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HUMAN LIFE FEDERALISM AMENDMENT I. LEGAL ASPECTS

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It must be remembered that a constitutional amendment is not necessary to achieve all legal and political change. Some things a constitutional amendment cannot do alone, and other things a constitutional amendment cannot do well. We know that a constitutional amendment will not be a panacea, it will be neither a total solution to the "tragedy" of abortion nor an immediate solution.¹ For instance, no matter how a constitutional amendment is phrased, it will be necessary as a practical matter to enact enforcing legislation.² So a constitutional amendment is not the end-all and be-all of the pro-life movement.

There are several critical reasons, however, why a constitutional amendment like the Hatch amendment³ is necessary. These reasons all have their common source in the Supreme Court decision of *Roe v. Wade*.⁴ In *Roe v. Wade*, the Supreme Court was considering the constitutionality of the Texas abortion laws, which for nearly 120 years had prohibited all abortions except those done for the purpose of preserving the life of the mother.⁵ Justice Blackmun, writing for the Court, began his analysis with the declaration that somewhere in the Constitution there is a fundamental right of privacy, which "is broad enough to encompass a

¹ See Caron, *The Human Life Federalism Amendment—An Assessment*, 27 CATH. LAW. 87, 100-11 (1982). The amendment does not directly prohibit abortions. It merely grants Congress and the states the power to restrict or prohibit abortions. *Id.* at 96-97.

² Horan, *Human Life Federalism Amendment: Its Language, Effects*, 62 HOSP. PROGRESS, Dec. 1981, at 12. "Any constitutional amendment needs state and federal legislative support. This is so because the federal Constitution . . . is not a criminal code or a regulatory statute . . . [; it] prohibits but does not punish and therefore does not compel." *Id.*

³ S.J. Res. 110, 97th Cong., 1st Sess., 127 CONG. REC. S10196 (daily ed. Sept. 21, 1981).

⁴ 410 U.S. 113 (1973).

⁵ *Id.* at 117-19.

woman's decision whether or not to terminate her pregnancy."⁶ This right of abortion privacy, the Court said, was a fundamental right.⁷

As you know, that is a very critical label, because that means that the right is entitled to special protection, the protection of strict judicial scrutiny.⁸ Laws which unduly burden or infringe upon a fundamental right, like the right to abortion, can only be sustained if necessary to effectuate a compelling state interest.⁹ So the determination that the right to abortion, or the right of abortion privacy, was a fundamental right effectively dictated the outcome of the constitutional analysis at the outset.

The Court observed, of course, that the Texas abortion laws did clearly infringe upon this right to abortion.¹⁰ So then the Court searched for a compelling state interest. It considered and rejected three potential justifications. First, it rejected the argument that Texas has a compelling interest to protect the "right" to life of unborn persons, because the Court found that the unborn are not persons in the constitutional sense, and, therefore, they have no right to life.¹¹ Second, the Court rejected the argument that maternal health constitutes a compelling interest for general abortion restrictions.¹² The Court found that mortality in abortions performed in early pregnancy may be less than mortality in childbirth, and, therefore, maternal health could not be a compelling interest.¹³ Finally, the Court rejected the argument that protecting the "potential life" of unborn children—whether they are persons or not—would be a compelling state interest because the Court found that there is a wide divergence of thinking about where life begins.¹⁴ For that reason, this could not be a compelling state interest.¹⁵

The decision in *Roe v. Wade* effectively invalidated, in whole or in part, abortion laws that were then in effect in a majority of states.¹⁶ Nevertheless, the Court outlined a model of constitutionally permissible abortion regulations in an *ABC* fashion:

(A) During the first trimester of pregnancy there can be no restric-

⁶ *Id.* at 153.

⁷ *See id.*

⁸ *See, e.g.,* *Dunn v. Blumstein*, 405 U.S. 330, 338-43 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

⁹ *See, e.g.,* *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

¹⁰ 410 U.S. at 164.

¹¹ *Id.* at 158.

¹² *Id.* at 163.

¹³ *Id.*

¹⁴ *Id.* at 159-62.

¹⁵ *See id.* at 160-62.

¹⁶ *See id.* at 118 n.2.

tion on the abortion decision of the woman and her physician.¹⁷

(B) During the second trimester of pregnancy the state still may not restrict the abortion decision of the woman and her physician.¹⁸ In the interest of maternal health it may, however, adopt, when necessary, narrowly drafted medical regulations. That is, the state can regulate the place and manner of abortion in the second trimester, if it is necessary to do so.¹⁹

(C) After viability the state can prohibit abortion, except when necessary "in appropriate medical judgment, for preservation of the life or health of the mother."²⁰

Depending upon how you define the health of the mother, the exception can swallow the rule of allowable postviability abortion restriction. For example, if health of the mother means whenever the woman wants an abortion, the rule is that even after viability the state can prohibit all abortions except when a woman wants an abortion. This is the genesis of the problems for which a constitutional amendment is the only feasible remedy.

There is no other feasible way to change *Roe v. Wade's* rule of constitutional law, the rule of abortion on demand.²¹ Because *Roe v. Wade* purported to interpret the Constitution, that decision cannot be overturned by ordinary legislation or by executive decree.²² Constitutional law is the supreme law of the land, and the right of abortion privacy, effectively, the right of abortion on demand, is presently part of the supreme law of the land. It is constitutional law.

There are only two ways the Supreme Court interpretation of the Constitution can be overturned or changed. One is by a subsequent Supreme Court decision that overrules or modifies the prior decision,²³ and the second is by adoption of a constitutional amendment by the processes outlined in Article V.²⁴ Although the first appears preferable, since it

¹⁷ *Id.* at 164.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 164-65.

²¹ See Caron, *supra* note 1, at 91.

²² Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 338-40 (1982).

²³ For example, during the 1940's the Supreme Court overruled or modified its earlier liberty of contract decisions. See, e.g., *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941) (upholding state statute fixing fees chargeable by a private employment agency); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941) (making it an unfair labor practice for employers to discourage membership in any labor union); *United States v. Darby*, 312 U.S. 100, 114 (1940) (it is within the legislative power to fix wages and hours for men as well as women).

²⁴ See U.S. CONST. art. V. Article V of the Constitution provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of

would involve much less effort on the part of the pro-life movement, it is not really feasible for a number of reasons.

First, courts are generally reluctant to overturn judicial precedent. This is especially true when that precedent is well established and supplemented by numerous cases. In the 10 years since *Roe v. Wade*, there have been approximately 250 reported federal court decisions applying *Roe v. Wade* to other abortion regulations.²⁵ There have also been about a dozen Supreme Court decisions.²⁶ The *Roe v. Wade* precedent is well established and supplemented by a great body of case law.

Second, it is unrealistic to expect the Court to overrule the decision when it has shown absolutely no inclination to do so. In fact, rather than limiting the doctrine announced in *Roe v. Wade* or cautiously expanding it, in decisions such as *Planned Parenthood v. Danforth*,²⁷ *Colautti v. Franklin*,²⁸ and *Bellotti v. Baird*,²⁹ the Supreme Court has radically expanded the doctrine to provocative and incredible extremes. It is simply unrealistic to expect an about-face under these circumstances.

Third, the controversy regarding the abortion privacy doctrine, and abortion itself, renders the Court reluctant to change. The courts are very jealous of their independence, and would be loath to reverse or modify a doctrine under circumstances that would create the impression of being influenced by popular will.

Fourth, it is simply unrealistic to expect a majority of the Justices of the Supreme Court to vote in accordance with the pro-life movement. For this to happen, pro-life justices would have to be appointed, and given the recent experience with Justice O'Connor, who was appointed over the strenuous objections of some well organized right-to-life groups, it is quite unlikely, at least for a couple of decades, that such appointments will be forthcoming.

That leaves only one alternative, the adoption of the constitutional amendment. A constitutional amendment is necessary to repudiate a rad-

two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

Id.

²⁵ See, e.g., *Doe v. Kenley*, 584 F.2d 1362, 1365-66 (4th Cir. 1978); *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 644 (4th Cir. 1975); *Word v. Poelker*, 495 F.2d 1349, 1350-52 (8th Cir. 1974).

²⁶ See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 639 (1979); *Colautti v. Franklin*, 439 U.S. 379, 386 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 65-70 (1976).

²⁷ 428 U.S. 52 (1976).

²⁸ 439 U.S. 379 (1979).

²⁹ 443 U.S. 622 (1979).

ical and inhumane legal doctrine that violates the very history and spirit of constitutional law. Laws requiring parental consent,³⁰ spousal consent to abortion,³¹ viability determination and laws requiring postviability abortion to be performed by the means least likely to destroy the unborn "child" have been found unconstitutional. State statutes have prohibited saline amniocentesis abortions, which are perhaps the most "cruel and inhumane" way to destroy unborn life, but such statutes have been invalidated uniformly by the courts.³² The ironies are incredible.

Furthermore, a constitutional amendment is necessary to return to the people the right to enact restrictions and prohibitions of abortions through their elected representatives. The Court stated that there was a right of abortion privacy protected by the Constitution, but that of course was a fiction. The word abortion does not appear in the Constitution, neither does the word privacy. Yet this is the law for no other reason but that seven members of the Supreme Court said it was the law. Consequently, many scholars believe that the doctrine of *Roe v. Wade* should be overturned for reasons that have little to do with the rightness and wrongness of abortion.³³ *Roe* has been severely criticized as violative of the constitutional principal of separation of powers.³⁴

Seven men, none of whom are elected, can overturn a doctrine so deeply rooted in the traditions of this country and can resist the persistent efforts of the state legislatures to reestablish protection for those values and those concerns. In the first 7 years after *Roe*, state legislatures enacted 176 different statutes to protect unborn life.³⁵

There is a need to protect the independence and integrity of the federal judiciary. There is also an urgent need for federal courts to return to "accepted" standards of professionalism in judicial performance. As a

³⁰ See *H.L. v. Matheson*, 450 U.S. 398, 407-10 (1981); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

³¹ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-72 (1976).

³² *Id.* at 75-79.

³³ See A. COX, *THE ROLE OF THE SUPREME COURT* 113 (1976). The major flaw of *Roe v. Wade*, according to Cox, is "that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical and social sciences." *Id.*

³⁴ See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 948 (1973). Professor John Ely, one of the most incisive of *Roe*'s critics, concludes that *Roe* was not supported by the language of the Constitution. *Id.* at 935-36. He also states that *Roe* was not only incorrectly decided, but was an illegitimate mode of judicial inquiry. *Id.* at 948-49; see Estreicher, *supra* note 22, at 337 & n.5.

³⁵ See, e.g., ILL. ANN. STAT. ch. 23, §§ 5-5, 6-1, 7-1 (Smith-Hurd Supp. 1982-1983) (withdrawing medical assistance funding for all abortions except those necessary for preservation of the mother's life); R.I. GEN. LAWS § 11-23-5 (1981) (an abortion, except to preserve the life of the mother, is manslaughter).

landmark decision, *Roe v. Wade* set an example for the federal courts to follow. The opinion is an embarrassment to the legal profession, and the writings and abortion decisions since then have followed the *Roe* example.

Finally, a constitutional amendment is necessary to stop the killing. Abortion is rapidly becoming another ho-hum method of birth control. The Human Life Amendment is the only viable solution.