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# THE HUMAN LIFE FEDERALISM AMENDMENT—AN ASSESSMENT

WILFRED R. CARON\*

This Article presents a legal assessment of the Human Life Federalism Amendment and considers the principal questions posed by others dedicated to the protection of the unborn. In recognition of its precise objective, the proposal shall be referred to as the "Life Amendment."

## INTRODUCTION

The Life Amendment provides:

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.<sup>1</sup>

It is at once evident that this new initiative to protect the unborn employs conceptually new means in pursuit of the traditional goal of the pro-life movement. Although the amendment must be examined with prudent circumspection, it is essential that the analytical process be one of reasoned objectivity predicated upon certain fundamental guiding principles.

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\* General Counsel, United States Catholic Conference. The author wishes to express his deep appreciation to Angelo Aiosa, Assistant General Counsel, United States Catholic Conference, for his assistance in the preparation of this article.

<sup>1</sup> S.J. Res. 110, 97th Cong., 1st Sess. (1981). The language of the Human Life Federalism Amendment recently has been revised and now provides:

A right to abortion is not secured by this Constitution. The Congress and the several States shall have concurrent power to restrict and prohibit abortion: *Provided*, That a provision of a law of a state which is more restrictive than a conflicting provision of a law of Congress shall govern.

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

## GUIDING PRINCIPLES OF THE ANALYTICAL PROCESS

*Norms for Interpretive Analysis*

The language of the Life Amendment must be assessed by those rules of interpretation which have been established by the judiciary for its own governance and the guidance of the bar. However justified or profound may be our disappointment with the results in cases like *Roe v. Wade*,<sup>2</sup> it cannot alter the need to rely upon those norms.

Statutory and constitutional provisions are a medium by which society communicates its will to its members.<sup>3</sup> As with any form of language, the potential for imprecision can affect the communication intended.<sup>4</sup> It is not possible to phrase a provision of law so perfectly that it cannot, by a process of hypercritical "philological" analysis, be construed at variance with what originally was intended.<sup>5</sup> Cognizant of these limitations of language, the courts traditionally have endeavored to interpret constitutional provisions so as to effectuate, rather than defeat, their underlying purposes.<sup>6</sup> The courts will look to the historical setting in which a constitutional provision was adopted to reveal the purpose of its framers and "search for admissible meanings of its words which, in the circumstances of its application, will effectuate those purposes."<sup>7</sup> A corollary is this: "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."<sup>8</sup>

Thus, in assessing the likely interpretation of the Life Amendment, it should be borne in mind that a tribunal will not look merely to particular words, but primarily to the manifest purpose of the amendment as evidenced by its historical context and the common understanding of what it

<sup>2</sup> 410 U.S. 113 (1973).

<sup>3</sup> 2A J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 1-2 (4th ed. 1973).

<sup>4</sup> *Id.*; see THE FEDERALIST No. 37, at 229 (J. Madison) (New American Library ed. 1961).

<sup>5</sup> *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 374 (1816) (Johnson, J., concurring).

<sup>6</sup> See *United States v. Classic*, 313 U.S. 299, 316 (1941); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531-32 (1870); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842) ("[n]o court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them").

<sup>7</sup> *United States v. Classic*, 313 U.S. 299, 317-18 (1941).

<sup>8</sup> *United States v. Sprague*, 282 U.S. 716, 731 (1931); see *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944) ("[o]rdinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written"); *Lake County v. Rollins*, 130 U.S. 662, 671 (1889) ("[t]he simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption").

is supposed to accomplish. It cannot be assumed that an antagonistic court will subvert the intended effect of the Life Amendment through arbitrary or unreasonable interpretation.

### *Objectivity and Resilience*

Until now, proposals to protect the unborn have been substantially locked in combat with the holding of *Roe v. Wade* that the unborn are not "persons" within the meaning of the fourteenth amendment. Outraged, the pro-life movement has labored vigorously to reverse this unacceptable concept and achieve explicit legal recognition of the unborn as "persons." Hence, we come to a consideration of the Life Amendment after more than 8 years of work with a different concept. It is critical that preconceptions not impair objective consideration of the merits of this innovative pro-life measure. It must be assessed in terms of its potential for protecting the unborn. We must judge it by its necessary and probable effects only; any other test would exalt form over substance and suggest a lack of resilience which can obfuscate the truth.

### *Natural Law and Human Law*

The assessment of the Life Amendment calls into consideration the relationship of positive human law to the natural law or moral order. On this profound level, the issue is jurisprudential and theological. It is natural for persons with a deep moral commitment to yearn for the convergence of the moral order and laws promulgated by society. As St. Thomas Aquinas taught, however, the proper office of human law is to serve the common good of society; that function is not coextensive with that of moral law.<sup>9</sup> In service to the common good, human positive law must take into account all relevant factors, not only the moral ideal.<sup>10</sup> This dynamic is particularly complex in a democratic and pluralistic society. The application of the relevant theological principles to the present situation presents complex and profound questions, for which a well-grounded response depends upon specialized theological knowledge. The bishops have addressed this issue and provided leadership. My purpose is not to attempt the requisite analysis, but solely to emphasize that a complete legal analysis transcends a consideration of the legal effect of the Life Amendment.

### THE *Roe v. Wade* DECISION

An analysis of the Life Amendment requires an initial consideration

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<sup>9</sup> XXVII THOMAS AQUINAS, *SUMMA THEOLOGICA* 1a-2ae, q.96, a.1.

<sup>10</sup> *Id.* at a.3.

of the relevant determinations in *Roe v. Wade*. The Court in *Roe* observed that the constitutional right of privacy had been developing since 1891.<sup>11</sup> In modern times the Court has progressively extended this right, which it grounds in the fourteenth amendment's concept of personal liberty, to freedom of personal choice in matters relating to marriage, procreation, contraception, family relationships and child rearing, and education. This right of privacy, the Court held in *Roe v. Wade*, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>12</sup>

Whether denominated a "right to abortion," or a "right of a woman to terminate her pregnancy," this new "right"<sup>13</sup> enunciated by the Court was described as qualified, rather than absolute, thereby allowing some state regulation. The Court held that in pursuance of its interests in safeguarding the health of a pregnant woman, maintaining medical standards, and eventually protecting "potential life," the state may regulate the factors that govern the abortion decision but only at points and to the extent that these interests become "sufficiently compelling."<sup>14</sup>

In the Court's view, the state's interest in protecting the health of the mother becomes "compelling" at approximately the end of the first trimester, because before that point the incidence of mortality of pregnant women caused by abortion may be less frequent than in normal childbirth.<sup>15</sup> Even at this point, however, the state's power to protect maternal health extends only to regulation of the medical aspects of such procedures (such as licensure and qualifications of persons performing abortions, and requirements respecting facilities where it is performed).<sup>16</sup>

Under *Roe v. Wade*, the state's interest in protecting the life of the unborn does not become compelling until viability, that is, the point at which the fetus is capable of living outside the womb. According to the Court, viability normally occurs after the commencement of the third trimester. At that point, the state may, if it chooses, restrict and prohibit abortion except where it is necessary, in appropriate medical judgment, to preserve "the life or health" of the pregnant woman.<sup>17</sup> Lest this power appear overly significant, it must be stressed that in the companion case

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<sup>11</sup> 410 U.S. at 152.

