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by

Dennis J. Horan

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*An Educational Publication of
Americans United for Life, Inc.*



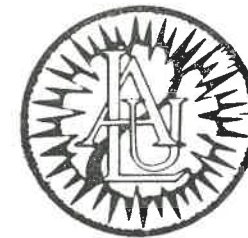
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THE HATCH AMENDMENT: A LEGAL ANALYSIS*

Statement of Dennis J. Horan, Esq.**

My name is Dennis J. Horan. I am Chairman of Americans United for Life. I have come before this Subcommittee to testify on what I perceive to be the fundamental legal considerations in formulating a new national policy on abortion through an Amendment to the United States Constitution.

Professor Victor Rosenblum will offer testimony later today that includes specific analysis of and suggestions with regard to one of the proposed Amendments before you, S.J. Res. 110, introduced by Senator Hatch. I, and those attorneys with whom I am most closely associated in the prolife cause, concur with the substance of Professor Rosenblum's testimony.

The United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), declared abortion to be a fundamental "right" under our Constitution and human beings before

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** Chairman: Right to Live/Right to Die Committee of the American Bar Association; Past Chairman of the Medicine and Law Committee of the American Bar Association; Lecturer in Law at the University of Chicago Law School; Co-editor and co-author of *New Perspectives on Human Abortion*, University Publications of America, Inc., Washington, D.C. (1981); Co-editor and co-author of *Death, Dying and Euthanasia*, University Publications of America, Inc., Washington, D.C. (1977); Partner - Hinshaw, Culbertson, Moelmann, Hoban & Fuller.

birth to be legally unprotectable entities in the face of this alleged "right" except under narrow, practically meaningless, circumstances.

In essence, this decision shifted decisively the decision-making authority on abortion away from the public forum to the pregnant woman and her physician, encapsulating them both within an alleged constitutionally protected "zone of privacy." Whether or not an unborn child should live or die thus became a matter without public scrutiny or control. The value of each unborn child came to depend solely on the views of the woman who bears the child. Not even the child's father can prevent a unilateral decision to cause the death of their offspring.

It is absurd to argue that such a system of procreative decision-making can be adduced from any principles mandated by our Constitution. There certainly is no doubt that the Framers of the Fourteenth Amendment, from which the Court extrapolated the right to abortion, would have regarded the public policy that the Supreme Court attributed to them by inference as perverse. Removal of a class of human beings from the purview of the law on the basis of their biological age and development was hardly among the purposes of the post-Civil War Congress that intended to extend full protection of law to another class of human beings which had previously been denied protection on the basis of racial status.

Roe v. Wade has been the object of universal criticism by almost all those members of my profession who view the Constitution as a document that exists in time and space, rather than as an excuse for flights of fantasy in pursuit of preferred social policies. I shall not repeat their criticism here. This Subcommittee is concerned with redirecting a public policy created by a misdirected Court, and it is my intent to indicate why and how this might be done.

There is simply no doubt that abortion entails conduct intended to cause the death of human beings. Unborn children of human parentage are, indisputably, as much individual organisms of the species *homo sapiens* as are the Members of this Subcommittee. From this perspective, the central outrage of *Roe v. Wade* was to deny to the people the right to fulfill their obligation to provide some measure of actual protection to these unborn members of the human family.

By virtue of this decision, a fissure has been created in American jurisprudence which not only permits the members of this class of our species to be destroyed at will, but positively forbids those of us whose human sensibilities are outraged by the treatment accorded them to employ normal legislative mechanisms to secure justice for them. Instead, we are told we must stand idly by—that the Constitution dictates that we must play Pilate, washing our hands in the face of the death of these beings with whom we all share a common humanity and history of growth and development.

The Constitution of the United States commands no such thing and if those presently charged with the authority to interpret our fundamental law say that it does, then they should and must stand corrected through an Amendment to the Constitution.

The sheer number of human deaths that will continue to occur with the blessing of our legal system and the outrage of a significant portion of our population over its impotence to find some practical means to protect the unborn within our political order are the matters that should immediately concern this Subcommittee. It must be emphasized, however, that reestablishing the power of the people to assert an interest in private conduct that affects human beings in the early stages of development is also necessary in order effectively to control and prevent genetic manipulation of the human species. Children are now routinely

aborted for alleged genetic deficiencies. Physicians may be sued in several states for failing to inform pregnant mothers of their "abortion option" when they are at risk of carrying a handicapped child. The unborn are aborted because they are the "wrong sex." In sum, as a consequence of unchecked abortion, we are developing a silent intra-uterine eugenics program, with the assistance of our civil law—a program designed to sort out for destruction those deemed unwanted, unfit, or undesirable.

In the future we will be able, with the assistance of technology, to manipulate the genetic constitution of the human species. Are not experimentation on and manipulation of human beings at early stages of development, cloning, and even the creation of new species or races with special human characteristics or combined animal and human characteristics, as is envisioned by some, matters of profound collective concern and proper subjects for legislative control? Yet on what ground can it be said, when children can be aborted for no reason at all, as under present law, that they should not be aborted when their sex or eye color are deemed undesirable? When unborn children can be killed at will, why should they not also be subject to experimentation or genetic manipulation? The most profound irony implicit in the Supreme Court's decision in *Roe* is that it deems abortion to be a "private" matter and the unborn of our species to be legal ciphers just as technology has opened the world of the unborn to public scrutiny. It is today clearer than ever that the future integrity of our species may depend on public recognition of some legally protectable status for our youngest members.

It is apparent that those infants born with handicaps who manage to escape the eugenic net that is being laid for them before birth are now increasingly viewed as errors that must be erased, rather than as human beings who

deserve empathy and attention. As the present Surgeon General, Dr. C. Everett Koop, who has spent his professional career in the care of infants born with handicaps, has pointed out, death by neglect is fast becoming a standard "treatment regimen" in the United States for children who are less than perfect physically or mentally. A recent report from England, a country with a longer history of abortion on demand, underscores what we in the United States can certainly anticipate if our present legal ethos, which deems some members of the human family to be devoid of legal value and worthy of life if and only if they are valued by those charged with their care, remains unchallenged. According to an Associated Press article published in the *Chicago Tribune* (Nov. 10, 1981), a recent poll of British pediatricians was conducted in the wake of a trial of a physician for denying useful medical care to a Down's syndrome child. 70% of the physicians who responded to the poll said they thought a child born with spina bifida who was rejected by his parents was better off dead. 17% of the doctors said they would drug the baby so he would be unlikely to demand food and would eventually die. 57% of the doctors said they would not recommend life-saving surgery for a Down's syndrome baby rejected by his parents. A mother was quoted on a B.B.C. television program on which the poll was reported as saying she was "horrified" when a pediatrician told her, just after the birth of her Down's child: "We can just gradually let them sleep themselves away. If they are very restless we can give them a small injection, and they just gradually sleep themselves to death."

What else can be expected for infants with handicaps who are born alive when perfectly normal human beings are aborted by the millions, when the medical profession has come to regard the destruction of embryonic or fetal life as a normal "treatment option" for human pregnancy, when the lack of social or personal value of some members

of our species to others is deemed a sufficient reason in itself to warrant a decision to cause their deaths? Who is more "valuable," whose life is more "meaningful"; the late-term human fetus who is perfectly normal or the infant born with a debilitating handicap? On what logically consistent ground may one be slain at will, but the other receive full legal protection, when a culture and its legal order have already determined that some members of the human family have lives so intrinsically valueless that they can be taken for no reason at all?

The present gap in our law that deems destruction of fellow human beings to be a private matter without public interest must be closed, and it is the obligation of this Subcommittee to initiate that process.

