortion were constitutional.[50] But it was necessary for the Court to acknowledge the existence of a constitutionally protected abortional right in order to establish the sweeping judicial control over legislative efforts to proscribe or regulate abortion that has ensued from *Roe*.[51]

To the extent that the right to privacy's protection of abortion remained intact, any governmental attempt to limit its exercise would not only have to be supported by a "compelling" interest, but also would have to be "narrowly drawn" to suit only that interest.[52] Thus, proscriptive legislation might have to be very carefully and specifically drawn to protect the unborn, sorting out any incidental or unnecessary burden on the remaining abortional liberty of the woman. When the right to abort is wholly and specifically abolished, on the other hand, the "narrowly drawn" requirement that attaches to legislation that burdens a constitutional right could not be invoked.

Under this Amendment, therefore, state and federal legislation would not be subject to judicial review under the "strict scrutiny" test, but only under the less stringent "rational relationship" test. Thus, if laws were rationally related to the legitimate state interest[53] in unborn life by protecting that interest, they would be held constitutional.

The Effect of the Second Sentence: Concurrent Power

The second sentence of S.J. Res. 110 reads, "The Congress and the several States shall have the concurrent power to restrict and prohibit abortions, *Provided*, That a law of a State more restrictive than a law of Congress shall govern."

The meaning of the "concurrent power" shared by "Congress and the several States," as used in a Constitutional Amendment, is clearly established by decisions of the United States Supreme Court.[54] The fullest explanation is in *United States v. Lanza*,[55] from which I quote:

> [I]t means that power to take legislative measures . . . shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures . . . Such as are adopted by Congress become laws of the United States and such as are adopted by a state become laws of that state. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

The meaning of the "concurrent power" shared by the Congress and the states when the term is explicitly embodied in the Constitution is, therefore, very different from the meaning of that and similar terms when used in judicial opinions concerning the mutual authority of Congress and the States to regulate commerce.[56] In the commerce context the courts are dealing with a constitutional grant of power to regulate interstate and foreign commerce which is given only to the federal government.[57] The question of a power of "concurrent legislation" in the states thus arises only when the federal government has failed to act. It is a very complex question whether and to what extent a state may act, since in some circumstances federal legislation will be held to "pre-empt" the field," while in others the state legislation will be upheld as a permissible complement."

The cases dealing with pre-emption have no application here. In construing the meaning of the "concurrent power" provided in the Eighteenth Amendment, the Supreme Court made this clear time and again.[60] Because, as in no other existing part of the Constitution, the power to be granted or recognized is "concurrent" -- and therefore equal between any state and the Congress -- there is no reason to be concerned about the application of the Supremacy Clause, which establishes that the Constitution and laws made in pursuance thereof take precedence over conflicting state laws.[61] There is no basis for use of the Supremacy Clause to invalidate state abortion legislation because the use of "concurrent power" affirms the *equality* of state with national power in the limited field of the Amendment; there is no need for its application because, under language that provides for "concurrent power to restrict and prohibit abortions," there is no possibility of a genuine conflict.

That there is no possibility of a genuine conflict arising from the independent exercise of the powers of Congress and the states to restrict and prohibit abortion is the crucial factor, and it bears elucidation.

When there was previously a provision of "concurrent power," in the Eighteenth Amendment to the Constitution, some lower courts indicated that by virtue of the Supremacy Clause, in the words of one decision, "In instances of [immediate and hostile collision' of state with federal law] the state legislation must yield."[62] The Supreme Court never found nor implied any applicability of the Supremacy Clause in Eighteenth Amendment cases and there is apparently no case at any level where there was an actual "conflict" of any type between state and federal legislation with regard to prohibition.

Consider the possible ways in which federal and state legislation might differ.

1. Congress might pass legislation restricting or prohibiting abortion (or both), while a given state did nothing. There would be no conflict.

". . . the Hatch HLA would free states to legislatively overcome the effect of any prior finding by their courts of an abortional privacy right under the state constitution."

Prohibited abortions or abortions done in violation of the restrictions would be crimes under federal but not under state law, and subject to injunction, prosecution, or whatever remedies were provided in the federal law, though they would not be subject to punishment under state law. A mere failure to act by the state would not conflict with the federal law.[63]

2. A state might pass legislation restricting or prohibiting abortion (or both), while Congress did nothing. There would be no conflict.

The situation would be the same as above, but in reverse. A mere failure of Congress to act would not conflict with the enforcement of state law.

3. Congress might pass legislation outlawing some abortions but permitting others, while a state passed legislation outlawing some or all of the abortions permitted by federal law. There would be no conflict.

That the Congress permits particular abortions merely means (however the statute is phrased) that it fails to prohibit them. This in no way interferes with the capacity of a state, exercising its concurrent power, to proscribe them. Such abortions would simply be subject to injunction, prosecution, or any other remedy provided under law, although immune from federal interdiction.

4. The same analysis would apply if a state outlawed some abortions but permitted others, and the Congress passed legislation outlawing abortions permitted by the state. There would be no conflict.

5. Congress and a state might pass seemingly incompatible regulations about abortions that were not prohibited. For example, Congress might require that all abortions be performed in hospitals, while a state might require that all or certain abortions be performed in free-standing outpatient surgical facilities. There would still be no conflict.

The key point is that the concurrent power provided by the Amendment is "power to restrict and prohibit abortion." Under the Eighteenth Amendment's concurrent powers section, state statutes that penalized possession of liquor specifically licensed by federal law were upheld.[64] In the hypothetical example, both laws would be constitutional, and neither would be stricken; the cumulative effect within the state would be that abortions could be performed neither in hospitals nor in free-standing outpatient surgical facilities (nor, of course, in any other place or facility).

6. Theoretically, Congress might pass a law requiring or compelling the provision of certain abortions, or a law protecting certain abortions from interference, and a state

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[50] Roe v. Wade, 410 U.S. 113, 159 (1973).

[51] *Id.* at 152-55, 162.

[52] San Antonio School District v. Rodriguez, 411 U.S. 1, 16-17 (1973).

[53] *Id.* at 40.

[54] McCormick & Co. v. Brown, 286 U.S. 123, 144-45 (1932); Everard's Breweries v. Day, 265 U.S. 545, 558-59 (1924); United States v. Lanza, 260 U.S. 377, 380-85 (1922); National Prohibition Cases, 253 U.S. 350, 387 (1920).

[55] United States v. Lanza, 260 U.S. 377, 381-82 (1922).

[56] *See* Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).

[57] U.S. Const. art. I, §8, cl. 3.

[60] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

[61] *See, e.g.*, Askew v. American Waterways Operators, 411 U.S. 325 (1973).

[62] McCormick & Co. v. Brown, 286 U.S. 131, 143-45 (1932); Van Oster v. Kansas, 272 U.S. 465, 468-69 (1926); Hebert v. Louisiana, 272 U.S. 312, 314-15 (1926); Vigliotti v. Commonwealth of Peensylvania, 258 U.S. 403, 408-409 (1922). *See also* Commonwealth v. Nickerson, 128 N.E. 273, 277-78 (Mass. 1920).

[63] U.S. Const. art. VI, cl. 2; *see* Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

[64] Commonwealth v. Nickerson, 128 N.E. 273, 279 (Mass. 1920). *Accord* State v. Lucia, 157 A. 61 (1931); State v. Ligaarden, 230 N.W. 729 (1930); State v. Gauthier, 118 A. 380 (1922).

[65] *See* National Prohibition Cases, 253 U.S. 350, 387 (1920) ("The power confided to Congress . . . is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.").

[66] McCormick & Co. v. Brown, 286 U.S. 131, 145 (1932); Idaho v. Moore, 212 P. 349 (Idaho 1923), *aff'd* 264 U.S. 569 (1924).

A Legal Analysis

Continued from Page 12

might pass a law prohibiting or restricting those abortions. For example, Congress might require that agencies receiving federal funds make referrals for "medically necessary" abortions, or it might penalize any individual who interferes with an abortion sanctioned by federal law. As applied to abortions within that state, the congressional legislation requiring or protecting abortions forbidden by the state would be unconstitutional.

7. Alternatively, a state might pass a law protecting or requiring the provision of abortions precluded or restricted by federal law. So long as the federal law was in effect, such state legislation would be unconstitutional and therefore unenforcible.

To the extent incompatibility exists, a Constitutional Amendment supersedes all previously adopted Amendments and other parts of the Constitution.[65] (With regard to state legislation, the Supremacy Clause[66] would apply in the sense that the federal Constitutional Amendment would be the supreme law of the land, taking precedence over any state constitution.) Thus, state legislation that restricts or prohibits abortion takes precedence, within that state, over conflicting congressional legislation that actively requires or protects abortion, and congressional legislation that restricts or prohibits abortion takes precedence over conflicting state legislation that actively requires or protects abortion. In order to be stricken (or its application enjoined as applied within a particular state) legislation purporting to require or protect abortions prohibited or restricted (incompatibly) by the other jurisdiction would have to threaten direct practical effects if enforced -- through criminal penalties, injunctions, disqualification for funding, provision of funding, or the like. Mere declaration of policy or hortatory statements, or failure to act, would not create a direct conflict.[67]

What happens if an individual is sought by both federal and state authorities for the same transaction? This creates no substantive conflict, only the practical one of which jurisdiction would have priority in custody, trial and punishment. It would be resolved in the same way as in any other case in which an individual is subject to both federal and state charges, a common occurrence even now: in the absence of a negotiated arrangement, the authority which first gets jurisdiction may first exhaust its jurisdiction to the ex-clusion of the other, after which the other authority gains control.[68]

All of this analysis follows inescapably from the language, "The Congress and the several States shall have the concurrent power to restrict and prohibit abortions." As introduced, the proposed Amendment also contains a proviso: "Provided, That a law of a State more restrictive than a law of Congress shall govern." On the basis of the analysis just presented, however, it is likely that this language is unnecessary.

It is conceivable that the proviso might tempt the Court to ignore *United States v. Lanza*[69] and embark upon a new construction of "concurrent," particularly since there is some language in the introductory statement[70] by Senator Hatch which might possibly be viewed as suggesting that "preemption" doctrine does apply. It is important to note that the emphasis in his statement on the need for an "irreconcilable conflict"[71] before any enactment of one jurisdiction could invalidate the enactment of another *should* lead to the same conclusions as were expressed by the Supreme Court in its previous constructions of "concurrent power" -- since, as has been demonstrated, no such "irreconcilable conflict" could ever exist. Nevertheless, there could be great mischief is the Court were to use the proviso to find that only one law -- whichever of the federal or state laws it deemed "more restrictive" -- could be in effect in any given state at one time.