<sup>12</sup> *Id.* at 153.

<sup>13</sup> The term "right," as used here, is not to be understood in the same sense in which that term is used in denominating natural rights, those "which grow out of the nature of man and depend on personality, as distinguished from such as are created by law and depend upon civilized society." BLACK'S LAW DICTIONARY 1190 (5th ed. 1979). Rather, it should be understood in the positive law sense as the "power of free action." *Id.* at 1189.

<sup>14</sup> 410 U.S. at 153-54, 163-64.

<sup>15</sup> *Id.* at 163.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

of *Doe v. Bolton*,<sup>18</sup> the Court viewed the mother's health as encompassing "all factors—physical, emotional, psychological, and the woman's age—relevant to well-being."<sup>19</sup> If the *Roe v. Wade* right to abortion is not de facto absolute, it falls only slightly short.<sup>20</sup>

The Court declined to predicate its qualification of the mother's right to an abortion upon the personhood of the unborn within the meaning of the fourteenth amendment, or upon a separate theory that human life commences before birth. Regarding the former, after reviewing the uses of the word "person" in the Constitution, as well as observing that in the 19th century prevailing legal abortion practices were far freer than they were in 1973, the Court concluded that the word "person," as used in the fourteenth amendment, does not include the unborn.<sup>21</sup> Regarding the latter, the Court noted the wide divergence of medical, philosophical and theological opinion, and denied the judiciary's competence to settle the issue. Furthermore, it rejected the notion that "by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."<sup>22</sup>

In terms of its practical effects, if not precisely in its rationale, *Roe v. Wade* has enshrined abortion on demand as a constitutionally protected right. It has privatized the matter of the life and death of the unborn and almost altogether deprived society of its right to judge its welfare in this fundamental aspect of life. The root of this result is the Court's holding that a right to abortion is encompassed by the right of privacy. The Court's rulings on the matter of the personhood of the unborn and the commencement of human life served only to diminish the regulatory power of the state. Had those rulings been otherwise, the life and welfare of the mother would nevertheless have been pitted against that of the unborn in a "due process" struggle, with the outcome an open question at this time. There would have been placed in "due process" opposition, the rights of one "person" against another "person," with an ensuing balance of the interests that would inevitably require the choice of only one.

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<sup>18</sup> 410 U.S. 179 (1973).

<sup>19</sup> *Id.* at 192.

<sup>20</sup> It has been observed: "That definition and the health exception effectively negated the state's power to protect life in the womb after viability. There is not, I should suppose, a single abortion performed that cannot claim justification in terms of the emotional and psychological well-being of the person requesting the abortion." *Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (Oct. 5, 1981) (statement of Prof. John T. Noonan, Jr.).

<sup>21</sup> 410 U.S. at 157.

<sup>22</sup> *Id.* at 162.

### THE LIFE AMENDMENT

*Roe v. Wade* pressed the Constitution into the service of the termination of unborn human life. The Life Amendment will eliminate this function and place the Constitution in service to the lives of the unborn. Upon its ratification, every state and the United States will be able to deal effectively with abortion according to the will of the people, free of the constraint of a constitutional "right" which places almost no value on unborn life. It is truly a pro-life amendment.

The Life Amendment is straightforward and powerful, yet possessed of a simplicity which is essential to a proper constitutional statement. The amendment has three components:

1. The absolute and unqualified denial of the Constitution as securing or protecting any right to abortion;
2. The grant of concurrent plenary power to the Congress and the states to restrict or altogether prohibit abortions; and
3. A proviso which seeks to give supremacy to the more restrictive law in cases where both the Congress and a state exercise their power.

The analysis that follows is organized according to these components.

*"A right to abortion is not secured by this Constitution"*

The above quote from the Life Amendment is representative of effective and necessary constitutional surgery. Because *Roe v. Wade* engrafted a "right" to abortion onto the Constitution, it is essential to expunge that right not only as it springs from the rationale of *Roe v. Wade*, but absolutely. Importantly, this provision is not tied to due process clauses, or to any other constitutional provision, in its abrogation of constitutional protection for a right of abortion. By virtue of this purposeful lack of specificity, it removes the possibility for grounding a right of abortion in any provision of the Constitution.<sup>23</sup> To say that this amendment would overturn the decision of *Roe v. Wade*, that there is a constitutionally protected right of abortion, is to identify only one aspect of its broad ameliorative thrust.

#### 1. "Right to Abortion"

Some have suggested there is a flaw in the phrase "right to abortion" upon the ground that *Roe v. Wade* spoke of a "right of privacy" which

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<sup>23</sup> When he introduced the Life Amendment, Senator Orrin Hatch stated that "it should be explicit that there is no constitutionally based right to abortion emanating from any provision of the Constitution that might potentially restrict the ability of Congress or the States to legislate with respect to the subject." 127 CONG. REC. S10197 (daily ed. Sept. 21, 1981) (remarks of Sen. Hatch) (emphasis added).

encompasses the decision whether to terminate pregnancy. The point is not well taken. The phrase "right to abortion" is currently used and understood in constitutional law as referring to the right of privacy found in *Roe v. Wade*. Indeed, one respected authority reports: "This same language, or similar language (i.e., 'right to an abortion,' or 'right of abortion') has been used in eighty-four federal court decisions since *Roe v. Wade* and *Doe v. Bolton* were decided. The phrase 'right to abortion' is used as shorthand for the constitutional right created in *Roe* and its progeny. . . ."<sup>24</sup>

Clearly, the interpretive norms mentioned earlier would preclude any misunderstanding of the meaning of "right to abortion." That the purpose of this amendment is to overrule *Roe v. Wade* is so manifest that it will be indisputable. Further, to employ *Roe v. Wade* terminology which relates to "due process" would only narrow the reach of the provision which, as noted, would exercise a claim of right from the entire Constitution. Finally, if there remained any doubt of the meaning of "right to abortion," it would be conclusively dispelled by the grant of unqualified, plenary authority to the Congress and the states to prohibit abortions. That grant is entirely inconsistent with a residual constitutional right of choice in the mother which would operate to restrain the exercise of that authority.

## 2. "Abortion"

The term "abortion" must be considered from the standpoint of the subject matter which it encompasses. What constitutes an abortion? The term has been commonly used in state statutes restricting or prohibiting abortions. Indeed, it is the term utilized in the Texas statute which the Supreme Court dealt with in *Roe v. Wade*, where the Court used the word "abortion" synonymously with the phrase "termination of pregnancy."<sup>25</sup> Modern medical practice regards the commencement of pregnancy as the time of the implantation of the fertilized egg in the uterine wall.<sup>26</sup> Clearly, abortion would include the intentional termination of unborn life from at least the time of implantation. This was assumed in *Roe v. Wade*.

