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STUDIES IN LAW AND MEDICINE

THE HATCH-EAGLETON CONSTITUTIONAL AMENDMENT PROPOSAL ON ABORTION: A LEGAL ANALYSIS

by
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Introduction

On February 28 and March 7, 1983, the Subcommittee on the Constitution of the United States Senate Committee on the Judiciary held hearings on constitutional amendments relating to abortion. Although several such amendments had been introduced in the Senate when the 98th Congress convened in January, 1983, the focus of the hearings quickly narrowed to one particular proposal.

Senate Joint Resolution (S.J. Res.) 3 was sponsored by the Subcommittee's Chairman, Senator Orrin G. Hatch (R., Utah), and was identical to S.J. Res. 110, which Senator Hatch had introduced in the 97th Congress on September 21, 1981. The resolution read as follows: "A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: *Provided*, That a law of a State which is more restrictive than a law of Congress shall govern."

The Constitution Subcommittee held nine days of hearings on S.J. Res. 110 late in 1981. Among those presenting testimony at these hearings were Dennis J. Horan, Chairman of Americans United for Life, and the AUL Legal Defense Fund, Chicago; AUL Vice-Chairman Victor G. Rosenblum; and AUL Board member John T. Noonan, Jr. The statements of Mr. Horan and Professor Rosenblum were published by AUL as "The Hatch Amendment: A Legal Analysis." *AUL Studies in Law and Medicine* 12 (1982). The complete record of the hearings on S.J. Res. 110 have been published, and are available free of charge from the Subcommittee on the Constitution, Committee on the Judiciary, United States Senate, Washington, D.C. 10510.

The Hatch Amendment was approved by the Committee on the Judiciary in March 1982, but was neither debated nor voted upon by the full Senate before the 97th Congress expired. Reintroducing the amendment as S.J. Res. 3, Hatch stated that he convened the February 28 and March 7, 1983 hearings as a continuation of the hearing process that had begun in late 1981.

The lead-off witness at the February 28 hearing was Senator Thomas F. Eagleton (R., Missouri), who proposed that the Subcommittee should approve a constitutional amendment containing only the first ten words of the Hatch Amendment. Thus, the new amendment would read as follows: "A right to abortion is not secured by this Constitution." In making this proposal, Eagleton stated, "I am convinced by our lack of progress on the right-to-life agenda over the past ten years, that a constitutional amendment focusing on a simple reversal of *Roe v. Wade* well may be the most politically feasible, yet meaningful step the Congress can take toward promoting the fundamental right to life of the unborn."

The testimony of the witness who followed Senator Eagleton, as well as the questioning of both by Chairman Hatch, soon made it evident that the Subcommittee was focusing its attention on the Eagleton version of Hatch's proposal. Following Senator Eagleton as witnesses on February 28 were Senator Robert Packwood (R., Oregon), Professor Laurence Tribe of the Harvard University School of Law, and Professor Lynn D. Wardle of the Brigham Young University, Reuben Clark Law School. Professor Wardle is a member of the AUL Board of Directors.

March 7 was the final day of the hearings. The lead witness was Steven R.

Valentine, Executive Director of Americans United for Life and the AUL Legal Defense Fund. Following Mr. Valentine was Rhonda Copelon of the Center for Constitutional Rights, New York. During his testimony, Mr. Valentine presented to the Subcommittee the prepared statements of AUL Chairman Horan and AUL Vice-Chairman Rosenblum. Chairman Hatch ordered Mr. Horan's and Professor Rosenblum's legal analyses to be placed in the permanent hearing record.

Presented in this publication of the *AUL Studies in Law and Medicine* series are the legal analyses of the Hatch-Eagleton proposed constitutional amendment on abortion, which were prepared at the request of the Senate Constitution Subcommittee by AUL lawyers Horan, Rosenblum, Wardle, and Valentine.

Steven Baer
Director of Education
Americans United for Life

**RESTORING THE FUNDAMENTAL BALANCE:
THE NEED FOR A CONSTITUTIONAL
AMENDMENT TO REVERSE ROE v. WADE***
Statement of Lynn D. Wardle, Esq.**

(Editor's Note: Professor Wardle submitted to the Subcommittee a detailed, scholarly analysis of Roe v. Wade and its effects on American Constitutional law. Due to space limitations, what is presented here is an excerpt from his testimony. It focuses specifically on Senator Eagleton's proposed modification of Senator Hatch's S.J. Res. 3).

I recommend that Congress enact a constitutional amendment reversing *Roe v. Wade* and restoring the constitutional balance of powers that existed before that decision. There are a number of verbal formulations by which that could be accomplished. I do not think it is essential to use any particular set of words to achieve this restoration. But I believe that the first sentence of S.J. Res. 3 would do the job nicely. That sentence provides: "A right to abortion is not secured by this Constitution." The effect of adopting this or similar language would be to achieve a restoration of the crucial constitutional allocation of powers. I can ask to explain why this is so by contrasting what his language would and would not do.

Adoption of the first sentence of S.J. Res. 3 would accomplish ten things.

- (1) It would repeal the rule that the Constitution protects a woman's rights to abortion. In *Roe*, the Court held that a woman's decision whether or not to terminate her pregnancy is a fundamental right protected by the Constitution. The first sentence of S.J. Res. 3 directly repeals that.
- (2) It uses the phrase "a right to abortion." That phrase has been used in over 80 federal court decisions as shorthand for the constitutional right created in *Roe* and its progeny, i.e., the right of a woman to choose whether or not to have an abortion without undue state interference.
- (3) It would prevent the creation of any other right to abortion in the harbor of any other provision of the Constitution. The article "a" makes the scope of the repeal broader than if the article "the" were used. "The" might be construed as limiting the repealer as to the "the" particular doctrine of law that has developed in *Roe* and its progeny. Use of the article "a" makes it declare that no other "right to abortion" is sheltered by the Constitution.
- (4) It would avoid the unnecessary repudiation of the doctrine of privacy. The use of the careful phrase "right to abortion" makes it clear that the amendment repeals only the abortion decisions. Other extensions of the right to privacy, such as in the contraception cases and the family privacy cases, would not be repealed.
- (5) It would mean that laws impinging upon the abortion decision will be examined under the ordinary standard of judicial review (unless they infringe other constitutional rights which do not constitute a "right to abortion" – e.g., a law prohibiting only black women from obtaining abortions would still be examined under a strict scrutiny test because of the racial dis-

* Presented before the Subcommittee on the Constitution, Committee on the Judiciary, United States Senate, at Washington, D.C., on February 28, 1983.

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crimination). Inasmuch as the Supreme Court has repeatedly acknowledged that states have a strong legitimate interest in protecting potential life throughout pregnancy, laws protecting the right to life of the unborn would necessarily be upheld as rationally related to those profound interests.

