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Patrick T. Conley

Robert J. McKenna

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# THE SUPREME COURT ON ABORTION—A DISSENTING OPINION

BY PATRICK T. CONLEY AND ROBERT J. MCKENNA\*

In the decade of the 1850's one of the most vexing constitutional questions concerned the status of slavery in the federal territories. For reasons which historians have not yet fully fathomed, this issue became a vent for the economic, emotional, psychological, and moral disputes generated by the institution of slavery itself. During this acrimonious debate three basic positions emerged: (1) the pro-slave argument which held that Congress had a positive duty to protect a slaveowner's property rights in the federal territories; (2) a diametrically opposed view, advanced by anti-slavery Northerners, stating that Congress must ban slavery from the territories; and (3) the middle ground of "popular sovereignty" which left the decision on slavery to the residents of the areas in question. Then, in 1857, a Southern-dominated Supreme Court attempted to resolve this morally-charged dispute in what it considered to be a rational and impartial manner. The result was the Dred Scott decision in which the Court novelly employed the procedural Due Process Clause of the 5th Amendment to vindicate the pro-slave position. But it did so in disregard of historical precedents which made that view untenable. To compound its error, the Court contended that Negroes could not attain citizenship because such status contravened the intent of the Founding Fathers.<sup>1</sup>

The Dred Scott decision did not resolve the great moral dispute over slavery and the status of the Negro in American society. It was so patently unsound that it was overridden—both by subsequent events and by the less violent process of constitutional amendment.

On January 22, 1973, the United States Supreme Court, in magisterial fashion, undertook to resolve another moral controversy in the case of *Roe*

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\* Dr. Conley is an Associate Professor at Providence College whose specialty is Constitutional History. He holds an M.A. and Ph.D. from the University of Notre Dame and will receive a J.D. from Suffolk University Law School in June. Professor McKenna is an Associate Professor of Politics at Salve Regina. He holds an M.A. from Brown University and is a Ph.D. candidate at Catholic University of America. Professor McKenna, who is also a State Senator from Newport, is a specialist in Church-State relations.

<sup>1</sup> The best analysis of this controversial decision is VINCENT C. HOPKINS, *DRED SCOTT'S CASE* (1951).

*v. Wade*,<sup>2</sup> and a companion case, *Doe v. Bolton*.<sup>3</sup> These decisions concerned abortion, and here a right more fundamental than citizenship was at stake—at issue was the right to life. The Dred Scott analogy to *Roe v. Wade* is not an exercise in hyperbole; not only was a more basic right involved, but a much larger class was affected. In 1857, approximately 4,200,000 blacks and their descendants were judicially attainted, while in the year 1973 alone about 5 million living human fetuses will be shorn of their natural right to life for at least the first six months of their existence.<sup>4</sup>

Unlike the Biblical decree of Herod, however, *Roe v. Wade* does not mandate a slaughter of the innocents. The Court, in fact, explicitly denied the contention of appellant Jane Roe (a fictional name), that a woman's right to an abortion is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. "With this we do not agree," said Justice Blackmun for the majority. His statement was echoed by the Chief Justice: "Plainly, the Court today rejects any claim that the Constitution requires abortion on demand," affirmed Mr. Burger.<sup>5</sup> Even the libertarian Justice Douglas admitted that "voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening."<sup>6</sup>

But, although the decision was not a total victory for the abortion advocates, it was a substantial victory nonetheless. In essence, the Court concluded that a state criminal abortion statute like that of Texas, which "excepts from criminality only a life saving procedure on behalf of the mother, without regard to a pregnancy stage and without recognition of the other interest involved, is violative of the Due Process Clause of the Fourteenth Amendment."<sup>7</sup>

The so-called right which the Texas abortion statute allegedly infringed upon was the expectant mother's right of privacy. In deference to maternal privacy the Court then proceeded to formulate the following abortion schedule: "(a) For the stage prior to approximately the end of the first trimester [the first three months], the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician; (b) For the stage subsequent to approximately the

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<sup>2</sup> 93 S. Ct. 705 (1973).

<sup>3</sup> 93 S. Ct. 739 (1973).

<sup>4</sup> These figures are approximations based upon data in *THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT*, Series A 59-70, at 9 (1965); and, *THE STATISTICAL ABSTRACT OF THE UNITED STATES: 1972*, Table No. 62 (live births), and Table No. 78 (fetal deaths), at 50, 57 (1972).

<sup>5</sup> *Roe v. Wade*, 93 S. Ct. 705 (1973); *Doe v. Bolton*, 93 S. Ct. 739 (1973).

