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Congressional Testimony:

Regan on Abortion

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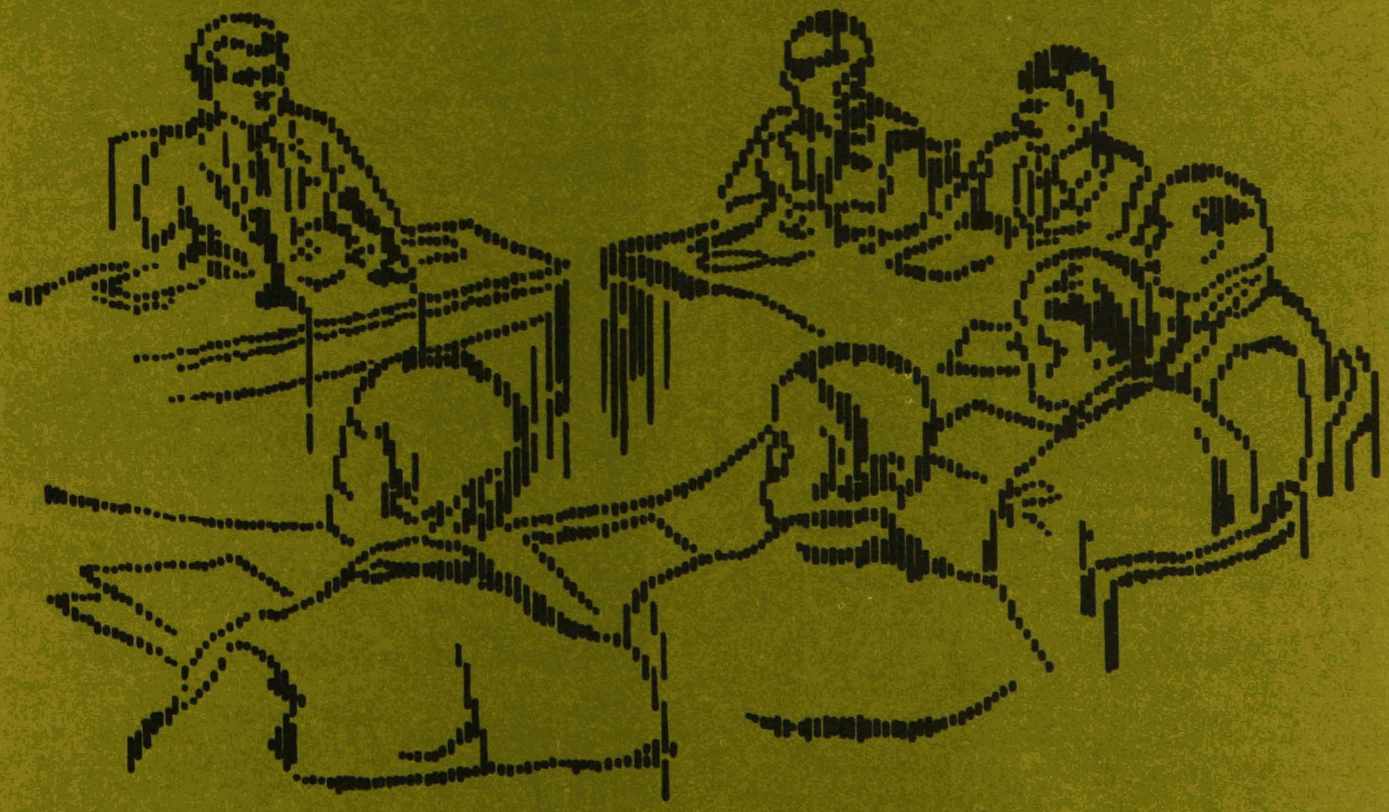


Constitutional Amendments on Abortion

Statement of
Donald Regan,
Professor of Law, The University of Michigan

Before the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Orrin Hatch, Chairman, November 17, 1981.