As between a statute outlawing all abortions, but providing a $50 fine for its violation, and a statute making an exception to prevent the death of the mother but providing prison sentences for its violation, which would be deemed "more restrictive"? If one jurisdiction proceeded by way of criminal penalties, while the other employed injunctive relief and civil damages secured by private rights of action, might not one be "more restrictive" in theory while the other would be more effective in practice?

Therefore, elimination of the proviso, as it is now drafted, is recommended. It would be preferable to end the second sentence with "abortion," and to rely specifically on *Lanza* and the other Eighteenth Amendment cases in the Committee Report.

Eliminating the article "the" placed before "concurrent" would also be desirable in order to make the Hatch Amendment correspond as closely as possible with the language previously construed by the Court.

In light of the existence of such clear precedents on the meaning of "concurrent power" when that phrase was a part of the Constitution, a future court would be hard pressed indeed to misconstrue the clear intent of the Amendment. Removal of the proviso would leave language entirely adequate to convey the intended meaning, particularly if the reliance of the Amendment framer upon those precedents is made explicit in the Committee Report.

Nevertheless, to ensure in the plain language of the Amendment that *Lanza* and the other Supreme Court cases construing "concurrent power" can never be reversed by a future Court, the language proposed by Professor Richard Stith of Valparaiso University would be desirable:

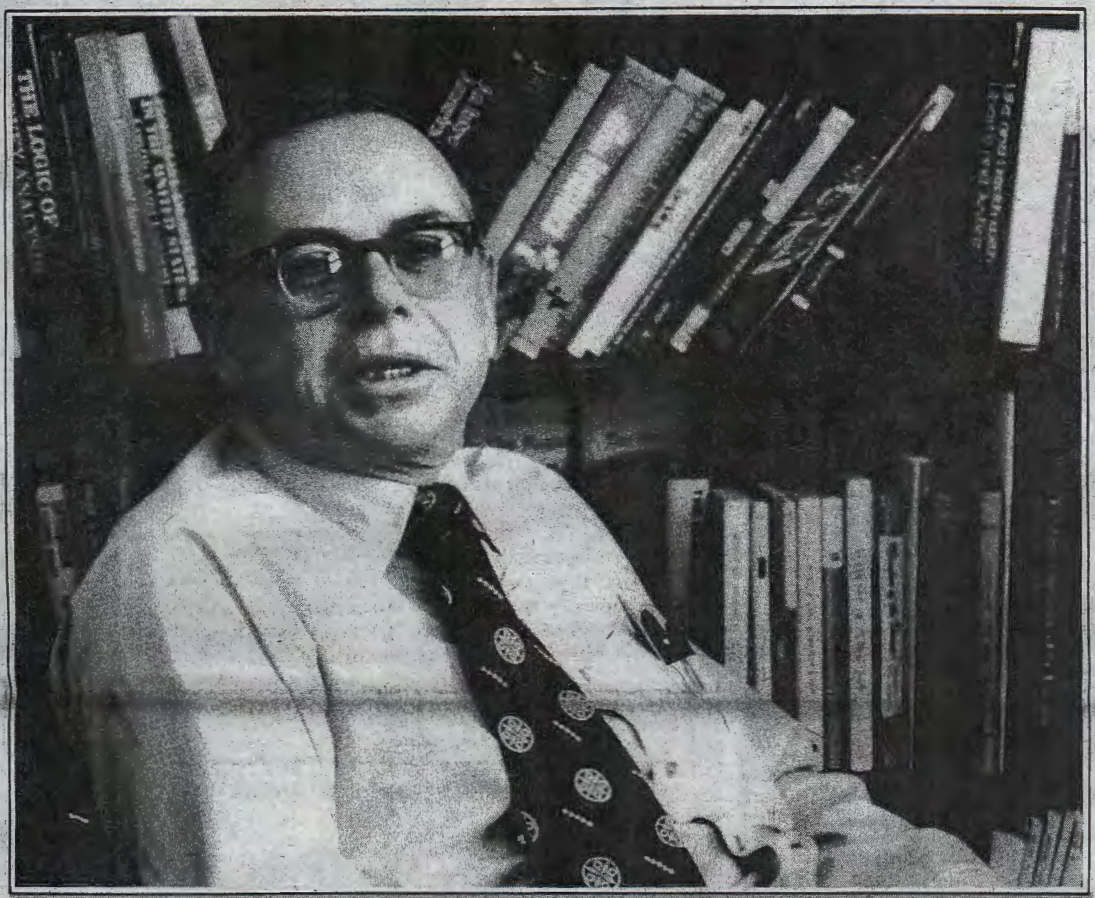
> The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

This simply restates the essential holding of *Lanza* and the other Supreme Court cases construing the meaning of "concurrent power" in the Eighteenth Amendment, and eliminates any prospect, however remote, of their reversal by a future Supreme Court. ("Abortion" is made singular instead of plural to emphasize its character as an "institution.")

The Effect of the Plenary Power Provided By the Hatch Amendment

The "power to restrict and prohibit abortions" is broad and plenary, designed to afford reasonable discretion to two sovereigns, federal and state, to legislate on the subject matter of the Amendment: abortion. It allows the Congress and the states power and authority to pass whatever legislation is deemed appropriate to restrict and prohibit abortions. This includes a grant of any lessor power, such as that of regulating abortions. By granting the states this plenary power in the federal Constitution which is the supreme law of the land, the Hatch HLA would free states to legislatively overcome the effect of any prior finding by their courts of an abortional privacy right under the state constitution. So, for example, after the ratification of the Hatch HLA, the California, Massachusetts, and New Jersey state legislatures could override the effects of rulings by their highest state courts, which found a right to abortion in each of their state constitutions. This is so because the Hatch HLA, as a part of the Constitution itself, is a grant of *plenary* power and is not a mere enforcement provision, although

Continued on Page 14



"...S.J. Res. 110, which provides 'concurrent power' to restrict and prohibit abortion to the states and to Congress, would permit both the states and the Congress to legislate, and there is no possibility that their laws could come into genuine conflict."

-- Professor Victor G. Rosenblum

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[65] *See* State Board v. Young's Market Co., 299 U.S. 59, 62 (1936).

[66] U.S. Const. art. VI, cl. 2.

[67] Cf. Wynn v. Scott, 449 F.Supp. 1302, 1314-15 n.9 (N.D. Ill. 1978), *aff'd sub nom.* Wynn v. Carey, 599 F.2d 193 (7th Cir. 1979) (legislative statement affirming fetus to be human being not unconstitutional despite constitutional right to terminate pregnancy).

[68] Ponzi v. Fessenden, 258 U.S. 254, 260-61 (1922).

[69] 260 U.S. 377 (1922).

[70] 126 Cong. Rec. S10194, S10197 (dailey ed. September 21, 1981) (remarks of Sen. Hatch).

[71] *Id.*

A Legal Analysis

Continued from Page 13

it contains within it the power to enforce. This should be made clear in the Committee Report.

"Abortion," as the term is employed in the Amendment, encompasses what might result in termination of embryonic or fetal life from fertilization and thereafter. It does not include the induction of labor after viability in order to bring about the earlier birth of a living infant. This should be made explicit in the Committee Report. That which harms or interferes with the physical integrity of the embryonic or fetal life is encompassed in that which threatens the life absolutely; thus, nontherapeutic fetal experimentation or genetic manipulation could be regulated or proscribed in accordance with the Amendment.

As pointed out earlier in my testimony,[72] like slavery, abortion has become an institution in American life. Just as the Thirteenth Amendment, in abolishing slavery, gave Congress power to deal with "all badges and incidents of slavery,"[73] so the Hatch Amendment, in providing for the concurrent power of Congress and the states to "restrict and prohibit" abortion, includes power to reach its "badges and incidents." Upholding under the Thirteenth Amendment a statute which it construed to prohibit private refusals to deal on the basis of race, the Supreme Court said, "Surely Congress has the power under the...Amendment rationally to determine what are the badges and the incidents..., and the authority to translate that determination into effective legislation."[74] The same principle should apply to the Hatch Amendment. Thus, for example, Congress or a state legislature could consider that *in vitro* fertilization without embryo transfer (in which human embryos are created outside the human body, not with the intent of transferral to the uterus of an infertile woman, but with the intent of their use as research subjects and their subsequent destruction) entails the same assault on the unborn as does termination of pregnancy. It is essentially part of the institution of abortion.[75] It would be subject to restriction and prohibition under the Amendment.

The discretion vested in the legislature by the Amendment is broad. Certainly, for example, the legislature, in taking account of the facts that most women who obtain abortions are under great stress, that they are usually ignorant of the humanity of their unborn child and unaware of the alternatives available to them, and that they are often much pressured by others, could decide to treat the woman subjected to abortion as a second victim and decline to visit criminal punishment upon her. If the legislature employed this policy -- one followed by a number of states[76] prior to *Roe v. Wade* -- yet did punish the abortionist, the statute embodying this choice could not be held unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment. This is because this sort of policy choice would be precisely what the Amendment intended to vest the legislature with the discretion to make. The principle would be the same as that under which the Supreme Court upheld a state statute treating beer produced within the state under the plenary and discretionary power over liquor given to the state when the Eighteenth Amendment was repealed by the Twenty-first: "([A] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth)."[77]

As indicated earlier in my testimony during the analysis of the first sentence, the appropriate test would be whether the legislation bears a "rational relationship" to "legitimate state interests" in restricting and prohibiting abortion recognized by the Amendment. For example, a distinction on the basis of race in permitting or restricting abortions would obviously bear no rational relationship to those interests, and a law making such a distinction would be unconstitutional.[78]

This does not mean that other constitutional protections would be abrogated whenever it could be argued that doing so -- dispensing with, say, the rule against unreasonable searches and seizures[79] or the right to a jury trial[80] -- might more efficiently restrict abortion. As the Supreme Court said in ruling that New York's liquor regulation statute, adopted under the authority of the Twenty-first Amendment, could not bar the operation of a duty-free shop at an international airport selling liquor for consumption aboard under the supervision of the federal customs service, "Both the Twenty-first Amendment and the Commerce Clause are part of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues at stake in any concrete case."[81]

"...S.J. Res. 110 is intended to reverse* Roe v. Wade *and all its progeny that recognize the existence of a constitutional right to abortion, however formulated..."