<sup>6</sup> 93 S. Ct. at 759 (Douglas, J., concurring).

<sup>7</sup> 93 S. Ct. at 732.

end of the first trimester [the second three months], the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health; (c) For the stage subsequent to viability [the final three months], the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”<sup>8</sup>

Such was the fiat of the Court—a formidable pronouncement indeed. Justice Blackmun’s rationale and argumentation, however, were not sufficient to support the Court’s foray into the legislative domain because the decision contained several dubious moral, logical, biomedical, and legal contentions.

First, the Court explicitly admitted that it “need not resolve the difficult question of when life begins . . . the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” Later it took notice of the fact that the Catholic Church, “many non-Catholics”, and “many physicians” believe that life begins at conception.<sup>9</sup> In view of these considerations and the Court’s candid admission of its own ignorance, it seems incredible that the Court could proceed with confidence to schematize abortion according to the trimester system. It chided Texas for arbitrarily selecting conception as a basis for that state’s abortion law, and then, in an equally arbitrary manner, chose viability as the basis of its own formula. In effect, the Court said: “We do not know if human life exists prior to viability, but even if it does we choose not to protect it, and we bar the states from protecting it also.”

It had often been the practice of the Court when it could not resolve or define a key issue before it (like the nature of a “republican form of government”) to declare the matter a political question and therefore non-justiciable. If ever the doctrine of political question should have been invoked, it was when the Court asserted that the question of life’s commencement was beyond its ability to resolve. To proceed in the face of that admission was reckless folly. It was, as stated by Justice White in his dissent, “an exercise in raw judicial power;” an “improvident and extravagant exercise of the power of judicial review.” White could find “no constitutional warrant” for the Court’s action, nor could he accept “the Court’s exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it.”<sup>10</sup> The Court

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

<sup>9</sup> *Id.* at 730.

<sup>10</sup> 93 S. Ct. at 763 (White, J., dissenting).

did rush in, however, armed with its nescience regarding the origins of human life, and the results were disastrous.

Having thus disposed of the question of life, the justices examined four main theories regarding the point in time when the rights of a person attach to a human fetus, namely (1) conception, (2) quickening or first movement, (3) viability, or (4) birth. Justice Blackmun concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Here the Court buttressed its contention with formidable but not insurmountable evidence.<sup>11</sup> With equal effort it could have reached the opposite conclusion, especially in view of the fact that no evidence was adduced to show that the drafters intended to exclude the unborn when they utilized the word "person" in the various sections of the Constitution where it appears. In the absence of a clear constitutional intent, arising no doubt from the fact that the particular problem raised in *Roe v. Wade* never occurred to previous constitutional draftsmen, the Court should have exercised restraint.

The Court has applied the "compelling state interest" standard to those legislatures which have set up classifications or categories, the members of which have been deprived of equal protection of the law. In several recent opinions a majority of the Court asserted that the strictness of the standard for decision in cases involving classifications made by legislative bodies varies according to the nature of the right placed in jeopardy; the more fundamental the right involved, the greater was the judicial requirement to "carefully and meticulously scrutinize" the classification in the light of the following principles:<sup>12</sup>

- (a) As the right in jeopardy becomes more fundamental, the more perfect must be the relationship between the classification excluding a human group from the enjoyment of the right and the purpose for which the classification is made.
- (b) As the right involved becomes more fundamental, the more "compelling" the state or governmental interest must be in making a classification excluding certain human groups from the enjoyment of the right.

In *Roe v. Wade* the Court has not practiced what it preached. In effect, it has established a *judicial* classification consisting of those unborn humans who have not reached the stage of viability and has deprived these individuals of their right to life by making them fair game for the abortionist. Several learned anti-abortionists who presented an *amicus curiae* brief to the Court for its consideration make this valid observation. They argued that "because of the fundamental nature of life, the most compelling of all

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<sup>11</sup> 93 S. Ct. at 728-31.

<sup>12</sup> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

interests would have to be shown on the part of the Court in order to carve out such a classification, which would exclude the lives of unborn humans from the protection of the law.”<sup>13</sup>

The Court did, indeed, advance a rationale to justify its conclusions by claiming that “the right of personal privacy” is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,” though admitting that the right was “not unqualified and must be considered against important state interests in regulation.”<sup>14</sup> When the Court tried to explain why this alleged right of privacy was fundamental enough to override a state’s interest in the protection of fetal life, the shallowness of its value system was glaringly revealed.