Editor's Note: *This excerpt from Professor Regan's testimony questions the theoretical advisability of amending the Constitution to restrict or prohibit abortion.*

This committee is considering proposed amendments to the Constitution. No one should vote for a constitutional amendment at any stage of the process as a matter of mere political expediency.

The question of whether to amend the Constitution should be treated as a matter of the highest principle. Granting that, how does one look for a principled answer to the question, "What should the Constitution say about abortion?" One possible approach is to consider the abstract question, "What would an ideal Constitution for an ideal State say about abortion?"

I am sure many witnesses before this committee, speaking on both sides of the issue, have taken essentially that approach. If I followed them in this, I would produce moral and philosophical arguments that a fetus should not be regarded as a person and that a woman should not be made to bear a child she does not want. If I did this, I would only repeat what you have heard before.

There is another way to approach the problem, which is in some respects a better way. You should be asking, "What legal position on abortion coheres best with the general spirit of our laws?" Our laws are a rich fabric, and they reveal more than any philosophical argument about what our values really are.

I believe that laws forbidding abortion are inconsistent with the general spirit of our legal system. Fundamental principles of American law, principles recognized in the common law and statutes as well as in parts of the Constitution that no one suggests should be amended, argue strongly that we should not prohibit abortion.

It is true that we are contemplating changing our laws if we amend the Constitution; but, still, what is being contemplated is a change in one part of our laws. We do not wish to change them all, all at once, nor could we do so. We should therefore be certain before we make a change that what we propose to add is consistent in spirit with what we already have and are satisfied with. The proposed amendments on abortion fail that test.

The first issue that arises, on my approach as on a standard approach, is whether the fetus is to be regarded as a person. In my view, a general consideration of our laws does not compel an answer to this question either way. I shall therefore concede for purposes of the following argument that it is permissible to regard the fetus as a person.

I suggest that, even so, laws prohibiting abortion are inconsistent with the basic tenets of our legal culture. The reason, simply stated, is this: It is a deeply rooted principle of our law that, in general, one individual should not be legally compelled to provide aid to another individual. For example, a Pennsylvania court recently held that a man could not be compelled to give bone marrow to be transplanted into his dying cousin, even though the operation involved little risk, even though healthy bone marrow regenerates, and even though there was no other source of aid.

We value highly the freedom to choose one's associations and responsibilities. We do not believe that one individual should be compelled to serve another. Forbidding abortion is tantamount to compelling a pregnant woman to serve the fetus—to give aid and to give aid of a specially personal, invasive, and burdensome sort. Unless there is some reason to set aside the general principle I have referred to, abortion should not be forbidden.

There are a number of possible objections to this argument. It might be said, "Abortion is not a mere refusal to aid; it is an active killing." It might said, "Surely it is not a fundamental principle of our law that individuals may ignore others in their need and, if it is a principle of our law, it is time we changed it." It might be said, "We make exceptions to the principle of not compelling aid. Surely laws against abortion would fall under some such exception." These objections are mistaken. I shall do what I can in the limited time available to explain why.

The most troublesome objection is the claim that abortion is not a mere refusal to aid but an active killing. We normally discuss problems about giving aid in terms of acts and omissions. That is the way lawyers talk about the problems. It is omissions that we normally decline to punish. Securing an abortion seems active and therefore seems to fall on the wrong side of the traditional distinction for my purposes.

The truth, however, is not that abortion falls on the wrong side of the traditional distinction; the truth is that abortion does not fit comfortably on either side. In some respects, to be sure, abortion looks like an act, but in other respects it is quite unlike the standard act which we forbid.

In the standard case, when we forbid an act against a victim—murder, for example—we are forbidding an invasion of the victim's life from outside. The victim's interests could be completely protected by removing the would-be actor from the scene entirely. The victim makes no claim on the actor except that the actor go away. That is not true in the abortion context. We cannot serve the fetus's interests by removing the woman from the scene. The fetus needs the woman. The fetus makes a positive claim and a substantial claim on the woman. The issue is whether the woman should be free to reject the fetus's claim.