The Resolution Proposing the Amendment

In addition to discussing the Amendment itself, it is well to consider the ratification process -- in particular, the question of what legislative majority should be required in the state legislatures in order to ratify.

As of 1975, 17 states require a majority of those present and voting to ratify a federal Constitutional Amendment, and two state require such a majority provided that it includes at least two-fifths of those elected. 24 states require a majority of those present and voting in the house, but a majority of those elected in the senate. One other state requires a majority of the authorized members, including any vacancies. One state requires two-thirds of those elected; three states require two-thirds of those elected to the house, but a majority of those elected to the senate; one state requires three-fifths of those elected.[82]

At least one state that requires a supramajority provides, "The requirements of this Section shall not govern to the extent they are inconsistent with requirements established by the United States."[83]

There is strong support for the view that the Congress has authority to establish requirements specifying the nature of the legislative majority uniformly to be required for state ratification, even in the absence of state provisions expressing such deference.

The authority of the Congress to provide, in the resolution proposing a Constitutional Amendment, that the Amendment will be deemed ratified when so voted by a majority of those present and voting, a quorum being present, of each house of the legislatures of the requisite three-fourths of the states, is grounded in two concepts. The first is that the state legislatures, in ratifying federal Constitutional Amendments, perform a "federal function" under authority of the U.S. Constitution rather than under their own state constitutions or rules. The second is that Congress has authority to regulate the procedure of ratification as an incident of its power to designate the mode of ratification.

Article V of the United States Constitution provides, in relevant part:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress....

Upholding the Nineteenth Amendment against a claim that its alleged ratification by certain legislatures violated provisions in their state constitutions, the Supreme Court held, "[T]he function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal

Continued on Page 15

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[72] *See* text accompanying note 16 *supra*.

[73] Civil Rights Cases, 109 U.S. 9, 20 (1883).

[74] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440-443 (1968). *See also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285-96 (1976) and Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (employment discrimination); Runyun v. McCrary, 427 U.S. 160 (1976) (right of black children of admission to private nonsectarian commercial schools). *Cf.* National Prohibition Cases, 253 U.S. 350, 387-88 (1920) (Eighteenth Amendment allows Congress to define nature of intoxicating liquor); Everard's Breweries v. Day, 265 U.S. 545, 560 (1924) ("[T]he power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating.").

[75] *Cf.* Leon Kass, *Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research, and Embryo Transfer* 4, in Ethics Advisory Board, U.S. Dep't of Health, Education and Welfare, *Appendix: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer* (1979).

[76] *4 Abortion: Hearings on S.J. Res. 6, S.J. Res. 10 and 11, and S.J. Res. 91 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 117 (1975) (statement of Robert M. Byrn).

[77] State Board of Equalization v. Young's Market Co., 299 U.S. 59, 63-64 (1936). *See also* California v. LaRue, 409 U.S. 109, 116 (1972).

[78] *Cf.* 126 Cong. Rec. S10194, S10197 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch).

[79] U.S. Const. amend. IV.

[80] U.S. Const. amend. VI.

[81] Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 332 (1964). *See also* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

[82] Dyer v. Blair, 390 F. Supp. 1291, 1295, 1305 n.34 (1975).

[83] S.H.A. Const. art. XIV, §4 (1971) (Illinois).

Congressman John Ashbrook (R-Ohio), on the House version of the Hatch Amendment (H.J. Resolution 372)

(From his Congressional Record *remarks, Dec. 11, 1981)*

I have today introduced House Joint Resolution 372, the human life federalism amendment. The language is identical to that of the amendment by Senator Hatch (S.J. Res. 110).

The effect of this amendment should be clear. First, it declares that a right to abortion is not secured by the Constitution, thus reversing the holding in Roe against Wade that the right to privacy includes the mother's right to kill her unborn child.

It would remove jurisdiction over abortion from the judicial branch of government and place again under the legislative branch where it was until the Supreme Court in 1973 usurped that power.

The simplicity of this amendment is its strength. It merely gives Congress the power to set a national standard to protect life, which individual States can exceed but not fall below.

What we have in this country today is nothing less than runaway, wide-open abortion-on-demand. There are no real restrictions on the so-called right to abortion that was created in the Supreme Court's 1973 decision.

Many people erroneously believe that abortions are freely available in the first trimester, subject to medical termination in the second, and banned in the third, when the fetus is viable.

This is simply not true. A lot of people may think it is that way because they expect it to be that way or, perhaps, because, unconsciously, they wanted it to be that way. But the fact is that abortions are allowed even into the third trimester of a pregnancy.

The practice of abortion has gone well beyond what most people thought it would be when the court handed down its 1973 decision. The "hard cases" that were so thoroughly publicized in the early 1970s were seen as the justification for allowing this practice. But today, these constitute less than 5 percent of the 1½ million abortions in this country each year.

When the Supreme Court made its 1973 decision legalizing abortion, it did not solve a problem; it created one. It legalized the taking of human life.

Now is the time to remove the abortion issue from the court monopoly and to give it to the people through their elected representatives in Congress and in the States to decide.

We can no longer allow access to the processes of representative democracy to be closed to those who rightfully object to the practice of abortion.

When this amendment is passed in Congress and is issued to the States for ratification, it is then that the will of the majority will be expressed. Until then, we are merely doing the only thing we can do -- placing limitations on appropriations. In the meantime, the real issue, the question of abortion itself, is left exclusively in the judicial branch of government. It is time now to let the people decide.

A Legal Analysis

Continued from Page 14

Constitution; and it transcends any limitations sought to be imposed by the people of a state."[84]

The states, then, are bound by the procedure set out by Article V. For example, they cannot require a referendum in order for their state legislature's ratification to be effective, or as a substitute for it.[85]

In the words of the Supreme Court, "The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution: that power is conferred upon Congress. . . ."[86] In *Dillon v. Gloss,*[87] upholding the authority of Congress to establish a set time by which a constitutional amendment must be ratified if the ratification is to have effect, the Court said, "An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments." The Court emphasized that "with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. . . . As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to that rule."[88]

Thus, the Court recognized the power of Congress to "determine. . . an incident of its power to designate the mode of ratification."[89]

Whether or not the specification of a simple majority by Congress may pre-empt a state legislature's rule requiring a greater majority in the ratification process has never directly been faced by the Supreme Court, since no previous Amendments have been proposed with such a specification. There is dicta in one three-judge court case that Article V consigns the specification of the requisite majorities to the state legislatures.[90] In that case, whose opinion was written by now Justice John Paul Stevens, plaintiff legislators challenged the failure of the Illinois General Assembly to certify ratification of the ERA, despite a simple majority vote in favor of it by both houses. The court did hold unconstitutional the provisions of the Illinois Constitution which required a majority of three-fourths of those elected to each house to ratify a federal Constitutional Amendment. However, because both houses of the legislature, independently of their state constitution, had adopted procedural rules containing the supramajority requirement, the requirement itself was not stricken. The court did not face, however -- nor did it, even in its dicta, take into consideration the prospect of -- direct Congressional regulation of the proportion of the majority required.

Although Congress has never provided for such a regulation, it entertained proposals to this effect in 1869.[91] Current legal commentaries have been favorable to the argument that Congress has constitutional authority in this regard.[92]

It may be presumed that Congress may not provide for ratification by less than a majority of the legislature, since that would vitiate the principle of state legislative ratification. With this limitation, however, there is strong support for the view that Congress may choose to advance uniformity among the various states and to reduce the chance that an obstreperous minority could block an Amendment for which there is strong consensus by establishing that ratification by a simple majority in each house of the state legislatures would be adequate.

Following is language which would embody such a provision:

Senate Joint Resolution

Proposing an Amendment to the Constitution of the United States relative to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by a majority of those present and voting, a quorum being present, of each House of the legislatures of three-fourths of the several States within ten years from the date of its submission by the Congress [text of amendment].

You will note that this text provides for a ten year ratification period. Such a time is three months and eight days less than the time which has now been provided for the proposed Equal Rights Amendment.[93]

In the course of drafting the ratification resolution, the Subcommittee would be well advised to consider carefully what approach it wants to take toward the time provided for ratification. From the time of the Eighteenth Amendment, Constitutional Amendments submitted by Congress to the states for ratification have usually named a specific ratification time limit, either in the text[94] or in the resolutions proposing them.[95] However, the Nineteenth Amendment[96] and Amendments I through XVII were proposed with no time limits.

In *Coleman v. Miller,*[97] the Supreme Court plurality opinion[98] stated that the timeliness of state ratifications is a matter entirely within the discretion of Congress and, with regard to amendments for which no deadline has initially been set, "the question [of whether a given amendment has achieved ratification within a reasonable time after its proposal] is an open one for the consideration of Congress when, in the presence of certified ratification by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment."[99]

Thus, it would be entirely within your province to choose *not* to set a ratification deadline initially, but to leave that question to the Congress in existence when three-quarters of the states have ratified, as was the tradition for over a century.

A resolution embodying this decision could read:

Senate Joint Resolution

Proposing an Amendment to the Constitution of the United States relative to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an Amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by a majority of those present and voting, a quorum being present, of each House of the legislatures of three-fourths of the several States, provided that the Congress therafter, by concurrent resolution, determines that the ratifications have occurred within a reasonable time from the date of its submission by the Congress [text of amendment].

Conclusion

In summary, S.J. Res. 110 would reverse *Roe v. Wade, Doe v. Bolton,* and all their progeny insofar as they are based on judicial recognition of a constitutionally protected abortional liberty. Henceforth, statutes that restrict or prohibit abortion would be valid if rationally related to the protection of unborn human life.

Further, S.J. Res. 110, which provides "concurrent power" to restrict and prohibit abortion to the states and to Congress, would permit both the states and the Congress to legislate, and there is no possibility that their laws could come into genuine conflict. This obviates the need for a proviso to counter any preemption problem that might arise under the Supremacy Clause.

In accordance with these conclusions and other observations, the following revised language is recommended:

No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to restrict and prohibit abortion.

