MEMO TO ROY August 5, 1971

FROM DAVID

RE: LEGISLATIVE PURPOSE, ET AL.

1. Your questions (1) and (2) raise essentially the same problem, i.e., how to discern legislative purpose. Of course, there is a formidable view that the exercise is largely meaningless, e.g., Radin, "Statutory Interpretation," 43 Harv. L. Rev. 863 (1930); Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L. Rev. 527, 540-544 (1947). Assuming the converse, however, Prof. Ely concurs with C.J. Warren (in U.S. v. O'Brien, 391 U.Sl 367, 383-84 (1968) that a chief problem, even without a consitutional context, is ascertainability. Ely, "Motivation in Constitutional Law," 79 Y.L.J. 1205, 1212-1214 (1970). Nevertheless, courts struggle with this problem all the time when they construe statutes, resolving it as best they can in the contexts of the cases before them.

In constitutional litigation, the problem takes on an added dimension, however; the validity of a challenged law hangs on the intent which a court ascribes to the legislature, usually on the basis of quite paltry evidence (and certainly in the absence of psychological data regarding the legislators'"real" intentions). See Ely, at 1214. Where the possibility exists that legislators could as easily use the same statutory language to manifest a permissible intention as an impermissible one (or both simultaneously)the shakiness of trying to determine which one they principally held is a good reason to avoid using the technique as a device for constitutional adjudication.

P erhaps the above explains why Prof. Means had such a difficult time trying to find Supreme Court cases to bolster his theory of cessation of constitutionality. Means, "The Law of New York,..." 14 N.Y.L.F. 411, 514-515 (1968). Indeed, his own conclusions sometime strain credibility: in the presence of manifest public outcry over fetal deaths just prior to the passage of New York's 1872 abortion law, Means disclaims any impact upon the legislature of this popular pressure (even though the statute itself copies the language of a pro-fetal group), and concludes instead that the law reflects"those legislators' remarkable ability to read the handwriting on the wall as to what that opinion [People v. Evans, decided several days after passage of the bill] would contain...." Means, at 486. No wonder courts are reluctant to indulge in lengthy exploration to discern intent for constitutional purposes.

Where the important thing is to win the case no matter how, however, I suppose I agree with Mean's technique: begin with a scholarly attempt at historical research; if it doesn't work, fudge it as necessary; write a piece so long that others will read only your introduction and conclusion; then keep citing it until courts begin picking it up. This preserves the guise of impartial scholarship while advancing the proper ideological goals.

The other big problem with intent as a basis for unconstitutionality is the potential futility of it all. If a court voids a law because of "unconstitutional intent," what is the court really doing except advising the legislature to be a bit more discreet in

its floor debate the next time around? See Ely, at 1214-15. If all possible intents would be "invalid," then legislative intent seems to drop out as a problem; the issue becomes lack of authority to enac the statute or impermissible impact. Judicial review of the latter issue is what Ely calls the disadvantageous distinction model of review: the challenger alleges he is being singled out by law for no reason related to a legitimate state purpose; the claim triggers a review according to a rational relationship, compelling interest, or balancing interest test. It is this model which seems to apply to the abortion cases rather than one where "improper intent" is a constitutional issue.

2. It follows from the above that the conclusion suggested in part (3) of your memo is quite untenable as a constitutional theory. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1960). (Although Means is often cited for his research on the common law of abortion and on the original rationale for the N.Y. abortion statutes, I have not seen a court adopt his cessation theory). If the state can demonstrate a legitimate purpose which plausibly explains a statute, it is unlikely that a court won't affirm. See Ely, at 1229.

3. As I suggested in my July 26th memo, attacking alternative justifications for abortion laws can be done forcefully by requiring them to meet the compelling interest standard; this is hardly an

original idea. It does, however, suggest some reorganizing in the Bolton brief to indicate clearly that the fetal and moral interests which may underlie the statute are neither legitimate nor compelling, and that a health interest is irrational.

Obviously, the moral interest rationale also is vulnerable to a charge of overbreadth, exactly like the statute in Griswold.

An additional theory, applicable principally to the moral interest rationale, is that the legislature harbored an unconstitutional motive by devising pregnancy as a punishment for "immoral" conduct. See Ely, at 1266. This is weaker than the above alternatives, and would be difficult to establish by evidence at this stage.

The notions of overinclusiveness (applicable to the moral interest rationale) and underinclusiveness (applicable to the fetal interest rationale) are well known to you. I think they are more effective if used to argue no legitimate compelling interest than to concede the interest and require the legislature to redraft the law.

MEMO TO DAVE

FROM: ROY

RE: LEGISLATIVE PURPOSES, CHANGES THEREIN, IDENTIFICATION THEREOF, AND IMPACT ON VALIDITY OF STATUTE 100 YEARS LATER

By early next week, let me know your thoughts on the best way to handle the problems involved in
(1) identifying the purpose behind these statutes;
(2) arguing that no other purposes attached themselves to the legislation in intervening years;
(3) concluding that the statute is therefore unconstitutional, without needing to show the invalidity of potential modern justifications; or
(4) showing that such modern justifications do not exist, or are so clumsily manifested by the statute as to require the legislature to try again if they really mean it.

Attached are two articles which may have useful material. Mark them up freely for your and my reference.

Also, I have a lot of research which needs to be done on (1) history of the 14th Amendment, (2) other medical and legal matters pertaining to ab, st, and con. How is your time allocated for the remainder of the summer?