In its basic structure then, the abortion situation is most like cases—the bone marrow case, for example—where the issue is whether aid must be provided and where a refusal to aid is a standard omission. The central issue is whether the woman may reject the fetus's positive claim. That issue is much more basic than whether, because of the special features of the case, the woman's refusal to aid must be accomplished by seemingly active methods.

That brings us to the second question—whether our law embodies a principle allowing one to refuse aid and, if it

does, whether we should change it. There are a wide range of cases in which our laws impose essentially trivial duties of aid—for example, a duty to call a doctor for someone who is injured. In fact, even cases involving these trivial duties are clearly treated by courts as exceptions to a general principle that no aid is required.

If I had time, I would argue at length that the pregnant woman has done less to make herself an appropriate subject for a duty to aid than any of the other individuals on whom we are willing to impose these trivial duties. But the first point which should be emphasized is that in no other case do we impose duties of aid which involve a physical invasion and physical burdens like those of pregnancy.

I have already mentioned the only decided "duty to aid" case which at all resembles the abortion case in this respect—the case which held that a man could not be compelled to give bone marrow to be transplanted into his dying cousin. The burden that was too great to impose on that man was much less than the burdens of a normal pregnancy.

We must not close our eyes to the fact that pregnancy is invasive. It alters the entire functioning of a woman's body. And it is burdensome. It involves substantial pain, discomfort, and disability spread over many months. Further, many aspects of our jurisprudence, from the disappearance of state-imposed corporal punishment to judicial scruples about organ donation by incompetent persons, show that the imposition of physical invasion and physical pain are specially disfavored.

It is true that some women accept the burdens of pregnancy willingly, even joyfully, if they want the child they are carrying, but the proper measure of the burdens for our purposes is how they appear to women who do not want the child. The issue is what we may impose on them.

If we want to consider cases involving burdens genuinely comparable to the burdens of pregnancy, we must consider hypothetical cases. Would any court punish a parent for not running into a burning building to rescue his child? I think not. Would any court order a parent to donate a kidney to his child? No. Even though these hypothetical cases involve people who intentionally became parents of living children—in some respects the people most appropriately compelled to give aid—I submit that no court would find a duty in these cases. It follows that a pregnant woman should have no duty to remain pregnant.

Let me say a few words on a topic I have already mentioned, the range of recognized exceptions to the principle that there is no duty to aid. We impose some duties of aid on lifeguards and innkeepers, on parents and social hosts, on people who voluntarily begin a process of rescue, and on people who innocently cause accidents to others. Why not on pregnant women?

All I can do, given the limitations of time, is to sum up in a series of negative propositions the facts that distinguish the pregnant woman from all others on whom we impose duties to aid. In the standard case of a woman who wants an abortion, the woman has not made any contract to give aid. She has not engaged in an economic enterprise involving the provision of services. She has not invited the formation of a relationship with the particular fetus inside her or indeed with any fetus at all. She has not acted in such a way as to discourage or deflect anyone else who could give the required aid. She has not volunteered aid to the fetus. She has not incurred a duty by barging into the fetus's life and damaging the prospects it enjoyed before her intervention. In short, none of the usual reasons for requiring aid apply.

It may seem that at least one of the standard reasons does apply. It may seem that any woman who voluntarily has sex, even if she uses the best available contraceptive measures, knows there is a chance she will become pregnant and may therefore be held to have assumed the risk that she will be required to aid a fetus.

Is not this "assumption of risk" argument essentially the basis on which we impose a duty to aid on innkeepers, for example? The innkeeper wants healthy guests, not sick ones, as the woman wants to have sex but not to get pregnant. But the innkeeper runs the risk of receiving a sick guest and suffering added responsibility, as the woman runs the risk of getting pregnant and being made to carry the fetus to term.