To be certain that the meaning of "concurrent power" as it has been previously construed cannot be altered by a novel Supreme Court construction, the following language is recommended:

No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

It is desirable that the Senate Committee Report emphasize:

1. That S.J. Res. 110 is intended to reverse *Roe v. Wade* and all its progeny that recognize the existence of a constitutional right to abortion, however formulated;

2. That the use of the word "recognized" (as has been suggested) or "secured" is intended to preclude use of any putative Ninth or Tenth Amendment right to abortion;

3. That the use of "concurrent power" is intended to invoke specifically the line of cases that includes *United States v. Lanza* in which these words have been authoritatively construed;

4. That "abortion" encompasses what might result in termination of embryonic or fetal life from fertilization and thereafter and that S.J. Res. 110 provides for plenary legislative power to protect that life; that the Amendment is intended to reach the institution of abortion, including its "badges and incidents";

5. That the elimination of a right to abortion and the provision for plenary power are intended to ensure that legislation enacted in accordance with the Amendment is judged by the "rational relationship" test; and,

6. That the legislative power granted under the Amendment overcomes any potential state constitutional inhibition.

It is further recommended that the Resolution accompanying S.J. Res. 110 provide for ratification by legislative majority in ratifying state legislatures and that the Subcommittee carefully consider whether to set a time limit for ratification of ten years, or, in the alternative, to permit a future Congress to determine whether ratification has occurred within a reasonable time.

Finally, let me again commend you, Mr. Chairman. You have embarked upon a noble enterprise to protect the weakest among us.

☆☆☆☆☆

[84] Leser v. Garnett, 258 U.S. 130, 137 (1922).

[85] Hawke v. Smith, No. 1, 253 U.S. 221, 229-31 (1920).

[86] *Id.* at 227.

[87] Dillon v. Gloss, 256 U.S. 368, 373 (1921).

[88] *Id.* at 373, 376.

[89] *Id.* at 376.

[90] Dyer v. Blair, 390 F.Supp. 1291, 1308 (N.D. Ill. 1975) (three-judge court).

[91] Cong. Globe, 41st Cong., 1st Sess. 75, 102, 334 (1869).

[92] *See* P. Brannon, D. Lillehaug, & R. Reznick, *Note: Critical Details: Amending the United States Constitution,* 16 Harv. J. Legis. 763, 798-805 (1979); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment,* 26 Notre Dame Lawyer 185, 210 (1951); *contra,* Dodd, *Amending the Federal Constitution,* 30 Yale L. J. 321, 341 (1921).

[93] H.J. Res. 638, 95th Cong., 2nd Sess., 123 Cong. Rec. S17318-19 (dailey ed. Oct. 6, 1978).

[94] U.S. Cong. amends. XVIII, XX, XXI, XXII.

[95] P. Brannon, D. Lillehaug, and R. Reznick, *Note: Critical Details: Amending the United States Constitution,* 16 Harv. J. Leg. 763, 768-69 (1979).

[96] A ratification time limit was defeated on the floor of the House. 58 Cong. Rec. 93 (1919).

[97] Coleman v. Miller, 307 U.S. 433 (1939).

[98] The four concurring justices considered the question of the time taken to ratify nonjusticiable. *Id.* at 460-70. Thus, the concurring justices would permit the same discretion to Congress at the plurality.

[99] *Id.* at 454.

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Reagan Says Allowing Retarded Child to Die Breaks Federal Law

United Press International

President Reagan yesterday responded to the death of a retarded Indiana infant whose parents instructed authorities to withhold food by declaring that such action amounts to illegal discrimination against the handicapped.

The president sent a memo to Health and Human Services Secretary Richard S. Schweiker and Attorney General William French Smith making it clear he considers withholding treatment from such infants illegal.

He cited a federal law that says services must not be withheld from the handicapped if they normally would be provided to others.

"Regulations under this law specifically prohibit hospitals and other providers of health sevices receiving federal assistance from discriminating against the handicapped," Reagan's memo said.

The president asked Schweiker to notify hospitals and "health care providers that if they receive federal funds they must abide by that law." He told Smith to notify him of "federal and constitutional remedies" to be used against those who break the law.

The six-pound baby was born with Down's syndrome and was unable to eat normally because his esophagus was not connected to his stomach. The week-old infant died April 15, hours before Justice John Paul Stevens of the Supreme Court was due to hear a request for a stay of a ruling by the Indiana Supreme Court.

The Indiana high court refused to order the hospital to feed the child, known only as "Baby Doe." The case triggered an outcry from the National Right to Life Committee.

Waterbury American, Wednesday, April 2
198

Pro-Life Principle Important To Nation

By RABBI SEYMOUR SIEGEL

I represent a faith which has from its beginnings been adamantly and enthusiastically pro-life. The God of Israel, Christiandom, and the whole world, is called the God of Life in Hebrew literature. The Torah, the collective name for the teachings of Judaism, is called a Torah of Life — "Torah Chayim."

If I were to categorize the Jewish view, which is shared with all high religions, we teach a *bias for life.*

Now the issues that agitate most of us are not the application of this principle to healthy young, vibrant individuals, rather it is those which have to do with what the great Protestant theologian Paul Ramsey of Princeton University called "the edges of life." The times when people are defenseless, and cannot speak for themselves, usually the very beginning or end of life.

Talmudic literature, which is for Jews the authentic scriptural interpretation and the source of doctrine and law, sees the fetus as possessing a human dimension. It speaks of "ubar bemeah imo," the fetus even exalting God.

The Zohar — the classic book of Jewish mysticism — in praising the Israelites in Egypt, says one of their great attributes was that they did not, despite provocation, destroy fetuses which the Zohar calls "the handiwork of the living God."

There are occasions, fortunately rare, when the fetus is a threat to the mother. In such situations, the doctrine of self defense can be invoked, and the aggressor eliminated to save the victim. That means terminating the life, or killing, the fetus is only justified in the most severe and painful situations where the only choice literally is between the life of the fetus and that of the mother.

Otherwise, killing a fetus is forbidden by ethics, morality, Jewish law, faith, and teaching.

The Talmud invokes the verse in Genesis 9:6 which says: "he who sheds the blood, adam v'adam, of a person or a being within a being shall be punished." And, as the Talmud interprets, what is the person within the person? The fetus. Therefore, the killing of a fetus is a serious, heinous crime.

There are some rabbinic authorities who are more liberal regarding this. But it is my heartfelt belief that when there is a difference of opinion with some on the side of life and others on the side of death, it is right to be on the side of life. So I would say that Jewish law does not permit abortions, except to save the mother's life.

I might add that we do not fulfill our responsibility to fetuses unless we also assume responsibility for what happens after they are born. This means, as Mother Theresa has been promoting, a program of finding homes for unwanted children where surrogate parents will provide the love, care, and affection which is so much a part of our human state.

We must be pro-life in extending help of all kinds to mothers who choose to bear their children. If we do not, then I believe our protestations will be flawed, because we are not pro all life, especially in the vulnerable years after birth.

People say it is wrong to legislate morality, that it is a "private matter." The fact is the only thing we do legislate is morality. All legislation is an institutionalization of moral ideas. Contract law, traffic laws, banking laws, laws governing the stork market all are expressions of our moral and ethical commitment.

How could anyone believe an issue as serious as whether we opt for life OR death — the most important decision we make — should not be the subject of legislation.

Freedom of choice has a very attractive ring to it, but it is against the Jewish religion, and I'm sure that's true of others as well.

These are the fundamental principles underlying civilization.

What one person does affects the whole community. Therefore, choice involves not only choosing for yourself but choosing the consequences for the group to which you belong, the nation in which you are a citizen, and the world where you exist.

In the Talmud there is a parable, which I think is paralleled in other ancient literature about three men in a boat. One man starts drilling a hole under his own seat, and the others ask, "What are you doing?" He says, "What do you care? This is my place, and what I'm doing is my business, not yours."

Of course, the fallacy of his reasoning is obvious.

We cannot, we must not, we should not, take with equanimity the notion that we can exist in a community where life is chaperoned and death institutionalized with the consent, or at least the indifference, of the government.

To sum it up, we all are committed: Jews, Christians, Muslims, perhaps even non-believers, to the thundering words of Deuteronomy "u'vecharta v'chayim," and you shall choose life!

Rabbi Seymour Siegel is Ralph Simon Professor of Theology and Ethics of the Jewish Theological Seminary of America and an adjunct scholar at The Heritage Foundation. This is based on his testimony during recent abortion hearings of the U.S. Senate Judiciary Subcommittee on the Constitution.

yond the Camp David accord, and France has

George F. Will

Abortion Does Cause Pain to Its Victims

In the eight years since the Supreme Court nationalized the abortion controversy, one facet of that subject has been neglected: pain. Abortion is painful for the aborted.

The neglect is explainable. To opponents of abortion, death, not pain, is the paramount issue. And, proponents of abortion need (emotionally or logically, or both) to deny the possibility of fetal pain.

In its 1973 decision legislating abortion on demand, the Supreme Court announced that fetal life is not alive. At least that is what the court seems to have meant (if it can be said to have meant anything) when it described the fetus as "potential life." Those who support the 1973 decision are committed to the idea that a fetus, being only "potential" life, cannot feel pain, pain being an attribute of actual life.

Thus does a legal absurdity breed a biological falsehood. This intellectual train wreck is the subject of an essay in The Human Life Review by Prof. John Noonan of the University of California (Berkeley) Law School. There are, he notes, four principal means of abortion.

Sharp curettage involves a knife killing the fetus (if the amateur embryologists on the court will allow us to speak of "killing" life that is merely "potential"). In suction curettage, a vacuum pump sucks out the fetus in bits (and a knife cleans out any remnants). In second trimester and later abortions, a saline solution is injected into the amniotic fluid. The salt seems to act as a poison; the skin of the fetus, when delivered, resembles skin soaked in acid. If by accident the solution leaks into the body of the mother, she experiences pain that is described as "severe." The fetus can be in this solution for two hours before its heart (a stubborn bit of "potential" life) stops beating. Alternatively, the mother can be given a dosage of a chemical sufficient to impair the circulation and cardiac functioning of the fetus, which will be delivered dead or dying.

A fetus, like an infant or an animal, has no language in which to express pain. But we infer, and empathize with, the pain of creatures, such as baby seals, which lack language to express pain.

There are uncertainties about the precise points in fetal development at which particular kinds of sensations are experienced. But observations of development and behavior indicate that by the 56th day, a fetus can move. Discomfort may occasion the movement. Tactile stimulation of the mouth produces reflex action about day 59 or 60. By day 77 the fetus develops sensitivity to touch on hands, feet, genital and anal areas, and begins to swallow. Noonan believes that the physiological literature teaches that "beginning with the presence of sense receptors and spinal responses, there is as much reason to believe that the unborn are capable of pain as that they are capable of sensation."