Because of some early judicial precedents, it has been suggested that the term "abortion" may be too readily subject to a narrow interpretation which would partially defeat the Life Amendment's purposes. Careful

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<sup>24</sup> *Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (Nov. 12, 1981) (statement of Prof. Lynn D. Wardle).

<sup>25</sup> 410 U.S. at 153-54; see J. NOONAN, *A PRIVATE CHOICE* 150 (1979).

<sup>26</sup> See AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, *OBSTETRIC-GYNECOLOGIC TERMINOLOGY* 299, 327 (1972) (definitions of conception and pregnancy respectively).



analysis, however, reveals that such a concern is not well founded. Although at early common law the term "abortion" was sometimes used to refer to the expulsion of the fetus before quickening or viability,<sup>27</sup> many courts employed the term to refer to the intentional termination of pregnancy at any time between conception and normal birth.<sup>28</sup> While both usages were recognized by legal lexicographers even into fairly modern times,<sup>29</sup> with the advent of criminal abortion statutes in the United States in the 19th century, this terminological distinction was effectively abolished, first by the state legislatures and then by the courts. In effect, when the term "abortion" was used it was done without regard to whether the act took place before or after quickening.<sup>30</sup> This modern, expanded definition of the term "abortion" is reflected in the existing statutory laws of the states. A sampling of such statutes shows that the term "abortion," when it is used in the statutes, has come to apply to the termination of pregnancy at any stage, regardless of quickening or viability.<sup>31</sup> This expanded, current use of the term is, as already noted, reflected in *Roe v. Wade*.

If doubt remained, one only would have to consider the absurd result if the term abortion were limited to the period before viability. There would continue a *Roe v. Wade* right to abortion after viability but not before, thus suggesting a policy which would reduce the protection of unborn life as fetal development advances. This is contrary to common sense, *Roe v. Wade*, and the policy of the pre-*Roe v. Wade* law which imposed more severe criminal sanctions for the destruction of fetal life

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<sup>27</sup> *Smith v. State*, 33 Me. 48, 59 (1851). The term "abortion" was sometimes refined even further to refer to expulsion during the period between the sixth week after conception and quickening of the fetus. *Id.* This terminology relates to the fact that at common law, in most jurisdictions, the commission of an abortion was not a crime unless the fetus had quickened. *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 265 (1845).

<sup>28</sup> See, e.g., *Mitchell v. Commonwealth*, 78 Ky. 204, 209-10 (1879); *State v. Cooper*, 22 N.J.L. 52, 54-58 (1849).

<sup>29</sup> See BALLENTINE'S LAW DICTIONARY 4 (3d ed. 1969); BLACK'S LAW DICTIONARY 20 (rev. 4th ed. 1968); 1 BOUVIER'S LAW DICTIONARY 88 (8th ed. 1914). But see BLACK'S LAW DICTIONARY 7 (5th ed. 1979) ("abortion" is defined simply as "the knowing destruction of the life of an unborn child or the intentional expulsion or removal of an unborn child from the womb other than for the principal purpose of producing a live birth or removing a dead fetus").

<sup>30</sup> See *State v. Reed*, 45 Ark. 333, 334 (1885); *Hall v. People*, 119 Colo. 141, 143, 201 P.2d 382, 383 (1948); *State v. Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *People v. Phelps*, 61 Hun 115, 117, 15 N.Y.S. 440, 441 (Sup. Ct. Gen. T. 3d Dep't 1891); *State v. Slagle*, 83 N.C. 544, 545 (1880).

<sup>31</sup> See, e.g., CAL. PENAL CODE § 274 (West Supp. 1981); GA. CODE ANN. § 26-1201 (1978); ILL. ANN. STAT. ch. 38, § 81-22(6) (Smith-Hurd Supp. 1980); IND. CODE ANN. § 35-1-58.5-1 [10-107] (Burns 1979); MICH. COMP. LAWS ANN. § 750.14 (1968); MISS. CODE ANN. § 97-3-3 (1972); N.Y. PENAL LAW § 125.05(2) (McKinney 1975); OHIO REV. CODE ANN. § 2919.11 (Page 1975); OKLA. STAT. ANN. tit. 21, § 861 (West Supp. 1980); TENN. CODE ANN. § 39-301 (1975).

after viability.<sup>33</sup> To the interpretive norms mentioned earlier may be added the principle that courts will void constructions which produce absurd, unjust, or unreasonable results.<sup>33</sup>

In the last analysis, the meaning of the term "abortion" (like every other), as used in the Life Amendment, will be determined according to its intended sense.<sup>34</sup> For those who require even more certainty, the solution is definitive "legislative" history.

### 3. Personhood

Some have suggested that the Life Amendment involves a compromise of principle because it does not explicitly identify the unborn as persons. That is not the case. The Life Amendment will empower Congress and the several states to provide the fullest possible protection to the unborn. It contemplates the protection which attaches to personhood as surely as if the term "person" was employed.

The Life Amendment declines to make rights dependent upon a category or classification, and goes directly to protection. When rights depend on the category of personhood, as they would in due process formulation, the rights of all persons in the category may be adjusted according to a judicial sense of human values, which could readily develop into subclasses of purposes of abortion. As noted earlier, recognition of the "personhood" of the unborn under the fourteenth amendment would have meant only that the unborn, like the mother, would be protected against deprivation of life without due process. The fourteenth amendment does not protect life absolutely, as is readily demonstrated by the sanction of the death penalty, but only assures that it will not be taken without that process which the courts consider "due." Our experience with *Roe v. Wade* and its progeny should lead us to other more reliable avenues of protection for the unborn. The Life Amendment is such an avenue.

Not only does the Life Amendment empower Congress and the several states to accord full protection to the unborn, but it calls into serious question, and perhaps negates, the *Roe v. Wade* denial of personhood for the unborn. This is not so much because of an interdependence of that holding and the right of privacy holding, but because the Life Amendment clearly and firmly negates the primacy of the mother in the conflict of rights between mother and unborn child. Indeed, it resolves the conflict for constitutional purposes and fosters the primacy of the child in all

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<sup>33</sup> See note 27 and accompanying text *supra*.

<sup>33</sup> *United States v. Wainer*, 49 F.2d 789, 791 (W.D. Pa. 1931); *Schaeffer v. Thomson*, 240 F. Supp. 247, 252 (D. Wyo. 1964); see *In re Chapman*, 166 U.S. 661, 667 (1897) (statutory provision construed).

<sup>34</sup> *United States v. Classic*, 313 U.S. 299, 317-18 (1941).

circumstances. If the Life Amendment is ratified, the manner in which the Supreme Court would rule on the "personhood" of the unborn for other purposes remains an open question. The Life Amendment provides new recognition of the unborn, a major "personhood" development. It seems wrong to fault the Life Amendment as compromising principle, and it seems even more erroneous to suggest, as some have, that it ratifies *Roe v. Wade's* denial of personhood to the unborn.