Justice Blackmun justified abortion on the grounds of privacy because “maternity, or additional offspring, may force upon the woman a distressful life and future,” cause psychological harm, bring “distress for all concerned,” or place a social “stigma” on the unwed mother. These were the “weighty reasons” for excluding the unborn from the enjoyment of the right to life. Justice Douglas, in a concurring opinion arising out of *Roe v. Wade* and its companion case involving a Georgia abortion law (*Doe v. Bolton*), went to more ridiculous extremes. Childbirth, said Douglas, “may deprive a woman of her preferred life style and force upon her a radically different and undesired future.” She would be required “to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health . . . and, in some cases to bear the lifelong stigma of unwed motherhood.”<sup>15</sup> One could scarcely imagine a more amoral and hedonistic rationale. For the highest court in a land which professes spiritual values and claims foundation “under God” to use such criteria to justify the extermination of human life is a tragic occurrence in every sense of the word. Here is humanism incarnate—man has become God.

The justifications for abortion expressed by Justices Blackmun and Douglas are the epitome of human selfishness and self-love. The countervailing evils of easy abortion were thrust aside by the Court. Among these baneful effects, according to Dr. Paul Marx, are “the denigration of the traditional sexual morality distilled from centuries of wisdom, the abandonment of self-control as an indispensable human virtue, the substitution of subjective whim for the priceless heritage of human knowledge, the enthronement of utilitarianism over principled morality, the devaluation

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<sup>13</sup> Brief of Certain Physicians, Professors, and Fellows of the American College of Obstetricians and Gynecologists as Amicus Curiae at 59-61, *Roe v. Wade*, 93 S. Ct. 705 (1973), *Doe v. Bolton*, 93 S. Ct. 739 (1973).

<sup>14</sup> 93 S. Ct. at 727.

<sup>15</sup> 93 S. Ct. at 759 (Douglas, J., concurring).

of life itself, the ruination of the moral basis of natural human rights, and the obvious opening to euthanasia."<sup>16</sup> A society that countenances the brutality of abortion is one in which psychological ills, irreverence for life, and sexual promiscuity are likely to proliferate. In sum, therefore, we have paid an exorbitant price to sustain a woman's right to personal privacy.

That alleged right, however, is more a judicial fiction than a verifiable fact. Even Justice Douglas frankly confesses that "there is no mention of privacy in our Bill of Rights," nor is the type of privacy claimed in *Roe v. Wade* specifically mentioned in any other section of the federal Constitution.<sup>17</sup> The Court invented this right in *Griswold v. Connecticut*<sup>18</sup> when it held that a state law forbidding the use of contraceptives was unconstitutional in as far as the law applied to married persons. The Court advanced the so-called "penumbra" doctrine which held that various guarantees in the Bill of Rights impliedly create zones of privacy.<sup>19</sup> In *Roe v. Wade* a woman's personal decision to abort her child was placed inside that judicially protected private zone.

In their attempt to vindicate this alleged right the appellant used a scattergun approach by claiming that the Texas statute abridged rights of personal privacy protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. One of these random shots found its mark, when the high court held that the right claimed by the appellant was "founded in the Fourteenth Amendment's concept of personal liberty."<sup>20</sup>

In recent years the Court has developed a complex formula to protect from invasion by the states those rights which it uncovers in the mysterious recesses of the Constitution. The test traditionally applied to state social and economic legislation is whether or not the law (for example, the Texas abortion statute) has "a rational relation to a valid state objective." Had this test been employed in *Roe v. Wade* the state statute may have been upheld. However, the Court devised a more stringent standard in *Shapiro v. Thompson*<sup>21</sup> which held that as the right involved becomes more fundamental, the more "compelling" the state interest must be in passing a law which abridges that right.<sup>22</sup> In *Shapiro* and subsequent rulings the "compelling state interest" standard was used only in situations involving the equal protection provision of the Fourteenth Amendment. Justice Harlan attacked this new criteria when he asserted in a *Shapiro* dissent that "when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational" the Court is not entitled "to pick

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<sup>16</sup> P. MARX, *THE DEATH PEDDLERS: WAR ON THE UNBORN* 182 (1971).

<sup>17</sup> 93 S. Ct. at 756 n.2 (Douglas, J., concurring).

<sup>18</sup> 381 U.S. 479 (1965).

<sup>19</sup> *Id.* at 484.

<sup>20</sup> 93 S. Ct. at 727.

<sup>21</sup> 394 U.S. 619 (1969).

