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HUMAN LIFE FEDERALISM AMENDMENT I. LEGAL ASPECTS

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In addressing the Human Life Amendment in light of the traditional goals of the pro-life movement, John Marshall is a good starting point. He stated that it is a constitution we are making. We are engaged in actually sponsoring a new language for our ancient constitution. We are dealing with a constitution, not with a criminal code. It cannot have the precision or the detail of a criminal code. We cannot draft something that is intended principally to deter evil men. We are drafting a document that is addressed basically to all Americans of good will and particularly to officials and federal judges; and it is entirely inappropriate to approach the drafting process as though we could and should anticipate every possible maneuver that would misinterpret the words.

After a decade of experience with attempts at drafting constitutional language, it seems clear to me that there is no form of words that is foolproof, or manipulation proof. The fourteenth amendment is a prime example. No one in the 1860's would have dreamed that what was written there in protection of liberty would be read to encompass the abortion laws.

With that preamble, one has to conclude that even though good faith from a court can be expected, the forum that is now most favorable should be chosen as the vehicle. That forum undoubtedly is the legislature, and the pro-life movement's involvement in that forum is with the Human Life Amendment.

The Human Life Amendment has taken two forms. One was the attempt to amend the meaning of person in the fifth and fourteenth amendments so that person in those amendments included the unborn.[1] The result of that proposal, had it been adopted, would have been that one could not take the life of the unborn without according the unborn due process of law. No phrase in the American Constitution has under-

[1] S. 158, 97th Cong., 1st Sess., 127 CONG. REC. S8420 (daily ed. July 24, 1981)

gone more manipulation than "due process."

The second form of the Human Life Amendment accords due process to the unborn and, in addition, says in so many words: No person shall take the life of an unborn person; the unborn person being defined to include all the unborn. This language also is not without its problems. First, taken absolutely, it would introduce a concept that has never existed in either American law or English—an absolute ban on abortion. Abortion has never been banned, only regulated. It has always been permitted to save the life of the mother. It is part of the American view of self-defense that one should be able to act in defense of one's own life, and it is perhaps chimerical to suppose that at this particular time in history one could suddenly abandon 800 years of tradition of self-defense in the abortion area.

Recognizing that this kind of exceptionless amendment would be fanciful, the drafters tried to add an exception, saying: "No person may take the life of an unborn person, except to save the life of the mother." It was then quickly realized that life, in the eyes of the federal judiciary, means health. The result, therefore, would be a constitutional exception that could completely eviscerate the rule of protection.

Attempting an even greater precision, the draftsmen put the exception in terms of what was necessary to prevent the imminent death of the mother. The problem here is that the language is singularly inappropriate for a constitution. It is unlikely that "imminent death" is the sort of constitutional language that would have very much of a response with the American people.

The second problem is rhetorical. The rhetoric of, "No person shall take the life of an unborn person," is the rhetoric of murder. Traditionally, neither law nor religion has treated abortion as murder, but rather as a separate species of moral offense.

The third problem is that whatever you do in the way of a constitutional amendment, it is not self-executing. Once a constitutional amendment is passed, it must be enforced. There are two ways in which this can be accomplished: through the judiciary and through the legislature.[2]

The judicial avenue is by private action.[3] Private action to enforce a constitutional amendment is the height of discretionary action. People would be taking it upon themselves to try to enforce the antiabortion amendment, and its enforcement would depend upon the remedy accorded them by the court. It would be discretionary with the individual

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[2] Horan, *Human Life Federalism Amendment: Its Language, Effects,* 62 HOSP. PROGRESS, Dec. 1981, at 12.

[3] *See* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916); Comment, *Private Rights of Action Under* Amtrak *and* Ash*: Some Implications For Implication,* 123 U. PA. L. REV. 1392, 1392-93 (1975).

as well as the courts.

The legislature, however, is going to act under the Hatch amendment.[4] If the legislature does not act, and there exists something like the proposed Human Life Amendment, one could go to court and secure injunctive relief against the legislature.[5] The Hatch amendment takes the forthright course of saying, "We are giving power to the legislature." That is the way the Constitution has traditionally invested different bodies of government with responsibility. It gives the power, in this case it gives absolute power, to protect life. With that absolute power and with the continued investment of energy and effort, the protection of unborn life at every stage would be almost within grasp.

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

[5] *See* Comment, *supra* note 3, at 1392-93.