In this regard, I must first indicate that I and those with whom I am most closely associated are finally committed to the prolife cause for one reason: to stop the killing. We recognize the law as one social mechanism—perhaps the most important mechanism in our culture—through which this end may be served, and know that the law encompasses the power of government to tax and to redistribute wealth to serve its ends as well as the power to punish conduct as criminal. But we also recognize the limitations of law. A criminal law of abortion that is on the books, but is unenforced or unenforceable, may soothe the conscience but will save few lives. A system of law that punishes those who perform abortions, but does nothing to assist the pregnant woman facing social oppression or economic difficulties to carry her child to term, penalizes the result without recognizing its possible cause. From this practical point of view, a Constitutional Amendment dealing with abortion must be, above all, an effective means to the end of altering our public policy to permit the protection of human life before birth through efficient use of all the normal machinery of government.

Constitutional amendments are not self-executing—abortion would not magically disappear, nor would it be automatically proscribed, should any of the Amendments dealing with abortion that have so far been proposed become part of our Constitution tomorrow. A Constitutional Amendment in our system of law has mere symbolic import unless it is implemented by one of our independent branches of government: the state and federal legislatures, the judiciary, or the executive must act as the Amendment requires or permits before it obtains any practical legal effect or significance.

Regulation of abortion practices under any of the proposed Amendments would necessarily be almost exclusively a legislative matter. Even those proposed Amendments that rely heavily on the judicial branch to coerce legislatures in some manner to enact abortion laws acknowledge this by inference. Courts do not create criminal penalties or appropriate funds in our system of government. Legislatures do.

The first and most important prerequisite of any Amendment dealing with abortion is, therefore, that it effectively empower legislatures to act without the untoward judicial interference that has paralyzed them and distorted the public policy debate on abortion for the past decade.

Of the Amendments seriously under consideration by this Committee, that recently introduced by Senator Hatch, S.J. Res. 110, deals directly with this consideration by breaking the judicial chains created by the Supreme Court's creation of a fundamental right to abort, by acknowledging the plenary power of the legislature in this area, and by providing for a potential national abortion policy through an Act of Congress. Under the approach taken by Senator Hatch, abortion would become, once again, a legislative matter that is subject to usual democratic processes rather than to judicial fiat.

Other Amendments before this Committee have taken a different approach than that proposed by Senator Hatch. By asserting that the unborn are persons under the Fifth and Fourteenth Amendments to the Constitution for purposes of the right to life acknowledged in those Amendments, and by including a specific prohibition on the performance of abortions except under stated circumstances, Amendments of this type operate by affirming the existence of an important governmental interest in the unborn as members of the human family and in treating them in accord with the principles of justice that currently apply to all. Rather than do away with any special restraint contained in the Constitution on the power of government to proscribe abortion, as Senator Hatch's Amendment proposes to do, these Amendments acknowledge the power of government to honor the rights and interests of the unborn under the Constitution.

The importance of the legal symbolism involved in this approach is hard to over-estimate. In the process of legislative action on such an Amendment, both the public and legislators would be required to consider the subject at the heart of the abortion controversy: the biologically human nature of the unborn child. Moreover, this approach seems most consistent with the ethos of those of us who wish to reestablish some social control over conduct intended to cause the death of some of our fellow humans.

S.J. Res. 110, on the other hand, avoids legal symbolism in favor of legal practicality. It recognizes that no Constitutional Amendment in this area will have a significant substantive effect in the absence of legislative action and, therefore, forthrightly grants to legislatures the power to act. It provides the potential for development of a national policy on abortion, determining by way of normal democratic process rather than through the extraordinary process of a Constitutional Amendment whether or under

what circumstances, if any, abortion should be permitted. It relegates consideration of "hard cases" to the context of a statutory debate rather than to the context of a debate on the nature of our fundamental law.

I repeat, the fundamental task before this Subcommittee, as I perceive it, is to issue an Amendment to the Constitution that will effectively loose the judicial bonds that presently prevent any form of significant collective action to protect the lives of human beings from private conduct intended to cause their death. An individual choice to destroy any member of the human family must not be deemed to lie outside the purview of our system of justice. Put another way, the death of any of our fellow humans cannot be a "private" matter subject only to the values, or lack of them, of the one who seeks or causes his or her death. This Subcommittee should initiate the process by which this principle is enshrined in our basic law.

As I have said, my involvement in the prolife cause is motivated by a desire to prevent, through whatever means are practical and available, intentional destruction of the unborn and others potentially subject to the same kind of radical discrimination based on biological or eugenic criteria. While I believe that legal symbolism is important, I believe that the protection of human life is even more important. In my view, S.J. Res. 110 would, on balance, be as effective as any means so far proposed in assuring potential use of the law to protect the youngest members of the human family. I therefore strongly endorse the concept that S.J. Res. 110 represents and urge this Subcommittee's favorable action on it.

THE HATCH AMENDMENT: A LEGAL ANALYSIS*

Statement of Victor G. Rosenblum, Esq.**

My name is Victor G. Rosenblum. For identification purposes, I have been a professor of law and political science at Northwestern University in Illinois for some twenty years. It should be made clear at the outset that I am in no way appearing today on behalf of or under the auspices of the University. I testify on my own personal behalf and in my capacity as Vice-Chairman of Americans United for Life Legal Defense Fund, the only public interest law firm in the nation that devotes its full-time efforts to prolife matters. It was in this capacity that I had the opportunity to argue orally the case for the Hyde Amendment and similar state abortion funding restrictions before the Supreme Court.¹

As I begin my testimony, which is intended primarily to convey the analysis of Americans United for Life Legal Defense Fund concerning the legal meaning and effect of S.J. Res. 110, the Hatch Amendment, I recall an involvement as amicus, together with the National Institute for Education in Law and Poverty, in the case of *Goldberg v. Kelly*.² The amicus argued that when a state terminates public assistance payments to a recipient it must afford him or her an evidentiary hearing before doing so in order to

* Presented before the Subcommittee on the Constitution of the United States Senate Committee on the Judiciary, November 16, 1981.

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¹ *Williams v. Zbaraz*, 100 S.Ct. 2694, 2696 (1980); *Harris v. McRae*, 100 S.Ct. 2671 (1980).

² *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970).

comply with the Due Process Clause of the Fourteenth Amendment.³ It was gratifying that the Supreme Court was convinced that welfare benefits are not merely a gratuitous privilege extended to the poor which may be taken away at will but, once there is an entitlement, something to which the poor have a right that may not be arbitrarily infringed. Stressing the importance of "the very means by which to live," the Supreme Court noted, "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."⁴

I mention this, Mr. Chairman, because I am greatly disturbed at the increasing tendency to characterize support for the life of the unborn as a concern exclusively of conservatives or of the so-called "New Right."

I take pride in being a lifelong Democrat who has tried to devote a portion of my legal and political energies to the causes of the disadvantaged and the disenfranchised in our society: the poor, the handicapped, and the victims of prejudice in many forms. My concern for the unborn is an outgrowth of this commitment. The mark of a humane society is, in my view, its attention to the protection of the weak, the dependent, the helpless, the victims of discrimination. The mark of a civilized and liberal nation is not willingness to cast off those who are dependent for their lives and well-being on those of us who are more fortunate, but rather a readiness to share the fruits of our privilege. Certainly, advocacy of abortion as a way to reduce the welfare rolls is the last position anyone who claims to be liberal should take, and yet is it not the very people who charge proliferators with being conservative who, so often, point to the "billions in welfare payments" which "the

³ U.S. Const. amend. XIV, §1.

⁴ *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

children of teen-agers cost" in the context of asserting a need for "the essential alternative of abortion," as did a *New York Times* editorial on November 1?⁵

It seems to me that the exclusion of the unborn from membership in human society and from the protection it entails is among the worst contemporary instances of discrimination. When that claim is based, as it often is, upon precisely the point that an unborn child is dependent on another human being, it inverts the whole order of national and compassionate principles of justice.

