No. 88-790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BERNARD J. TURNOCK, M.D., M.P.H.,
Director of the Illinois Department
of Public Health, *et al.*,
Appellants,

v.

RICHARD M. RAGSDALE, M.D., *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF OF CERTAIN ILLINOIS SENATORS AND REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

[Amici listed inside front cover]

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BRIEF OF CERTAIN ILLINOIS SENATORS AND REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF THE *AMICI*

Amici Curiae constitute a bipartisan group of Illinois legislators with differing views on abortion as public policy. All of the *amici curiae,* however, support the authority of state legislatures and administrative agencies to regulate outpatient surgical facilities to promote public health and protect the lives of women undergoing abortions. After a five-month investigation, the *Chicago-Sun-Times* and the Better Government Association published a series of articles entitled, "The Abortion Profiteers," in November 1978, which disclosed that at least twelve women had died following abortions in Chicago abortion clinics; that abortions were performed under unsterile conditions, on women who were not pregnant, or without

anesthesia; that patients were forced to leave the recovery room prematurely, that medical records were falsified; and that kickbacks were paid for abortion referrals. This investigation raised such a public outcry over the conditions and practices in Illinois abortion clinics that state officials were compelled to respond with appropriate regulatory oversight.

In declaring these statutes and regulations unconstitutional because of the presumed bad "motive" of the legislators (*i.e.*, to regulate abortion), the court of appeals ignored compelling evidence of the need for regulatory control of outpatient surgical facilities in 1973, and the need for more intensive regulation of abortion clinics discovered in 1978. To uphold the constitutional authority of public officials to address these public health needs, *amici curiae* submit this brief in support of Appellants.*

SUMMARY OF THE ARGUMENT

This Court has long held that States have broad authority to regulate the practice of medicine under their police powers. In enacting the Ambulatory Surgical Treatment Center Act (ASTCA) in 1973, the Illinois General Assembly sought to provide better and less expensive health care by authorizing outpatient surgical facilities, including abortion clinics. The bill creating the Act was drafted and supported by the Illinois State Medical Society. Many other States have also authorized ambulatory surgical treatment centers or free-standing outpatient facilities in an effort to ensure more economical health care for their citizens.

The Ambulatory Surgical Treatment Center Act was supported by abortion-rights proponents. Some abortion opponents supported the ASTCA; others opposed it because they believed that the Act would foster abortion on demand. There is no evidence in the legislative history

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* Letters of consent from both parties of record to the filing of this brief have been filed with the clerk.

that any abortion opponents favored the ASTCA because they believed that it would restrict abortion.

The Illinois Health Facilities Planning Act (IHFPA) was enacted in 1974 to promote the efficient planning of new health facilities, including ASTC's. Like many States, the IHFPA required a certificate of need for new health facilities. The IHFPA was also supported by abortion-rights proponents.

In 1979, the ASTCA and the regulations promulgated thereunder were amended, as a direct result of the November, 1978, *Chicago Sun-Times* exposé, "The Abortion Profiteers." Those amendments were sponsored and supported by abortion proponents in an effort to remedy the abuses revealed in the *Sun-Times* series. The abortion-specific regulations were intended to address particular abuses that were discovered in the clinics' practices.

In holding that ambulatory surgical treatment centers that perform first and early second trimester abortions are not subject to regulation, the Seventh Circuit seriously erred. A critical element in the court's decision was its conclusion that the ASTCA and the IHFPA were influenced by an impermissible "legislative motive," *i.e.*, to restrict abortion. This conclusion was based solely on the minutes of three meetings of the licensing board created by the ASTCA, evidence which had nothing to do with the creation and enactment of the 1973 act, the 1974 act, or the 1979 amendments, and which the trial court expressly refused to admit as proof of the legislature's intent. The court's analysis reflects not only inaccurate legislative history, but poor constitutional law. Except in a few narrow circumstances not relevant here, this Court has consistently repudiated the doctrine that legislative motive may be considered in determining the constitutionality of a statute. To the extent that the court of appeals may have found support for its reliance upon legislative motive in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), that as-

pect of *Thornburgh* should be expressly abandoned. To strike down statutes that are otherwise constitutional on the basis of the alleged motivations of the legislators is unprincipled in theory, unprecedented in practice and unacceptable in a democratic society.

ARGUMENT

> I am persuaded . . . that under *Roe* and its progeny a state not only has the power and authority, but also the duty, to regulate all medical facilities, particularly any facility where any surgical procedures are performed (including first-trimester abortions) as a valid exercise of its interest in protecting the health and welfare of its citizens while ensuring that the facilities will provide "conditions insuring maximum safety for the woman" who had decided to terminate her pregnancy. *Connecticut v. Menillo*, 423 U.S. at 11, 96 S.Ct. at 171.

Ragsdale v. Turnock, 841 F.2d 1358, 1388 (7th Cir. 1988) (Coffey, J., dissenting).

This is an appeal from a judgment of the Court of Appeals for the Seventh Circuit holding that statutes and administrative rules regulating outpatient surgical facilities in the interest of public health may not be applied to those facilities which perform first- and early second-trimester abortions. *Ragsdale v. Turnock*, 625 F.Supp. 1212 (N.D.Ill. 1985), *aff'd in part, rev'd in part*, 841 F.2d 1358 (7th Cir. 1988), *juris. post.*, 109 S.Ct. 3239 (1989).[1]

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[1] Although technically the court of appeals affirmed a preliminary injunction issued by the district court, the Seventh Circuit considered the statutes and regulations to be unconstitutional as a matter of law and refused to sever any of the provisions struck down. *Ragsdale*, 841 F.2d at 1371. Both the district court judge and the parties in subsequent litigation have understood the Seventh Circuit to have declared the regulations to be unconstitutional in their application to abortion clinics. *See Hedd Surgi-Center, Inc. v. Turnock*, 711 F. Supp. 439, 443 & n.6, 444 (N.D.Ill. 1989).