(6) It would repudiate implicitly all of the bag and baggage of *Roe* and its progeny. A ludicrous statement that the law does not recognize the personhood of the unborn as well as subsequent holdings such as those prohibiting parental and spousal participation in the abortion decision and post-viability abortion restrictions would become dead letters in the law.

(7) It would restore to the states their general police power to restrict and prohibit abortion. The states could enact legislation to the same extent that they could prior to *Roe*.

(8) It would restore Congress's limited power to restrict and prohibit abortion (mostly through indirect means) as necessary and appropriate to perform its constitutional responsibilities to control interstate commerce, federal lands, federal taxation, spending, etc.

(9) It would disestablish a class or type of constitutional rights. It would not establish any new constitutional rights. In essence, the Amendment does not attempt to say what balance between the interests of the unborn and the interests of the pregnant woman is established by the Constitution, if any, but it makes clear what balance is not established (i.e., there is no right to abortion).

(10) It would restore the constitutional balance of power between the states and the federal government and between the legislative and judicial branches of government. In sum, it would restore the *status quo ante Roe* insofar as the power and responsibility to resolve abortion issues is concerned.

It is equally important to acknowledge what the first sentence of S.J. Res. 3, or similar language, would *not* do.

- (1) It would not establish any new constitutional right. It would only reestablish constitutional rights – states' rights – that existed before *Roe*.
- (2) It would not prohibit the Supreme Court from interpreting the Fourteenth Amendment to protect all humans, including the unborn. The only right that could *not* be distilled from the Constitution would be a "right to abortion."
- (3) It would not compel or prohibit the adoption by any state legislature or by Congress of any legislation restricting abortion.
- (4) It would not preclude judicial review of abortion laws. It would not prohibit a court from holding pro-abortion laws unconstitutional.
- (5) It would not prevent a court from holding some abortion restriction unconstitutional if it violated other constitutional provisions, unless that would effectively create any "right to abortion." Thus, racially discriminatory abortion laws could be invalidated, but not ordinary abortion restrictions.
- (6) It would not affect state constitutions. It would not prohibit the citizens in any state from adopting (or, for that matter, any state supreme court from creating in *Roe*-fashion) a right to abortion under the state constitution.
- (7) It would not give Congress any power directly to restrict or prohibit abortion.
- (8) It would not deprive Congress of its limited constitutional authority to

regulate abortion (mostly by indirect means) under its authority to regulate interstate commerce, control federal lands, to tax, to spend, etc.

(9) It would not give the states any new authority to regulate abortion, either. Their general police powers to regulate abortion would be restored, but would not be enhanced.

(10) In short, it would not alter the constitutional allocation of power between the federal and state governments, or between the legislative and judicial branches.

**THE REVERSAL OF ROE v. WADE BY
A CONSTITUTIONAL AMENDMENT***
Statement of Steven R. Valentine, Esq.**

Mr. Chairman, and members of the Subcommittee, my name is Steven R. Valentine. I am the Executive Director of Americans United for Life and the AUL Legal Defense Fund, Chicago, Illinois. The AUL Legal Defense Fund is the nation's only full-time, public interest law firm devoted solely to litigation involving the right-to-life issues of abortion and euthanasia. I am the author of *All Shall Live*, a Quaker perspective on abortion question, and a contributing author of the Brigham Young University Press volume *Infanticide and the Handicapped Newborn*. My articles on the right-to-life issue have appeared in *The New York Times* and *The Human Life Review*. I would like to offer one of those articles, entitled "A Decision Needing Undoing," which appeared in *The New York Times* on January 14 of this year, for the hearing record.

The Subcommittee invited AUL Chairman Dennis J. Horan and Vice-Chairman Victor G. Rosenblum to testify this morning. Both Mr. Horan and Professor Rosenblum appeared here to offer their analyses of Senate Joint Resolution 110 during the hearings held by the Subcommittee in the First Session of the 97th Congress. Unfortunately, both had long-standing prior commitments and were unable to be here today. Mr. Horan and Professor Rosenblum have prepared written statements, however, and I have supplied your Chief Counsel, Randall Rader, with both of those manuscripts.

Mr. Chairman, ten years after the U.S. Supreme made its *Roe v. Wade* decision, the myth endures that it was a moderate ruling, even a compromise between passionately held views on the abortion question. There are two principal facets to this myth. First, it is repeated time and time again in the national media that *Roe v. Wade* legalized abortion only in the first trimester of pregnancy. After that, these reports say, the States may regulate the procedure. Second, it is widely believed that, after viability, abortion may be prohibited so that the life of the child capable of survival outside the womb may be protected.

That both of these characterizations of *Roe v. Wade* are false underscores the extreme nature of the abortion right that the Supreme Court created, and imposed by judicial fiat on the States, with its 1973 ruling. *Roe* legalized

* Presented before the Subcommittee on the Constitution, Committee on the Judiciary, United States Senate, at Washington, D.C., on March 7, 1983.

** B.G.S., J.D., Indiana University; Executive Director, Americans United for Life and the AUL Legal Defense Fund, Chicago.

abortion through all nine months of pregnancy for virtually any reason. Prior to viability, *Roe* flatly precludes the States from prohibiting abortion for any reason. All that States are permitted to do is to require that a physician perform the abortion in the first three months and that she do so in a hospital in the second three. After viability, the States must allow abortions where the mother's life or health is endangered. The key word is health. *Roe*'s companion, *Doe v. Bolton*, defined health so broadly as to include emotional well-being. Because the health exception to the rule against post-viability abortions is so broad that it consumes that rule, there exist no significant legal barriers in any of the 50 states to a woman obtaining an abortion at any time during pregnancy. Thus, it is plain, viability is a meaningless criterion.

Roe v. Wade imposed on the nation an abortion regulatory scheme that is more permissive than that of any other Western nation. In its wake, our society has witnessed a tragic assault on the sanctity of, and respect for, all human life. Under it, genetic screening programs have been set up to search out and to destroy handicapped babies in the womb. Many state courts allow the parents of handicapped babies who escape this fate to sue their obstetrician for the cost of raising their child. Two states allow the child herself to sue because she was not aborted. Other babies who escape eugenic abortion are not so lucky. In Indiana last year, the State Supreme Court allowed the parents of a Down's Syndrome baby boy to starve him to death because, as the father said, the boy probably would lead a life of insufficient "quality."

But *Roe v. Wade* is not just bad social policy. It is bad constitutional law. The Supreme Court fashioned the abortion right out of what Solicitor General Rex Lee aptly describes as a combination of constitutional shadows. Principally, the Court found the new right in the Due Process Clause of the Fourteenth Amendment.