There are a number of points to be made here. The "assumption of risk" argument provides *no basis at all* for forbidding abortion in pregnancies resulting from rape. More broadly, it is not the general tendency of our law to hold people responsible for all the risks they can possibly foresee, however small. Strict liability has a place in our law but hardly any place at present when the result would be to impose substantial costs on individuals.

That brings us to the crucial point: there may be cases where we are willing to say that one has a duty to aid because he has assumed the risk, but in no other case do we impose burdens remotely approaching the burdens of pregnancy on such a slender basis as that. We speak easily of the innkeeper's duty to aid, but it would never occur to us to require an innkeeper to donate a kidney, say, to a guest in need.

It may seem that I have somehow forgotten the central point, which is that if the fetus is regarded as a person, then there is a person's life at stake. I have not forgotten that. One of the lessons of my argument is precisely that to say there is a life at stake is not to settle the issue. We have other values besides the preservation of life, and the other values sometimes prevail over the value of life.

There are many cases, having nothing to do with abortion, where we allow refusals to aid even though life is at stake. In such cases, the value of life is outweighed, and it is outweighed by precisely the same values that support a woman's right to choose abortion.

I turn now to the last point in my written statement. I have argued that it is inconsistent with the general spirit of our laws to forbid abortion. To forbid abortion is to impose on the pregnant woman burdens of a sort we impose on no one else.

If that is correct, then the injustice of forbidding abortion is exacerbated by the fact that it is women who suffer. Women as a class have suffered from much discrimination, both private and public. We should not add new discrimination. Further, no one chooses his or her sex. We should be, and in general we are, particularly reluctant to impose burdens on a class defined by a characteristic over which individuals have no control.

In sum, to forbid abortion is to compel women to give aid to other individuals at substantial cost to themselves in a manner at odds with the general tenor of our laws. It is wrong to impose special disadvantages on any class, and it is especially wrong when the victims are a class such as women.

The force of this argument cannot be avoided by saying that we reject the general principle that one is entitled to refuse aid and that the proposed constitutional amendments before this subcommittee represent first steps towards a better legal order.

First of all, even most opponents of abortion would not reject the basic principle that one may refuse aid in cases such as those raising the possibility of compelled organ donation.

Second, there is no evidence at all that the movement to forbid abortion is the first step in a movement to impose greater duties of aid generally.

Third, and most important, even if we were inclined to impose greater duties of aid, starting by forbidding abortion is starting at the wrong end. The pregnant woman has done much less to invite the imposition of a duty to aid than

many others on whom we currently impose no duties at all. The burdens that we would impose on her are vastly more objectionable than any we impose in other contexts.

I think it is also appropriate to remind the subcommittee at this point that, although I have been assuming the fetus may be treated as a person, the status of the fetus is highly controversial, and that controversy further argues against starting with a prohibition on abortion. Even if we are inclined to make enormous changes in the areas of law I have discussed—and I do not believe we are—prohibiting abortion is not the way to start.

Editor's Note: *After testifying on the inadvisability of any constitutional amendment prohibiting abortion, Professor Regan went on to comment on each of the proposals that were before the subcommittee. One of them, the Hatch proposal, has since been voted out of subcommittee and approved by the full Senate Judiciary Committee. It now will go to the Senate floor. It will have to be approved there and in the House by a two-thirds majority, as well as be ratified by three-quarters of the states to become part of the Constitution.*

The portion of Professor Regan's testimony which concerns this specific proposal and responses by Senator Hatch are given here. The wording of the proposed amendment, S.J. Res. 110, is: "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 the law of a State which is more restrictive than a law of Congress shall govern."

Mr. Regan: The Hatch proposal represents an unprecedented invitation to Congress to enter areas of family law and ordinary criminal law. Our whole history presupposes that Congress should leave these areas alone. If we must act, then what we should do is simply return the matter to the States. I am interested to note that that is how Senator Hatch describes his proposal, although the proposal as written does a bit more.

