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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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There are two pro-life initiatives pending in Congress, the Hatch amendment[1] and the Human Life Bill.[2] For some unexplained reason, the pro-life supporters of each clash rather than support a unified result. The two initiatives depend upon each other because, standing alone, each bill is inadequate. The Hatch amendment needs strong legislative support. The legislation needs the support of a constitutional amendment.

The Hatch amendment gives constitutional support to federal legislation involving abortion.[3] The added dimension that the Hatch amendment provides is allowing the federal government to legislate, along with the states. Then, when state and federal legislation coexist, the more restrictive of the two becomes the minimum standard. The Hatch amendment thus nationalizes the debate and creates the possibility of avoiding the Nevada divorce enclave approach to the problem. In the event that a state did nothing, the federal law passed pursuant to the Hatch amendment would control.

The amendment itself is very simple. The first sentence reads: "A right to abortion is not secured by this Constitution."[4] There has been plenty of criticism by friends and enemies of the Hatch amendment. In the critical comments that have been written, the language of the first sentence has not been very hotly debated. The purpose of the sentence is

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

[2] H.R. 900, 97th Cong., 1st Sess., 127 CONG. REC. H128 (daily ed. Jan. 19, 1981).

[3] *Cf.* Uddo, *The Human Life Bill: Protecting the Unborn Through Congressional Enforcement of the Fourteenth Amendment*, 27 LOY. L. REV. 1079, 1093 (1981) (the Human Life Bill unleashes an "untapped reservoir of federal legislative power to define and promote the constitutional rights of individuals in relation to state government").

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

to erase the substantive rule of law enunciated in *Roe v. Wade*.[5] This sentence is broad and covers every aspect of the Constitution so that a right to abortion could not receive support from any portion of the Constitution, neither the fifth, ninth, tenth, fourteenth, nor any other amendment, or any portion of the Constitution.[6] Therefore, if this amendment were passed and someone again wanted to legalize abortion, they would have to pass a constitutional amendment. In effect, then, once the first sentence has taken away the substantive rule of law, all those cases that flow from the creation of the right to abortion under *Roe v. Wade* would be undercut.[7]

One of the debates that has arisen is whether the words "right to abortion" are broad enough to cover the entire scope of the problem. Some argue that the right of privacy is the real issue and that the amendment should abolish this right. A fair reading of the opinions, however, makes it quite clear that the words "right to abortion" encompass the totality of the problem. There is no doubt about the intent of the first sentence—to destroy the right to abortion, however conceived.[8] The very phrase "right to abortion" has appeared in federal court cases.

The last item that has arisen in the debate is that somehow this amendment enshrines abortion into the Constitution. Certainly the first sentence does not do so because it indicates that the Constitution does not support any right to abortion. The right to abortion, in the constitutional sense, exists now because of *Roe v. Wade*. This amendment and this sentence abolish the force of that decision. It leaves to the legislatures of both state and federal governments the abortion problem, as it existed prior to the decision in *Roe v. Wade*.[9]

Abortion is now legal and by virtue of *Roe v. Wade* is enshrined in our current law. The Hatch amendment reverses this situation and allows the states to abolish abortion. The amendment does not create personhood for the unborn; however, it does allow states to create personhood for the unborn.[10] It allows federal legislation to create personhood for the unborn for any specific right or reason that personhood might be desired.[11] As important as personhood is, if achieving it is a practical and political impossibility, then pro-lifers should be willing to attempt alternative effective solutions.

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[5] *See* Caron, *The Human Life Federalism Amendment—An Assessment*, 27 CATH. LAW. 87, 93 (1982).

[6] *See* S. REP. No. 465, 97th Cong., 2d Sess. 1-2 (1982).

[7] *See, e.g.*, Connecticut v. Menillo, 423 U.S. 9, 9-10 (1975) (per curiam).

[8] *See* Caron, *supra* note 5, at 93.

[9] S. REP. No. 465, 97th Cong., 2d Sess. 5 (1982).

[10] *See* Caron, *Legal Assessment: Human Rights Federalism Amendment*, 11 ORIGINS 495, 498 (1982).

[11] *Id.*

Some who contest the amendment do so primarily because it does not contain any reference to personhood, and because it does not raise the unborn child to the status of a born person.[12] That is a debate of some significance and, in fact, is the debate that is tearing the right-to-life movement apart, and thereby jeopardizing passage of the amendment. This is especially true if those people who support personhood as a remedy to *Roe v. Wade* continue to take this position to the exclusion of any other approach. It is ironic that the movement is being pinned on the petard of personhood; it was the flag that united us to move in our directed course. The Hatch amendment is a solution that does not bystep personhood, but merely does not include it as part of the constitutional amendment.

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[12] *See* Caron, *supra* note 5, at 106-07. *See generally* Boyle, *That the Fetus Should Be Considered a Legal Person*, 24 AM. J. JURIS. 59, 59-71 (1979).