#### 4. Ancillary Effects

It is difficult to assess the ancillary effects of the Life Amendment. One respected pro-life leader points out, convincingly, that the abrogation of the right to abortion will effectively nullify those cases whose holdings were predicated upon a right to abortion.<sup>55</sup> By way of illustration, he refers to the spousal and parental consent cases.<sup>56</sup> It appears logical to assume that the excision of the right to abortion will seriously undermine the holdings of such cases.

*"The Congress and the several States shall have the concurrent power to restrict and prohibit abortions"*

In addition to denying all constitutional status to any right of abortion, the Life Amendment would confer upon the federal government (in addition to the states) a new power—"the concurrent power to restrict and prohibit abortions."

Traditionally, and by virtue of our federal system, under which the national government is one of limited delegated powers, the states have been the guardians of the health, welfare, and safety of people. This reserved power of the states, provided for in the tenth amendment, is referred to under the rubric of the police power. By conferring concurrent power on the federal government, and by reestablishing the power of the states, the Life Amendment would depart from this traditional division of powers. However, precedents are not lacking. For example, the eighteenth amendment gave Congress and the states concurrent power to enforce the prohibition of the manufacture, sale or transportation of intoxicating liquors for beverage purposes. Thus, on matters of important national policy, both levels of government may be called upon to effectuate such goals.

The Life Amendment does not, by its own terms, prohibit or declare restrictions on abortions. As a matter of national policy, it expunges any

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<sup>55</sup> *Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (Nov. 16, 1981) (statement of Prof. Victor G. Rosenblum).

<sup>56</sup> *Bellotti v. Baird* (II), 443 U.S. 622, 625 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 58 (1976).

claim of constitutional right to abortion, and, subject to other constitutional limitations (discussed below), grants Congress and the several states complete discretionary power to restrict and prohibit abortions. Each is empowered to formulate and enforce its policy according to the will of the people whom the legislators represent. Such a grant necessarily allows the possibility that abortion may not be prohibited in particular circumstances. Yet, as a matter of national policy, the Life Amendment is an unmistakable and decisive declaration for the protection of the unborn.

As noted above, since the Life Amendment is directed against abortion only, and against any claim of right thereto under the Constitution, legislation thereunder will be subject to other constitutional guarantees involving, for example, the due process and equal protection clauses of the fourteenth amendment. Illustrative of the former is the application of the so-called "due process" right of privacy to the use of contraceptives by married couples.<sup>87</sup> Any earlier provision of the Constitution which might conflict with the Life Amendment, and legislation thereunder, would be deemed limited to the extent that the policy and provisions of the Life Amendment would be controlling.<sup>88</sup> No provision of the Constitution could be invoked to dilute the plenary power granted by the Life Amendment to prohibit abortions.

With power granted to both the federal and state governments, a question immediately arises concerning the reconciliation of the exercise of power by two sovereigns in a different manner. Although the question requires consideration of the grant of the power itself, more particularly the grant of "concurrent" power, it should be discussed in the context of the final component of the amendment, namely, the proviso.

*"Provided, that a law of a State which is more restrictive than a law of Congress shall govern"*

This proviso seeks to assure that when both the federal and state governments exercise their "concurrent power," the federal law will govern except where the state law more stringently exercises the power to "restrict and prohibit" abortions. By this device, the prospect of abortion havens in particular states, which would inhere in a purely "state's rights" approach, would be curtailed by the enactment of a preemptive, minimum national standard. Although the objective of the proviso is undoubtedly sound, its actual legal effect must be examined in light of the grant of "concurrent power."

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<sup>87</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>88</sup> See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *State Bd. v. Young's Market Co.*, 299 U.S. 59, 62 (1936).

The eighteenth amendment is the only provision in the Constitution which expressly grants "concurrent power" to both the federal and state governments. As a result, the legal effect judicially accorded to that grant is relevant to an analysis of the probable legal effect of a like grant in the Life Amendment. Section 1 of the eighteenth amendment prohibited the manufacture, sale, transportation, import, or export of intoxicating liquors for beverage purposes. Section 2 provided: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

Some of the early state and lower federal court cases applying the eighteenth amendment held or suggested that if a federal and state law were in conflict, the latter would have to yield to the federal law under the federal supremacy clause in article VI of the Constitution.<sup>39</sup> Others were of the view that there could be no irreconcilable conflict between two sovereigns attempting to enforce prohibition, albeit by different means.<sup>40</sup> The matter was settled by the United States Supreme Court in favor of the latter view. Beginning with the *National Prohibition Cases*,<sup>41</sup> the Supreme Court held that the grant of concurrent enforcement power gave each sovereign equal and independent authority to enforce the national prohibition policy, and that, therefore, the statutes of both could be enforced as the will of separate sovereigns.<sup>42</sup> The federal government's enforcement power is derived from the eighteenth amendment, while that of the states is derived from the general powers reserved to them by the tenth amendment.<sup>43</sup>

As a result of these basic principles, criminal sanctions could be imposed by both sovereigns for the same transaction without violating the fifth amendment guarantee against double jeopardy;<sup>44</sup> both federal and state legislative schemes were enforceable despite significant differences. Indeed, a state law prohibiting the possession of liquor specifically licensed by federal law was sustained.<sup>45</sup> The only limitation upon both sovereignties was that neither could validate acts or transactions which violated the prohibition of the eighteenth amendment; so long as their statutes furthered its purposes, they were enforceable.

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<sup>39</sup> See, e.g., *Ex parte Ramsey*, 265 F. 950, 952-53 (S.D. Fla. 1920); *State v. Ceriani*, 96 Conn. 130, 133, 113 A. 316, 317 (1921); *Commonwealth v. Nickerson*, 236 Mass. 281, 292, 128 N.E. 273, 277 (1920).

<sup>40</sup> See, e.g., *Jones v. Hicks*, 150 Ga. 657, 657-64, 104 S.E. 771, 771-74 (1920); *State v. Gauthier*, 121 Me. 522, 525-26, 118 A. 380, 382 (1922).

<sup>41</sup> 253 U.S. 350 (1920).

<sup>42</sup> *Id.* at 387; see *United States v. Lanza*, 260 U.S. 377, 381-82 (1922).

<sup>43</sup> 260 U.S. at 381-82.

<sup>44</sup> *Hebert v. Louisiana*, 272 U.S. 312, 314 (1926).

<sup>45</sup> *McCormick & Co. v. Brown*, 286 U.S. 131, 144 (1932); see *State v. Moore*, 36 Idaho 565, 212 P. 349, 351 (1923), *aff'd*, 264 U.S. 569 (1924).

It has been suggested that the grant of "concurrent power" in the Life Amendment, without the proviso, would lead to the approach taken by the courts under the eighteenth amendment. Since that approach was tied to a particular substantive constitutional policy, and was developed in the course of construing a concurrent grant of power to enforce that policy, it is critical to examine and compare the nature of the grant in the Life Amendment.