The regulatory scheme derives from the Ambulatory Surgical Treatment Center Act (ASTCA), Ill. Rev. Stat., ch. 111½, par. 157-8.1 *et seq.* (1987); the Illinois Health Facilities Planning Act (IHFPA), Ill. Rev. Stat., ch. 111½, par. 1151 *et seq.* (1987); and the Medical Practice Act (MPA), Ill. Rev. Stat., ch. 111, par. 4433(1) (1987). The original statutes and regulations were enacted in 1973 and 1974. Some of the regulations have not been enforced due to intervening judicial decisions. *See Ragsdale*, 841 F.2d at 1363-64.

The district court entered a preliminary injunction against enforcement of the regulations to the extent that they apply to outpatient surgical facilities that perform first and early second trimester abortions, holding that the appropriate standard of review was whether the state could articulate a "compelling need" for the scheme and could show that the regulations were "medically necessary." *Ragsdale*, 625 F.Supp. at 1229-30. *See also Hedd Surgi-Center, Inc. v. Turnock*, 711 F.Supp. 439, 444 n. 8 (N.D.Ill. 1989).

The court of appeals affirmed the district court's preliminary injunction, as well as the "medical necessity" standard of review. *Ragsdale*, 841 F.2d at 1368.

I. THE AMBULATORY SURGICAL TREATMENT CENTER ACT WAS ENACTED IN 1973 TO REGULATE ALL OUTPATIENT SURGICAL FACILITIES AND NOT TO RESTRICT ACCESS TO ABORTION.

The court of appeals held that the Ambulatory Surgical Treatment Center Act could not be applied to outpatient surgical facilities that perform first- and early second-trimester abortions because "the State may not require separate licensure of facilities primarily devoted to performing abortions." *Id.* at 1371. The court applied the strict scrutiny standard of judicial review because it found that the statute had been enacted "primarily with abortion clinics in mind and only applied to

outpatient surgical clinics generally in an effort to save the statute from unconstitutionality." *Id.* at 1369.[2]

In support of this finding, the majority opinion relied exclusively on unattributed statements recorded in the minutes of the licensing board created by the Act. *Id.*, citing plaintiff's exhibits 22 to 24. As Judge Coffey noted in his dissent, however, "*the district court specifically . . . rejected the plaintiff's request to admit the minutes of the licensing board meeting as proof of the legislature's intent.*" *Id.* at 1379 n. 9, citing the trial transcript at 616 (emphasis in original).[3]

The district court's ruling was clearly proper because " 'a court should adhere to the enacting legislature's purposes,' Posner, *The Federal Courts*, p. 279 (1985), rather than post-enactment statements regarding legislative intent, particularly when those statements are not even made by the legislators involved." *Id.* at 1379 (Coffey, J., dissenting). *See Western Air Lines v. Board of Equalization of South Dakota*, 107 S.Ct. 1038, 1043 note (1987). Instead of searching post-enactment statements for evidence of legislative *motive*, the majority opinion should have focused on the *text* of the statute, section two of which sets forth the *intent* of the Act:

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[2] Section 3(A) defines an "ambulatory surgicial treatment center" as "any . . . place . . . devoted primarily to . . . the performance of surgical procedures or any facility in which a medical or surgical procedure is utilized to terminate a pregnancy, irrespective of whether the facility is devoted primarily to this purpose." Ill. Rev. Stat., ch. 111½, par. 158-8.3(A). As a result of the Illinois Supreme Court's decision in *Village of Oak Lawn v. Marcowitz*, 86 Ill.2d 406, 427 N.E.2d 36 (1981), the Act and the regulations promulgated thereunder have been applied only to facilities that are primarily devoted to the performance of surgical procedures (including abortions). 841 F.2d at 1363.

[3] The minutes were admitted only for the limited purpose of establishing the Board's state of mind regarding its enforcement procedures. *Id.*

> It is declared to be the public policy that the State has a legitimate interest in assuring that all medical procedures, including abortions, are performed under circumstances that insure maximum safety. Therefore, the purpose of this Act is to provide for the better protection of the public health through the development, establishment, and enforcement of standards (1) for the care of individuals in ambulatory surgical treatment centers, and (2) for the construction, maintenance and operation of ambulatory surgical treatment centers, which, in light of advancing knowledge, will promote safe and adequate treatment of such individuals in ambulatory surgical treatment centers.

Ill. Rev. Stat., ch. 111½, par. 157-8.2. That the Act was designed to protect public health and not to promote a hidden agenda of restricting abortion is evident from an examination of the pertinent legislative history.

The Ambulatory Surgical Treatment Center Act was created by Senate Bill 1051, sponsored by Senator Wooten. Legislative Synopsis and Digest, 1973 Sess., 78th Ill. Gen. Assem. at 508. The primary purpose of the Act "was to regulate and prescribe safeguards for the rapidly developing trend of cost-effective ambulatory surgical treatment medical services." *Ragsdale*, 841 F.2d at 1377 (Coffey, J., dissenting). *See generally*, L. Burns, *Ambulatory Surgery: Developing and Managing Successful Programs* (1984).

At the express request of the Illinois State Medical Society, Senate Bill 1051 was considered together with Senate Bills 1049 and 1050, which were drafted in an attempt to bring the Illinois abortion statutes into compliance with this Court's then-recent decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), notwithstanding the sponsor's serious reservations about including Senate Bill 1051 in a package of bills regulating abortion. 78th Ill. Gen. Assem., Senate

Proceedings, June 1, 1973, pp. 42-43, 45.[4] All three bills were drafted by the Illinois State Medical Society, which supports legalized abortion, the Illinois Hospital Association and the Illinois Department of Public Health. 78th Ill. Gen. Assem., Senate Proceedings, May 29, 1973, at 26; House Proceedings, July 1, 1973, at 106.

Senator Wooten explained the purpose of Senate Bill 1051:

> [Senate Bill 1051] has to do with the ambulatory-surgical treatment center, which is a center for the performance of minor surgery that does not require an overnight stay. *This . . . is an attempt to attack the very problem alluded to by Senator Sours, the tremendous expense of a hospital stay.* Such centers are not limited to abortions. They can do all sorts of minor surgery.