As Professor Rosenblum pointed out in his testimony before the Subcommittee on Separation of Powers in 1981, the legislative history of the Fourteenth Amendment reveals that its framers intended the Amendment's protection of a right to life to apply to all persons. They made plain that the word "person" meant all human beings. Yet the Supreme Court, in *Roe v. Wade*, perverted this intent by defining unborn human beings, even viable ones, as nonpersons. Then it used the Constitutional language that was intended to protect their lives to create a private right to destroy them for any reason.

Senate Joint Resolution 3 is designed to remove the *Roe v. Wade* blot on American jurisprudence by declaring that no right to abortion is protected by the Constitution and that the Congress and the States have the power to regulate abortion. When he appeared before this Subcommittee on February 28, Senator Eagleton proposed that the concurrent powers provision of S. J. Res. 3 should be eliminated in favor of an amendment that would declare simply that "A right to abortion is not secured by this Constitution." I want to address the legal effect of Senator Eagleton's proposal.

I will focus my attention on three important questions. First, would the Eagleton formulation fulfill the Senator's purpose of reversing *Roe v. Wade* and restoring the *status quo ante*? Second, if the *status quo ante* would be restored by the amendment under consideration, what powers would government have to regulate abortion? Third, if the proposed amendment were passed and ratified, could the Supreme Court thwart its intent by fashioning an abortion right on a constitutional rationale wholly different from that which it employed in *Roe v. Wade*?

1. It is clear that the first sentence of S. J. Res. 3 would reverse *Roe v. Wade* and restore the *status quo ante*. Regardless of the "right to privacy" terms in which the Court couched it in *Roe v. Wade*, it is plain that that decision created a right to abortion. As Professor Lynn Wardle pointed out in his February 28 testimony, the phrase right to abortion has been employed in 84 Federal court opinions since *Roe*, including one opinion of the Supreme Court itself.

In their prepared statements, Mr. Horan and Professor Rosenblum concur fully in this judgment, as did Professor Wardle last Monday in his remarks. In addition, I was present at the February 28 hearing and understood that both Senator Packwood and Harvard Law School Professor Laurence Tribe agreed that the first sentence of S. J. Res. 3 would reverse *Roe v. Wade* and restore the *status quo ante*.

2. If the first sentence of S. J. Res. 3 were added to the Constitution, the States would be restored their full police power to regulate abortion through their criminal laws. Before *Roe v. Wade*, all 50 states had such statutes, all of which, I would add, *Roe* struck down. If *Roe* were erased, then the States would be freed to proscribe abortion to the extent that the elected representatives of the people deem necessary and appropriate. For example, a state could proscribe all post-viability abortions. It could outlaw sex selective abortion. It could prohibit abortions aimed at Down's Syndrome unborn babies. It could prohibit all abortions except those involving rape, incest, and a genuine danger to the life of the mother. It could go further and recognize only the latter exception.

Though after *Roe v. Wade* were undone the States would have the primary power to regulate abortion, the Federal government would have certain residual power to do so. For example, the interstate commerce or taxation powers might be employed. But there are significant limits on these powers, and it is not likely that any Federal power to regulate abortion would come anywhere close to being as sweeping as would that of the States. State criminal laws would be the primary, dominant vehicle by which the lives of the unborn could be protected.

3. After the proposed constitutional amendment reversed *Roe v. Wade*, the Supreme Court would be barred from creating a new or different right to abortion. This is because the words "right to abortion" are all inclusive. They do not depend for their efficiency on how such a right is formulated. Thus, they invalidate the Court's *Roe* declaration that the constitutional right to privacy is broad enough to encompass the decision on whether to terminate pregnancy. Likewise, they preclude the Court from finding an abortion right by the use of any other constitutional rationale.

Thus the Court would be bound, after this amendment were added to the Constitution, by the unmistakable intent of the framers to deny that there is a constitutional right to an abortion. This judgment too is concurred in by Mr. Horan, Professor Rosenblum, Professor Wardle, and Professor Tribe. I would understand it also to be the same as that of Senators Eagleton and Packwood.

I thank you, Senator Hatch, for giving me the honor and privilege of presenting my views to your Subcommittee this morning.

The following article was submitted
for the hearing record:

A Decision Needing Undoing*
By Steven R. Valentine
The New York Times
January 14, 1983

CHICAGO — A decade after the United States Supreme Court tried to settle the abortion issue, it is plainly evident that it did not. The Court failed politically. It failed socially. It failed legally. And it failed medically. Because of these failures, the American right-to-life movement remains alive and determined.

The landmark abortion ruling, in *Roe v. Wade*, failed politically because it was extreme. With it, the Court struck down the abortion laws of all 50 states. Before *Roe*, those few states that permitted elective abortions at all allowed them only early in pregnancy. After *Roe*, each was required to permit abortion on demand through the second trimester of pregnancy. *Roe* requires states to allow an abortion, even after the point at which the fetus becomes viable outside the womb, when the mother's life or health would be endangered by live birth. In a companion case, *Doe v. Bolton*, the Court defined health so broadly as to include threats to emotional well-being.

Such sweeping frustration of the legislatively expressed will of the people of every state was bound to produce a fierce political reaction, and did. Though many observers expected it to be almost wholly impotent by now, the right-to-life movement's Washington lobby remains an uncommonly significant influence on the Congress. Indeed, last March it produced a majority vote by the Senate Judiciary Committee to reverse *Roe v. Wade* by means of a constitutional amendment.

The decision failed socially because it struck at the heart of society's traditional reverence for the sanctity of all human life. By declaring that the unborn child is not a constitutional person, the Court divorced the concept of personhood from that of humanness. In spite of the decree, many Americans passionately continue to hold that all humans, regardless of the stage of their biological development, are persons who have the most basic right to live. These "right-to-lifers" are a sociological phenomenon because they constitute a rare social activist group — one that does not have its own self-interest at stake.

Roe is a legal failure because it engendered the nearly universal scorn of constitutional law scholars from across the ideological spectrum. Solicitor General Rex Lee was charitable recently when he told the Court in a brief that the *Roe* right to an abortion was constructed on a foundation of constitutional shadows. There is no support whatever for the notion that the framers of the 14th Amendment even remotely considered abortion, much less intended to guarantee access to it, yet that part of the Constitution is where the Court claimed that the right to abort is grounded.

What the Court, in its 7-2 decision, did was to impose a model abortion statute formulated on the basis of the social, economic and political views of seven men. But the Court is not a legislature. When it acted as if it were, it

committed an abuse of power that undermined its integrity and its standing as a democratic institution.