As earlier noted, the Life Amendment does not expressly prohibit abortions or establish a lesser degree of restriction. Having substantively nullified a right to abortion under the Constitution, it liberates the states in the exercise of their reserved power under the tenth amendment to restrict and prohibit abortions. Concurrently, it grants the federal government coextensive authority. Each sovereign is vested with discretion regarding the manner in which it will exercise its authority. Thus, the parallel with the eighteenth amendment seems intact unless there is a vital distinction between a grant of concurrent power to *enforce* an express, absolute constitutional policy of prohibition (eighteenth amendment) and a grant of concurrent discretionary power both to *establish* and *enforce* basic policy (Life Amendment).

Although the Life Amendment does not contain an express prohibition of an activity, as did the eighteenth amendment, the evident thrust, and circumstances of ratification, of the Life Amendment will clearly establish an unmistakable national policy of protection of unborn life. The profound nature of that policy will be evident from the very fact that this nation will have expunged the decisional law which established a contrary policy. It is possible, therefore, that the federal judiciary would give effect to the laws of each sovereign to the fullest extent of their restrictive or prohibitory provisions, based upon an analogy to the eighteenth amendment cases. On the other hand, it also must be recognized that the concurrent power under the Life Amendment is as much a power to establish substantive policy as it is a power to enforce. Although policy decisions also were involved in the enforcement statutes under the eighteenth amendment, they involved less substantive latitude. The potential for conflict between the laws of two sovereigns under the Life Amendment may be greater, thus rendering the analogy to the eighteenth amendment less than precise.

It is the stated goal of the Life Amendment to effectuate the "more restrictive" of the federal and state enactments. That is the purpose of the proviso. It requires that when both sovereigns act, those legislative provisions which most effectively accomplish the goal of protecting the unborn will be given effect. Although the fundamental purpose of the proviso is clear, its terms leave open some questions. For example, is a statute more restrictive because it enumerates fewer categories of exceptions to its prohibition, or because, statistically, the exceptions would lead

to fewer abortions, or because of both reasons, perhaps combined with others? In determining which law shall "govern," will the entire statutory scheme of each sovereign be compared and only one survive, or will there be a selective judgment made concerning discrete, competing provisions?

The issue involves highly technical legal questions which are now under critical discussion. That is by no means cause for hesitancy in supporting the Life Amendment. The principle is there, and it will undoubtedly be effectuated to the extent that words and the lawyers' skill allow. That is not to say that there will not eventually be a need for judicial interpretation. The action of two sovereigns may lead initially to some legal questions despite the tidiness of language or principle. However, this is often a consequence of broad constitutional provisions and may be a necessary aspect of adjusting to an amendment which recognizes a need for national standards without preempting the freedom of the people in each state to adopt more stringent standards to reflect their local values. In the end, we also must trust the good will and judgment of the Congress to enact legislation which will present the fewest problems in its relationship to state laws.

#### CONCLUSION

The Life Amendment thus far has withstood expert legal comment remarkably well. It has been critically examined by the attorneys who are acknowledged leaders in the pro-life movement. Many have endorsed the Life Amendment as a sound proposal.<sup>46</sup> A few have not yet lent their support, primarily because of their longstanding commitment to a measure which would expressly denominate the unborn as persons and immediately provide for the prohibition of abortion. Their concerns, however, are apparently more philosophical than legal. The Life Amendment is a legally sound vehicle for attaining the maximum protection of the unborn.

#### SUPPLEMENTAL DISCUSSION—A RESPONSE TO SOME CRITICISMS OF THE HUMAN LIFE FEDERALISM AMENDMENT

The Life Amendment is practically assured of adoption in this Congress if it is supported by all who are devoted to the protection of the unborn. Those committed to abortion on demand correctly assess the Life Amendment as the most serious threat to constitutionalized abortion

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<sup>46</sup> Supporters of the Life Amendment include, for example, Dennis J. Horan, Esq. (Chairman, Americans United for Life Legal Defense Fund (Americans United)); Professor John T. Noonan, Jr. (University of California, Berkeley); Professor Victor G. Rosenblum (Northwestern University; Vice Chairman, Americans United); Professor Richard Stith (Valparaiso University); Professor Lynn D. Wardle (Brigham Young University).

since the Supreme Court accorded abortion constitutional recognition in *Roe v. Wade*.<sup>47</sup> Thus, the National Abortion Rights Action League (NARAL) has launched an "Emergency Campaign to Stop the Hatch Amendment" to assist it in meeting "this unprecedented threat to the right to choose abortion." Yet, there are some in the pro-life movement who counsel opposition to the Life Amendment in the belief that it will not deliver as much protection for the unborn as other measures. Such opposition, when combined with that of others, could defeat the Life Amendment. If that is to be counted as a victory for the unborn, no one has yet successfully explained why. As I shall show, no analysis has been forthcoming which adequately demonstrates a legal basis for opposing the Life Amendment.

The strictly legal concerns which have been put forward by several pro-life attorneys are few and are readily answered. They are stated in *Opposing Memoranda*<sup>48</sup> which reflect a common theme with occasional, secondary embellishments. Before proceeding to legal analysis, however, it is important to make several observations which will help to put these memoranda in perspective.

#### *Introductory Comments*

In my principal statement, I anticipated the possibility that objectivity could fall prey to 8 years of single-minded commitment to protecting the unborn through the overruling of *Roe v. Wade's* denial of their fourteenth amendment personhood. I counseled:

It is at once evident that this new initiative to protect the unborn employs conceptually new means in pursuit of the traditional goal of the pro-life movement. Although the amendment must be examined with prudent circumspection, it is essential that the analytical process be one of reasoned objectivity predicated upon certain fundamental guiding principles.

Among the principles I mentioned was adherence to established rules of interpretation which teach the importance of context and the lawmaker's intent. The *Opposing Memoranda* do not deny the validity of these principles, but neither do they follow them.

The *Opposing Memoranda* indulge in hypercritical philological anal-

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<sup>47</sup> 410 U.S. 113 (1973).

<sup>48</sup> J. Baker, *The Hatch Amendment—A Legal Analysis* (1982) [hereinafter cited as Baker Memo]; R. Byrn, *Memorandum In Opposition to S.J. Res. 110* [hereinafter cited as Byrn Memo]; Rice, *The Hatch Amendment is not the Answer*, *Wanderer*, November 26, 1981 at 6, col. 3 [hereinafter cited as Rice Memo]; Rice, *Supportive Memo on Hatch Amendment Reveals Glaring Deficiencies in SJR 110*, *Wanderer*, January 7, 1982, at 4, col. 5 [hereinafter cited as Rice Memo II]; J. Witherspoon, *Constitutional Protection of Unborn Children: An Examination of the "Hatch Amendment"* (1982) [hereinafter cited as Witherspoon Memo].



ysis which has led to an erroneous portrayal of the Life Amendment. Regarding objectivity, it is difficult to consider the Opposing Memoranda as genuine efforts intended to give the Life Amendment its due. This is evident not only from the hypercriticism already mentioned, but from other characteristics as well. Thus, the Opposing Memoranda are essentially adversarial in tone; they do not fully respond to the points made in my principal statement; and one or more of them engages in such polemical excesses as inflammatory language,<sup>49</sup> distortions of my earlier discussion, and affronts to the bishops.<sup>50</sup> These are not the hallmarks of reasoned objectivity.