Senate Proceedings, May 29, 1973, at 33-34 (emphasis added). Later in the debate, the sponsor stated:

> *While this [Senate Bill 1051] has a relationship to abortion, it actually goes much beyond that. It provides for the establishment and licensing of facilities which can perform minor surgery.* This would be things like tonsillectory, hernias, abortions would be included, facial surgery, plastic surgery and so on. In other words[,] procedures which would not require an overnight stay. And indeed these ambulatory surgical treatment centers are forbidden to keep patients overnight. However, . . . untoward things can occur at any time, and so provision is made in

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[4] "That the ASTCA was initially a companion bill to the abortion bills is more of a historical coincidence relished by political opportunists who, in this case, apparently fully utilized it to their advantage. As the minutes of the licensing board reflect, for whatever their worth: 'Without the public interest in abortions, we would not have any of the present legislation.' That is to say that the state legislators and other interested parties who were primarily interested in regulating ambulatory medical services would not have been able to enact the legislation without the statewide and even nationwide interest in the abortion question at the time." 841 F.2d at 1382 (Coffey, J., dissenting).

> here that *doctors who function in such a center must also be licensed to practice in a hospital nearby so that if any complications occur they can quickly move the patient to that place.* Now, I handed out an outline to explain to you how these things would work, definitions, they must get a license, some of these things are left open as to regulations. The Department [of Public Health] would like to take a hand in that. *This is something [that] doctors have been urging us to do for a couple of years now, and ambulatory surgical treatment centers are . . . are in effect out west. The idea is that they can be a great saving to a patient.* One of the big costs in a hospital, if you remember it's kind of like a hotel which has special services. And if you don't need that overnight stay, you can save a great deal of money. So there's a great savings possible for the patient who needs this kind of a one-day surgical treatment. *It does include abortion, and everything would be rather closely regulated and inspected.*

Senate Proceedings, June 1, 1973, at 43 (emphasis added). After Senator Wooten indicated that abortion was simply "one of the procedures that would be possible" to perform in an ambulatory surgical treatment center, Senator Knuppel expressed his support:

> [T]his bill is a good bill. It's not related in any way to abortions. It's sponsored by the Medical Association. There's nothing wrong with ambulatory medical services.

Senate Proceedings, June 1, 1973, at 44.

Some opponents of legalized abortion opposed the legislation, believing that the bills would facilitate the performance of abortions in Illinois. Defending Senate Bill 1051 against Senator Ozinga's accusation that the bill would make abortions easier to obtain in Illinois, Senator Wooten responded that "*the main thrust of this is to try to save some money by getting minor surgical treatment out of the hospital where it is hideously expensive and into a clinic.*" Senate Proceedings, June 1, 1973, at 45 (emphasis added). The Senate approved the bill on a

vote of 30 to 6, one member voting present (Illinois Senate Journal (1973) at 1531), and it was then taken up by the House of Representatives. The House sponsor, Representative Day, spoke in support of the bill:

> Now the last Bill . . . licenses Ambulatory Surgical Treatment Centers . . . . [*T*]*his Bill is not limited to the matter of abortions, but it would include such things as* [*o*]*ral* [*s*]*urgery or very minor operations or stitching in case someone needs a few stitches and it fairly sets up stringent regulations for the licensing of these facilities.* It provides that they must be operated under the medical supervision of a physician and that if surgery is performed by a doctor, it must be by a doctor who can admit a patient to a hospital if complications arise. [*Senate bill 1051*] [*c*]*ontains very strict regulations for the licensing of these Ambulatory Surgical Treatment Centers.*

House Proceedings, July 1, 1973, at 107 (emphasis added).

Immediately before the final vote in the House, Representative B. B. Wolfe spoke in favor of Senate Bills 1049, 1050 and 1051:

> [*A*]*n editorial* [*in the Chicago Sun Times*] . . . *said,* "[*W*]*e urge House Members, many of whom are violently opposed to . . . legislation of abortion to view the measures not as pro-abortion Bills but as public health measures.*["] *That is what they are and they should be approved as such* and I heartily endorse this package because it is the only one in the State of Illinois to carry out quality medicine in this area.

House Proceedings, July 1, 1973, at 110 (emphasis added).[5] The House of Representatives approved Senate

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[5] It should be noted that in 1969, Representative Wolfe sponsored House Bill 1407, which, if enacted, would have repealed the former Illinois abortion statutes, which permitted abortion only to preserve the life of the woman, and would have allowed abortion on demand through the twentieth week of pregnancy, and on specified grounds thereafter. House Bill 1407, 76th Ill. Gen. Assem. (1969).

Bill 1051 on a vote of 111 to 14, twenty-four members voting present. Illinois House Journal (1973) at 5034-35.

Review of the legislative debate reveals that supporters of Senate Bills 1049, 1050 and 1051 were at pains to reassure opponents of abortion that the bills would not legalize abortion on demand in Illinois. Notwithstanding these reassurances, several senators and representatives with strong records of opposing abortion refused to support the bill. Senate Proceedings, June 1, 1973, at 45 (remarks of Senator Ozinga); House Proceedings, July 1, 1973, at 108-09 (remarks of Representatives Hudson, R.D. Walsh); Senate Journal (1973) at 1531; House Journal (1973) at 5034-35.

It is apparent from the foregoing that there is no basis in fact for the court of appeals' finding that the Ambulatory Surgical Treatment Center Act was "enacted primarily with abortion clinics in mind . . . ." 841 F.2d at 1369.[6] "[C]ontrary to the majority's mere speculative assertions," Judge Coffey correctly observed in dissent, "the legislative history clearly and unequivocally supports

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[6] This is evident not only from the overwhelming support Senate Bill 1051 received from both houses of a legislature deeply divided on the issue of abortion, but also from a comparison of the voting on that bill with the voting on three pre-*Roe* bills which would have relaxed legal restrictions on abortion. In 1969, the Illinois House of Representatives considered and rejected a series of bills that would have substantially broadened the circumstances under which abortions could be performed. House Bills 634, 663 and 1407, two of which would have allowed abortion on demand, were defeated on votes of 103 to 57, 80 to 51 and 91 to 38, respectively. House Journal (1969) at 1805-06, 2802, 3736-37.

