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Human Life Federalism Amendment - I. Legal Aspects

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HUMAN LIFE FEDERALISM AMENDMENT I. LEGAL ASPECTS

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In addition to denying all constitutional status to any right of abortion, the "Life Amendment"[1] would confer upon Congress and the states "the concurrent power to restrict and prohibit abortion."[2] Thus, it would restore to the states the power which they had before *Roe v. Wade*[3] to deal with the matter of abortion; in addition, it would confer upon Congress the same power.[4] By conferring concurrent power on both levels of government, the Life Amendment departs from the traditional division of powers under which the regulation of such matters was left to the states. Historical precedents, however, are not lacking. For example, the eighteenth amendment gave both Congress and the states concurrent power to enforce prohibition.[5] In view of the national scope of the problem of abortion, it is advisable that both levels of government have the power to legislate against abortion.

By its own terms, the amendment neither prohibits nor restricts abortions. Rather it grants Congress and the states complete discretionary power to restrict and prohibit.[6] Each sovereign can formulate and enforce its own policy on abortion according to the will of the people whom the legislators represent. Such a grant necessarily allows the possibility that abortion may not be prohibited in particular circumstances. Yet, as a matter of national policy, the Life Amendment is an unmistakable and decisive declaration for the protection of the unborn.

Because the Life Amendment is directed against abortion only, legis-

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[1] *See* S. REP. No. 465, 97th Cong., 2d Sess. 1-2 (1982).
[2] *Id.*
[3] 410 U.S. 113 (1973).
[4] *See* S. REP. No. 465, 97th Cong., 2d Sess. 1-2 (1982).
[5] U.S. CONST. amend. XVIII (1919, repealed 1933).
[6] *See* S. REP. No. 465, 97th Cong., 2d Sess. 1-2 (1982).

lation under it would of course be subject to other constitutional guarantees, for example, the due process and equal protection clauses of the fourteenth amendment. Illustrative of the former would be the application of the so-called "due process" right of privacy to the use of contraceptives by married couples.[7] Any earlier provision of the Constitution, however, that might conflict with the Life Amendment, and legislation pursuant to it, would be limited to that extent—the policy and provisions of the Life Amendment would be controlling. In other words, no provision of the Constitution could be invoked to dilute the plenary power to prohibit abortion granted by the Life Amendment.

The significance of the term "restrict and prohibit" is simply to underscore that the power may be exercised over the full range of legislative possibilities. The legislators may choose to prohibit abortion entirely, with no exceptions, or they may elect to implement such lesser degrees of protection for the unborn as they may deem appropriate. They may also use whatever enforcement mechanism they deem expedient.

With power granted to both the federal and state governments, a question immediately arises concerning the reconciliation of conflicting exercises of state and federal power. To understand how the conflict would be resolved under the amendment, we must look to the term "concurrent power" as well as the proviso.[8] The only place in the Constitution where the term "concurrent power" is used expressly is the eighteenth amendment, which gave Congress and the several states "concurrent power to enforce" the amendment by appropriate legislation.[9] Beginning with the *National Prohibition Cases,* the Supreme Court held that the grant of concurrent enforcement power gave each sovereign equal and independent authority to enforce the national prohibition policy enunciated by the amendment, and that the statutes of both could be enforced as the will of separate sovereigns.[10] The power of each was derived from different sources: in the case of the federal government, the eighteenth amendment,[11] and in the case of the states, the general powers reserved to them by the tenth amendment.[12] Thus, criminal sanctions could be imposed by both sovereigns for the same transaction without violating the double

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[7] *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

[8] The Human Life Amendment provides:

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

S. REP. No. 465, 97th Cong., 2d Sess. 1-2 (1982).

[9] U.S. CONST. amend. XVIII (1919, repealed 1933).

[10] *See, e.g.,* National Prohibition Cases, 253 U.S. 350, 383, 387 (1920).

[11] *See* U.S. CONST. amend. XVIII (1919, repealed 1933).