As for the theological underpinnings of the bishops' support of the Life Amendment, the Opposing Memoranda appear to claim a greater competence and a higher authority. Indeed, one lawyer assumed the role of moral theologian and surprisingly opined that a return to the pre-*Roe v. Wade* state's rights situation would be morally preferable to supporting the Life Amendment. He then accused the bishops of "a betrayal of the unborn child and of their sacred trust as moral leaders."<sup>51</sup> Obviously, it is the lawyer's job to present critical legal analysis. However, it overtaxes the law degree to put it in service of claims to a philosophical and theological competence so impeccable as to justify such judgments.

The difficult question of whether to support the Life Amendment, or indeed *any* measure to protect the unborn, involves not only legal questions, but others even more profound. The point recently has been cogently expressed by Rev. John G. Johnson, Chief Judge of the Court of the Diocese of Columbus, Ohio:

The abortion issue is a concatenation of several interlocking but distinct questions, each of which should be answered within the context of its own field of study. Among others, there are questions of biology, questions of philosophy, questions of morality, questions of jurisprudence and questions of public policy. Failing to distinguish these questions can result—must result—in muddled thinking. Failing to advert to the proper data and methods for answering each question can only lead to irresponsible conclusions.<sup>52</sup>

A disciplined adherence to this truth is essential. The opinions of lawyers

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<sup>49</sup> See, e.g., Byrn Memo, *supra* note 48, at 4. Byrn charges the Life Amendment with treating the unborn as "rightless things" comparable to "snail darters" and "whales." *Id.* Similarly, Witherspoon compares the treatment to that of "things," "chattels" and "slaves." See Witherspoon Memo, *supra* note 48, at 4.

<sup>50</sup> See, e.g., Rice Memo, *supra* note 48, at 6. Rice accuses the bishops of supporting a measure (the Life Amendment) which legitimatizes "legalized abortion" and which "is at war with the authentic teachings of the Catholic Church." *Id.*

<sup>51</sup> Rice Memo II, *supra* note 48, at 7.

<sup>52</sup> Johnson, *The Dynamics of the Abortion Debate*, 146 AMERICA, 106, 106, (Feb. 1982).

respecting matters other than law are entitled to no special weight.

*Legal Discussion: A Right to Abortion is Not Secured by this Constitution*

Reduced to their essence, the Opposing Memoranda are predicated upon these two major assertions:

1. The Life Amendment will not defeat the right to terminate pregnancy established in *Roe v. Wade* under the mantle of the right to privacy, particularly in cases involving the health of the mother.
2. The Life Amendment affirmatively incorporates into the Constitution *Roe v. Wade's* holding that the unborn are not "persons" within the meaning of the fourteenth amendment.

From these erroneous premises, certain consequences are said to flow.

The phrase "right to abortion" is attacked as an ineffective phrase because (a) *Roe v. Wade* does not literally employ it, (b) what is really at issue is the woman's qualified "right of privacy" and the state's interest in protecting fetal life, and (c) a woman's right to abortion may also be grounded in her constitutional right to be protected in her health. Because I treated these points in my principal statement, I will hold this discussion to bounds appropriate to a supplement.

The term "right to abortion" is judicially understood as referring to the right to terminate pregnancy which *Roe v. Wade* found was encompassed in the fourteenth amendment right of privacy. To put the point to rest, hopefully once and for all, I refer to the Supreme Court's own characterization of the right it recognized in *Roe v. Wade*:

In *Roe* we held that Tex. Penal Code, Art. 1196, which permitted termination of pregnancy at any stage only to save the life of the expectant mother, unconstitutionally restricted a woman's right to an abortion. . . . [O]ur opinion recognized only her right to an abortion under those circumstances.<sup>53</sup>

Objections to the efficacy of the phrase "right to abortion" are not only niggling—they do not accept language already employed by the Court whose interpretive authority over the Life Amendment will be final. This disposes of specifications (a) and (b) above.

As for specification (c), it is sufficient response to insist that due effect be given to the entirety of the first sentence of the Life Amendment: "A right to abortion is not secured by *this Constitution*." The Life Amendment does not merely expunge a right to abortion only as it may arise on a particular theory, or claim its roots in a particular constitutional provision. Rather, it denies any constitutional predicate or roots for

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<sup>53</sup> Connecticut v. Menillo, 423 U.S. 9, 10 (1975).

an asserted right to abortion. As I said in my principal statement:

Because *Roe v. Wade* engrafted a "right" to abortion onto the Constitution, it is essential to expunge that right not only as it springs from the rationale of *Roe v. Wade*, but absolutely. Importantly, this provision is not tied to due process clauses, or to any other constitutional provision, in its abrogation of constitutional protection for a right of abortion. By virtue of this purposeful lack of specificity, it removes the possibility for grounding a right of abortion in any provision of the Constitution. To say that this amendment would overturn the decision of *Roe v. Wade*, that there is a constitutionally protected right of abortion, is to identify only one aspect of its broad ameliorative thrust.

The Opposing Memoranda do not confront this point. Rather, they explore constitutional possibilities as though the Life Amendment were not as thoroughly purgative as it is.

The only reasonable interpretation to which the first sentence of the Life Amendment is susceptible is the one stated above. That is so as a matter not only of its precise language, but also as a matter of its historical antecedents and the Life Amendment's grant of plenary authority to Congress and the states "to restrict *and* prohibit abortion." Plainly, a woman is explicitly denied special constitutional prerogatives which can be cited to defeat legislative enactments restricting or prohibiting abortion. The suggestion that such legislation could be held unconstitutional as an infringement upon her constitutionally protected "right to health"<sup>54</sup> is devoid of merit because it fails to recognize the broad sweep of the Life Amendment. It also overlooks the fact that the right to abortion enunciated in *Roe v. Wade* was grounded, at least in part, in the pregnant woman's interest in her own health.<sup>55</sup>

#### 1. "Nonpersonhood" of the Unborn

In the Life Amendment, neither the absolute purgation of the right to abortion nor the conferral of legislative power to restrict and prohibit abortion is a function of a particular status except that of being unborn. The unborn are to be protected irrespective of the outcome of legalistic, philosophical, or other debates over whether and when the unborn are persons or human beings. In short, the Life Amendment gets down to cases and avoids the debate which to date has frustrated effective legislation. Before addressing the particular criticism contained in the Opposing Memoranda, it will be useful to comment on the exaggerated importance which has been attributed to *Roe v. Wade's* holding that the unborn are not persons under the fourteenth amendment.

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<sup>54</sup> Byrn Memo, *supra* note 48, at 6-9.