The Court's medical failure lies in its putting the medical profession at war with itself. At a time when the development of fetal monitoring and intrauterine treatment techniques are enabling doctors to consider the fetus a patient, others in the profession work to perfect abortion methods so that no unwanted child will emerge alive. Whether the doctor will heal or kill the unborn child in a given case is solely the mother's choice, which reduces the physician to a mere technician.

Perhaps more ominous, *Roe v. Wade* gave rise to the "wrongful life" theory of legal action, which is enjoying increased acceptance in Federal and state courts. This development gives the parents of a handicapped child the right to sue the doctor who attended the pregnancy when they can show that he should have discovered the defect so that an abortion could have been obtained. The resulting pressures on physicians encourage infanticide as doctors seek to avoid potential financial liability for children whom they "negligently" caused to be born alive.

The Declaration of Independence holds that the right to life is the inalienable right of every human being. Ten years after the Supreme Court alienated just that right of the youngest of Americans, it ought to seize the opportunity presented by the three abortion cases now on its docket to admit the fundamental failures of *Roe v. Wade*, and restore the rights of personhood to the full scope of humanity. Until that is done, the right-to-life movement will not be silent and will not die.

A CONSTITUTIONAL AMENDMENT TO UNDO ROE v. WADE*

Statement of Dennis J. Horan, Esq.**

Mr. Chairman, and members of the Subcommittee, my name is Dennis J. Horan. I am presenting this statement in my capacity as Chairman of the Board of Directors of Americans United for Life and the AUL Legal Defense Fund, Chicago, Illinois. For identification purposes, let me also add that I am a partner in the Chicago law firm of Hinshaw, Culbertson, Moelmann, Hoban & Fuller. I am a former Chairman of the Medicine and Law Committee (TIPS Section) of the American Bar Association and a former Lecturer in Medicine and Law at the University of Chicago. I am a co-editor of the books *Abortion and Social Justice*, *New Perspectives on Human Abortion*, and *Infanticide and the Handicapped Newborn*.

I commend this Subcommittee for holding these two days of hearings concerning the legal ramifications of various proposed constitutional amendments relating to abortion. Although I note that quite a few such proposals have been introduced in the 98th Congress, I will confine my remarks to legal observations regarding Senate Joint Resolution 3. In addition, I will

* Submitted to the Subcommittee on the Constitution, Committee on the Judiciary, United States Senate, March 7, 1983.

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address the proposed modification of S. J. Res. 3 that was set forth by Senator Thomas Eagleton when he appeared before this Subcommittee on February 28.

The goal of S. J. Res. 3, of course, is to reverse the decision of the United States Supreme Court in *Roe v. Wade*.¹ It is my belief, as well as that of my colleagues at the AUL Legal Defense Fund, that *Roe* is the most fundamentally unjust ruling of the Court since the infamy of its 1857 decision in the case of *Dred Scott v. Sandford*.² I endorse your efforts to remove its blot on American jurisprudence.

Roe v. Wade imposed on the nation an abortion regulatory scheme that is more permissive than that of any other Western nation. With it, the Court struck down the abortion laws of all 50 states. Before *Roe*, those few states that had liberalized their abortion laws still permitted elective abortions only relatively early in pregnancy. After *Roe*, each was required to permit abortion on demand throughout pregnancy. *Roe* requires states to allow abortion, even after viability, when the mother's life or health is endangered. In *Roe*'s companion case, *Doe v. Bolton*,³ the Court defined health so broadly as to include even threats to emotional well-being.

Because the "health" exception to the rule permitting the prohibition of post-viability abortions is so broad, there is no meaningful manner in which a state can protect the lives even of viable fetuses. As my colleague at the AUL Legal Defense Fund, Professor John Noonan, has noted, in the post-viability period a woman need only convince a physician that she "needs" an abortion in order to obtain one.⁴

This policy of unbridled legal abortion through all nine months of pregnancy has led to a frightening erosion of our society's traditional respect for the sanctity of all human life. A year ago next month, the nation became aware, as never before, of the growing practice of infanticide against handicapped newborn children. With the approval of the Indiana Supreme Court, Infant Doe was allowed to starve to death because he suffered from Down's Syndrome and esophageal atresia and his parents did not want him.⁵ When our law permits a perfectly healthy baby to be destroyed for virtually any reason just weeks before birth, why should we be surprised that we now see handicapped babies killed only a few days afterward?

The rigid judicial fiat of the Supreme Court in *Roe v. Wade* places each of the 50 states in a straight jacket that precludes them from providing any manner of effective protection to unborn human life. The fundamental task before this Subcommittee is to recommend to the full Judiciary Committee, and the Senate as a whole, a constitutional amendment that will free our legislatures from those judicial bonds. This Subcommittee must repudiate the Court's unprincipled usurpation of the power of the people of the States to protect the youngest of their fellow 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 be outside the purview of our system of justice.

Abortion is not a private matter. The destruction of human life, even "incipient" or developing human life in the womb, can never be considered a private matter under our law. The contention that it is a private matter would be too ludicrous and absurd to even argue were it not so often put forth under such intellectually impeccable auspices. Would those civil libertarians who

argue that abortion is a private matter argue that the exercise of civil rights is purely a private matter between the Black man and the man that thwarts them? Certainly not. Just as the civil right to vote must be protected by law, so too the most fundamental and basic of all civil rights – the Right to Life – must be protected by law.

Nor is abortion a merely sectarian religious problem or one for the area of “private” morality. Abortion is nothing less than a question of *civil rights*: Does the unborn child have a civil right to life? If he or she does, is it not then the duty of *all* citizens in a pluralistic society, regardless of religious faith or private moral sensitivities, to protect the unborn child’s civil rights?

In *Roe v. Wade*, the Supreme Court *created*, rather than *recognized*, a constitutional right to abortion. Prior to *Roe v. Wade* there was no such right. That is why *Roe* has engendered the nearly universal scorn of constitutional law scholars from across the ideological spectrum.⁶ Solicitor General Rex Lee was charitable recently when he told the Supreme Court in a brief that the *Roe* right to an abortion was constructed on a foundation of constitutional shadows. There is no support whatever for the notion that the framers of the Fourteenth Amendment even remotely considered abortion, much less intended to guarantee access to it. Yet, that part of the Constitution is where the Court claimed that the right to abortion is found.

What the Court did in *Roe v. Wade* was to impose a model abortion statute that was formulated on the basis of the social, economic, and political views of the seven men who subscribed to its majority opinion. But the Court is not a legislature. When it acted as if it were, it committed an abuse of power that undermined its integrity and its standing in our democratic society.

Even believing as I do that in *Roe v. Wade* the Supreme Court abused its constitutional power in a tragic manner, I recognize that in our legal system it “is the duty of the Court to say what the law is.”⁷ That way lies in an amendment to the Constitution.