I feel very comfortable, therefore, in appearing before this distinguished Subcommittee to advance what I feel is the essentially liberal cause of restoration of legal protection to the unborn child. While I might have preferred to see a Constitutional Amendment which contains on its face a ringing reaffirmation of the equality of all members of the human race, including the unborn, I believe that your proposal, Mr. Chairman, nobly and effectively advances that cause.

I say this because, from a legal point of view, the unborn would not be treated differently from other human beings in the Constitutional text were your Amendment to be adopted. Throughout the Constitution, including its Amendments, the legislature is often prohibited from legislating with particular effects and often empowered to legislate on particular subjects, but, except for duties related to the operation of the government itself (such as apportioning the number of House members for each State⁶ and determining their pay⁷), the legislature is never *required* to legislate.

⁵ *They Want to Be Babied Themselves*, N.Y. Times, Nov. 1, 1981, at 20 E.

⁶ U.S. Const. art. I, §2, cl. 3.

⁷ U.S. Const. art. I, §6, cl. 1.

It is important to note that *any* Constitutional Amendment will need state and federal legislative support. This is so because the federal Constitution, even when it contains provisions that restrict private conduct such as are found in the Thirteenth Amendment, is not a criminal code nor a regulatory statute. Even when a provision is seemingly self-executing, the Constitution prohibits but does not punish and therefore does not compel conduct. As Chief Justice Marshall reminded us so eloquently in *McCulloch v. Maryland*, "We must never forget that it is a *constitution* we are expounding. . . . [P]rovision[s] made in a constitution [are] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."⁸ Thus, implementing legislation is always needed to adapt the broad and sweeping formulations of the Constitution to the needs of everyday law.

With this as background, let me proceed to an analysis of the Amendment's language.

THE EFFECT OF THE FIRST SENTENCE: REVERSAL OF *ROE*, ITS HOLDINGS AND ITS PROGENY

The first sentence of S.J. Res. 110 reads, "A right to abortion is not secured by this Constitution."

This sentence would reverse *Roe v. Wade*,⁹ its companion case, *Doe v. Bolton*,¹⁰ and their progeny, which declared that constitutional protection of privacy includes a "decision whether or not to terminate . . . pregnancy"¹¹

⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis added).

⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰ *Doe v. Bolton*, 410 U.S. 179 (1973).

¹¹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

free of "unduly burden(some)"¹² "governmental restriction on access to abortions."¹³ The right of privacy under the Fourteenth Amendment¹⁴ would no longer include protection of access to abortion. Nor would any other section of the Constitution include such a right. No court could find a right to an abortion expressly or impliedly under the Constitution. The explicit intent of the Amendment, as announced by its sponsor,¹⁵ establishes that the Amendment eliminates any such right, however formulated, as a constitutional matter. This should be reiterated in the Committee Report.

The words "right to an abortion" are used in their broadest sense and therefore include all lesser legal concepts. Since that right would no longer exist under the Constitution, any lesser formulation of that right would likewise no longer exist under the Constitution.

S.J. Res. 110 is modeled on the Thirteenth Amendment in the sense that it applies to abortion as an institution,¹⁶ just as the Thirteenth Amendment applied to slavery as an institution, including all its badges and incidents.¹⁷ Thus, *any* purported constitutional right which is conceived to place obstacles in the way of the legal prohibition of abortion is intended to be no longer secured under the Constitution.

¹² *Maher v. Roe*, 432 U.S. 464, 474 (1977).

¹³ *Harris v. McRae*, 100 S.Ct. 2671, 2688 (1980).

¹⁴ See *Roe v. Wade*, 410 U.S. 113, 154 (1973), and the cases cited therein.

¹⁵ 126 Cong. Rec. S10194, S10196 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch).

¹⁶ For abortion as an institution comparable to slavery, see J. Noonan, *A Private Choice: Abortion in America in the Seventies* 1-3, 80-89 (1979).

¹⁷ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-43 (1968).

The concern has been expressed that, because the words of the Amendment do not track precisely the words employed by the Supreme Court in formulating the right to privacy on abortions, the Amendment might be construed by the Court to leave some or all of those formulations intact, despite the clear intent of its framer.

An attempt to cure this reputed imperfection might well lead to the result it sought to avoid. Were the amendment to be tied to any technical formulation, the Court might well escape it simply by altering the formulation it gives to the right. It is important to recall that, unlike statutes, a constitutional amendment is necessarily broad and sweeping in its wording. By using the generic term "right to abortion," the entire field of possible aspects or reformulations of any abortional liberty is encompassed more thoroughly than would be the case were the amendment to tie itself to specific language quoted from *Roe, Doe*, or one of their progeny. Both literally and in terms of the framer's intent, S.J. Res. 110 ends any and all constitutional support for abortion.

In 1795 the Eleventh Amendment was adopted¹⁸ in response to a Supreme Court decision, *Chisholm v. Georgia*,¹⁹ which held that a state could be sued by a citizen of another state. Its text denied federal jurisdiction of "any suit . . . against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State."²⁰ The Supreme Court later held that it operated also to bar federal jurisdiction of a suit brought against a state by one

¹⁸ Congressional Research Service, Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 92-82, 92nd Cong. 2d Sess. 28 n.3 (1973).

¹⁹ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

²⁰ U.S. Const. amend. XI.

of its *own* citizens, relying on a close examination of the history of the adoption of the Eleventh Amendment.²¹ It noted the strong public reaction against *Chisholm*, and drew on the discussion of the decision and of the Amendment during the period between *Chisholm* and the Amendment's ratification to conclude that the people strongly believed that the *Chisholm* majority opinion was wrong in denying, and the dissenting opinion was correct in asserting, that suing a state, without its consent, was unknown in law and unauthorized by the Constitution.

By similar analysis, any future court would have to conclude that the Hatch Amendment was intended to overturn *Roe* and its progeny. Certainly, it could not rationally conclude that the Amendment was designed merely to reaffirm the decision already established in *Maher* and *Harris* that there is no "unqualified 'constitutional right to an abortion'" such that the government must pay for the abortion of indigents.²² It would be utterly absurd to assume that the people would have gone to the lengths necessary to adopt a Constitutional Amendment only in order to secure a confirmation of those decisions.

Let me also point out that the first sentence will have to be considered together with the second sentence, which provides for a plenary power to "restrict and prohibit abortion," a power which clearly could not be interdicted by any antecedent abortional liberty.

While this is the clear intent and effect of the language as drafted, it should be altered slightly to stress that intent:

²¹ *Hans v. Louisiana*, 134 U.S. 1, 10-12, 15, 18-19 (1890).

²² *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). *Accord*, *Harris v. McRae*, 97 S.Ct. 2671, 2688 (1980).

"No right to abortion is recognized by this Constitution."²³

"No" emphasizes that any such rights are comprehensively denied. "Recognized" is preferable to "secured" because "secured" has too "benign a flavor," as Professor John Noonan has testified.²⁴ It is also preferable to "conferred" because the latter term could conceivably be construed not to cover putative Ninth Amendment rights and Tenth Amendment powers, which are not conferred by the Constitution, but merely "retained by" or "reserved to the people."²⁵ In addition, it would be well to stress in the Committee Report that the Hatch Amendment is intended to preclude reliance on Ninth and Tenth Amendment reserved rights and powers.

It follows from the first sentence that any holding in any federal or state case that relied upon recognition of a federal constitutional "right to abort" would be reversed to the extent that the existence of such a "right" was a necessary predicate of the holding.

Thus, for example, the Supreme Court's decision in *Planned Parenthood of Missouri v. Danforth*,²⁶ declaring that the state cannot grant husbands and parents of minor children "veto power" over the abortion decisions of wives and children would be implicitly vacated. Since abortion would no longer be a "constitutional right" under the

²³ This language has been recommended by Professor Richard Stith of the School of Law, Valparaiso University.