<sup>22</sup> *Id.* at 634.

out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test." Such action, concluded Harlan, "would go far toward making this Court a 'super-legislature.'"<sup>23</sup> Yet the Court went even beyond this in *Roe v. Wade*—it not only held a woman's private right to abort her unborn child to be "fundamental;" it also expanded the stringent "compelling state interest" test in a novel way to embrace the Due Process Clause (shades of *Dred Scott!*).<sup>24</sup>

The majority's decision regarding the fundamental nature of the particular right of privacy asserted in this case was vigorously and persuasively attacked by Justice Rehnquist in a dissenting opinion: "The fact that a majority of the States, reflecting . . . the majority sentiment in those states, have had restrictions on abortions for at least a century seems . . . as strong an indication as there is that the asserted right to an abortion is not . . . fundamental. Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellants would have us believe," concluded Rehnquist.<sup>25</sup> In support of this latter statement he could have cited with telling effect the results of the 1972 abortion referenda in Michigan and North Dakota. In the former state the pro-life advocates polled 61% of the vote, while in North Dakota their total was an overwhelming 79%.<sup>26</sup>

The right of privacy asserted by the Court is not only absent from the express provisions of the original Constitution, the Bill of Rights, and later Amendments, it is not generally recognized by law, by custom, or by majority opinion. How could such an alleged right, therefore, be "so rooted in the traditional conscience of our people to be ranked as fundamental." The Court does not satisfactorily explain its startling judgment. It "simply fashions," says dissenting Justice White, "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 state abortion statutes."<sup>27</sup>

The Court with equal effort could have "discovered" the unborn's right to life, invested it with "fundamental" status, and clothed it with judicial protection. This right is not explicit in any part of the Constitution, but, unlike the right to abort, it is recognized by law, by custom, and by majority opinion. It can also be inferred from the phraseology of no less a document than our Declaration of Independence: "We hold these truths

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<sup>23</sup> *Id.* at 662 (Harlan J., dissenting).

<sup>24</sup> 93 S. Ct. at 727-28.

<sup>25</sup> *Id.* at 737 (Rehnquist, J., dissenting).

<sup>26</sup> National Catholic Reporter, Nov. 24, 1972 at 6 gives an in-depth analysis of these referenda.

<sup>27</sup> 93 S. Ct. at 763 (White, J., dissenting).

to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are *Life, Liberty, and the Pursuit of Happiness.*" Traditionally the term "creation" is applied to conception rather than to the other definable stages of fetal life.

This line of argumentation is at least as formidable as the privacy doctrine which the Court concocted, but, unfortunately, the Court used its legal legerdemain to uphold the right of privacy at the expense of the unborn's right to life—a strange choice indeed, especially in view of the solicitude shown by the Court for criminals under a death sentence in *Furman v. Georgia*.<sup>28</sup>

Such was the decision of the Court in *Roe v. Wade* and its companion *Doe v. Bolton*. Almost as an afterthought, however, the justices alluded to a serious flaw in the arguments of those who sought to uphold state abortion restrictions. The state appellees in *Wade* and *Bolton* asserted that the unborn's right to life was constitutionally protected by the due process clauses of the Fifth and Fourteenth Amendments. Yet the state statutes which they defended, especially Georgia's more "modern" law, allowed abortion in special circumstances: (1) if the life or health of the mother were endangered (this was the extent of the Texas statute); (2) if the fetus would very likely be born with a grave, permanent, and irremedial mental or physical defect; or (3) if the pregnancy resulted from forcible or statutory rape. As Justice Douglas was quick to observe, the Georgia statute permits fetal destruction in several instances without regard for due process or the developmental stage of the fetus.<sup>29</sup>

Justice Blackmun, in a footnote in *Roe v. Wade*, also spotted the dilemma. Despite a broad proscription on abortion, an exception exists in every state, at least to save the life of the mother. "But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command," queried Blackmun, "and why is the woman not a principal or an accomplice" to the killing? This inconsistency can only be effectively resolved by recourse to the position that any *direct* taking of the life of the fetus is a moral and legal crime for all involved.<sup>30</sup> Whether such an absolute and rigid moral standard should be legally imposed, however, is a question of great difficulty for which we have no solution.

Our dissenting opinion to the Court's abortion ruling would be merely an intellectual catharsis and an exercise in frustration, if the Court's action could not be overridden. Our purpose thus far has been to show that the

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<sup>28</sup> 408 U.S. 238 (1972).

<sup>29</sup> 93 S. Ct. at 761 (Douglas, J., concurring).

<sup>30</sup> 93 S. Ct. at 729 n.54.

decision was patently unsound from either a logical, biomedical, moral, or legal perspective. Hopefully this knowledge of the decision's infirmity will provide an incentive to secure its reversal. Thus, in conclusion we offer guidelines for those who wish to challenge the ruling and vindicate the rights of the unborn child.