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

jeopardy clause.[13] It was also held in the eighteenth amendment cases that both federal and state legislative schemes were enforceable despite significant differences;[14] indeed, a state law prohibiting the possession of liquor specifically licensed by federal law was sustained.[15]

It has been suggested that the grant of "concurrent power" in the Life Amendment would lead to the result reached by the courts under the eighteenth amendment. Because that result was tied to a particular substantive constitutional policy, however, and was developed in the course of construing a concurrent grant of power to enforce that policy, it is critical to examine and compare the nature of the grant in the Life Amendment.

As was already mentioned, the Life Amendment does not expressly prohibit abortions nor does it establish any degree of restriction. Substantively nullifying a right to abortion under the Constitution liberates the states in the exercise of their reserved powers under the tenth amendment to restrict and prohibit abortions. Concurrently, it grants the federal government coextensive authority. Each sovereign is vested with discretion regarding the manner in which it will exercise its authority. Thus, the parallel with the eighteenth amendment would seem intact unless there is a vital distinction between a grant of concurrent power to *enforce* an express, absolute constitutional policy or prohibition, as in the eighteenth amendment, and a grant of concurrent discretionary power both to *establish* and to *enforce* basic policy, as in the Life Amendment. It must be recognized that the concurrent power under the Life Amendment is as much a power to establish substantive policy as it is a power to enforce. Although certain policy decisions were also involved in the enforcement statutes under the eighteenth amendment, they did not involve substantive latitude. The potential for conflict between the laws of two sovereigns under the Life Amendment is greater. The analogy to the eighteenth amendment is less than precise. Therefore, it cannot be assumed that by itself the conferral of "concurrent power to restrict and prohibit abortion" is sufficient to guarantee that there will not be conflicts between the laws of Congress and a given state in respect of the exercise of their powers under the amendment.

It is for this reason that the proviso was made part of the amendment. It requires that when both sovereigns act, what will emerge and be given effect are the legislative provisions that most effectively accomplish the goal of protecting the unborn.[16] The proviso serves to prevent the

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[13] Herbert v. Louisiana, 272 U.S. 312, 314 (1926).

[14] *See* Johnson v. State, 81 Fla. 783, 89 So. 114, 116 (1921) (state liquor laws may be valid, though they differ substantially from federal enforcement laws).

[15] *See* McCormick & Co. v. Brown, 286 U.S. 131, 144 (1932).

[16] *See* S. REP. No. 465, 97th Cong., 2d Sess. 1-2 (1982). The proviso allows a state law which

supremacy clause from bringing about preemption by a provision of a law of Congress that is more permissive of abortion than a conflicting provision of state law. The proviso, by dealing explicitly only with the situation in which a state law is more restrictive of abortion than a federal law, is designed to let the supremacy clause operate when a provision of a law of Congress is more restrictive of abortion than a conflicting provision of state law. Thus, the design of the amendment is not to favor one level of government over the other when conflicts arise between provisions of the statutes of Congress and a state. Rather, the amendment requires preemption in favor of those provisions that are more restrictive of abortion than the conflicting provisions of the other sovereign's legislation. In a nutshell, the amendment may be said to have a mini-supremacy clause of its own which makes the protection of the lives of the unborn the touchstone.

Finally, it should be observed that the term "provision of a law" is used to refer to the points of conflict that are to be resolved under the proviso. This is designed to ensure that when and if conflict arises and some sort of preemption is required—and it should be understood that this would be the exception—the entire legislative scheme of one sovereign or the other would not be superseded. Only the less restrictive, conflicting provision will be preempted, and the entire balance of that sovereign's legislative scheme will continue to be operative. In this way, enforcement mechanisms of both sovereigns will continue to operate.

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is restrictive of abortion rights to preclude a more lenient federal law. *Id.* Inherent in this proviso is a protection against liberally drawn abortion statutes. Thus, it is suggested, the unborn fetus is accorded greater protection.