²⁴ Pending Constitutional Proposals and Their Legal Impact: Hearings on S.J. Res. 110 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. — (1981) (statement of John Noonan at 13).

²⁵ U.S. Const. amends. IX, X.

²⁶ *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

Hatch Human Life Amendment, it could not be claimed as a basis on which statutory provisions such as the spousal and parental consent provisions at issue in *Danforth* might be stricken. (Of course, *Danforth's* invalidation of the ban on saline abortions and its refusal to allow the imposition of a standard of care to preserve the life and health of the fetus would also be reversed.) *Colautti v. Franklin*,²⁷ striking another standard of care provision, and *Bellotti v. Baird II*²⁸ which held unconstitutional a parental/judicial consent law and which set forth rigid rules for determining the constitutionality of such laws, would also be reversed. In addition, to the extent that the nonphysician abortion case (*Connecticut v. Menillo*²⁹), the case abstaining from judgment on a parental consent law, (*Bellotti v. Baird I*³⁰), the abortion funding cases (*Maher v. Roe*³¹ and *Harris v. McRae*³²), the public hospital case (*Poelker v. Doe*³³), and the parental notice case (*H.L. v. Matheson*³⁴) contain reaffirmations of the tenets of *Roe*, *Doe*, *Danforth* and *Colautti*, the reaffirmations would be vacated. Any cases decided between now and the Hatch HLA's ratification would be reversed to the extent they rely upon or expand the holdings in these cases. In addition, any other cases that cite or otherwise rely upon such holdings would stand only to the extent they could retain vitality independent of the support drawn from reliance on those authori-

²⁷ *Colautti v. Franklin*, 439 U.S. 379 (1979).

²⁸ *Bellotti v. Baird II*, 443 U.S. 622 (1979).

²⁹ *Connecticut v. Menillo*, 423 U.S. 9 (1975).

³⁰ *Bellotti v. Baird I*, 428 U.S. 132 (1976).

³¹ *Maher v. Roe*, 432 U.S. 464 (1977).

³² *Harris v. McRae*, 100 S.Ct. 2671 (1980).

³³ *Poelker v. Doe*, 432 U.S. 519 (1977).

³⁴ *H.L. v. Matheson*, 101 S.Ct. 1164 (1981).

ties. The numerous lower court cases dependent on any of the Supreme Court's abortion holdings would also fall. The slate would be wiped clean: as far as judicial precedent is concerned, it would be as if *Roe* and its progeny had never existed. Such questions as those of the relative rights of parents and children or husbands and wives in the context of abortion would be restored to where they stood before the adoption of *Roe* and the subsequent decisions dependent on it.

What of ancillary questions decided in those cases, such as issues of standing, procedural holdings, and the like? They would have the same precedential status as the holdings in the many cases which are frequently cited as "reversed on other grounds."³⁵

An interesting question is what would become of the holding in *Roe* that the unborn are not "persons" under the Fourteenth Amendment.³⁶ Nullification of the judicial abortion doctrine discredits the steps in the logic, expressed as subsidiary holdings, which led to the concluding holding creating the abortifacient liberty. The Court itself recognized that its holding that the unborn lack Fourteenth Amendment personhood was necessary to its decision.³⁷ Arguably, therefore, with the adoption of the Hatch Amendment the constitutional character of the unborn would be returned to pre-*Roe*—that is, unsettled—status. It would therefore be possible for those who have maintained that

³⁵ Colum. L. Rev., Harv. L. Rev. Ass'n, U. Penn. L. Rev., & Yale L.J., A Uniform System of Citation 46 (12th ed. 1976); see *Hartford Life Insurance Co. v. Blincoe*, 255 U.S. 129, 134-36 (1921).

³⁶ *Roe v. Wade*, 410 U.S. 113, 158 (1973).

³⁷ *Id.* at 156-57.

the unborn are in some sense "persons"³⁸ under the Constitution to renew their legal claims since the personhood of the unborn would again be an open question. Moreover, if it vacates the personhood holding of *Roe*, the Hatch HLA would remove a highly significant legal impediment to a federal declaration of unborn personhood, such as that in the Human Life Bill (HLB) presently before the Congress.³⁹ Since this Amendment would at least call into question the validity of the Supreme Court's prior declaration of fetal nonpersonhood, it would implicitly require courts examining an HLB or otherwise confronted with a claim of unborn personhood in the wake of its passage to reevaluate carefully the logic by which the unborn were previously denied constitutional status. (It is certain, however, that the Hatch Amendment would not, of itself, make the unborn "persons.")

On the other hand, it is possible that the interpretation of the word "person" in the Fourteenth Amendment to exclude the unborn could conceivably be considered by the Supreme Court as extraneous to its creation of the abortifacient privacy right and, therefore, as unaffected by this Amendment. In other words, the Court might hold, when interpreting the Hatch Amendment, that even though the abortifacient right of privacy is no longer secured by the Constitution, the unborn are still not persons "in the whole sense"⁴⁰ under the federal Constitution because its framers did not intend them to be. Such a conclusion would be erroneous, as I sought to demonstrate last year in testimony before the Subcommittee on Separation of

³⁸ See *Steinberg v. Brown*, 321 F.Supp. 741, 746-47 (N.D. Ohio 1970); R. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Ford L. Rev. 807, 839-57 (1973).

³⁹ S. 1741, 97th Cong., 1st Sess., 126 Cong. Rec. S11528 (daily ed. Oct. 15, 1981).

⁴⁰ *Roe v. Wade*, 410 U.S. 113, 162 (1973).

Powers.⁴¹ After adoption of the Hatch Amendment, however, states would unquestionably be free to make the unborn persons under their constitutions and laws.

Even apart from the second sentence of the Amendment, the nullification of the "right to abortion" accomplished by the first sentence would allow legislative proscription of abortion. In the absence of such a "right," various governmental entities, acting within their traditional spheres of jurisdiction, might legitimately proscribe or regulate abortion practices on behalf of their continuing, already judicially recognized, legitimate interest in the protection of fetal life.⁴² This means that those laws that proscribe abortion which remain codified could be revived,⁴³ and that new laws could be enacted within traditional spheres of jurisdiction to proscribe and to restrict abortion should the various legislatures choose to do so.

Given the existence of the second sentence, however, the most important legal impact of the first sentence, apart from its removal of a blot upon our jurisprudence, is that it assures that laws enacted by Congress and the states in accordance with the second sentence would be subject only to the "rational relationship" test and not to the more exacting "strict scrutiny" test.

Previously proposed Human Life Amendments tended to focus on assuring the legal status of unborn children by declaring them constitutional "persons," thus provid-

⁴¹ V. Rosenblum, *Abortion, Personhood and the Fourteenth Amendment* (Americans United for Life Studies in Law and Medicine No. 11, 1981).

⁴² Harris v. McRae, 100 S.Ct. 2671, 2692 (1980); Poelker v. Doe, 432 U.S. 519, 520-21 (1977); Maher v. Roe, 432 U.S. 464, 478-79 (1977); Beal v. Doe, 432 U.S. 438, 445-46 (1977); Roe v. Wade, 410 U.S. 113, 162 (1973).