Americans are proud of their humane feelings and are moved by empathy. Thus, we regulate the ways animals can be killed. Certain kinds of traps are banned. Cattle cannot be slaughtered in ways deemed careless about pain. Stray dogs and cats must be killed in certain humane ways.

But no laws regulate the suffering of the aborted. Indeed, Planned Parenthood, the most extreme pro-abortion lobby, won a Supreme Court ruling that it is unconstitutional to ban the saline abortion technique. That's right: the court discovered that the "privacy" right to abortion, which right the framers of the Constitution neglected to mention, even confers a right to particular abortion techniques.

Most pro-abortion persons have a deeply felt and understandable need to keep the discussion of abortion as abstract as possible. They become bitter when opponents use photographs to document early fetal development. The sight of something that looks much like a child complicates the task of trying to believe that there is nothing there but "potential" life. If fetal pain is acknowledged, America has a problem: its easy conscience about 1.6 million abortions a year depends on the supposition that fetal pain is impossible.

Magda Denes, in her book, "In Necessity and Sorrow: Life and Death in an Abortion Hospital," brought to the subject not anti-abortion convictions but a reporter's eye for concrete detail. Examining the body of an aborted child, she described the face as showing "the agonized tautness of one forced to die too soon." That is a description to bear in mind this day, as many thousands of abortions occur.

Hobart Rowen

New Perspectives on Human Abortion

New Perspectives on Human Abortion

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JOHN T. NOONAN, JR.

16

The Experience of Pain by the Unborn

One aspect of the abortion question which has not been adequately investigated is the pain experienced by the object of an abortion. The subject has clearly little attraction for the pro-abortion party, whose interest lies in persuading the public that the unborn are not human and even in propagating the view that they are not alive. Indeed, in a remarkable judicial opinion Judge Clement Haynsworth has written, "The Supreme Court declared the fetus in the womb is not alive. . . ."[1] Judge Haynsworth's statement is merely a resolution of the oxymoron "potential life," which is the term chosen by the Supreme Court of the United States to characterize the unborn in the last two months of pregnancy.[2] Before that point, the unborn are referred to by the Court as alive only according to one "theory of life";[3] and as the phrase "potential life" appears to deny the actuality of life, Judge Haynsworth does not exaggerate in finding that, by definition of our highest court, the unborn are not alive. From this perspective, it is folly to explore the pain experienced. Does a stone feel pain? If you know as a matter of definition that the being who is aborted is not alive, you have in effect successfully bypassed any question of its suffering.

It is more difficult to say why the investigation has not been pursued in depth by those opposed to abortion. The basic reason, I believe, is the sense that the pain inflicted by an abortion is of secondary importance to the intolerable taking of life. The right to life which is fundamental to the enjoyment of every other human right has been the focus. That suffering may be experienced by those who are losing their lives has been taken for granted, but it has not been the subject of special inquiry or outrage. The assumption has been that if the killing is

topped, the pain attendant on it will stop too, and it has not seemed ecessary to consider the question of pain by itself. In this respect, those pposed to abortion have been, like most medical researchers, concenrating on a cure not for the pain but for the disease.

There are good reasons, however, for looking at the question of ain by itself. We live in a society of highly developed humanitarian eeling, a society likely to respond to an appeal to empathy. To those oncerned with the defense of life, it makes no difference whether the life aken is that of a person who is unconscious or drugged or drunk or in ull possession of his senses: a life has been destroyed. But there are those vho either will not respond to argument about killing because they egard the unborn as a kind of abstraction, or who will not look at actual hotographs of the aborted because they find the fact of death too strong o contemplate, but who nonetheless might respond to evidence of pain uffered in the process of abortion. In medical research it has proved seful to isolate pain as a phenomenon distinct from disease, so it may e useful here.[4]

The Analogy of Animals

The best indication that attention to the pain of the unborn may ave social consequences is afforded by the example of humanitarian ctivity on behalf of animals. Let me offer three cases where substantial eform was effected by concentrating on the pain the animals expeienced. In each case it was accepted that animals would die, whatever eform was enacted; an appeal on their behalf could not be based on an version to putting animals to death. The only forceful argument was hat the way in which the animals were killed was cruel because it was ainful to the animals.

The first case is that of trapping animals by gins—traps that spring hut upon the animal, wound it, and hold it to die over a probably rotracted period. A campaign was launched in England against this nethod of trapping in 1928, and after thirty years Parliament responded y banning such trapping.[5] A second case is the butchering of cattle for neat. The way in which this was for centuries carried out was painful to he animal being slaughtered. A typical modern statute is the law in California which became effective only in 1968—all cattle are to be endered insensible by any means that is "rapid and effective" before eing "cut, shackled, hoisted, thrown or cast." Or, if the animals are eing slaughtered for kosher use, their consciousness must be destroyed y "the simultaneous and instantaneous severance of the carotid arteries vith a sharp instrument."[6] A third case: a 1972 California statute egulates in detail the methods by which impounded dogs or cats may be illed. If carbon monoxide is used, the gas chamber must be lighted so

that the animal's collapse can be monitored. A newborn dog or cat may not be killed other than by drugs, chloroform, or a decompression chamber. The use of nitrogen gas to kill an older dog or cat is regulated in terms of an oxygen reduction to be reached within sixty seconds.[7] Each of these laws has a single goal: to assure that the animal not suffer as it dies.

It may seem paradoxical, if not perverse, to defend the unborn by considering what has been done for animals. But the animal analogies are instructive on three counts: they show what can be done if empathy with suffering is awakened. They make possible an *a fortiori* case—if you will do this for an animal, why not for a child? And they exhibit a successful response to the most difficult question when the pain of a being without language is addressed—how do we know what is being experienced?

The Inference of Pain

Our normal way of knowing whether someone is in pain is for the person to use language affirming that he or she is suffering.[8] This behavior is taken as a sign, not necessarily infallible but usually accurate, that the person is in pain. By it we can not only detect the presence of pain but begin to measure its threshold, its intensity, and its tolerability. Infants, the unborn, and animals have no conceptual language in which to express their suffering and its degree.

Human infants and all animals brought up by parents will cry and scream.[9] Every human parent becomes adept at discriminating between a baby's cry of pain and a baby's cry of fatigue or of anxiety. How do we distinguish? By knowing that babies are human, by empathizing, by interpreting the context of the cry. We also proceed by trial and error: this cry will end if a pain is removed, this cry will end if the baby falls asleep. But animals, we know, are not human and are, in many significant ways, not like us. How do we interpret their cries or their wriggling as pain reactions if they are silent?

What we do with animals to be able to say that they are in pain is precisely what we do with the newborn and the infant: we empathize. We suppose for this purpose that animals are, in fact, "like us," and we interpret the context of the cry. We also proceed by trial and error, determining what stimuli need to be removed to end the animal's reaction.[10] We are not concerned with whether the animal's higher consciousness, its memory and its ability to understand cause and to forecast results, are different from our own, even though we know that for us the development of our consciousness, our memory, our understanding, and our sense of anticipation all may affect our experience of

pain. With animals, we respond when we hear or see the physical sign we interpret as a symptom of distress.

Once we have made the leap that permits us to identify with animals, we do not need to dwell on the overt signs of physical distress. All we need is knowledge that an injury has been inflicted to understand that the animal will be in pain. Consider, by way of illustration, this passage on the cruelties of whaling: "A lacerated wound is inflicted with an explosive charge, and the whale, a highly sensitive mammal, then tows a 300-ton boat for a long time, a substantial fraction of an hour, by means of a harpoon pulling in the wound."[11] The author does not particularize any behavior of the wounded whale beyond its labor tugging the whaleboat, nor does he need to. We perceive the situation and the whale's agony. In a similar way the cruelty involved in hunting seals is shown by pointing to their being shot and left to die on the ice.[12] The pain of the dying seal is left to imaginative empathy.

We are, in our arguments about animal suffering and in our social response to them, willing to generalize from our own experience of pain and our knowledge of what causes pain to us. We know that pain requires a force inflicting bodily injury and that, for the ordinary sentient being who is not drugged or hypnotized, the presence of such a force will occasion pain. When we see such a force wounding any animal we are willing to say that the animal feels pain.

The Nature of Pain

If we pursue the question more deeply, however, we meet a question of a mixed philosophical-psychological character. What is pain? Pain has in the past been identified with "an unpleasant quality in the sense of touch." Pain has also been identified with "unpleasantness," understood as "the awareness of harm."[13] In the analysis of Thomas Aquinas, *dolor* requires the deprivation of a good together with perception of the deprivation. *Dolor* is categorized as interior *dolor*, which is consequent on something being apprehended by the imagination or by reason, and exterior *dolor*, which is consequent on something being apprehended by the senses and especially by the sense of touch.[14] The Thomistic definition of exterior *dolor*, while general, is not incongruent with a modern understanding of pain, which requires both harmful action on the body and perception of the action. It has been observed that pain also has a motivational component: part of the pain response is avoidance of the cause of the pain.[15] In the words of Ronald Melzack, a modern pioneer in work on pain, "The complex sequences of behavior that characterize pain are determined by sensory, motivational, and cognitive processes that act on motor mechanisms."[16]

Pain, then, while it may be given a general definition, turns out upon investigation to consist of a series of specific responses involving different levels and kinds of activity in the human organism. Melzack has put forward a "gating theory" of pain, in which the key to these responses is the interaction between stimuli and inhibitory controls in the spinal column and in the brain which modulate the intensity and reception of the stimuli.[17] Melzack's theory requires the postulation of control centers, and it is not free from controversy.[18] Yet in main outline it persuasively explains a large number of pain phenomena in terms of stimuli and inhibitors.