You recognize that fact, Mr. Chairman, as well as the concomitant political reality that sufficient support does not yet exist for a constitutional amendment that would reverse *Roe v. Wade* and guarantee the protection of constitutional personhood to all unborn human lives. So in 1981 you proposed the Human Life Federalism Amendment, S. J. Res. 110, to the 97th Congress. I was pleased to appear before this Committee on November 16, 1981, to testify in favor of the concept behind that measure.⁸ At that time, I offered for the Subcommittee’s record my article “Human Life ‘Federalism’ Amendment: Its Language, Effects.”⁹ In that article, I offered a legal analysis of S. J. Res. 110. I commend that article to the subcommittee now as it considers S. J. Res. 3.

Let me turn, however, to a consideration of Senator Eagleton’s proposed modification of S. J. Res. 3. Senator Eagleton would remove that portion of S. J. Res. 3 that grants Congress and the States the concurrent power to restrict and prohibit abortion.¹⁰ The new amendment, then, would contain just ten words: “A right to abortion is not secured by this Constitution.”¹¹

Senator Eagleton’s approach has the appeal of simplicity. It presents the issue squarely. Do we want to continue under the *Roe v. Wade* regime of abortion on demand from conception to birth or do we wish to return to the *status quo ante*, when the people of the several states were free to provide whatever measure of protection to their unborn fellow humans that they

chose?

There is ample historical precedent for a constitutional amendment that is designed to be a simple statement of intent reversing a decision of the Supreme Court. The Eleventh Amendment, which prohibits the bringing of lawsuits by citizens of a state against another state, came in direct response to an action of the Supreme Court in accepting jurisdiction over such a case, *Chisholm v. Georgia*.¹²

The Fourteenth Amendment was a direct response to the *Dred Scott* ruling¹³ that black people were not American citizens and thus could be accorded no protection under the Constitution. In addition, the Sixteenth Amendment, which authorizes Congress to impose a Federal income tax, was a direct response to the Supreme Court decision in *Pollock v. Farmer’s Loan and Trust Co.*,¹⁴ which precluded such legislative action.

Finally, the Twenty-Sixth Amendment, which accorded eighteen-year-olds the right to vote in Federal and state elections, was a response to the Court’s ruling in *Oregon v. Mitchell*¹⁵ that the Congress lacked the authority to mandate that the States so conform their laws.

When my colleague on the Board of Directors of the AUL Legal Defense Fund, Professor Lynn Wardle, appeared before this Subcommittee on February 28, he said that the so-called “ten word amendment” approach... “would restore the *status quo ante Roe* insofar as the power and responsibility to resolve the abortion issue is concerned.”¹⁶ Similarly, when he made his suggestion, Senator Eagleton said that the ten-word formulation would “wipe out the legal status afforded to the ‘abortion right’ by *Roe v. Wade* and return us to the *legal status quo ante*, when abortion was a matter for each of the States to decide.”¹⁷ Even the opponents of this measure who appeared before this Subcommittee on February 28, Senator Robert Packwood and Professor Laurence Tribe of the Harvard Law School, agreed that this language would reverse *Roe v. Wade*.¹⁸

I concur in those judgments, as does AUL Legal Defense Fund Vice-Chairman Victor G. Rosenblum, Professor of Law at Northwestern University, in his prepared statement. The language of the first sentence of S. J. Res. 3 reverses outright *Roe v. Wade* and its companion case, *Doe v. Bolton*. When it became effective, the right of privacy under the Fourteenth Amendment no longer would include protection of a woman’s decision to terminate her pregnancy. Nor would any other section of the Constitution include such protection. No court could find a right to an abortion anywhere in the Constitution. Those who seek such a right would have to propose, pass and ratify another constitutional amendment. The clearly expressed legislative intent of Senator Hatch when he introduced S. J. Res. 3 demonstrates that the first sentence eliminates the abortion right, however formulated.

The words “right to abortion” in this sentence are used in their broadest sense, and include, therefore, all lesser legal concepts. Since that right no longer would exist under the Constitution, any lesser formulation likewise could not exist under the Constitution. For example, later clarifications by the Court about what its *Roe* and *Doe* decisions meant also no longer would be secured by the Constitution, and also would fall. Thus, even if the woman’s right is considered only to be a right against interference by the government when she makes a decision to abort her unborn child, that right no longer would be secured by the Constitution.

S. J. Res. 3, modified by Senator Eagleton's proposal, is closely analogous to the Thirteenth Amendment in the sense that it applies to abortion as an institution, just as the Thirteenth Amendment applied to slavery as an institution, including all its badges and incidents. Thus any purported constitutional right that is crafted to place obstacles in the way of the legal prohibition of abortion would be impermissible, and in fact could not exist, under the "ten word" amendment language.

Adoption of S. J. Res. 3 under the Eagleton formulation would reverse not only *Roe* and *Doe*, but also those subsequent cases that depend for their authority on the right to abortion as enunciated in *Roe*. Thus, *Planned Parenthood of Missouri v. Danforth*,¹⁹ including its holdings regarding spousal and parental consent requirements, its invalidation of the ban on saline solution abortions, and its refusal to allow the imposition of a standard of care to preserve the life and health of the fetus, would be reversed. *Colautti v. Franklin*,²⁰ striking down another standard-of-care provision, and *Baird v. Bellotti, II*,²¹ which held unconstitutional a parental/judicial consent law and which set forth rigid rules for determining the constitutionality of such laws, also would be reversed. In addition, to the extent that the abortion funding cases (*Maher v. Roe*²² and *Harris v. McRae*²³), the public hospital case (*Poelker v. Doe*²⁴), and the parental notice case (*H.L. v. Matheson*²⁵) contain reaffirmations of the tenets of *Roe*, *Doe*, *Danforth*, *Colautti*, and *Bellotti*, those reaffirmations would be vacated.

Further, I would add that any cases decided between now and the ratification of S. J. Res. 3 (as modified) would be reversed to the extent that they relied upon or expanded the holdings on these cases. In addition, any other cases that cite, or otherwise rely upon, such holdings would stand only to the extent that they could retain vitality on a basis independent of the reliance on those authorities that flow from *Roe* and *Doe*. Finally, the numerous lower court cases dependent upon any of the Supreme Court's abortion holdings also would fall.

Any abortion statute on the books that has not been repealed by a state legislature, but the enforcement of which is prevented because it is incompatible with the Court-created right to abortion, may be reinstated automatically by the ratification of the amendment under consideration. They might regain their full force and effect. This outcome, however, would depend upon state law interpretation.