Senator Hatch: Actually, that is not correct. It does absolutely nothing. All it does is give the option. I might mention, and it is speculation on my part, . . . that the likely congressional action would probably be to do away with federal funding of abortions. But there will certainly be an effort by those who are anti-abortion to enact a very stringent federal law, as there will always be by those on the other side as well to not have a stringent law.

Mr. Regan: I am not denying that, Senator, but I believe you have characterized your amendment as essentially doing nothing but reversing *Roe v. Wade* and putting the matter back under State jurisdiction.

Senator Hatch: No. I make it very clear that the Congress can act on this matter.

Mr. Regan: What I mean is that I believe in your original statement—the statement you read us earlier this morning—you characterized your proposal that way, and you now agree with me that you do in fact create a brand new congressional power under your proposal.

Senator Hatch: No. We create what existed previously, prior to *Roe* and *Doe*. Frankly, I do not find that a very difficult position to be in. I do not mean to interrupt you, but I just want to correct that one point.

We have filed a new Criminal Code. It is going to be passed out of the committee within the next week or so. That Code opens up all kinds of areas that heretofore have not been considered, and we codified certain areas which have. There is nothing in the law that says Congress has no right to do that or should not have the right to do it. It comes down to a question of philosophy whether Congress should or should not have the right to pass stringent or non-stringent abortion laws.

All my amendment does, in my opinion, should it be passed by two-thirds of the Congress and be ratified by three-quarters of the States, is provide the opportunity for the people, through elected representatives, to determine the outcome of this particular issue.

I might add that whether or not congressional authority existed with respect to abortions prior to *Roe* is the real question. I think it did.

Be that as it may, your statement has been very provocative today, and I have enjoyed it, in spite of the fact that you have differed with me, which I find just awful. That is supposed to be humorous.

Mr. Regan: Despite your comments, I continue to believe that your proposal creates a new form of federal jurisdiction to prohibit and restrict abortion. Conceivably it existed previously but that would have been regarded as extremely doubtful by most constitutional scholars. It certainly represents a kind of legislation which Congress has by and large avoided, I believe.

To make a related but more technical point, this would be an almost unprecedented creation of a situation in which Congress has a power to legislate but not a supreme power.

Ordinarily, of course, federal law is made controlling by the supremacy clause. You have suggested creating a congressional power and specifically stipulating that it shall not be supreme.

Senator Hatch: You are probably right also, although not necessarily so, that that power may not have existed prior to *Roe v. Wade*. I have to acknowledge that. On the other hand, this is a very innovative country.

Mr. Regan: Indeed it is, but there is always a question of whether inventions are a good thing.

Senator Hatch: And occasionally we Senators can be fairly innovative, but most inventions are certainly worthy of debate.

Mr. Regan: That is a matter on which we could have a long discussion, which I will attempt not to begin.

I have two more very specific points. The stipulation in the Hatch proposal that the more restrictive of two laws, one state and one federal, shall control is likely to produce severe problems about deciding which of two laws is in fact more restrictive. I think the most difficult problems, which may be the least immediately obvious, will arise when states and Congress prescribe different procedures, either different medical procedures for an abortion everybody agrees is permitted, or different procedures for deciding whether a specific abortion is permitted under the relevant law. Again, I think that these particular problems are problems that no one really wants to create.

Finally, I cannot help suggesting that one defect of the Hatch proposal, to my mind, is that it would allow states and Congress to forbid abortions even when a woman's life is at stake. I hope that no state or Congress would do that, but one of the advantages of other proposals is that they at least suggest that would not be a good idea.

Senator Hatch: If I could interrupt you on that, I cannot conceive of anybody doing that.

Mr. Regan: I am glad to hear that, Senator. Thank you.

Senator Hatch: Let me ask another question about the amendment I have offered. I have argued that one of its virtues is that it allows these very difficult issues relating to abortion to be resolved by legislative consensus rather than by solutions imposed upon everyone kicking and screaming by the Supreme Court itself.