Of the scores of representatives who voted on House Bills 634, 663 and 1407 in 1969 and also on Senate Bill 1051 in 1973, all but one of the members voting in favor of the former bills voted in favor of the latter. House Journal (1969) at 1805-06, 2802, 3736-37; House Journal (1973) at 5034-35. It strains credulity to suggest that legislators who voted in favor of abandoning virtually any legal control of abortion prior to *Roe v. Wade* would have voted in favor of the bill creating thhe ASTCA if they had believed that the bill would have restricted access to abortion.

the proposition that the ASTCA was not enacted primarily to regulate abortions, but rather for the regulation of all semi-complicated (minor) surgical procedures performed in the rapidly developing ambulatory surgical treatment centers." *Id.* at 1381 (Coffey, J., dissenting). The legislative history of the ASTCA thus provides no basis for impugning the "motives" of the Illinois General Assembly.

II. THE ILLINOIS HEALTH FACILITIES PLANNING ACT WAS ENACTED IN 1974 TO CONTROL THE COST OF HEALTH CARE FACILITIES AND NOT WITH ANY PRIMARY PURPOSE OF REGULATING ABORTION.

The court of appeals also held that the "certificate of need" proceeding requirement of the Illinois Health Facilities Planning Act (Ill. Rev. Stat., ch. 111½, par. 1151 *et seq.* (1987)) (IHFPA), could not constitutionally be applied to ambulatory surgical treatment centers that perform abortions. *Id.* at 1374-75. The court found that the State's "interest in preventing wasteful duplication of resources" is not compelling, and that "[w]here the exercise of constitutional rights is concerned, the government may play no role in determining whether outlets for their exercise are 'needed'" *Id.* Apparently, the court was led to use strict scrutiny because of its belief that the IHFPA was "part of a 'tripartite' legislative scheme to limit the availability of abortions." *Id.* at 1381 (Coffey, J., dissenting). Again, the legislative history refutes this interpretation.

The IHFPA was passed by the General Assembly on June 28, 1974, and signed into law by the Governor on August 27, 1974, more than one year *after* the ASTCA was enacted. Section 2 identifies the legislative purposes of the Act:

> [T]o establish a procedure designed to reverse the trends of increasing costs of health care resulting from unnecessary construction or modification of health care facilities. Such procedure [requiring a

> certificate of need] shall represent an attempt by the State of Illinois to improve the financial ability of the public to obtain necessary health services, and to establish an orderly and comprehensive health care delivery system which will guarantee the availability of quality health care to the general public.

Ill. Rev. Stat., ch. 111½, par. 1152. The Act enjoyed the support of the Illinois State Medical Society, the Illinois Hospital Association and the Nursing Home Association.[7] By its terms, the Act applies to all ambulatory surgical treatment centers, but not to "facilities operated as a part of the practice of a physician . . . ." Par. 1153. Abortion clinics, because they are ambulatory surgical treatment centers, fall within the scope of the IHFPA. But there is not a scintilla of evidence that the Act was intended to regulate abortion clinics merely because they perform abortions—abortion is not mentioned in the Act or in the legislative debates thereon. *See* Senate Proceedings: June 5, 1974, at 20-29, June 6, 1974, at 38-45, 233-39; House Proceedings: June 27, 1974, at 241-57, June 28, 1974, at 217-30.

The IHFPA was created by Senate Bill 1609. Its purpose was explained by Senator Knuepfer, one of the sponsors:

> [Senate Bill 1609] addresses itself to a problem that we have in Illinois, *and that problem is essentially a surplus in hospital facilities.* We all pay for that surplus in hospital facilities and one of the motivating forces behind the bill has been those insurance companies as well, who take our dollars as third party payers to pay the hospital, and *it* [*Senate Bill 1609*] *sets up a mechanism for determining whether or not this* [*dramatic*] *expansion in hospital facilities can continue.*

Senate Proceedings, June 6, 1974, at 234 (emphasis added). Representative Kempiners echoed this thought in his remarks:

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[7] 78th Ill. Gen. Assem., Senate Proceedings, June 6, 1974, at 233.

> We're all familiar with the problems that the people of Illinois have today in paying for hospital care. Part of that problem is unused hospital beds. . . . Senate Bill 1609 . . . will provide a means *for proper planning with local input and decision making to cut down on empty hospital facilities*, nursing home facilities, sheltered care . . . facilities *and . . . ambulatory surgical facilities.*

House Proceedings, June 28, 1974, at 217-18 (emphasis added).

Notwithstanding this legislative history, the Seventh Circuit struck down the IHFPA, in part, because the court construed the motive of the Illinois legislators to be the suppression of abortion per se. Based upon the text of the acts and their legislative history, Judge Coffey correctly concluded, to the contrary, that "there is no proof in this record that either the ASTCA or the IHFPA [was] enacted primarily to regulate abortions; rather, these laws were adopted to regulate the delivery of medical services to its citizens and to attempt to prevent and control the further unnecessary overexpansion of Illinois' medical facilities." 841 F.2d at 1382.[8]

III. THE AMBULATORY SURGICAL TREATMENT CENTER ACT AND THE REGULATIONS ADOPTED BY THE DEPARTMENT OF PUBLIC HEALTH WERE SUBSTANTIALLY AMENDED IN 1979 IN DIRECT RESPONSE TO A *CHICAGO SUN-TIMES* AND BETTER GOVERNMENT ASSOCIATION INVESTIGATION OF CHICAGO ABORTION CLINICS IN 1978.

The Ambulatory Surgical Treatment Center Act was first enacted in 1973 to regulate all outpatient surgical facilities. In 1978, however, the attention of the public

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[8] At least thirty-six States impose certificate-of-need requirements. Bovbjerb, *Problems and Prospects for Health Planning: The Importance of Incentives, Standards, and Procedures in Certificate of Need,* 1978 Utah L. Rev. 83. The economic effects of the certificate of need system are discussed in *Symposium: Certificate of Need Laws in Health Planning.* 1978 Utah L. Rev. 1.

and the Illinois legislature was drawn to Chicago abortion clinics by a series of articles in the *Chicago Sun-Times*, entitled "The Abortion Profiteers," which was based on a five-month, undercover investigation undertaken by the *Chicago Sun-Times* and the Better Government Association, a private watchdog group. This series was cited by Justice Powell in his plurality opinion in *Planned Paernthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 488 n.12 (1983).[9] Specifically referring to "The Abortion Profiteers," which "disclosed widespread questionable practices in abortion clinics in Chicago," Justice Powell noted that "not all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards." *Id.*

The *Sun-Times* and the Better Government Association made the following findings:

> (1) Twelve women suffered fatal infections or bled to death after undergoing abortion procedures in state-regulated clinics;
>
> (2) Many women, because of unsterile conditions and haphazard clinic care, suffered debilitating cramps, massive infections and such severe internal damage that all of their reproductive organs had to be removed;
>
> (3) Dozens of abortions were performed on women who were not pregnant;
>
> (4) Abortions were illegally performed on women who were more than 12 weeks pregnant;
>
> (5) Abortions were performed by incompetent or unqualified physicians;
>
> (6) Abortions were performed without anesthesia or before anesthetics could take effect;
>
> (7) Patients were forced to leave the recovery room while they were still in pain because of severe overcrowding;

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[9] *Amici Curiae* have lodged ten copies of this series of articles with the Clerk of the Court.