In addition to concurring with Professor Wardle's judgement that the Eagleton version of S. J. Res. 3 would restore the *status quo ante Roe v. Wade*, I concur with his listing in his February 28 testimony before this Subcommittee as to ten things that the amendment would do and ten that it would not do. I wish to emphasize and endorse especially clearly three of these points by Professor Wardle.

First, Professor Wardle observes, the amendment would restore to the States their general police power to restrict and prohibit abortion by the enactment of appropriate criminal statutes. The States, he said, could enact such legislation to the same extent to which they could do so prior to *Roe*.

I agree completely. After ratification of S. J. Res. 3 (Eagleton version), the States would be restored their full abortion regulatory power. As I observed earlier, prior to *Roe*, all 50 states had abortion laws, albeit of considerable variety. It is safe to assume that after ratification of this amendment, a similar situation might obtain.

Second, Professor Wardle notes, Congress's limited power to regulate abortion by certain indirect means would be restored after the amendment reversed *Roe*. This limited power could be exercised by Congress as necessary or appropriate in furtherance of its responsibility to control interstate commerce, Federal lands, taxation, spending and the like. I would emphasize, however, that this Federal power would be residual, and almost certainly secondary, to the criminal law/police authority of the States.

Finally, I agree wholeheartedly with Professor Wardle's observation that ratification of the amendment would not prohibit the Supreme Court from interpreting the Fourteenth Amendment, at some future date, to protect the right to life of all human beings, including the unborn.

For the foregoing reasons, Mr. Chairman, I am pleased to endorse the concept of reversing *Roe v. Wade* with the simple, direct and effective approach that has been proposed by Senator Eagleton.

FOOTNOTES

¹410 U.S. 113 (1973).

²60 U.S. (19 How.) 393 (1857).

³410 U.S. 179 (1973).

⁴John T. Noonan, Jr., *A Private Choice* (New York: MacMillan, 1979), 12.

⁵See George F. Will, "The Killing Will Not Stop," *The Washington Post*, April 22, 1982, at A29, Col. 3.

⁶See, e.g., Ely, *The Wages of Crying Wolf*, 82 Yale L. J. 920 (1973); A. Cox, *The Role of the Supreme Court in American Government*, B 114 et seq. (1976).

⁷*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸See *Constitutional Amendments Relating to Abortion: Hearings on S. J. Res. 17, S. J. Res. 18, S. J. Res. 19, and S. J. Res. 110 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Congress, 1st Session 753-760 (1981) (statement of D. Horan).

⁹*Ibid.*, at 761-763.

¹⁰See, testimony of Senator Eagleton before the Subcommittee on February 28, 1983.

¹¹*Ibid.*

¹²2 U.S. (2 Dall.) 419 (1793).

¹³See note 2, *supra*.

¹⁴158 U.S. 601 (1895).

¹⁵400 U.S. 112 (1970).

¹⁶See the testimony of Professor Wardle before the Subcommittee on February 28, 1983.

¹⁷See note 10, *supra*.

¹⁸See the testimony of Senator Packwood and Professor Tribe before the Subcommittee on February 28, 1983.

¹⁹428 U.S. 52 (1976).

²⁰439 U.S. 379 (1979).

²¹443 U.S. 622 (1979).

²²432 U.S. 464 (1977).

²³448 U.S. 297 (1980).

²⁴432 U.S. 519 (1977).

²⁵450 U.S. 398 (1981).

THE "FIRST SENTENCE" OF SENATE JOINT RESOLUTION 3: A LEGAL ANALYSIS*

Statement of Victor G. Rosenblum, Esq.**

I appreciate the opportunity once again to submit testimony to this distinguished Subcommittee concerning the desirability and legal effects of a constitutional amendment to "undo" the abortion decisions of the United States Supreme Court.

I had the honor to appear in person before the Subcommittee on November 16, 1981, to testify concerning the desirability and legal effects of S. J. Res. 110, 97th Congress, 1st Session (1981), proposed by Senator Hatch.¹ While I regret that longstanding prior commitments prevent my personal appearance before the Subcommittee as it now considers both the Hatch Amendment and the modification of that amendment proposed by Senator Eagleton, I am grateful for the chance to submit this written statement for the record.

For identification purposes, I have been a professor of law and political science at Northwestern University in Illinois for some 20 years. (It should be made clear that none of the views I here expound are expressed 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 and the AUL Legal Defense Fund, Chicago, Illinois. The AUL Legal Defense Fund is the only public interest law firm in the nation that devotes its full-time efforts to pro-life 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.²

As I remarked when testifying 15 months ago, 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.

It seems to me that the Supreme Court decision in *Roe v. Wade*³, erecting a constitutional bar to the inclusion of the unborn in the membership of human society and the protection that entails is among the worst contemporary instances of discrimination.

That *Roe v. Wade* is a decision badly needing undoing is a point I shall not belabor. The Subcommittee has already heard, both in this series of hearings and in those conducted during the last Congress, of the nearly unanimous scholarly critique of the jurisprudence underlying *Roe*. Some of the most telling of that criticism comes from distinguished academicians who personally

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agree with the results of that decision as a matter of policy. The Subcommittee has heard testimony from experts detailing the detrimental effects of unlimited abortion on demand, throughout pregnancy on maternal mortality and morbidity, on infant mortality, on the psychological condition of those undergoing abortion, on the medical profession, and on social and political division within our country. It has heard testimony demonstrating that the extreme position taken by the Supreme Court lacks substantial support in public opinion, and is opposed by a majority of Americans. The widely publicized "Infant Doe" case in Bloomington, Indiana⁴, together with revelations about the selective nontreatment of handicapped newborns at Yale-New Haven Hospital by the *Hartford Courant*⁵ combine with surveys of pediatricians and pediatric surgeons⁶ to suggest that abortion is being followed rapidly by a decline in respect for the lives of the disabled even outside the womb.

Of course, the greatest motive for the urgent necessity of undoing *Roe v. Wade* must be its direct cost in human lives within the womb, a toll substantially in excess of a million a year.

As I testified in November, 1981, the Hatch Amendment would nobly and effectively advance the essentially liberal cause of restoration of legal protection to the unborn child. I refer the Subcommittee to that testimony for a detailed analysis of the legal meaning and effects of that proposal. I shall now concentrate on a similar analysis of the legal consequences of Senator Eagleton's proposal that a constitutional amendment be enacted containing only the first sentence of the Hatch Amendment: "A right to abortion is not secured by this Constitution." Regrettably, such an amendment would not so fully effectuate the opportunity to protect the unborn on a national basis as would the Hatch Amendment's grant to the Congress of full plenary power to restrict and prohibit abortion. However, such an amendment, properly interpreted, would completely undo *Roe v. Wade*, *Doe v. Bolton*,⁷ and their progeny, restoring the *status quo ante*.