<sup>55</sup> *Connecticut v. Menillo*, 423 U.S. 9, 10 (1975); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

As I observed in my principal statement, the fourteenth amendment does not guarantee life, but rather that a person shall not be deprived of life without due process of law. Capital punishment survives that test in principle.<sup>66</sup> In the unique situation of pregnancy, recognition of the personhood of both mother and child would perforce lead to a choice of one over the other when abortion is at issue. Constitutional experience teaches that the ensuing balancing of interests would provide no certain security for the unborn despite the badge of personhood. Indeed, even before *Roe v. Wade's* personhood holding, state enactments governing abortion were not considered violative of the fourteenth amendment although they permitted abortion in order to save the life of the mother as well as for less vital reasons related to her well-being. It seems certain that before *Roe v. Wade*, knowledgeable constitutional lawyers would have conceded the shortcomings of "due process" personhood for the unborn.<sup>67</sup> Yet, because of some dicta in *Roe v. Wade*, the authors of the Opposing Memoranda now perceive personhood as a secure haven.

In *Roe v. Wade*, Justice Blackmun said that if the unborn were a person under the fourteenth amendment, "the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment."<sup>68</sup> This language has been substituted by some for constitutional principle and analysis. It is held out as a guarantee that personhood and protection come hand in hand. They do not! In the context of the case, the real significance of this robust but imprecise utterance is very much in doubt. First, it is merely dictum<sup>69</sup> and consequently does not constitute precedent in the binding sense of *stare decisis*.<sup>70</sup> Second,

<sup>66</sup> *Gregg v. Georgia*, 428 U.S. 153, 177 (1976).

<sup>67</sup> See, e.g., UNIF. ABORTION ACT § 2, 9 U.L.A. 1 (1971) (superseded in 1973 by the Revised Uniform Abortion Act, which was withdrawn in 1979). The Act, drafted and approved by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1972, is set forth in a footnote in *Roe v. Wade*, 410 U.S. at 146 n.40. The Act, as approved in 1971, allows abortion during the first 20 weeks of pregnancy in cases of endangerment to the life or health of the mother, grave physical or mental defect of the fetus, and rape (including illicit intercourse with a girl under 16 years of age) or incest.

<sup>68</sup> *Roe v. Wade*, 410 U.S. 113, 156-57, 157 n.54 (1973).

<sup>69</sup> Statements in a court's opinion which go beyond the narrow question stated and decided by the court, and which are not necessary to the court's decision, are regarded as "dicta." *Technograph Printed Circuits, Ltd. v. Packard Bell Elecs. Corp.*, 290 F. Supp. 308, 317 (C.D. Cal. 1968).

<sup>70</sup> Lower courts, federal and state, are bound to follow precedents of the United States Supreme Court. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). However, it is well settled that neither the Supreme Court nor inferior courts are bound under the principle of *stare decisis* to follow dicta from previous opinions of the Court. *Williams v. United States*, 289 U.S. 553, 568 (1933); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 398 (1921); *Cameron v. Mullen*, 387 F.2d 193, 197 (D.C. Cir. 1967).

its character as judicial rhetoric supplies no meaningful guidance as to the choices the Court would make in resolving the due process issues when the interests of mother, child, and state compete, especially considering the numerous combinations and permutations of those interests. The prospects for the unborn would probably be nil in cases where the mother's life (personhood) is at risk, with the degree of acceptable risk now an entirely open question. The prospects are no more certain where the health of the mother is involved, interpreted by the courts to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."<sup>61</sup> Although it may be assumed that due process personhood for the unborn would diminish the effect of the mother's "health" on her right to abortion, the extent of that effect is also an open question. Third, to depend entirely upon due process personhood for the protection of the unborn leaves them fully in jeopardy where purely private (mother and physician) action is involved.<sup>62</sup> To the extent abortions would not be prohibited by the state, they would be unimpeded by the fourteenth amendment personhood of the unborn.

At this juncture, it is useful to compare the protection of the unborn under the Life Amendment with that under their assumed fourteenth amendment personhood without the Life Amendment. In either case, the protection of the unborn depends upon the enactment of legislation. Second, under the Life Amendment the legislative power to protect the unborn is plenary and complete, unimpeded by a constitutionally protected right to abortion. As noted above, mere fourteenth amendment personhood would not yield nearly so salutary or predictable a result. Third, under the Life Amendment the power to protect the unborn extends both to private as well as state action, whereas the uncertain protection provided by fourteenth amendment personhood falls far short.

The authors of the Opposing Memoranda are so immersed in years of personhood disputation they do not see that the badge of personhood is neither necessary nor fully efficacious in the protection of the unborn. They castigate the Life Amendment for declining to make protection of the unborn dependent upon the shifting sands of due process personhood. More to the point, however, they wrongly accuse the Life Amendment of endorsing the *Roe v. Wade* conclusion that the unborn are not persons under the fourteenth amendment. Indeed, it is asserted that the Life Amendment would formally incorporate that proposition into the Constitution.

This criticism of the Life Amendment is unreasonable. Certainly the language of the Life Amendment does not support the charge. As noted,

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<sup>61</sup> *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

<sup>62</sup> See generally *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

the Life Amendment does not explicitly ratify, nullify, or address the *Roe v. Wade* personhood holding. Does it do so implicitly? Certainly not! Indeed, as I observed in my principal statement:

Not only does the Life Amendment empower Congress and the several states to accord full protection to the unborn, but it calls into serious question, and perhaps negates, the *Roe v. Wade* denial of personhood for the unborn. This is not so much because of an interdependence of that holding and the right of privacy holding, but because the Life Amendment clearly and firmly negates the primacy of the mother in the conflict of rights between mother and unborn child. Indeed, it resolves the conflict for constitutional purposes and fosters the primacy of the child in all circumstances. If the Life Amendment is ratified, the manner in which the Supreme Court would rule on the "personhood" of the unborn for other purposes remains an open question. The Life Amendment provides new recognition of the unborn, a major "personhood" development. It seems wrong to fault the Life Amendment as compromising principle, and it seems even more erroneous to suggest, as some have, that it ratifies *Roe v. Wade's* denial of personhood to the unborn.

I stand firmly on this statement, and the Opposing Memoranda have offered no persuasive rebuttal.

The only discernible attempt to support the charge by analysis is found in the contention that the unborn are treated as nonpersons because the Life Amendment leaves their protection to the legislative branch. The fallacy of this view is self-evident in light of the vast reservoir of power vested in government which can declare lives forfeited when the common good and public order require. My precise point is that we do not cease to be persons because we are subject to law. The law recognizes defenses to the crime of homicide, but it does not condone the homicide. The law imposes the death penalty for serious crime, but does not deny the personhood of the prisoner.

In short, it is fundamental error to assert that the Life Amendment treats the unborn as "nonpersons," or "rightless things," or "snail-darters," or "whales"<sup>63</sup> because it entrusts their care to the legislative branch. Such a view is not only conceptually unsound and logically indefensible, but it literally ignores the Life Amendment's denial of constitutional status to the right of abortion which has robbed the unborn of their rights since *Roe v. Wade*. As already noted, if the Life Amendment has any effect on the fourteenth amendment personhood of the unborn it will be to support it. Finally, I have already demonstrated that due process personhood does not affirmatively protect the unborn, but only restricts state action. By the logic of the Opposing Memoranda, under the due process clause the unborn are also nonpersons because their protection is likewise

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<sup>63</sup> See note 49 *supra*.

left to legislation.