⁴³ This would depend upon principles of state law.

ing the State with a "compelling state interest" in the protection of unborn life sufficient to overcome the woman's "fundamental right" to choose an abortion. ("Where certain 'fundamental rights' are involved, [such as the abortifacient liberty⁴⁴] the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."⁴⁵) Because the abortifacient right remains intact despite the personhood of the unborn, however, governmental regulations intended to protect the unborn could continue to be "strictly scrutinized" by the courts and it is possible that "personhood" alone would not ensure the validity of fully restrictive governmental legislation. The rights of the unborn would be balanced against the privacy right of the woman and, at least in some circumstances, the latter might be held to prevail.⁴⁶ Although the States would probably have a "compelling state interest" in the protection of the unborn once they were "persons," it is noteworthy that in *Roe* the Court recognized such a "compelling state interest" in the unborn after viability, yet still required that post-viability abortion be legal when done "to preserve the life or health of the mother."⁴⁷ Previously proposed amendments have attempted to meet this problem without specifically denying the existence of a constitutional abortifacient right by stating particular circumstances under which abortions would

⁴⁴ Roe v. Wade, 410 U.S. 113, 152-53 (1973).

⁴⁵ *Id.* at 155.

⁴⁶ J. Bopp, *Examination of Proposals for a Human Life Amendment*, §§II(2), II(3), in *Restoring the Right to Life: The Human Life Amendment* (J. Bopp ed. 1982).

⁴⁷ Roe v. Wade, 410 U.S. 113, 163-64 (1973).

be permitted and proscribed⁴⁸ or by stating that the right to life of the unborn dominates or is "paramount" to any other contrary right which might be asserted.⁴⁹

The Hatch Human Life Amendment meets this problem directly by simply denying the existence of the abortifacient right that lies at the very heart of constitutionally protected abortion. It would not have been necessary for the *Roe* Court to have found the unborn to be "persons" in order to hold that governmental proscriptions on abortion were constitutional.⁵⁰ But it was necessary for the Court to acknowledge the existence of a constitutionally protected abortifacient right in order to establish the sweeping judicial control over legislative efforts to proscribe or regulate abortion that has ensued from *Roe*.⁵¹

To the extent that the right to privacy's protection of abortion remained intact, any governmental attempt to limit its exercise would not only have to be supported by a "compelling" interest, but also would have to be "narrowly drawn" to suit only that interest.⁵² Thus, proscriptive legislation might have to be very carefully and specifically drawn to protect the unborn, sorting out any incidental or unnecessary burden on the remaining abortifacient liberty of the woman. When the right to abort is wholly and specifically abolished, on the other hand, the "narrowly drawn" requirement that attaches to legislation that burdens a constitutional right could not be invoked.

⁴⁸ *E.g.*, S. J. Res. 17, 97th Cong. 1st Sess. (1981).

⁴⁹ S. J. Res. 19, 97th Cong., 1st Sess. (1981).

⁵⁰ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

⁵¹ *Id.* at 152-55, 162.

⁵² *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

Under this Amendment, therefore, state and federal legislation would not be subject to judicial review under the "strict scrutiny" test, but only under the less stringent "rational relationship" test. Thus, if laws were rationally related to the legitimate state interest⁵³ in unborn life by protecting that interest, they would be held constitutional.

THE EFFECT OF THE SECOND SENTENCE:

CONCURRENT POWER

The second sentence of S.J. Res. 110 reads, "The Congress and the several States shall have the concurrent power to restrict and prohibit abortions; *Provided*, That a law of a State more restrictive than a law of Congress shall govern."

The meaning of the "concurrent power" shared by "Congress and the several States," as used in a Constitutional Amendment, is clearly established by decisions of the United States Supreme Court.⁵⁴ The fullest explanation is in *United States v. Lanza*,⁵⁵ from which I quote:

[I]t means that power to take legislative measures . . . shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each state, as also Congress, may exercise an independent judgment in selecting and shaping measures. . . . Such as are

⁵³ *Id.* at 40.

⁵⁴ *McCormick & Co. v. Brown*, 286 U.S. 123, 144-45 (1932); *Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924); *United States v. Lanza*, 260 U.S. 377, 380-85 (1922); *National Prohibition Cases*, 253 U.S. 350, 387 (1920).

⁵⁵ *United States v. Lanza*, 260 U.S. 377, 381-82 (1922).

adopted by Congress become laws of the United States and such as are adopted by a state become laws of that state. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

The meaning of the "concurrent power" shared by the Congress and the states when the term is explicitly embodied in the Constitution is, therefore, very different from the meaning of that and similar terms when used in judicial opinions concerning the mutual authority of Congress and the States to regulate commerce.⁵⁶ In the commerce context the courts are dealing with a constitutional grant of power to regulate interstate and foreign commerce which is given only to the federal government.⁵⁷ The question of a power of "concurrent legislation" in the states thus arises only when the federal government has failed to act. It is a very complex question whether and to what extent a state may act, since in some circumstances federal legislation will be held to "pre-empt" the field,⁵⁸ while in others the state legislation will be upheld as a permissible complement.⁵⁹

The cases dealing with pre-emption have no application here. In construing the meaning of the "concurrent power" provided in the Eighteen Amendment, the Su-

⁵⁶ See *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

⁵⁷ U.S. Const. art. I, § 8, cl. 3.

⁵⁸ See, e.g., *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

⁵⁹ See, e.g., *Askew v. American Waterways Operators*, 411 U.S. 325 (1973).

preme Court made this clear time and again.⁶⁰ Because, as in no other existing part of the Constitution, the power to be granted or recognized is "concurrent"—and therefore equal between any state and the Congress—there is no reason to be concerned about the application of the Supremacy Clause, which establishes that the Constitution and laws made in pursuance thereof take precedence over conflicting state laws.⁶¹ There is no basis for use of the Supremacy Clause to invalidate state abortion legislation because the use of "concurrent power" affirms the *equality* of state with national power in the limited field of the Amendment; there is no need for its application because, under language that provides for "concurrent power to restrict and prohibit abortions," there is no possibility of a genuine conflict.

That there is no possibility of a genuine conflict arising from the independent exercise of the powers of Congress and the states to restrict and prohibit abortion is the crucial factor, and it bears elucidation.

When there was previously a provision of "concurrent power," in the Eighteenth Amendment to the Constitution, some lower courts indicated that by virtue of the Supremacy Clause, in the words of one decision, "In instances of ['immediate and hostile collision' of state with federal law] the state legislation must yield."⁶² The Supreme

⁶⁰ *McCormick & Co. v. Brown*, 286 U.S. 131, 143-45 (1932); *Van Oster v. Kansas*, 272 U.S. 465, 468-69 (1926); *Hebert v. Louisiana*, 272 U.S. 312, 314-15 (1926); *Vigliotti v. Commonwealth of Pennsylvania*, 258 U.S. 403, 408-409 (1922). See also *Commonwealth v. Nickerson*, 128 N.E. 273, 277-78 (Mass. 1920).

⁶¹ U.S. Const. art. VI, cl. 2; see *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

⁶² *Commonwealth v. Nickerson*, 128 N.E. 273, 279 (Mass. 1920). *Accord* *State v. Lucia*, 157 A. 61 (1931); *State v. Ligaarden*, 230 N.W. 729 (1930); *State v. Gauthier*, 118 A. 380 (1922).

Court never found nor implied any applicability of the Supremacy Clause in Eighteenth Amendment cases and there is apparently no case at any level where there was an actual "conflict" of any type between state and federal legislation with regard to prohibition.

Consider the possible ways in which federal and state legislation might differ.

1. Congress might pass legislation restricting or prohibiting abortion (or both), while a given state did nothing. There would be no conflict.

Prohibited abortions or abortions done in violation of the restrictions would be crimes under federal but not under state law, and subject to injunction, prosecution, or whatever remedies were provided in the federal law, though they would not be subject to punishment under state law. A mere failure to act by the state would not conflict with the federal law.⁶³

2. A state might pass legislation restricting or prohibiting abortion (or both), while Congress did nothing. There would be no conflict.

The situation would be the same as above, but in reverse. A mere failure of Congress to act would not conflict with the enforcement of state law.

3. Congress might pass legislation outlawing some abortions but permitting others, while a state passed legislation outlawing some or all of the abortions permitted by federal law. There would be no conflict.