Some have argued⁸ that the Supreme Court declared laws limiting abortion unconstitutional, not on the basis of any constitutional "right to abortion," but on the distinguishable basis that the constitutional right to abortion, "privacy" encompasses the "decision whether or not to terminate... pregnancy."⁹ In *Maier v. Roe*, Justice Powell, speaking for the Court, wrote, "*Roe* did not declare an unqualified 'constitutional right to abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."¹⁰ Such language has led some to fear that an amendment abolishing "[a] right to abortion" will not effectively remove abortion from judicial protection.

For this reason, it should be made unmistakably clear in the Committee Report that it is the crystallized intent of the Amendment's framers to eliminate any right that encompasses abortion, however formulated. Were the Amendment phrased so as to track explicitly the "privacy" formulation of the *Roe* Court, the Court might well escape the intended effect of the Amendment by reformulating the source or foundation of the legalized access to abortion. Some reformulation may already be underway. Notwithstanding the fact that the Supreme Court majority in *Harris v. McRae* upheld the constitutionality of the Hyde Amendment, the rationale developed in Justice Stewart's opinion referred to legalized access to abortion

as a "freedom of personal choice," held to be an "implicit constitutional liberty."¹¹ By the use in both the Hatch and Eagleton Amendments of the generic term "right to abortion," the entire field of possible or reformulations of legalized access to abortion is encompassed more thoroughly than would be the case were the Amendment to tie itself to limited specific language quoted from *Roe*, *Doe*, or one of its progeny. Both literally and in terms of the framers' intent, the constitutional amendments are designed to end any and all constitutional support for abortion.

The language used in the Committee Report accompanying S. J. Res. 110 in the last Congress provides an excellent example of the sort of legislative history that should be created if the Subcommittee and its parent Judiciary Committee decide to report out the Eagleton language:

The first sentence of S. J. Res. 110, which states, "A right to abortion is not secured by this Constitution," is intended to preclude reliance upon any provision of the Constitution as authority for recognition of any right to abortion. In particular, the first sentence is intended to reverse *Roe v. Wade* and its companion *Doe v. Bolton*, insofar as these cases hold that the Constitution protects an abortion liberty. In addition, any holding in any subsequent Federal or State court decision relying, as a matter of law or public policy, upon the *Roe* or *Doe* decisions, or upon the existence of a constitutionally-founded "right to abortion" would be reversed to the extent that the existence of such a "right" was a predicate to that holding.

S. J. Res. 110 does not employ the specific phraseology of the abortion liberty adopted by the Supreme Court in *Roe v. Wade* — the "right to privacy" which includes the right to decide "whether or not to terminate a pregnancy." Instead, the proposed amendment employs the more general phrase "right to abortion" in order to emphasize that the amendment is intended to foreclose any potential constitutional recognition of such a right, regardless of how it might be formulated, regardless of how it might be articulated, and regardless of what constitutional provision might be invoked as authority for it. For example, S. J. Res. 110 is intended to foreclose potential use of the Ninth or Tenth Amendments to recognize abortion as a reserved right, as much as it is intended to foreclose use of the Fourteenth Amendment to protect abortion as a "privacy right." Under S. J. Res. 110, there would exist no constitutional authority for any right to abortion.

As Professor Wardle has observed, the term "right to abortion" (or "right to an abortion" or "right of abortion") has been used in at least 84 Federal court decisions since the *Roe* and *Doe* cases were decided, including at least one decision by the Supreme Court. As he notes,

The phrase "right to abortion" is used as shorthand for the constitutional right created in *Roe* and its progeny, the right of a woman to choose whether or not to have an abortion free from

State restrictions.

The modifier "a" rather than "the" is intended to clarify, however, that the "right to abortion" referred to in the first sentence does not simply refer to the precise "right" as originally introduced in *Roe* but any alternative concept of such a right emanating from the Fourteenth Amendment or any other provision of the Constitution.

Since there would exist no constitutional basis whatsoever for the abortion liberty following the passage of S. J. Res. 110, it follows that there would be no "qualified" constitutional right to abortion in any particular circumstance, under any unusual conditions, during any stage of pregnancy or fetal development or as an incident or adjunct to some other recognized and protected right. Thus, for example, it could not be claimed that a putative "right to health" would immunize abortions from legislative restriction. There would be no case in which any abortion would be the object of any special constitutional protection.¹⁵

Under the canons of statutory construction, "the intent of the legislature as revealed by the committee report is highly persuasive."¹³ With appropriate language in that report, the prospect that a Supreme Court with any pretense to conscientiousness could construe the language of the Amendment so as to leave intact any form of constitutional protection for abortion — or any practical equivalent of that, however formulated — is remote indeed.

With such committee report language, any future Court would have to conclude that the Amendment now under consideration was intended to overturn *Roe* and its progeny. It would be an utterly absurd result to assume that the people would go to the lengths necessary to adopt a constitutional amendment only in order to secure a confirmation of the Court's current holdings on the matter of abortion.

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

Thus, for example, the Supreme Court's decision in *Planned Parenthood of Missouri v. Danforth*,¹⁴ declaring that the State cannot grant husbands and parents of minor children "veto power" over the abortion decisions of wives and children would be vacated. (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*,¹⁵ striking another standard of care provision, and *Bellotti v. Baird II*,¹⁶ 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*)¹⁷, the case abstaining from judgement on a parental consent law (*Bellotti v. Baird I*)¹⁸, the abortion funding cases (*Maher v. Roe*,¹⁹ *Harris v. McRae*,²⁰ and *Williams v. Zbaraz*)²¹, the public hospital case (*Poelker v. Doe*)²², and the parental notice case (*H. L. v. Matheson*)²³ contain reaffirmations of the tenets of *Roe*, *Doe*, *Danforth*, *Colautti*, and *Bellotti*, the reaffirmations would be vacated. Any cases decided between now and the Amendment's ratification would be reversed to

the extent they relied upon or expanded the holdings in these cases.²⁴ 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."²⁵

The Amendment's language is modeled on the Thirteenth Amendment in the sense that it applies to abortion as an institution,²⁶ just as the Thirteenth Amendment applied to slavery as an institution, including all its badges and incidents.²⁷ Under this Amendment, as under the Thirteenth, the legislatures would have "the power...rationally to determine what are the badges and incidents...and the authority to translate that determination into effective legislation."²⁸

As it did in its report accompanying S. J. Res. 110, the Committee should make clear in the report to accompany this Amendment:

By the term "abortion," the Committee intends to include those actions which intend the destruction of the human embryo or fetus. Thus, both the direct destruction of the unborn and the indirect destruction — for example, by induced expulsion of the fetus from the mother's body before it is capable of survival — would be within the terms of the proposed amendment. All individual organisms of the species *Homo sapiens* from the onset of fertilization until live birth or its equivalent, without regard to the stage or locus of development, inside or outside the mother's body, would be within the permitted scope of protection of the amendment.²⁹

Thus, for example, no constitutional right could be asserted to prevent legislative regulation or preclusion of experimentation on developing human zygotes, morulae, blastocysts, embryos, or fetuses whether they were at the time of the experimentation inside the womb or in a petri dish or artificial placenta, or whether conceived *in vivo* or *in vitro*.