To take one illustration at the level of common experience, if someone picks up a cup of hot liquid, his or her response may vary depending on whether the cup is paper or porcelain. The paper cup may be dropped to the ground; an equally hot porcelain cup may be jerkily set back on the table. What is often looked at as a simple reflex response to heat is modified by cognition.[19] To take a more gruesome experience, a number of soldiers severely wounded on the beach at Anzio told physicians in the field hospital that they felt no pain; they were overwhelmingly glad to be alive and off the beach. The same wounds inflicted on civilians would have been experienced as agonizing.[20] For a third example, childbirth without anesthesia is experienced as more or less painful depending on the cultural conditioning which surrounds it.[21]

As all of these examples suggest, both the culture and specific experiences play a part in the perception of pain. Memory, anticipation, and understanding of the cause all affect the perception. It is inferable that that brain is able to control and inhibit the pain response. In Melzack's hypothesis, the gating mechanism controlling the sensory inputs which are perceived as painful operates "at successive synapses at any level of the central nervous system in the course of filtering of the sensory input."[22] In this fundamental account, "the presence or absence of pain is determined by the balance between the sensory and the central inputs to the gate control system."[23]

What is the nature of the sensory inputs? There are a larger number of sensory fibers which are receptors and transmitters, receiving and transmitting information about pressure, temperature, and chemical changes at the skin. These transmissions have both temporal and spatial patterns. It is these patterns which will be perceived as painful at certain levels of intensity and duration when the impulses are uninhibited by any modulation from the spinal column or brain.[24]

The Experience of the Unborn

For the unborn to experience pain there must be sense receptors capable of receiving information about pressure, temperature, and cutaneous chemical change; the sense receptors must also be capable of transmitting that information to cells able to apprehend it and respond to it.

By what point do such receptors exist? To answer this question, the observation of physical development must be combined with the observation of physical behavior. As early as the 56th day of gestation the child has been observed to move in the womb.[25] In Liley's hypothesis, 'the development of structure and the development of function go hand in hand. Fetal comfort determines fetal position, and fetal movement is necessary for a proper development of fetal bones and joints."[26] If fetal bones and joints are beginning to develop this early, movement is necessary to the structural growth; and if Liley is correct, the occasion of movement is discomfort or pain. Hence, there would be some pain receptors present before the end of the second month. A physiologist places about the same point—day 59 or 60—the observation of "spinal reflexes" in the child. Tactile stimulation of the mouth produces a reflex action, and sensory receptors are present in the simple nerve endings of the mouth.[27] Somewhere between day 60 and day 77 sensitivity to touch develops in the genital and anal areas.[28] In the same period, the child begins to swallow. The rate of swallowing will vary with the sweetness of the injection.[29] By day 77 both the palms of the hands and the soles of the feet will also respond to touch; by the same day, eyelids have been observed to squint to close out light.[30]

A standard treatise on human physiological development puts between day 90 and day 120 the beginning of differentiation of "the general sense organs," described as "free nerve terminations (responding to pain, temperature, and common chemicals), lamellated corpuscles (responding to deep pressure), tactile corpuscles, neuromuscular spindles, and neurotendinous end organs (responding to light and deep pressure)."[31] But as responses to touch, pressure, and light precede this period, visible differentiation must be preceded by a period in which these "general sense organs" are functioning.

The cerebral cortex is not developed at this early stage; even at 12 to 16 weeks it is only 30 percent to 40 percent developed.[32] It is consequently a fair conclusion that the cognitive input into any pain reaction will be low in these early months. Neither memory nor anticipation of results can be expected to affect what is experienced. The unborn at this stage will be like certain Scotch terriers, raised in isolation for experimental purposes, who had no motivational pain responses when their noses encountered lighted matches; they were unaware of noxious signals in their environment.[33] But if both sensory receptors and spinal column are involved, may one say with assurance that the reception of strong sense impressions causes no pain? It would seem clear that the reactions of the unborn to stimuli like light and pressure are the motivational responses we associate with pain. We say that a sense receptor is there because there is a response to touch and a taste receptor because there is a response to taste. By the same token we are able to say that pain receptors are present when evasive action follows the intrusion of pressure or light, or when injection of a disagreeable fluid lowers the rate of swallowing. Liley is categorical in affirming that the unborn feel pain.[34] His conclusion has recently been confirmed by an American researcher, Mortimer Rosen, who believes the unborn respond to touch, taste, and pain.[35]

While the likelihood of weak participation by the cerebral cortex will work against the magnification of the pain, there will also be an absence of the inhibitory input from the brain which modulates and balances the sensory input in more developed beings. Consequently, the possibility exists of smaller and weaker sensory inputs having the same effect which later is achieved only by larger and stronger sensations.

As the sensory apparatus continues to grow, so does the cerebral cortex: light stimuli can evoke electrical response in the cerebral cortex between the sixth and seventh months.[36] By this time there will be a substantial cerebral participation in pain perception together with the likelihood of greater brain control of the sensory input. If a child is delivered from the womb at this date, he or she may shed tears. He or she will cry.[37] As we do with other newborns, we interpret these signs in terms of their context and may find them to be signs of pain. What we conclude about the delivered child can with equal force be concluded about the child still in the womb in months six through nine: that unborn child has developed capacity for pain.

In summary, beginning with the presence of sense receptors and spinal responses, there is as much reason to believe that the unborn are capable of pain as that they are capable of sensation. The ability to feel pain grows together with the development of inhibitors capable of modulating the pain. By the sixth month, the child in the womb has a capacity for feeling and expressing pain comparable to the capacity of the same child delivered from the womb. The observation sometimes made that we don't remember prenatal pains applies with equal force to the pains of being born or the pain of early infancy. Memory, it must be supposed, suppresses much more than it recalls. If we remember nothing about life before birth or life before three or four, it may even be that some recollections are painful enough to invoke the suppressive function of our memory; life in the womb is not entirely comfortable.

The Experience of Pain in an Abortion

The principal modern means of abortion are these. In early pregnancy sharp curettage is practiced: a knife is used to kill the unborn child.[38] Alternatively, suction curettage is employed: a vacuum pump sucks up the unborn child by bits and pieces, and a knife detaches the remaining parts.[39] In the second trimester of pregnancy and later a hypertonic saline solution is injected into the amniotic fluid surrounding the fetus. The salt appears to act as a poison;[40] the skin of the affected child appears, on delivery, to have been soaked in acid.[41] Alternatively, prostaglandins are given to the mother; in sufficient dosage they will constrict the circulation and impair the cardiac functioning of the fetus.[42] The child may be delivered dead or die after delivery.[43]

Are these experiences painful? The application of a sharp knife to the skin and the destruction of vital tissue cannot but be a painful experience for any sentient creature. It lasts for about ten minutes.[44] Being subjected to a vacuum is painful, as is dismemberment by suction. The time from the creation of the vacuum to the chief destruction of the child again is about ten minutes.[45] Hypertonic saline solution causes what is described as "exquisite and severe pain" if, by accident during an abortion, it enters subcutaneously the body of the woman having the abortion.[46] It is inferable that the unborn would have an analogous experience lasting some two hours, as the saline solution takes about this long to work before the fetal heart stops.[47] The impact of prostaglandins constricting the circulation of the blood or impairing the heart must be analogous to that when these phenomena occur in born children: they are not pleasant. If, as has been known to happen, a child survives saline or prostaglandin poisoning and is born alive, the child will be functioning with diminished capacity in such vital functions as breathing and cardiac action.[48] Such impaired functioning is ordinarily experienced as painful.

Do the anesthestics the mother has received lessen the pain of the child? It is entirely possible that some drugs will cross the placenta and enter the child's system, causing drowsiness. Anesthesia, however, is not administered to the gravida with the welfare of her child in mind, nor do the anesthetics ordinarily used prevent the mother from serious pain if she is accidentally affected by the saline solution. It may be inferred the child is not protected either. Is it possible that the abortifacient agent destroys the pain receptors and the capability of a pain response earlier than it ends the life of the unborn, so that there is a period of unconsciousness in which pain is not experienced? This is possible in curettage by knife or suction, but it would seem to occur haphazardly, since stunning the child is not the conscious aim of the physician performing the abortion. In saline or prostaglandin poisoning it seems unlikely

that the pain apparatus is quickly destroyed. An observation of Melzack is of particular pertinence: the local injection of hypertonic saline opens the spinal gate, he has remarked, and evokes severe pain. At the same time, it raises the level of the inhibitors and closes the gate to subsequent injections.[49] From this it may be inferred that an unborn child subjected to repeated attempts at abortion by saline solution—the baby in the *Edelin* case was such a child[50]—suffers a good deal the first time and much less on the second and third efforts. The general observation of Melzack on the mechanism of pain is also worth recalling: any lesion which impairs the tonic inhibitory influence from the brain opens the gate, with a consequent increase of pain.[51] Any method of abortion which results first in damage to the cortex may have the initial effect of increasing the pain sensations.

From the review of the methods used, we may conclude that as soon as a pain mechanism is present in the fetus—possibly as early as day 56—the methods used will cause pain. The pain is more substantial and lasts longer the later the abortion is. It is most severe and lasts the longest when the method is saline poisoning.

Whatever the method used, the unborn are experiencing the greatest of bodily evils, the ending of their lives.[52] They are undergoing the death agony. However inarticulate, however slight their cognitive powers, however rudimentary their sensations, they are sentient creatures undergoing the disintegration of their being and the termination of their vital capabilities. That experience is painful in itself. That is why an observer like Magda Denes, looking at the body of an aborted child, can remark that the face of the child has "the agonized tautness of one forced to die too soon."[53] The agony is universal.

CONCLUSION

There are no laws which regulate the suffering of the aborted like those sparing pain to dying animals. There is nothing like the requirement that consciousness must be destroyed by "rapid and effective" methods as it is for cattle; nothing regulating the use of the vacuum pump the way the decompression chamber for dogs is regulated; nothing like the safeguard extended even to newborn kittens that only a humane mode of death may be employed. So absolute has been the liberty given the gravida by the Supreme Court that even the prohibition of the saline method by a state has been held to violate the Constitution.[54] The Supreme Court has acted as though it believed that its own fiat could alter reality and as if the human fetus is not alive.

Can human beings who understand what may be done for animals and what cannot be done for unborn humans want this inequality of treatment to continue? We are not bound to animals to the same degree as we are bound to human beings because we lack a common destiny, but we are bound to animals as fellow creatures, and as God loves them out of charity, so must we who are called to imitate God.[55] It is a sign not of error or weakness but of Christlike compassion to love animals. Can those who feel for the harpooned whale not be touched by the situation of the salt-soaked baby? We should not despair of urging further the consciences of those who have curtailed their convenience to spare suffering to other sentient creatures.

With keener sensibilities and more developed inhibitors than animals, we are able to empathize with their pain. By the same token, we are able to empathize with the aborted. We can comprehend what they must undergo. All of our knowledge of pain is by empathy: we do not feel another's pain directly. That is why the pain of others is so tolerable for us. But if we begin to empathize, we may begin to feel what is intolerable.