⁶³ See *National Prohibition Cases*, 253 U.S. 350, 387 (1920). ("The power confided to Congress . . . is in no wise dependent on or affected by action or inaction on the part of the several States or any of them.")

That the Congress permits particular abortions merely means (however the statute is phrased) that it fails to prohibit them. This in no way interferes with the capacity of a state, exercising its concurrent power, to proscribe them. Such abortions would simply be subject to injunction, prosecution, or any other remedy provided under law, although immune from federal interdiction.

4. The same analysis would apply if a state outlawed some abortions but permitted others, and the Congress passed legislation outlawing abortions permitted by the state. There would be no conflict.

5. Congress and a state might pass seemingly incompatible regulations about abortions that were not prohibited. For example, Congress might require that all abortions be performed in hospitals, while a state might require that all or certain abortions be performed in free-standing outpatient surgical facilities. There would still be no conflict.

The key point is that the concurrent power provided by the Amendment is "power to restrict and prohibit abortion." Under the Eighteenth Amendment's concurrent powers section, state statutes that penalized possession of liquor specifically licensed by federal law were upheld.⁶⁴ In the hypothetical example, both laws would be constitutional, and neither would be stricken; the cumulative effect within the state would be that abortions could be performed neither in hospitals nor in free-standing outpatient surgical facilities (nor, of course, in any other place or facility).

6. Theoretically, Congress might pass a law requiring or compelling the provision of certain abortions, or a law

⁶⁴ *McCormick & Co. v. Brown*, 286 U.S. 131, 145 (1932); *Idaho v. Moore*, 212 P. 349 (Idaho 1923), *aff'd* 264 U.S. 569 (1924).

protecting certain abortions from interference, and a state might pass a law prohibiting or restricting those abortions. For example, Congress might require that agencies receiving federal funds make referrals for "medically necessary" abortions, or it might penalize any individual who interferes with an abortion sanctioned by federal law. As applied to abortions within that state, the congressional legislation requiring or protecting abortions forbidden by the state would be unconstitutional.

7. Alternatively, a state might pass a law protecting or requiring the provision of abortions precluded or restricted by federal law. So long as the federal law was in effect, such state legislation would be unconstitutional and therefore unenforceable.

To the extent incompatibility exists, a Constitutional Amendment supersedes all previously adopted Amendments and other parts of the Constitution.⁶⁵ (With regard to state legislation, the Supremacy Clause⁶⁶ would apply in the sense that the federal Constitutional Amendment would be the supreme law of the land, taking precedence over any state constitution.) Thus, state legislation that restricts or prohibits abortion takes precedence, within that state, over conflicting congressional legislation that actively requires or protects abortion, and congressional legislation that restricts or prohibits abortion takes precedence over conflicting state legislation that actively requires or protects abortion. In order to be stricken (or its application enjoined as applied within a particular state) legislation purporting to require or protect abortions prohibited or restricted (incompatibly) by the other jurisdiction would have to threaten direct practical effects if enforced—

⁶⁵ See *State Board v. Young's Market Co.*, 299 U.S. 59, 62 (1936).

⁶⁶ U.S. Const. art. VI, cl. 2.

through criminal penalties, injunctions, disqualification for funding, provision of funding, or the like. Mere declaration of policy or hortatory statements, or failure to act, would not create a direct conflict.⁶⁷

What happens if an individual is sought by both federal and state authorities for the same transaction? This creates no substantive conflict, only the practical one of which jurisdiction would have priority in custody, trial and punishment. It would be resolved in the same way as in any other case in which an individual is subject to both federal and state charges, a common occurrence even now: in the absence of a negotiated arrangement, the authority which first gets jurisdiction may first exhaust its jurisdiction to the exclusion of the other, after which the other authority gains control.⁶⁸

All of this analysis follows inescapably from the language, "The Congress and the several States shall have the concurrent power to restrict and prohibit abortions." As introduced, the proposed Amendment also contains a proviso: "Provided, That a law of a State more restrictive than a law of Congress shall govern." On the basis of the analysis just presented, however, it is likely that this language is unnecessary.

It is conceivable that the proviso might tempt the Court to ignore *United States v. Lanza*⁶⁹ and embark upon a new

⁶⁷ Cf. *Wynn v. Scott*, 449 F.Supp. 1302, 1314-15 n.9 (N.D. Ill. 1978), *aff'd sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) (legislative statement affirming fetus to be human being not unconstitutional despite constitutional right to terminate pregnancy).

⁶⁸ *Ponzi v. Fessenden*, 258 U.S. 254, 260-61 (1922).

⁶⁹ 260 U.S. 377 (1922)

construction of “concurrent,” particularly since there is some language in the introductory statement⁷⁰ by Senator Hatch which might possibly be viewed as suggesting that “preemption” doctrine does apply. It is important to note that the emphasis in his statement on the need for an “irreconcilable conflict”⁷¹ before any enactment of one jurisdiction could invalidate the enactment of another *should* lead to the same conclusions as were expressed by the Supreme Court in its previous constructions of “concurrent power”—since, as has been demonstrated, no such “irreconcilable conflict” could ever exist. Nevertheless, there could be great mischief if the Court were to use the proviso to find that only one law—whichever of the federal or state laws it deemed “more restrictive”—could be in effect in any given state at one time.

As between a statute outlawing all abortions, but providing a \$50 fine for its violation, and a statute making an exception to prevent the death of the mother but providing prison sentences for its violation, which would be deemed “more restrictive”? If one jurisdiction proceeded by way of criminal penalties, while the other employed injunctive relief and civil damages secured by private rights of action, might not one be “more restrictive” in theory while the other would be more effective in practice?

Therefore, elimination of the proviso, as it is now drafted, is recommended. It would be preferable to end the second sentence with “abortion,” and to rely specifically on *Lanza* and the other Eighteenth Amendment cases in the Committee Report.

⁷⁰ 126 Cong. Rec. S10194, S10197 (daily ed. September 21, 1981) (remarks of Sen. Hatch).

⁷¹ *Id.*

Eliminating the article “the” placed before “concurrent” would also be desirable in order to make the Hatch Amendment correspond as closely as possible with the language previously construed by the Court.

In light of the existence of such clear precedents on the meaning of “concurrent power” when that phrase was a part of the Constitution, a future court would be hard pressed indeed to misconstrue the clear intent of the Amendment. Removal of the proviso would leave language entirely adequate to convey the intended meaning, particularly if the reliance of the Amendment framer upon those precedents is made explicit in the Committee Report.

Nevertheless, to ensure in the plain language of the Amendment that *Lanza* and the other Supreme Court cases construing “concurrent power” can never be reversed by a future Court, the language proposed by Professor Richard Stith of Valparaiso University would be desirable:

The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

This simply restates the essential holding of *Lanza* and the other Supreme Court cases construing the meaning of “concurrent power” in the Eighteenth Amendment, and eliminates any prospect, however remote, of their reversal by a future Supreme Court. (“Abortion” is made singular instead of plural to emphasize its character as an “institution.”)

THE EFFECT OF THE PLENARY POWER PROVIDED BY THE HATCH AMENDMENT

The "power to restrict and prohibit abortions" is broad and plenary, designed to afford reasonable discretion to two sovereigns, federal and state, to legislate on the subject matter of the Amendment: abortion. It allows the Congress and the states power and authority to pass whatever legislation is deemed appropriate to restrict and prohibit abortions. This includes a grant of any lesser power, such as that of regulating abortions. By granting the states this plenary power in the federal Constitution which is the supreme law of the land, the Hatch HLA would free states to legislatively overcome the effect of any prior finding by their courts of an abortifacient privacy right under the state constitution. So, for example, after the ratification of the Hatch HLA, the California, Massachusetts, and New Jersey state legislatures could override the effects of rulings by their highest state courts, which found a right to abortion in each of their state constitutions. This is so because the Hatch HLA, as a part of the Constitution itself, is a grant of *plenary* power and is not a mere enforcement provision, although it contains within it the power to enforce. This should be made clear in the Committee Report.