I have been criticized, however, for leaving a question of

basic individual rights up to a democratic vote, something that is generally inconsistent with the Constitution. In return, I have suggested that S.J. Res. 110 is nevertheless an appropriate constitutional solution because of the deep division over what precisely these individual rights in fact are—the rights of a pregnant woman or rights of the unborn child.

Could you offer some comments on this whole issue of leaving an issue such as abortion to a democratic representative process rather than to unelected jurors?

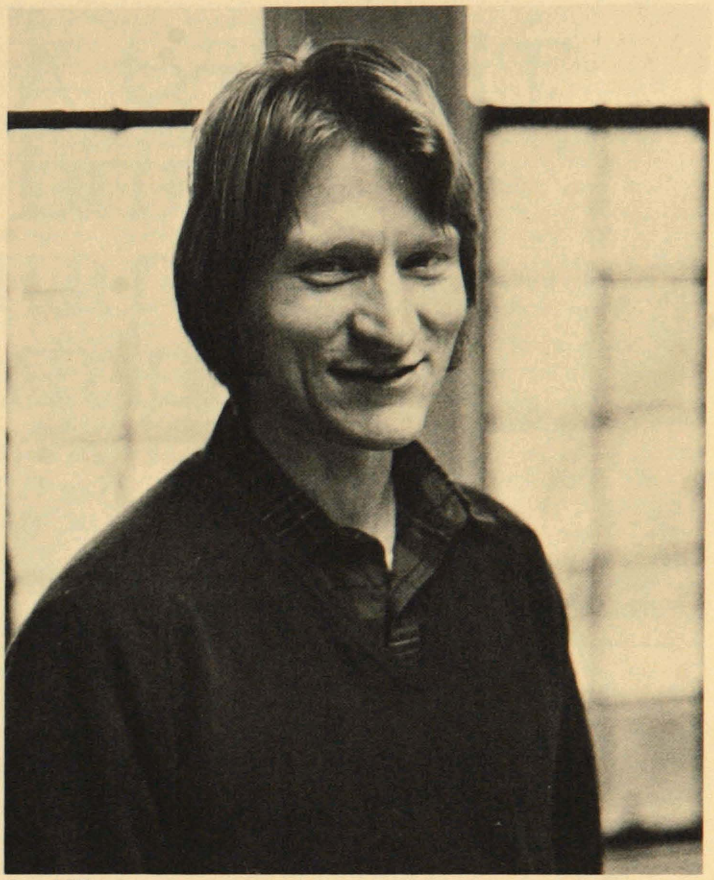
Mr. Regan: The claim that the Supreme Court Justices went beyond their judicial role in *Roe v. Wade* is, I think, simply mistaken. It has always been an essential part of the Court's role to interpret the Constitution and to protect individual rights. That means sometimes making controversial decisions about what individual rights are. We do not say, and we have never said, that every question should be left to ordinary legislative processes.

The fact of the matter is that *Roe* has been a controversial decision and has made lots of changes in state laws. I do not think, on the whole, that it made greater incursions on state laws than, say, *Brown v. Board of Education* or than, say, *Reynolds v. Sims*, and I could go on. We have never said that all questions should be left to the ordinary political processes. In particular, questions about rights should not.

You are absolutely right that the claim can be made that there are rights on both sides of this issue. The same could be said, for example, about the issue of race discrimination. It was claimed in favor of those who wanted to discriminate that there were rights of association. There are usually ways to find rights on both sides.

The mere fact that this is a controversial question about which there is great division in our nation, which nobody can fail to see, is not by itself an argument for giving it back to the states or taking it away from the Court. The Court has made decisions, decisions that almost everybody would now approve of, on many highly divisive issues, as divisive as abortion.

The real question, which we should not try to avoid, is, given that the Court was operating within their role, were they right? I think they were.



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