(8) Unqualified personnel filled syringes and gave injections;

(9) Aides were directed to falsify records of patients' pre-operative and post-operative vital signs; [10]

(10) Clinics failed to order critical post-operative pathology reports, ignored the results or mixed up the specimens;[11]

(11) Clinics did not have a registered nurse on staff at all times the facility was open, as required by law;

(12) Clinics were not properly regulated by the Department of Public Health, which lacked adequate administrative procedures to investigate or close dangerous clinics;

(13) Unscrupulous sales techniques were used to pressure women into having abortions;

(14 Kickbacks were paid for abortion referrals;

(15) Women received incompetent counseling by untrained staff.

As a direct result of the *Sun-Times* series, the Subcommittee on Health of the Human Resources Committee of the Illinois House of Representatives conducted public hearings and recommended needed legislation. The Subcommittee, which heard testimony from investigators, state officials, medical experts, clinic operators and representatives from referral services, issued its report on December 13, 1978. "State Regulation Of Abortion Clinics," Report to the Human Resources Committee,

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[10] "According to medical experts consulted by The Sun-Times, it is essential to measure both pulse and blood pressure before and after abortions: before, to be sure the patient can tolerate the procedure and the anesthesia; after, to detect excess bleeding, shock or other life-threatening complications." "The Abortion Profiteers," *Chicago Sun-Times,* November 16, 1978, p. 19.

[11] Accurate pathology reports are essential because they indicate whether the patient was in fact pregnant, whether the abortion was incomplete or whether the patient may be suffering from a life-threatening ectopic pregnancy. "The Abortion Profiteers," *Chicago Sun-Times,* November 19, 1978, p. 25.

Subcommittee on Health, 80th Ill. Gen. Assem. (1978) (hereinafter 1978 Report).[12]

The report, which relied heavily on the *Sun-Times* investigation for its conclusions, urged legislative and administrative action that would generally upgrade monitoring and enforcement. *See* 1978 Report, Summary of Recommendations.[13] Virtually all of their recommendations were incorporated into amendments to the Ambulatory Surgicial Treatment Center Act and the regulations promulgated thereunder. *See* House Bill 438, Senate Bill 676, 81st Ill. Gen. Assem. (1979); 3 Ill. Reg. Vol. 10, pp. 43-54 (1979); 3 Ill. Reg. Vol. 30, pp. 371-89 (1979); 6 Ill. Reg. 6220 *et seq.* (1982); 6 Ill. Reg. 13337 *et seq.* (1982).[14]

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[12] *Amici Curiae* have lodged ten copies of the Subcommittee's Report with the Clerk of the Court.

[13] That the Subcommittee was not motivated by an anti-abortion amimus is evident from its marked hostility to the legislature's efforts to regulate abortion in the wake of *Roe v. Wade*, 410 U.S. 113 (1973), and its final recommendation that abortion services should be made available "in all areas of the State." *See* Subcommittee on Health Report, Introduction and pp. 16-17.

[14] For example, the court of appeals found that minimum size requirements for recovery rooms were not "medically necessary" and had "no medical justification whatsoever." (841 F.2d at 1368, 1373), but the *Sun-Times* and the House Subcommittee found that recovery rooms were not large enough to accommodate all patients, thereby forcing some to leave clinics while they were still in pain. Koshner & Zekman, "Jury subpenas [sic] records of abortion clinic," *Chicago Sun-Times*, November 12, 1978, at 5-6; 1978 Report at 10.

Likewise, the court of appeals held that "the State may not require separate licensure of facilities primarily devoted to performing abortions." 841 F.2d at 1371. But the House Subcommittee recommended that inspections pursuant to the ASTC licensing act should be stepped-up, that reports submitted by physicians pursuant to the licensing act should be more carefully monitored, that the Department of Public Health should be given greater authority to close clinics whose licenses have been suspended, that licensure fees should be imposed to "offset some of the costs of the . . . regulatory program" and that penalties should be "stiffen[ed]" for

The following spring, 1979, amendatory bills were sponsored in the General Assembly. The principal bill (House Bill 438) was sponsored by Representatives Cullerton, Chapman and Kelly, the first two of whom support legalized abortion.[15] Dr. Nina Adams, President of the "People's Alliance for Reproductive Choice," and Sherry S. Walker, administrator of the Concord Medical Center, an abortion clinic, appeared before the House Committee on Human Resources in support of House Bill 438. Bruce Simon, a representative of Planned Parenthood of Chicago, appeared before the Senate Committee on Public Health, Welfare & Corrections in support of the bill.

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operating a clinic without a license. The Subcommittee recommended that licensure standards for abortion clinics should generally be as strict as those for nursing homes. 1978 Report at 2-6. The *Sun-Times* found that Dr. Arnold Bickman, one of the subjects of the exposé, was operating three clinics in different States—"all without state licenses." Zekman & Warrick, "Meet the Profiteers," *Chicago Sun-Times,* November 13, 1978, at 1.

The court declared "invalid" the regulation requiring the same doctor who performs the abortion to perform a pregnancy test. 841 F.2d at 1372 (citing 77 Ill. Admin. Code, sec. 205.730(a)(2)). But the *Sun-Times* found that abortions were performed on women who were not pregnant (Zekman & Warrick, "The Abortion Profiteers," *Chicago Sun-Times,* November 12, 1978, at 1), and the Subcommittee recommended that the attending physician inform the patient of the test results. 1978 Report at 9.