"Abortion," as the term is employed in the Amendment, encompasses what might result in termination of embryonic or fetal life from fertilization and thereafter. It does not include the induction of labor after viability in order to bring about the earlier birth of a living infant. This should be made explicit in the Committee Report. That which harms or interferes with the physical integrity of the embryonic or fetal life is encompassed in that which threatens the life absolutely; thus, nontherapeutic fetal experimentation or genetic manipulation could be regulated or proscribed in accordance with the Amendment.

As pointed out earlier in my testimony,⁷² like slavery, abortion has become an institution in American life. Just as the Thirteenth Amendment, in abolishing slavery, gave Congress power to deal with "all badges and incidents of slavery,"⁷³ so the Hatch Amendment, in providing for the concurrent power of Congress and the states to "restrict and prohibit" abortion, includes power to reach its "badges and incidents." Upholding under the Thirteenth Amendment a statute which it construed to prohibit private refusals to deal on the basis of race, the Supreme Court said, "Surely Congress has the power under the . . . Amendment rationally to determine what are the badges and the incidents . . . , and the authority to translate that determination into effective legislation."⁷⁴ The same principle should apply to the Hatch Amendment. Thus, for example, Congress or a state legislature could consider that *in vitro* fertilization without embryo transfer (in which human embryos are created outside the human body, not with the intent of transferral to the uterus of an infertile woman, but with the intent of their use as research subjects and their subsequent destruction) entails the same assault on the unborn as does termination of pregnancy.

⁷² See text accompanying note 16 *supra*.

⁷³ Civil Rights Cases, 109 U.S. 9, 20 (1883).

⁷⁴ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-443 (1968). See also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976) and *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975) (employment discrimination); *Runyun v. McCrary*, 427 U.S. 160 (1976) (right of black children of admission to private nonsectarian commercial schools). Cf. *National Prohibition Cases*, 253 U.S. 350, 387-88 (1920) (Eighteenth Amendment allows Congress to define nature of intoxicating liquor); *Everard's Breweries v. Day*, 265 U.S. 545, 560 (1924) ("[T]he power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating.").

It is essentially part of the institution of abortion.⁷⁵ It would be subject to restriction and prohibition under the Amendment.

The discretion vested in the legislature by the Amendment is broad. Certainly, for example, the legislature, in taking account of the facts that most women who obtain abortions are under great stress, that they are usually ignorant of the humanity of their unborn child and unaware of the alternatives available to them, and that they are often much pressured by others, could decide to treat the woman subjected to abortion as a second victim and decline to visit criminal punishment upon her. If the legislature employed this policy—one followed by a number of states⁷⁶ prior to *Roe v. Wade*—yet did punish the abortionist, the statute embodying this choice could not be held unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment. This is because this sort of policy choice would be precisely what the Amendment intended to vest the legislature with the discretion to make. The principle would be the same as that under which the Supreme Court upheld a state statute treating beer imported from another state differently than beer produced within the state under the plenary and discretionary power over liquor given to the state when the Eighteenth Amendment was repealed by the Twenty-first: “[A] classification recognized by the Twenty-

⁷⁵ Cf. Leon Kass, *Ethical Issues in Human In Vitro Fertilization, Embryo Culture and Research, and Embryo Transfer* 4, in Ethics Advisory Board, U.S. Dep’t of Health, Education and Welfare, *Appendix: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer* (1979).

⁷⁶ 4 *Abortion: Hearings on S.J. Res. 6, S.J. Res. 10 and 11, and S.J. Res. 91 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 94th Cong. 1st Sess. 117 (1975) (statement of Robert M. Byrn).

first Amendment cannot be deemed forbidden by the Fourteenth.”⁷⁷

As indicated earlier in my testimony during the analysis of the first sentence, the appropriate test would be whether the legislation bears a “rational relationship” to “legitimate state interests” in restricting and prohibiting abortion recognized by the Amendment. For example, a distinction on the basis of race in permitting or restricting abortions would obviously bear no rational relationship to those interests, and a law making such a distinction would be unconstitutional.⁷⁸

This does not mean that other constitutional protections would be abrogated whenever it could be argued that doing so—dispensing with, say, the rule against unreasonable searches and seizures⁷⁹ or the right to a jury trial⁸⁰—might more efficiently restrict abortion. As the Supreme Court said in ruling that New York’s liquor regulation statute, adopted under the authority of the Twenty-first Amendment, could not bar the operation of a duty-free shop at an international airport selling liquor for consumption aboard under the supervision of the federal customs service, “Both the Twenty-first Amendment and the Commerce Clause are part of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues at stake in any concrete case.”⁸¹

⁷⁷ *State Board of Equalization v. Young’s Market Co.*, 299 U.S. 59, 63-64 (1936). See also *California v. LaRue*, 409 U.S. 109, 116 (1972).

⁷⁸ Cf. 126 Cong. Rec. S10194, S10197 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch).

⁷⁹ U.S. Const. amend. IV.

⁸⁰ U.S. Const. amend. VI.

⁸¹ *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 332 (1964). See also *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971).

THE RESOLUTION PROPOSING THE AMENDMENT

In addition to discussing the Amendment itself, it is well to consider the ratification process—in particular, the question of what legislative majority should be required in the state legislatures in order to ratify.

As of 1975, 17 states require a majority of those present and voting to ratify a federal Constitutional Amendment, and 2 states require such a majority provided that it includes at least two-fifths of those elected. 24 states require a majority of those elected; 1 state requires a majority of those present and voting in the house, but a majority of those elected in the senate. 1 other state requires a majority of the authorized members, including any vacancies. 1 state requires two-thirds of those elected; 3 states require two-thirds of those elected to the house, but a majority of those elected to the senate; 1 state requires three-fifths of those elected.⁸²

At least one state that requires a supramajority provides, “The requirements of this Section shall not govern to the extent they are inconsistent with requirements established by the United States.”⁸³

There is strong support for the view that the Congress has authority to establish requirements specifying the nature of the legislative majority uniformly to be required for state ratification, even in the absence of state provisions expressing such deference.

The authority of the Congress to provide, in the resolution proposing a Constitutional Amendment, that the Amendment will be deemed ratified when so voted by a majority of those present and voting, a quorum being present, of each house of the legislatures of the requisite

⁸² *Dyer v. Blair*, 390 F. Supp. 1291, 1295, 1305 n.34 (1975).

⁸³ S.H.A. Const. art. XIV, §4 (1971) (Illinois).

three-fourths of the states, is grounded in two concepts. The first is that the state legislatures, in ratifying federal Constitutional Amendments, perform a “federal function” under authority of the U.S. Constitution rather than under their own state constitutions or rules. The second is that Congress has authority to regulate the procedure of ratification as an incident of its power to designate the mode of ratification.

Article V of the United States Constitution provides, in relevant part:

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 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 Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

Upholding the Nineteenth Amendment against a claim that its alleged ratification by certain legislatures violated provisions in their state constitutions, the Supreme Court held, “[T]he function of a state Legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.”⁸⁴

The states, then, are bound by the procedure set out by Article V. For example, they cannot require a referendum

⁸⁴ *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

in order for their state legislature's ratification to be effective, or as a substitute for it.⁸⁵

In the words of the Supreme Court, "The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution: that power is conferred upon Congress. . . ."⁸⁶ In *Dillon v. Gloss*,⁸⁷ upholding the authority of Congress to establish a set time by which a constitutional amendment must be ratified if the ratification is to have effect, the Court said, "An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments." The Court emphasized that "with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed. . . . As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to that rule."⁸⁸

Thus, the Court recognized the power of Congress to "determine . . . an incident of its power to designate the mode of ratification."⁸⁹

Whether or not the specification of a simple majority by Congress may pre-empt a state legislature's rule requiring a greater majority in the ratification process has never directly been faced by the Supreme Court, since no previous Amendments have been proposed with such a specification.