Because it is clear that the Life Amendment does not explicitly or implicitly adopt the *Roe v. Wade* personhood holding, the adverse consequences envisioned by the Opposing Memoranda are moot. Thus, the Life Amendment would not preclude the Supreme Court from reconsidering its personhood holding in *Roe v. Wade* either through confrontation with a personhood statute or by reason of other advocacy.

To conclude, the focus of the Opposing Memoranda is on the Constitution. It must be recalled, however, that under the Life Amendment, *Roe v. Wade* will not nullify the power of each state to declare the personhood of the unborn either legislatively or constitutionally. Whatever may be said of the status and utility of personhood for the unborn under the federal Constitution, it should be clear that personhood under state law would be alive and well.

## 2. The Meaning of "Abortion"

In their resolve to fault the Life Amendment, the Opposing Memoranda also question the efficacy of the term "abortion" as applied to fetal experimentation, and the destruction of unborn life before implantation or in connection with *in vitro* fertilization. Without at all wishing to deny the importance of this subject matter, it must be acknowledged that it constitutes a relatively small segment of the abortion problem.

Before addressing these issues, I would refer to the treatment of the term "abortion" in my principal statement, which has been distorted by two of the Opposing Memoranda.<sup>64</sup> Because medical practice may consider that pregnancy commences with implantation, I noted in passing that "abortion would include the intentional termination of unborn life from *at least* the time of implantation." I observed, however, that the legal usage of the term expanded after the early common law, and that "many Courts employed the term to refer to the intentional termination of pregnancy *at any time between conception and normal birth*." I observed further that modern abortion statutes employ the term abortion in this expanded sense, as did the Texas statute in *Roe v. Wade*, and concluded the discussion with this statement: "In the last analysis, the meaning of the term 'abortion' (like every other), as used in the Life Amendment, will be determined according to its intended sense. For those who require even more certainty, the solution is definitive "'legislative' history."

The foregoing notwithstanding, John S. Baker has remarked: "Legal counsel for the Catholic Bishops is apparently prepared to stipulate that

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<sup>64</sup> Baker Memo, *supra* note 48, at 13-14; Rice Memo II, *supra* note 48, at 4.

pregnancy does *not* begin at conception.”<sup>65</sup> With similar license, another commentator charges that I consider it the “intent and effect of the Hatch Amendment” to limit the restriction and prohibition of abortion to “post-implantation termination of pregnancy.”<sup>66</sup> Misleading remarks such as these ignore or overlook the entirety of my discussion. They are especially regretted because they come from the academic community.

### 3. Fetal Experimentation

The Opposing Memoranda suggest that the Life Amendment would not authorize legislation dealing with such matters as fetal experimentation and *in vitro* fertilization. The term “abortion” used in the Life Amendment is broad enough to encompass legislation designed to protect unborn human life in all circumstances and stages of development. The Supreme Court itself used the term very broadly to refer to extraction of the unborn at any time before normal childbirth.<sup>67</sup> As already noted, the accepted legal sense has expanded. For example, *Black’s Law Dictionary* defines “abortion” simply as “[t]he knowing destruction of the life of an unborn child or the intentional expulsion or removal of an unborn child from the womb other than for the principal purpose of producing a live birth or removing a dead fetus.”<sup>68</sup> The expanded legal applications, together with the Amendment’s broad ameliorative sweep, would seem to assure that any destruction or removal of a fertilized ovum would come within the reach of possible legislation where the intent is other than to produce a live birth.

It must be kept in mind that the first sentence of the Life Amendment would remove all constitutional protection from any purported right to abortion. Once this is accomplished, legislation restricting or prohibiting abortion would no longer be impinging upon a fundamental constitutional right. Congress or any state could enact any legislation which is rationally related to its constitutionally recognized interest in restricting and prohibiting abortion. It is unlikely under this regimen that legislation prohibiting removal of a fertilized ovum at any stage of development could be invalidated.

By reasonable extension, the destruction of ova fertilized outside the womb would be equally subject to legislative control. It would be absurd to argue that because fertilization had taken place outside the womb the matter had been placed beyond legislative power to protect human life.

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<sup>65</sup> Baker Memo, *supra* note 48, at 13.

<sup>66</sup> Rice Memo II, *supra* note 48, at 4.

<sup>67</sup> *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); J. NOONAN, *supra* note 25, at 150.

<sup>68</sup> BLACK’S LAW DICTIONARY 7 (rev. 5th ed. 1979).



*Summary Remarks*

There is no valid legal objection to the Life Amendment, at least none that I have been able to find or that the Opposing Memoranda have been able to support. What emerges is essentially a dispute concerning what is morally required, based in part upon conflicting legal analyses. Thus, the problem is that lawyers enter realms for which they have no special professional competence, namely, the political, philosophical, and theological. What emerges with equal clarity is that the Opposing Memoranda directly or indirectly advance the cause of other legislative initiatives. The Opposing Memoranda are not objective legal analyses of the Life Amendment, my principal statement, or the supportive statements given by many outstanding lawyers in the leadership of the pro-life ranks.<sup>69</sup>

We are at a crossroads. Those who support the Life Amendment, including the bishops, are fully committed to the protection of the unborn and a solution to the problem and evil of abortion. They view the Life Amendment as "an achievable solution to the present situation of abortion on demand."<sup>70</sup> They do not believe that in the present or foreseeable climate of opinion an absolute constitutional prohibition of abortion is achievable.

These are the true parameters of the dialogue between the critics of the Life Amendment and its supporters. Purported legal criticisms of that amendment which focus on the matter of personhood should be viewed as nothing less than the expression of a differing point of view on a question of policy grounded in moral considerations. It is not within the scope of this paper to deal with the complex political, philosophical, and theological assessments which underlie the decision of the bishops to endorse the Life Amendment. Suffice it to say that those who attack the Life Amendment on these grounds dispute the collective expertise, wisdom, and authority of the hierarchy of the Catholic Church in the United States and the judgment of persons of good will who are associated with other religions.

I am left with a deep concern for those devoted to the protection of the unborn, for whom the legal debate must surely be a source of anguished disquiet. Nonlawyers cannot judge whether a legal argument has validity in the law, although they can surely discern where logic and common sense lie. The difficulty is that logic and law are not always synonymous, law being an art which depends only partly on logic for its re-

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<sup>69</sup> See note 46 *supra*.

<sup>70</sup> *Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 1st Sess. (Nov. 5, 1981) (statement of Archbishop John Roach), reprinted in 11 *ORIGINS* 357, 357-59 (Nov. 19, 1981).

sults. In the end, we must encourage Catholics who are torn by the legal debate to place their confidence where faith leads them. If they have faith in the intelligence and moral commitment of the bishops, then they will accept their judgment and leadership. If not, they will follow a different leadership.