Neither the *Sun-Times* investigative series nor the Report of the House Subcommittee on Health was ever mentioned in the majority opinion, despite the fact that both the series and the Report were submitted to the court.

[15] In 1969, Representative Chapman co-sponsored House Bill 634, which would have repealed the substantive provisions of the principal Illinois abortion statute and would have allowed aborton on demand throughout pregnancy. House Bill 634, 76th Ill. Gen. Assem. (1969). Representative Cullerton joined a brief in *Webster v. Reproductive Health Services, Inc.,* 109 S.Ct. 3040 (1989), urging this Court *not* to overrule *Roe v. Wade.* See Brief Of *Amici Curiae* On Behalf Of 608 State Legislators From 32 States, at 4a.

The bill, as enacted, imposes licensing fees; confers upon the Director of the Department of Public Health discretionary authority to deny issuance of a license to an applicant who has been convicted of a felony or two or more misdemeanors involving moral turpitude, or whose moral character is not reputable, or whose licensure status or record in another State indicates that granting a license would be detrimental to the interests of the public; requires detailed statements of ownership and financial statements; mandates quarterly inspections and makes facilities subject to inspection without prior notice; authorizes the Department to order the immediate closure of any facility which poses an imminent and serious menace to the health or safety of its patients or which is run by a person who previously has been convicted of operating an unlicensed facility; enhances the penalties for operating an unlicensed facility or one not in compliance with applicable statutes and regulations.

A floor amendment to House Bill 438, authorizing the Department of Public Health to order the immediate closure of an unsafe facility, was offered by Representative Pullen, who explained the necessity of conferring this power on the Department:

> [W]hen we had the Committee hearing on this Bill, . . . several Members . . . felt there was a problem in the provisions concerning the possible closing down of an abortion clinic. And the problem that they saw was that it gave the clinic 24 hours notice before it could be closed down. . . . And we certainly felt . . . that it was much more appropriate to follow this procedure [immediate closure followed by an administrative hearing] with respect to abortion facilities than to give a facility 24 hours notice before it is closed down. As was pointed out by witnesses, a facility would have 24 hours in which to clean up its act, face its hearing, continue its license and then go back to the practices that caused the closure to begin with. *So we felt that because of the dangers to human life presented in these facilities, which were exposed very shockingly a few months ago by the*

> *Sun Times, an immediate shut down would be much more in order.* So this Amendment proposes that there would be an immediate . . . that there could be an immediate shut-down by the inspector, then the facility would have 24 hours notice of that action and the procedures for hearing are retained in the Bill so the facility would still be able to appeal.

81st Ill. Gen. Assem., House Proceedings March 27, 1979, at 5-6 (emphasis added). Representative Cullerton, the bill's sponsor, supported the proposed amendment:

> It was disclosed during the Committee hearing that the standard by which an Ambulatory Surgical Treatment Center could be closed down was that when the continued operation of such facility constitutes an imminent and serious menace to the health or safety of the patient, and I feel that when this situation exists there is no need to allow the licensee 24 hours to continue his operation.

Id. at 6.

On third reading, Representative Cullerton spoke at length regarding the need to strengthen the Ambulatory Surgical Treatment Center Act to curb the abuses discovered in the *Sun-Times* articles:

> [L]ast year the Chicago Sun Times and the [Better] Government Association disclosed the atrocities that were being performed in the abortion clinics on Michigan Avenue in Chicago. A special subcommittee of the House, made many recommendations to respond to the investigations and the findings of that exposé. The next 4 Bills which we are to consider [House Bills 437, 438, 439 and 440] are the implementations of those recommendations. *Whether one is an opponent of abortion or not, there must be universal support for the improved regulation of these facilities and the enforcement of existing laws so that the [risk] of death and injury can be lessened. We cannot tolerate a situation that continues to allow profiteers to victimize women seeking abortions. This package of Legislation is concerned solely with improved regulation of the facilities operating as abor-*

> *tion clinics in Illinois. It is not designed to limit [or] restrict [a woman] from getting an abortion, nor is it intended to make it easier for women to obtain abortions. The objective is to insure [that] these facilities are operated in a safe and healthy manner. The sooner we do that, the sooner we will know that women will not experience any more tragedies of the type reported last fall.*

House Proceedings, April 10, 1979, at 52 (emphasis added). Speaking again in support of this legislation, Representative Cullerton said:

> *We're trying to eliminate the shoddy practices that were being performed in these clinics.* The only time that a clinic can be closed down immediately is if the health of the patient is at stake . . . if there are serious conditions which could affect the life [or] the health of the woman in these clinics.

Id. at 54 (emphasis added).

The House of Representatives approved the bill on a vote of 161 to 1. *Id.* at 55.

Speaking in support of the bill, Senator Carroll stated:

> This . . . is part of the package of abortion reform legislation to upgrade the Department of Public Health's ability to license surgical treatment centers. This bill would provide that the department can assess the applicant to determine if there were any criminal records involving the people who will be operating these facilities. It will require that they have physicians on its staff and that these physicians be outlined in name to a person who would come in to these surgical treatment centers. It would prohibit expenditures of public funds for patients which have not filed the necessary financial disclosures statements and require an annual licensing. *Basically this legislation is necessary to allow the department to better regulate these treatment centers and deny licenses as we have seen in the newspaper articles, deny licenses to those types of facilities that I*

believe every member of the Senate would say should not be allowed to exist in the State of Illinois.

Senate Proceedings, June 20, 1979, at 64 (emphasis added). The Senate approved House Bill 438, as amended, on a vote of 56 to 0, one member voting present. *Id.* The bill was returned to the House of Representatives, which concurred in the Senate's amendment on a vote of 137 to 0. House Proceedings, June 24, 1979, p. 33.