⁸⁵ *Hawke v. Smith*, No. 1, 253 U.S. 221, 229-31 (1920).

⁸⁶ *Id.* at 227.

⁸⁷ *Dillon v. Gloss*, 256 U.S. 368, 373 (1921).

⁸⁸ *Id.* at 373, 376.

⁸⁹ *Id.* at 376.

There is dicta in one three-judge court case that Article V consigns the specification of the requisite majorities to the state legislatures.⁹⁰ In that case, whose opinion was written by now Justice John Paul Stevens, plaintiff legislators challenged the failure of the Illinois General Assembly to certify ratification of the ERA, despite a simple majority vote in favor of it by both houses. The court did hold unconstitutional the provisions of the Illinois Constitution which required a majority of three-fifths of those elected to each house to ratify a federal Constitutional Amendment. However, because both houses of the legislature, independently of their state constitution, had adopted procedural rules containing the supramajority requirement, the requirement itself was not stricken. The court did not face, however—nor did it, even in its dicta, take into consideration the prospect of—direct Congressional regulation of the proportion of the majority required.

Although Congress has never provided for such a regulation, it entertained proposals to this effect in 1869.⁹¹ Current legal commentaries have been favorable to the argument that Congress has constitutional authority in this regard.⁹²

It may be presumed that Congress may not provide for ratification by less than a majority of the legislature, since that would vitiate the principle of state legislative ratification. With this limitation, however, there is strong sup-

⁹⁰ *Dyer v. Blair*, 390 F.Supp. 1291, 1308 (N.D. Ill. 1975) (three-judge court).

⁹¹ Cong. Globe, 41st Cong., 1st Sess. 75, 102, 334 (1869).

⁹² See P. Brannon, D. Lillehaug, & R. Reznick, *Note: Critical Details: Amending the United States Constitution*, 16 Harv. J. Legis. 763, 798-805 (1979); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 Notre Dame Lawyer 185, 210 (1951); contra, Dodd, *Amending the Federal Constitution*, 30 Yale L. J. 321, 341 (1921).

port for the view that Congress may choose to advance uniformity among the various states and to reduce the chance that an obstreperous minority could block an Amendment for which there is strong consensus by establishing that ratification by a simple majority in each house of the state legislatures would be adequate.

Following is language which would embody such a provision:

Senate Joint Resolution

Proposing an Amendment to the Constitution of the United States relative to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by a majority of those present and voting, a quorum being present, of each House of the legislatures of three-fourths of the several States within ten years from the date of its submission by the Congress:

[text of amendment]

You will note that this text provides for a ten year ratification period. Such a time is three months and eight days less than the time which has now been provided for the proposed Equal Rights Amendment.⁹³

In the course of drafting the ratification resolution, the Subcommittee would be well advised to consider carefully what approach it wants to take toward the time provided for ratification. From the time of the Eighteenth Amend-

⁹³ H.J. Res. 638, 95th Cong., 2nd Sess., 123 Cong. Rec. S17318-19 (daily ed. Oct. 6, 1978).

ment, Constitutional Amendments submitted by Congress to the states for ratification have usually named a specific ratification time limit, either in the text⁹⁴ or in the resolutions proposing them.⁹⁵ However, the Nineteenth Amendment⁹⁶ and Amendments I through XVII were proposed with no time limits.

In *Coleman v. Miller*,⁹⁷ the Supreme Court plurality opinion⁹⁸ stated that the timeliness of state ratifications is a matter entirely within the discretion of Congress and, with regard to amendments for which no deadline has initially been set, "the question [of whether a given amendment has achieved ratification within a reasonable time after its proposal] is an open one for the consideration of Congress when, in the presence of certified ratification by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment."⁹⁹

Thus, it would be entirely within your province to choose *not* to set a ratification deadline initially, but to leave that question to the Congress in existence when three-quarters of the states have ratified, as was the tradition for over a century.

⁹⁴ U.S.Const. amends. XVIII, XX, XXI, XXII.

⁹⁵ P. Brannon, D. Lillehaug, and R. Reznick, *Note: Critical Details: Amending the United States Constitution*, 16 Harv. J. Leg. 763, 768-69 (1979).

⁹⁶ A ratification time limit was defeated on the floor of the House. 58 Cong. Rec. 93 (1919).

⁹⁷ *Coleman v. Miller*, 307 U.S. 433 (1939).

⁹⁸ The four concurring justices considered the question of the time taken to ratify nonjusticiable. *Id.* at 460-70. Thus, the concurring justices would permit the same discretion to Congress as the plurality.

⁹⁹ *Id.* at 454.

A resolution embodying this decision could read:

Senate Joint Resolution

Proposing an Amendment to the Constitution of the United States relative to abortion.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an Amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by a majority of those present and voting, a quorum being present, of each House of the legislatures of three-fourths of the several States, provided that the Congress thereafter, by concurrent resolution, determines that the ratifications have occurred within a reasonable time from the date of its submission by the Congress:

[text of amendment]

CONCLUSION

In summary, S.J. Res. 110 would reverse *Roe v. Wade*, *Doe v. Bolton*, and all their progeny insofar as they are based on judicial recognition of a constitutionally protected abortifacient liberty. Henceforth, statutes that restrict or prohibit abortion would be valid if rationally related to the protection of unborn human life.

Further, S.J. Res. 110, which provides "concurrent power" to restrict and prohibit abortion to the states and to Congress, would permit both the states and the Congress to legislate, and there is no possibility that their laws could come into genuine conflict. This obviates the need for a proviso to counter any preemption problem that might arise under the Supremacy Clause.

In accordance with these conclusions and other observations, the following revised language is recommended:

No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to restrict and prohibit abortion.

To be certain that the meaning of "concurrent power" as it has been previously construed cannot be altered by a novel Supreme Court construction, the following language is recommended:

No right to abortion is recognized by this Constitution. The Congress and the several States shall have concurrent power to enact legislation to restrict and prohibit abortion. Such laws shall be concurrently valid.

It is desirable that the Senate Committee Report emphasize:

1. That S.J. Res. 110 is intended to reverse *Roe v. Wade* and all its progeny that recognize the existence of a constitutional right to abortion, however formulated;
2. That the use of the word "recognized" (as has been suggested) or "secured" is intended to preclude use of any putative Ninth or Tenth Amendment right to abortion;
3. That the use of "concurrent power" is intended to invoke specifically the line of cases that includes *United States v. Lanza* in which these words have been authoritatively construed;
4. That "abortion" encompasses what might result in termination of embryonic or fetal life from fertilization and thereafter and that S.J. Res. 110 provides for plenary legislative power to protect that life; that the Amendment is intended to reach the institu-

tion of abortion, including its "badges and incidents";

5. That the elimination of a right to abortion and the provision for plenary power are intended to ensure that legislation enacted in accordance with the Amendment is judged by the "rational relationship" test; and,
6. That the legislative power granted under the Amendment overcomes any potential state constitutional inhibition.

It is further recommended that the Resolution accompanying S.J. Res. 110 provide for ratification by legislative majority in ratifying state legislatures and that the Subcommittee carefully consider whether to set a time limit for ratification of ten years, or, in the alternative, to permit a future Congress to determine whether ratification has occurred within a reasonable time.

Finally, let me again commend you, Mr. Chairman. You have embarked upon a noble enterprise to protect the weakest among us.