We are bound to the beings in the human womb by the common experience of pain we have also known in the womb. We are bound to them as well by a common destiny, to share eternal life. As fellow wayfarers, we are bound to try to save them from a premature departure. We can begin to save them by communicating our knowledge of the suffering they must experience.

NOTES

1. Floyd v. Anders, 440 F. Supp. 535, 539 (D. S.C. 1977).
2. Roe v. Wade, 410 U.S. 113, 162 (1973).
3. Id. at 163.
4. On the usefulness of looking at pain as a separate phenomenon, see Ronald Melzack, *The Puzzle of Pain* (New York: Basic Books, 1973), pp. 9-10.
5. C.W. Hume, *Man and Beast* (London: Universities Federation for Animal Welfare, 1962), p. 214.
6. Cal. Agric. Code § 19 (1967).
7. Cal. Penal Code §§ 597 v. and w. (1978).
8. John S. Liebeskind and Linda A. Paul, "Psychological and Physiological Mechanisms of Pain," *American Review of Psychology* 28 (1977):42.
9. As to parentally cared-for animals, see Hume, op. cit., p. 45.
10. Ibid., pp. 94-95.

11. Ibid., p. 215.
12. Ibid., pp. 215-216.
13. Edward Boring, *Pain Sensations and Reactions* (Baltimore: The Williams and Wilkins Co., 1952), pp. v-vi.
14. Thomas Aquinas, *Summa Theologica*, I-II, q. 35, art. 7.
15. Melzack, op. cit., p. 163.
16. Ibid., p. 165.
17. Ibid., pp. 158-166.
18. *See* Liebeskind and Paul, op. cit., p. 47.
19. Cf. Melzack, op. cit., pp. 29-31.
20. Ibid., pp. 29-30.
21. Ibid., p. 22.
22. Ibid., p. 166.
23. Ibid., p. 171.
24. Ibid., p. 158.
25. A. William Liley: The foetus as personality. *Australia and New Zealand Journal of Psychiatry* 6:99, 1972.
26. A. William Liley, "Experiments with Uterine and Fetal Instrumentation," in *Intrauterine Fetal Visualization*, ed. Michael M. Kuback and Carlo Valenti (Oxford: Excerpta Medica; New York: American Elsevier Publishing Co., 1976), p. 75.
27. P.S. Timiras, *Developmental Physiology and Aging* (New York: The Macmillan Company, 1972), p. 153.
28. Ibid., p. 153.
29. Liley: The foetus as personality. Op. cit., p. 102.
30. Trypena Humphrey, "The Development of Human Fetal Activity and Its Relation to Postnatal Behaviour," in *Advances in Child Development and Behavior*, ed. Hayne W. Reese and Lewis P. Lipsitt (New York: Academy Press, 1973), pp. 12, 19.
31. Timiras, op. cit., p. 137.
32. Geoffrey S. Dawes, *Fetal and Neonatal Physiology* (Chicago: Year Book Medical Publishers, 1968), p. 126.
33. Melzack, op. cit., p. 28.
34. Liley: Experiments with Uterine and Fetal Instrumentation. Op. cit.
35. Mortimer Rosen, "The Secret Brain: Learning Before Birth," *Harper's*, April 1978, p. 46.
36. Timiras, op. cit., p. 149.
37. Paul Mussen, John Congar, and Jerome Kagan, *Child Development and Personality*, 2nd ed. (New York: Harper and Row, 1963), p. 65.

38. Louis M. Hellman and Jack A. Pritchard, eds., *Williams Obstetrics*, 14th ed. (New York: Appleton-Century-Crofts, 1971), p. 1089.

39. Selig Neubardt and Harold Schwelman, *Techniques of Abortion* (Boston: Little, Brown and Company, 1972), pp. 46-47.

40. Ibid., p. 68.

41. Magda Denes, *In Necessity and Sorrow: Life and Death in an Abortion Hospital* (New York: Basic Books, 1976), p. 27.

42. Sultan M.M. Karim, *Prostaglandins and Reproduction* (Baltimore: University Park Press, 1975), p. 107.

43. *See* Floyd v. Anders, 440 F. Supp. 535 (D. S.C. 1977), for a case where the child died after delivery.

44. André Hellegers, director of the Joseph and Rose Kennedy Institute, to the author, oral communication.

45. Id.

46. Neubardt and Schwelman, op. cit., p. 68.

47. Karim, op. cit., p. 107.

48. *See* A.I. Csapo et al.: Termination of pregnancy with double prostaglandin input. *American Journal of Obstetrics and Gynecology* 124:1, 1976.

49. Melzack, op. cit., pp. 181-182.

50. Commonwealth v. Edelin, — Mass., 359 N.E.2d 4 (1976).

51. Melzack, op. cit., p. 171.

52. Thomas Aquinas, *Summa contra Gentiles* 4, 52.

53. Denes, op. cit., p. 60.

54. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

55. Thomas Aquinas, *Summa Theologica*, II-II, q. 25, art. 3, reply to objection 3.

NATIONAL PRO-FAMILY COALITION

File

MEMORANDUM

file

TO: Jean Mondi, Secretary Donovan's Office

DATE: November 16, 1982

FROM: Connie Marshner CCM

Thank you for asking me for information about the skilled trades issue.

I have had several occasions to meet with representatives of the International Society of Skilled Trades (ISST). They have proven to be very sympathetic with major portions of our conservative/pro-family program. In the 1980 campaigns, they supported the Republican ticket and lent their organizational support to Congressional candidates when they were asked for it. Based upon these experiences, I feel that this segment of the labor community is potentially a friend, and deserves some specialized attention.

The union today is small (40,000 members). Its members are skilled workers, e.g., tool and dye makers, plastic molders. The membership is small because the workers are required to belong to the AFL-CIO, and few are willing to pay double dues. Skilled tradesmen rankle at being considered "blue collar labor," and resent the fact that they are forced to belong to the AFL-CIO.

The Mallinkrodt decision of the NLRB in 1966 sealed the fate of the skilled tradesmen as far as they are concerned. That decision in essence said they have to belong to the AFL-CIO. In return for supporting the candidacy of Ronald Reagan, ISST had hoped that the NLRB would re-open the issue. Indeed, a case is currently approaching the NLRB which would offer an opportunity to overturn Mallinkrodt at least for metalworkers. Mack-Wayne Plastics Company (22-RC-8838) may be heard by the NLRB shortly.

The ISST leaders who had formed an alliance with Republicans during the 1980 campaign lost face with their own members when 1981 and 1982 came and went with no action on this issue. The ISST was not active on behalf of Republican candidates in 1982. If the union is to remain friendly the leaders need to be able to point to some movement -- thus far, there is none to point to. If skilled trades workers could receive hope of liberation from the AFL-CIO through the actions of the Reagan Administration, it might have a significant ripple effect.

721 Second St., N.E. ● Washington, D.C. 20002 ● (202) 546-3000

Morton Blackwell at the White House and Paul Weyrich of the Committee for the Survival of a Free Congress are also acquainted with this issue, and would welcome an opportunity to meet with the Secretary to discuss it.

bcc: Morton Blackwell
Paul Weyrich

The New Right's

ABORTION WAS NOT ALL THAT WAS DISCUSSED AT UNITY '81. THE long procession of top New Right activists, practically a Who's Who of the movement, spoke frankly about how the antiabortion crusade fit into their larger political scenarios. In fact, taken together their presentations provided a remarkable survey of the New Right's thinking and planning for 1982 and after.

Leading the pack was Paul Weyrich, who is regarded by many as the founder of the New Right phenomenon. Certainly, as head of the Committee for the Survival of a Free Congress, he is one of its most effective and sophisticated legislative infighters. Weyrich described an exhaustive analysis he had undertaken of several close election contests in the 1978 campaign, to determine what was the key factor separating the winners from the losers. That key factor, he concluded, was neither money nor media, contrary to the accepted political wisdom; instead, he found that having a clear strategy was the decisive element. Candidates who had a clear idea of where they wanted to go, and which voters they were after were the ones most likely to win. One of the main advantages of a clear strategic vision, Weyrich explained, was that it usually enabled a candidate to set the agenda of a campaign, or once elected, of a legislative situation.

For the New Right, Weyrich continued, the guiding strategic vision should be above all the expansion and solidification of the coalition of interest groups and movements which had performed so well for them in 1980. In looking to build that coalition, he told the conference, they should not exclude anyone from their efforts, no matter how unlikely, from their calculations.

Following Weyrich was his close associate, Connie Marshburn. Marshburn is not a widely-known New Right figure, but is highly regarded as a political operative by informed observers of the movement, and her performance confirmed this estimate. Marshburn described how the proposed Family Protection Act was likely to be the primary legislative tool with which she and Weyrich expected to set the political agenda in the coming year and expand the New Right coalition's appeal.

The Family Protection Act contains over 30 provisions, which include a ban on federal funds for groups advocating homosexual lifestyles and a requirement that federally-supported educational materials not slight "traditional images" of women as mothers and homemakers. These and several related provisions have roused the ire of gay rights and feminist groups. The value of these controversial provisions, however, is strictly tactical, Marshburn said. She does not expect them to pass. Instead, they are useful mainly because they evoke liberal outrage, which Marshburn expects to use to paint liberals as "anti-family," meanwhile stressing to her target constituencies other, less objectionable provisions. In fact, she said, there were only half a dozen provisions in the bill which its New Right sponsors really want to see enacted. These included, for instance, special tax breaks for multigenerational households, families who adopt children, and families with a nonworking woman spouse.

Such proposals may be debatable, but they are hardly as offensive to liberals as the throwaway anti-gay and pro-"traditional images" provisions. Even so, their potential appeal to moderate but inflation-pressed voters is obvious.

Thus, as she explained it, the Family Protection Act represents a highly sophisticated legislative plan for building New Right support by conveying to politically moderate but family-minded citizens the message that the New Right wants to help them keep the family together, while its liberal opponents are only concerned with the interests of gays, abortionists, sex educators and other "anti-family" forces. (So far, it must be added, the largely indiscriminate and near-hysterical reaction to the Act by liberal and left groups is playing exactly into Ms. Marshburn's scenario.)

Another major thrust running parallel to the Family Protection Act campaign will be a wide-ranging effort against "secular humanism," particularly in public schools. This campaign was described by Onalee McGraw, a staff member of the New Right-oriented Heritage Foundation, who has written extensively about this philosophy and its allegedly pernicious effects on children. New Right activists, she said, will soon be pressing for legislation at all levels to require parental consent before educational materials "tainted" with these values can be used in their children's classes. (A similar federal provision is a key section of Connie Marshburn's Family Protection Act.)