Senate Bill 676, which also amended the Ambulatory Surgical Treatment Center Act, was introduced in the same legislative session as House Bill 438. The bill, as enacted, requires a corporation operating an ASTC "devoted primarily to providing facilities for abortion" to have a licensed physician who is "actively engaged in the practice of medicine at the Center, on the board of directors as a condition of licensure." The purpose of the bill, as explained by its sponsor, Senator Adeline Geo-Karis, was "to protect people who have to use these ambulatory treatment pregnancy centers." Ill. Gen. Assem., Senate Proceedings, May 17, 1979, at 89. The bill provides "a safeguard for the women who are going to go through these clinics" and is intended to "avoid a lot of vicissitude[s] that have happened in some of these abortion centers." *Id.* at 90. Senator Schaffer voiced his support of the bill:

> We've seen over the years, in these type [of] clinics . . . that the ownership changes very quickly and when the department finds something wrong and they move against the individuals there usually is not a medical practitioner involved. There's usually someone who is profit motivated . . . to operate this place. We get the goods on them. We shut them down and they close the door of Acme Clinic and the next day it's the Uptown Clinic. There are a different set of names with the same medical personnel and the same procedures and we go right back into court and we fight the battle all over again. I don't think it's inappropriate to request and to require that

> one person who could effectively be held responsible for the medical practices in this type of clinic to be involved in the incorporation. I think it's a reasonable proposal and I think it will help us stamp out some of the abuses which we are all so acutely aware of.

Id. at 90-91. The Senate approved Senate Bill 676 on a vote of 46 to 1. *Id.* at 91.

In the House, Representative Leinenweber explained that "Senate Bill 676 was introduced apparently in part in response to the *Sun-Times* series on abortion clinics." House Proceedings, June 18, 1979, at 16. The bill was intended to provide accountability by requiring a physician to serve on the board of directors of an incorportaed ambulatory surgical treatment center whose principal business is performing abortions. *Id.* at 18-19, 24-25 (remarks of Rep. Leinenweber). The House of Representatives approved Senate Bill 676, as amended, on a vote of 148 to 0, two members voting present. House Proceedings, June 20, 1979, at 127. The bill was returned to the Senate which concurred in the amendment on a vote of 53 to 0. Senate Proceedings, June 23, 1979, at 138.

Even before the Illinois General Assembly considered these bills, the Department of Public Health took prompt action to remedy the more serious abuses uncovered by the *Sun-Times* series. On February 23, 1979, the Department invoked its emergency rulemaking authority because "[a]ny delay . . . will permit conditions to continue that may be detrimental to the public health and safety." 3 Ill. Reg. Vol. 10, p. 43 (1979). The Department's notice specifically referred to "[r]ecent investigations by governmental and private agencies [that] have discovered improprieties in several Ambulatory Surgical Treatment Centers." *Id.* The rules were promulgated "to require these centers to use the services of specially trained medical personnel and to follow a specific procedure in evaluating qualifications of staff as well as ongoing evaluation

of care provided." *Id.* The Department also imposed "[a]dditional requirements for the qualifications of counselors and the quality of counseling" and "new requirements for laboratory examination of tissues removed during the performance of an abortion." *Id.* With minor changes, these rules were made permanent on July 23, 1979. 3 Ill. Reg. Vol. 30, pp. 371-89 (1979).

The majority opinion held that "the State may not require separate licensure of facilities primarily devoted to performing abortions," (841 F.2d at 1371), notwithstanding compelling evidence that regulation of these facilities is *essential* to protect the health, indeed the very lives, of women undergoing abortions. The *amici curiae* fully agree with Judge Coffey that "individual states have the obligation, the duty, and the power to license facilities where semi-complex (minor) surgical procedures, including first-trimester abortions, are performed as a valid exercise of a state's interest in protecting health and ensuring maximum safety for the patients." *Id.* at 1398 (Coffey, J., dissenting). The legislative history indicates that this was the essential purpose of the 1979 amendments to the ASTCA.

IV. IN STRIKING DOWN THE AMBULATORY TREATMENT CENTER ACT AND THE REGULATIONS ADOPTED THEREUNDER, THE COURT OF APPEALS RELIED UPON THE "LEGISLATIVE MOTIVE" DOCTRINE OF *THORNBURGH v. AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS,* WHICH THIS COURT SHOULD EXPRESSLY ABANDON.

In invalidating the ASTCA, the court of appeals looked beyond both the statute itself and the relevant legislative history, and inquired into the legislature's motive. The court opined that the ASTCA "was enacted primarily with abortion clinics in mind and only applied to outpatient surgical clinics generally to save the statute from unconstitutionality." *Id.* at 1369. This attempt to reach beyond the accepted tools of statutory analysis—the plain

language of the statute and the legislative history of the Act—and invalidate otherwise constitutional legislation based on the alleged motivation of the legislators who enacted the statute, is contrary to well-settled rules of constitutional law.

The court's search for legislative motive strays from the "familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1967). *Accord McCray v. United States*, 195 U.S. 27 (1904). Chief Justice Marshall first enunciated this principle in the landmark decision, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). In setting forth the rule, the Chief Justice first explained the practical impossibility of an inquiry into motive:

> If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means might be applied to produce this effect. Must it be by direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of its members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

Id. at 130. The Chief Justice then articulated the rule against such an inquiry:

> [Inquiry into the] impure motives [of the legislature] . . . is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers. . . .
>
> If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and if

> less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Id.

In *McCray v. United States,* the Court again stressed this principle:

> The decisions of this court from the beginning lend no support to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence.

195 U.S. at 56.[16]

Chief Justice Warren's opinion in *United States v. O'Brien* reiterated the impropriety of inquiry into legislative motive. The Chief Justice elaborated on the impossibility of determining "the motive" of the legislature, first addressed in *Fletcher v. Peck*:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature[], because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-

[16] *See also Brooklyn Union Gas Co. v. Standard Oil Co.,* 391 U.S. 366, 383 (1968); *Daniel v. Family Ins. Co.,* 336 U.S. 220, 223-25 (1948); *Arizona v. California,* 283 U.S. 423, 454 (1930); *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 210 (1921); *Hamilton v. Kentucky Distilleries Co.,* 251 U.S. 146, 161 (1919); *United States v. Doremus,* 249 U.S. 86, 93 (1919); *Dakota Central Tel. Co. v. South Dakota,* 250 U.S. 163, 187 (1918); *Wilson v. New,* 243 U.S. 332, 358-59 (1917); *Weber v. Fried,* 239 U.S. 325, 329-30 (1915); *United States v. Des Moines Nav. & Ry. Co.,* 142 U.S. 510, 544-45 (1892); *Doyle v. Continental Ins. Co.,* 94 U.S. 535, 541 (1877); *Aldridge v. Williams,* 44 U.S. (3 Howard) 15, 23 (1845).

> settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

391 U.S. at 383-384.[17] This Court and individual justices have reaffirmed this principle more recently. *See Palmer v. Thompson*, 403 U.S. 217 (1971); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Boos v. Barry*, 108 S.Ct. 1157, 1171 (1988) (Brennan, J., concurring).[18]

As a matter of constitutional principle, this Court uniformly refuses to probe the motivation of the legislature where, as here, the challenged statute is otherwise constitutional. Generally, the Court has been unwilling to engage in such an inquiry except in Equal Protection Clause cases and cases under the Establishment Clause, and even there, inquiry into legislative motive has met with strong opposition.

In Equal Protection Clause cases, discriminatory intent will be considered if, and only if, the challenged statute or policy has a disproportionate discriminatory effect. *Washington v. Davis*, 426 U.S. 229, 239 (1976). *Accord,*

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[17] Justice Scalia has also voiced his disapproval of searching the motives of the legislature. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), he wrote that "determining the subjective intent of legislators is a perilous enterprise," and that "[t]o look for *the sole purpose* of even a single legislator is probably to look for something that does not exist." *Id.* at 637 (emphasis in original).

[18] The lower federal courts have also consistently refused to inquire into the legislative motive behind an otherwise constitutional statute. *See, e.g., Fraternal Order of Police Hobart Lodge No. 121, Inc. v. City of Hobart*, 864 F.2d 551 (7th Cir. 1988); *Torres v. Delgado*, 510 F.2d 1182 (1st Cir. 1975); *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir. 1986); *Felix v. Young*, 536 F.2d 1126 (6th Cir. 1976); *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973); *Sipes v. United States*, 321 F.2d 174 (8th Cir. 1963); *United States v. Ross*, 458 F.2d 1144 (11th Cir. 1972).

e.g., Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65 (1977); *Personnel Administrator v. Feeney*, 442 U.S. 256, 272-274 (1979) (gender discrimination); *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985). The finding of a disproportionate effect serves as the necessary pry to open the door of inquiry into legislative motive.

In Establishment Clause cases, this Court applies the three-prong test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), the first prong of which requires inquiry into the legislative motive. ("It is clear, first of all, that regardless of what 'legislative purpose' may mean in other contexts, for the purpose of the *Lemon* test it means 'actual' motives of those responsible for the challenged action." *Edwards v. Aguillard*, 482 U.S. 578, 613 (1987) (Scalia, J., dissenting). The inappropriateness of a test requiring inquiry into the minds and motives of lawmakers has generated considerable criticism from members of this Court, including calls for its abandonment. *See, e.g., County of Alleghany v. American Civil Liberties Union*, 109 S.Ct. 3086 (1989) (Kennedy, J., dissenting) ("Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today," *Id.* at 3134; *Edwards v. Aguillard*, 482 U.S. 578, 636-640 (1987) (Scalia, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 108-113 (1985) (Rehnquist, J., dissenting); *Epperson v. Arkansas*, 393 U.S. 97, 113 (1968) (Black, J., concurring).

As the Equal Protection Clause and Establishment Clause cases demonstrate, the Court's willingness to engage in an analysis of legislative motive—in these two narrow areas where such inquiry has been entertained—is waning. Inquiry into legislative motive in other areas of the law represents an unwarranted and substantial departure from long-settled constitutional principles.

The court of appeal's reliance on legislation motive was implicitly based on *Thornburgh v. American College of*

Obstetricians and Gynecologists, 476 U.S. 747 (1986). There, the majority invalidated Pennsylvania's Abortion Control Act based on an inquiry into legislative motive. *Id.* at 751 *passim.* As Justice White observed in his dissent, however, *Thornburgh* marked a radical departure from accepted constitutional principles.

> The majority's opinion evinces no deference toward the State's legitimate policy. Rather, the majority makes it clear from the outset that it simply disapproves of any attempt by Pennsylvania to legislate in this area. The history of the state legislature's decade-long effort to pass a constitutional abortion statute is recounted as if it were evidence of some sinister conspiracy. [Citation]. In fact, of course, the legislature's past failure to predict the evolution of the right first recognized in *Roe v. Wade* is understandable and is in itself no ground for condemnation. Moreover, the legislature's willingness to pursue permissible policies through means that go to the limits allowed by existing precedents is no sign of *mens rea.* The majority, however, seems to find it necessary to respond by changing the rules to invalidate what before would have been permissible.

Id. at 798 (White, J., dissenting).

That the peculiar legislative motive analysis engaged in *Thornburgh* has precipitated an unprecedented change in principles of constitutional analysis in the context of abortion is evidenced by the number of lower federal courts echoing *Thornburgh's* motive inquiry. For example, in its findings of fact upon which it relied in invalidating Minnesota's parental notice law, the district court found that "a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature." *Hodgson v. Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev'd on other grounds*, 853 F.2d 1452 (8th Cir. 1988). Similarly, Judge Williams found support in *Thornburgh* for his determination that the abortion regulation at issue was "*actually* undertaken to discourage constitutionally privileged induced abortions." *Margaret S. v. Edwards*, 794 F.2d 994, 1002

(5th Cir. 1986) (Williams, J., concurring) (emphasis added).

The legislative motive analysis in *Thornburgh* is inconsistent with the well-settled principle that legislative motive ought not be considered when the statute is otherwise constitutional, and is consistent only with "an entirely different principle: that in cases involving abortion, a permissible reading of a statute is to be avoided at all costs." 476 U.S. at 812 (White, J., dissenting). The legislative motive analysis thoroughly infected the court of appeals' decision. It caused the court not to focus on the effect of Illinois' regulatory scheme, but to speculate on the motivations of unnamed legislators; it caused the court to ignore the actual reasons behind specific statutes and regulations and to focus instead on the motivations behind a "tripartite scheme;" it caused the court to ignore entirely the critical public health problems that surfaced in 1978, and to focus on the minutes of unrelated meetings that occurred in 1974. The court's opinion thus stands as a revealing example of why the legislative motive analysis of *Thornburgh* should be expressly abandoned.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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