At the state level the Legislature has several plausible options. First, it can take advantage of the Court's failure to resolve "the difficult question of when life begins." It can declare as a conclusive presumption "that life commences at the instant of conception."<sup>31</sup> This legislative finding of fact will reestablish protection for the unborn child, at least until the issue is settled as to whether or not the Court will accept a legislative determination in this area.<sup>32</sup> Such a course of action, however, is at best a stopgap measure. Second, the Legislature can memorialize Congress to adopt a constitutional amendment to protect the unborn child. Third, the Legislature can petition Congress to call a constitutional convention to act on this issue. Fourth, it can require that the father's rights be protected in those cases where he does not agree to have his child killed.<sup>33</sup> Fifth, it can and

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<sup>31</sup> On March 13, 1973 the Rhode Island General Assembly passed Senate Bill 73-S287 Substitute "A", "An Act Relating to Abortion." This Act was principally sponsored by Senators Taylor, Chaves, and McKenna. Governor Philip W. Noel signed the bill into law the same day the Senate voted final passage.

This Act speaks directly to the Court's acknowledgement of "the difficult question of when life begins . . . the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." The measure states that "It shall be conclusively presumed in any action . . . that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the Fourteenth Amendment of the Constitution of the United States."

This act is presently being challenged before the U.S. District Court for the District of Rhode Island. The issue is quite clearly joined: When is human life present, and is it a legislative prerogative or a judicial prerogative to determine this question of *fact*?

<sup>32</sup> In a Connecticut case, *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972), in which this issue was raised, a request for rehearing was denied by the U.S. Supreme Court. 41 U.S.L.W. 3554 (U.S. April 16, 1973).

<sup>33</sup> North Carolina has enacted a law which requires written permission for the abortion from the husband when the woman is a minor (under 18); if the woman is an unmarried minor, written permission from her parents is required. 1B N.C. GEN. STAT. 14-45.1 (Supp. 1971). A bill is pending in the Rhode Island General Assembly at this writing. This bill, 73-S618 "An Act Requiring Family Court Permission Prior to an Abortion," provides that any "person desiring an abortion . . . shall . . . request permission for said abortion . . . [of] the chief judge of the Family Court. . . . The chief judge shall appoint an attorney to represent the unborn child." It further requires that "The court shall grant the petition if it finds that . . . the abortion . . . will not destroy human life, except where necessary in order to save the life of the person who desires the abortion, and that the father of the unborn child consents to an abortion freely and without duress or compulsion of any kind, and, the court shall further fully consider the rights of the unborn child." This bill will join the question raised but not resolved by the Court in *Roe v. Wade*, "Neither in this opinion nor in *Doe v. Bolton*, *post.* do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision."

should provide that no person or institution shall be required to assist in any way with an abortion if such an act violates the values of that person or institution.

Despite these state remedies, however, the most effective countermeasures can be wielded by Congress. For example, the Congress can adopt and propose to the states a constitutional right-to-life amendment. While this is a time-consuming remedy it is also one that would be decisive and relatively enduring. It is the best course of action to pursue. The Constitution is not an instrument to tinker with or to alter capriciously, but certainly the right to life is an issue comparable in magnitude to such questions as the right to vote, the prohibition of intoxicating drink, the composition of the electoral college, or the jurisdiction of the federal courts—issues which have been the subject of constitutional amendment. Second, Congress can pass an act to establish the start of life at the instant of conception and thus answer the key question sidestepped by the Court. Third, the Congress can also remove the power of the Supreme Court to hear appeals in this area by altering the Court's appellate jurisdiction. There is precedent for such a move in the case of *Ex parte McCardle*<sup>34</sup> and in the OPA cases of the World War II era.<sup>35</sup> Such a course of action may seem drastic, but the Court's abortion ruling demands a vigorous and effective response.

The Dred Scott decision's denial of the Negro's right to citizenship was only overcome by the concerted and forceful effort of those who thought the Court's opinion morally, historically, and legally unsound; can we do less for those living yet unborn than to vindicate their right to life itself?

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<sup>34</sup> 74 U.S. 506 (1869).

<sup>35</sup> *Yakus v. U.S.*, 321 U.S. 414 (1944). The Senate Judiciary Committee's version of the Crime Control Act of 1968 attempted to thwart the *Miranda* decision by denying to any article III court, jurisdiction to review or reverse a ruling of a state trial court in a criminal proceeding which admitted in evidence as voluntarily made an admission or confession of any accused person. This provision was deleted from the final act, but the report associated with this provision contains a forceful and persuasive defense of congressional power over jurisdiction. See Title II of the amended S. 917, 90th Cong., 2nd Sess., in S. Rep. No. 1097.