The logic of these efforts was further explicated by Richard Viguerie, the premier rightwing direct mail fundraiser and one of the best-known New Right figures. The abortion issue, he said, was "the door through which" many people came into conservative politics. "But they didn't stop there," he noted. Their convictions against abortion were like the first of a series of falling

Plan for '82

dominoes: they led to concern about sexual ethics and standards among young people; this led to opposition to "secular humanism," particularly in schools, with its purportedly decadent morality; "secular humanism" was in turn identified as both the godfather of and the royal road to socialism and communism, which pointed the way to commitments to minimally-regulated free enterprise at home and to aggressive foreign and military policies to counter the communist threat from Russia and its many surrogates.

Propagandists like Viguerie work hard at making these connections in the minds of their recruits, to cement their identification with overall New Right views. Once committed, he said, they see that all the New Right issues are based on a unified, principled outlook. On this principled base, he asserted, winning assaults against liberal softness and sellouts can be mounted.

Plans for another such assault on liberal strongholds were outlined by Howard Phillips, head of the Conservative Caucus. Phillips, who directed Richard Nixon's attempt to dismantle the antipoverty program (an effort which Ronald Reagan finally completed), wants to "defund the left," by depriving it of federal money. His group, he said, has more than 500 Freedom of Information Requests outstanding as part of a major effort to trace in detail just how much federal funding is going to various private groups which advocate policies the New Right opposes. Obviously, pro-abortion groups like Planned Parenthood, which gets many millions in federal grants, head Phillips's list. But he is also after environmental, consumer, civil rights and other public interest groups as well. Phillips says the plan is based on his analysis of public opinion polls; while they don't show majority opposition to many of these groups' objectives, Phillips asserted they do show latent majority opposition to government funding of such advocacy, on the basis that it is unfair to use taxpayers' money to argue one side of a controversial issue.

Thus Phillips expects to use his data to build pressure on Ronald Reagan to veto bills containing appropriations destined for such groups. He believes, probably correctly, that such vetoes, if sustained, would deal many of these groups a crippling, perhaps fatal blow.

Taken together, these various schemes—antiabortion, pro-family and defunding to the left—amount to a formidable set of "social issues" challenges to liberal groups and their congressional allies. Perhaps the greatest obstacle to their success, however, lies not in any liberal counterattack as much as in the White House. The New Right supported Ronald Reagan, and knows that its followers still broadly support the president. Thus they need him at the head of their ranks if they are to get very far in their efforts. But Reagan has been stalling their demands for a legislative offensive based on the social issues for almost a year. This has left the New Right leadership and its most intense partisans disappointed and angry, but with no real recourse. When they took on the president last summer over the nomination of Sandra O'Connor to the Supreme Court, their efforts were an utter failure.

Morton Blackwell, former editor of *The New Right Report*, and now White House liaison with such groups, tried to reassure the restive, almost hostile audience at Unity '81 that Reagan had not in fact forgotten them or completely sold them out, and that their time was coming, soon. He told of hearing Nevada Senator Paul Laxalt, Reagan's closest congressional ally and friend, telling a right wing gathering that Reagan has pledged to make the social issues the primary items on his political agenda early in 1982.

Assuming Laxalt's pledge is legitimate, however, doesn't guarantee that the president will be able to deliver, because Reagan, for all his acknowledged political skill, is not in complete control of events. This is particularly true of economic developments; as unemployment rises and the recession deepens, a pressure on the administration over further budget cuts and taxes—in short, over the whole economic program, which was supposed to be finished by now to make way for the social issues—will intensify rather than abate. This in turn will fuel challenges to Reagan's plans for a massive military buildup. These two factors—Reaganomics and defense—could easily become a political tarbaby, obliging Reagan to put off an assault on the social issues through next year, and perhaps indefinitely. There are also other factors, especially international events, which could become equally problematical and time-consuming.

None of this means that if the New Right's turn at the plate is put off that they will not be heard from next year and after. Far from it; as the presentations at Unity '81 showed clearly, the New Right leadership is smart, shrewd, determined, and planning for a longterm struggle. They will undoubtedly make plenty of trouble for liberals in 1982 in one way or another, and the battle will not be over then.

■

National Pro-Life Political Action Committee
State Fund

101 Park Washington Ct., Falls Church, VA 22046 (703) 536-7650

April 1, 1982

Peter Keisler, Executive Vice President
The Leadership Institute
8001 Braddock Road, #402
Springfield, VA 22151

Dear Peter:

A very good friend of the conservative movement is running for the state legislature in Arizona...Gary Giordano is in a race for a state representative seat in the Phoenix area.

Gary, a former YAF staffer and long-time Conservative Caucus State Director, is a no-nonsense conservative activist who has paid his dues to the movement early and often.

Since his mid-February kick-off luncheon, featuring Howard Phillips, Gary has raised $3,000 of his $10,000 budget and has recruited nearly all of his workers for an extensive Kasten-type precinct organization plan.

There are three candidates in the race for two seats -- Gary needs to place first or second to win. With a large majority of registered Republicans, it is safe to say that winning the September 7th GOP primary is tantamount to winning the election.

Gary needs some PAC money -- now -- if he is to keep up the momentum. Will you help? National Pro-Life PAC has already contributed $300...we hope you'll do the same.

Please look over the information I've enclosed from Gary Giordano's campaign...then get in touch with him. You'll be glad you did.

Cordially,

Peter B. Gemma, Jr.
Executive Director

P.S. Gary Giordano is being supported by State Representative Jim Skelly, the Gun Owners of America, Ed McAteer of the Religious Roundtable and Howard Phillips of the Conservative Caucus -- you'll be in good company if you come aboard.

PBGjr/am
cc: Gary Giordano
Morton Blackwell

National Pro-Life Political Action Committee
State Fund

101 Park Washington Ct., Falls Church, VA 22046 (703) 536-7650

April 1, 1982

Miss Lilli Dollinger
Committee for Responsible Youth Politics
P.O. Box 4135, Texas A & M University
College Station, TX 77844

Dear Lilli:

A very good friend of the conservative movement is running for the state legislature in Arizona...Gary Giordano is in a race for a state representative seat in the Phoenix area.

Gary, a former YAF staffer and long-time Conservative Caucus State Director, is a no-nonsense conservative activist who has paid his dues to the movement early and often.

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PBGjr/am
cc: Gary Giordano
Morton Blackwell

Gary Giordano for State Representative Committee
Box 2896 New River Stage
Phoenix, Arizona 85029
Telephone: 602-263-8165 (O); 602-465-7750 (H)

1982 Republican Primary in Arizona -- State Legislative District #24 at a glance...

This District was once represented by Sandra O'Connor and was the home base of Barry Goldwater. The area includes the lush resort and country club parts of Paradise Valley, takes in parts of North Phoenix and North Scottsdale, and goes north to the Maricopa line.

The District is overwhelmingly Republican with a registration edge of 54%-37% over Democrats. A high percentage of the Democrats and Independents are conservative and vote Republican. In short, the winner of the Republican primary will win the general election. (Most Republicans win by a 2-1 margin).

To reach the approximately 21,000 registered Republicans in nearly 35 precincts, Giordano plans to raise and spend $10,000 in addition to setting-up a Kasten precinct organizational plan to identify and turn-out the vote.

Numerous specialty mailings are planned -- directed to target groups of voters. Also, a district-wide mailer is in the works.

In addition to the 70 volunteers working the organization plan for precincts, Gary Giordano will be personally canvassing the homes in the District. Election day will conclude with the Kasten vote turn-out.

Giordano's opposition for the two legislative seats will be the one incumbent who is a moderate-to-liberal country-club Republican (pro-abortion, Planned Parenthood Director, etc.) and the Republican District Vice Chairman.

Gary Giordano on the issues...

CRIME --

Double bunking: If overcrowding is a problem in our prisons, than we cannot afford the luxury of one inmate to a cell. The solution to this problem should not be laid entirely on the backs of the taxpayer.

Put inmates to work: We can solve the problem of too much idle time for our inmates by utilizing their labor and thereby lessening the taxpayer's load. If we bring inmate labor into the plans for massive roadbuilding in Arizona, in the years ahead a portion of the proposed gasoline tax increase can be shelved. There are other areas where this labor can also be used.

Restitution to victims by offenders: Crime would not pay if those convicted of a crime were forced to make restitution to their victims.

Stricter bail and parole procedures: Too many people who should not be turned loose are out on the streets awaiting trial and commiting further crimes. There should be no bail or parole for repeat offenders.

Restrict the exclusionary rule: Disregarding evidence that may have been obtained illegally is absurd. We must change this so the facts in a crime are not dismissed and criminals set free. If evidence is obtained by breaking the law, we can penalize the law enforcement personnel responsible. Let's not set the guilty free to rectify this problem.

LIMITING GOVERNMENT -- State spending in the past decade has risen approximately 300% while the population has increased by only about 50%. We need to eleminate any unnecessary government functions and programs -- and cut spending whenever possible. Taxes could then be lowered to reflect the reduced spending.

STATE SOVEREIGNTY -- If the citizens of Arizona have a 55 MPH spped limit or an auto emissions inspection program, it should be because they want them based on their own merits. We need individuals in state and local government who are willing to fight the increasing federal encroachment on local perogatives. We must draw the line on federal blackmail.

TRADITIONAL VALUES -- The morality and values that have provided the basis for our laws for hundreds of years have been eroded or disregarded in recent times. We need a new dedication as individuals and society to the values this country was founded on and blessed so abundantly for in the past. For that reason I am committed to:

The Right to Life: We must end the genocide on the unborn. There is no "right to choose" the taking of an innocent life.

Prayer in the Schools: We should extend the same right of voluntary prayer that is presently enjoyed by Congress to our schools. The seperation of church and state was not meant to seperate God from government.

Parental control of their children and schools: The primary responsibility for rearing children rests with the family, not bureaucrats. Schools should reflect that precept and not be an adversary to values taught at home.

Endorsements of Gary Giordano for State Representative...

The National Pro-Life Political Action Committee
Ed McAteer, President, The Religious Roundtable
Gun Owners of America
Howard Phillips, National Director, The Conservative Caucus
State Representative Jim Skelly of Arizona