Nor could any constitutional right be asserted to support "wrongful birth" of "wrongful life" cases such as *Robak v. United States*,³⁰ in which the Seventh Circuit of Appeals held that parents may sue a governmental hospital for failing to provide them an opportunity to abort their handicapped child.

The nullification of "[a] right to abortion" accomplished by the Amendment would allow legislative proscription of abortion. In the absence of such a "right," various governmental entities, acting within their traditional spheres of jurisdiction, could legally proscribe or regulate abortion practices on behalf of their continuing, already judicially recognized, legitimate interest in the protection of fetal life.³¹ This means that those laws that proscribe abortion which remain codified could be revived,³² and that new laws could be enacted within traditional spheres of jurisdiction to proscribe and to re-

strict abortion.

A very important consequence of this Amendment, if properly emphasized in the legislative history and committee report, would be that laws regulating or prohibiting abortion would no longer be subject to strict scrutiny but would at most have their constitutionality analyzed under the "rational basis" test. "Where certain 'fundamental rights' are involved, the Court has held that regulation 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."³³

But it is also "well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, [its] validity...must be sustained unless 'the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.'"³⁴ When "[a] right to abortion" is wholly and specifically abolished, as by this Amendment, the "compelling state interest" and "narrowly drawn" requirements that attach to legislation burdening a constitutional right could not be invoked.

Under this Amendment, therefore, 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 interest³⁵ in unborn life by protecting that interest, they would be held constitutional.

The modification of the Hatch Amendment proposed by Senator Eagleton is simple and precise: with full and appropriate legislative history, such as that I have urged in earlier sections of this statement, it would effectively reverse *Roe v. Wade*, its companions and progeny, and would erase the enormous blot that has disfigured our jurisprudence through the judicially imposed abortion doctrine.

¹*Constitutional Amendments Relating to Abortion: Hearings on S. J. Res. 17, S. J. Res. 18, S. J. Res. 19, and S. J. Res. 110 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Congress, 1st Session (1981) (statement of Victor G. Rosenblum, Professor of Law, Northwestern University).

²*Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980).

³*Roe v. Wade*, 410 U.S. 113 (1973).

⁴See, e.g., Dorothy Petrosky, *Infanticide analyzed: court involvement makes a baby's death noteworthy*, Indianapolis Star, April 27, 1982, at 1, col. 2.

⁵Diane Brozek, *Defective Newborns Are Dying By Design*, Hartford Courant, June 14, 1981, at 1; Diane Brozek, *At Issue: A Productive Life or Tragedy*, Hartford Courant, June 15, 1981, at 1; Diane Brozek, *Twins Case a Test of Infant Care Practices*, Hartford Courant, June 16, 1981, at 1; *parents Chose Death for Baby*, Hartford Courant, June 17, 1981, at 1.

⁶Shaw, Randolph, & Manard, *Ethical Issues in Pediatric Surgery: A National Survey of Pediatricians and Pediatric Surgeons*, 60 Pediatrics 588 (1977).

⁷*Doe v. Bolton*, 410 U.S. 179 (1973).

⁸John S. Baker, Jr., *The Hatch Amendment 6-7* (1982).

⁹*Roe v. Wade*, 410 U.S. at 153.

¹⁰*Maher v. Roe*, 432 U.S. 464, 475-76 (1977).

¹¹*Harris v. McRae*, 448 U.S. at 312.

¹²Senate Committee on the Judiciary, *Human Life Federalism Amendment*, S. Rep. 465, 97th Congress, 2nd Session, 54-55 (1982).

¹³C. Dallas Sands, 2A *Statutes and Statutory Construction* § 43.06 (4th ed. 1973).

¹⁴*Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

¹⁵*Colautti v. Franklin*, 439 U.S. 379 (1979).

¹⁶*Belotti v. Baird II*, 443 U.S. 622 (1979).

¹⁷*Connecticut v. Menillo*, 423 U.S. 9 (1975).

¹⁸*Belotti v. Baird I*, 428 U.S. 132 (1976).

¹⁹*Maher v. Roe*, 432 U.S. 464 (1977).

²⁰*Harris v. McRae*, 448 U.S. 297 (1980).

²¹*Williams v. Zbaraz*, 448 U.S. 358 (1980).

²²*Poelker v. Doe*, 432 U.S. 519 (1977).

²³*H. L. v. Matheson*, 101 S.Ct. 1164 (1981).

²⁴This principle applies, of course, to the three cases awaiting the decision of the Supreme Court as I testify: *City of Akron v. Akron Center for Reproductive Health*, cert. granted, 102 S.Ct. 2266 (1982); *Ashcroft v. Planned Parenthood Ass'n. of Kansas City, Mo.*, cert. granted, 102 S.Ct. 267 (1982); and *Simopoulos v. Virginia*, cert. granted, 102 S.Ct. 2265 (1982).

²⁵Colum. L. Rev., Harv. L. Rev. Ass'n, U. Penn. L. Rev., & Yale L.J., *A Uniform System of Citation* 46 (12th ed. 1976).

²⁶For abortion as institution comparable to slavery, see J. Noonan, *A Private Choice: Abortion in America in the Seventies* 1-3, 80-89 (1979).

²⁷*Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-43 (1968).

²⁸*Id.* See also *Everard's Brewery v. Day*, 265 U.S. 545, 560 (1924).

²⁹Senate Committee on the Judiciary, *Human Life Federalism Amendment*, S. Rep. 465, 97th Congress, 2nd Session 56 (1982) (footnote omitted).

³⁰*Robak v. United States*, 658 F. 2d. 471 (7th Cir. 1981)

³¹*Harris v. McRae*, 448 U.S. 297, 325 (1980); *Poelker v. Doe*, 432 U.S. 519, 520-21 (1971); *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).

³²This would depend upon principles of state law.

³³*Roe v. Wade*, 410 U.S. 113, 155 (1973).

³⁴*Harris v. McRae*, 448 U.S. at 322, quoting *McGowan v. Maryland*, 366 U.S. 420, 423 (1961).

³⁵*San Antonio School District v. Rodriguez*, 411 U.S. 1, 19-40 (1973).