# THE CASE FOR A TWO-AMENDMENT STRATEGY

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Abortion and slavery, Dred Scott and Roe v. Wade: how many times have we used that analogy? We have used it for the moral light it sheds on the pro-life cause. May I suggest that it also sheds historical light? I think it illuminates our political position.

Because the abortion "right" is of such recent vintage, people tend to think that slavery must have been far more entrenched in American society, in its day, than abortion is today. Hence they imagine that abortion can be turned back and abolished more easily than slavery was. A decade's work, a Republican Senate, a definitive Amendment, and voila. Let me puncture that illusion.

The first and best measure of how entrenched an evil is in our society is the number of families involved in the practice of it. In 1860 there were roughly 7 million white, nuclear families in the United States, of which less than 1.5 million lived in the deep South. Among the Southern and Border-state whites, slightly less than 384,000 persons owned even one slave in 1860, and of course it tended to be the same families which owned slaves year-in and year-out. It was a rather static institution. So, if we make the generous assumption that the number of different families involved in the slave-holding evil was the same as the number of slave-holders, we are talking about an evil in which, in its hey-day, no more than one American family in twenty was involved.

Now look at abortion. It is not a static practice, involving only the same families year after year, but a spreading epidemic. There are

roughly 50 million American families today, and there have been over 10 million "legal" abortions in the eight years since Black Monday, 1973. If we make the generous assumption that fully half of these abortions have been repeat performances on women who had already had at least one abortion during the same eight years (and I think 1/2 is too high a figure, but let's concede it anyway), it remains tha case that over 5 million <u>different</u> women have had abortions in these eight years, involving close to 5 million different nuclear families. That is one American family in ten, or 10% of the total <u>already</u>, and the number is going up every year. If it takes us just another 7 years, until 1988, to ratify a Human Life Amendment, it is not improbable that abortion will have embraced and practiced by a full one-fourth of all American families by the time it is outlawed. So by this measure, abortion is already a more entrenched evil in our society than slavery was in 1860.

In a moment, I want to look at another measure of an evil's entrenchment. But first I want to explain why it is illuminating to look at <u>family</u> involvement in a bad practice. Bound together by blood or marriage, family members are the persons most likely to justify one another's behavior. It must have been hard to be a fiery abolitionist, if your brother owned a slave. It is now hard to think of abortion as murder, when your sister has had one. As a result, the network of family sympathy is a growing network of abortion-sympathy in today's America.

And the sheer extent of the thing is not the worst of it. What really scares one about this spreading sympathy is just the fact that it is not ideological. It is not feminism which is spreading (that's dead), nor gnosticism, nor any of those other "isms" which, by their very

nature, are the sort of thing only a minority ever believes in. What is spreading is the concrete and convenient conviction that, in a sad case, -- like my niece's case, like my cousin's case -- abortion is the right thing. To such thoughts majorities are seduced. And no other kind of thought -- no higher, more general or more consistent thought -- is needed to doom the politics of our Amendment.

Now look at another measure of abortions' entrenchment. If the weakness of an evil is the strength of the forces ranged against it, slavery was weak. The power of opinion was against it. From the print media to the pulpits, abolitionism dominated the nation's intellectual, literary and moral elites. Pro-life is in the reverse position. Also, the Republican electoral victory of 1860 was the victory of a party whose very raison d'etre -- not a mere plank of whose platform -- was abolition. If 1980 were a pro-life analog to 1860, Ellen McCormick would be in the White House now, not Ronald Reagan. In short, the forces arrayed against slavery were gargantuan compared to the forces arrayed today against abortion.

And still slavery proved intractable. It took a war, a confiscation, an armed occupation, and three Constitutional Amendments to get rid of it. It took one Amendment just to abolish slavery as a legal status (the Thirteenth), so as to bring the Constitution into line with the reality already created by the Union army. It took another Amendment (the Fourteenth) to prevent the covert re-introduction of slavery under other names. And it took a third Amendment (the Fifteenth) to give freed slaves the means of defending their political gains at the ballot box. None of which Amendments would have been ratified, historians tell us, had it not been for the solid block of 10 states

which was held captive, that is, forced to ratify or face indefinite occupation as conquered territory.

What a chain of drastic steps! Do they not tell us something about the cure of entrenched evils? Do they not suggest, and more than suggest, the futility of a one-punch solution?

Let me come at this same lesson from another angle, a very different historical analogy. Until well past the middle of the 19th Century, there was very little beer brewed in this country, wine had to be imported at great expense, and the water was of suspect quality in many places. As a result, the popular American drink was whiskey, to an extent almost unimaginable to us today. At a nickel a gallon, the stuff was used to wash down every meal, to season the cuisine, and to cure all ills. The resulting social evils were staggering, and the Temperance movement arose as a response to them. It took five decades of work before the Temperance crusaders had produced enough dry states to try for total victory, a Constitutional Amendment. In the meantime certain social realities had changed: clean water had become the rule, and the European immigrants, with their milder brews and home vineyards, had introduced some less harmful drinking habits at popular prices. But the Temperance people were not interested in these nuances; their political ideal of enforced total abstinence had been formed in the harsher climate of the 1850s. They pushed for a single, definite Amendment, and in 1919 they got it. What turned their victory to ashes just 14 years later was a flood tide of opposition which need never have existed, if they had not made the mistake of going after an entrenched practice with an all-in-one Amendment. If they had approached the matter in stages, if their first Amendment had eliminated only hard liquor, their work might have won a broader consensus, stood, and paved

the way for further steps towards their full ideal.

I admit that this analogy is dangerous because it is easily misunderstood. I am not suggesting that having a drink is at all like having an abortion. For one thing, there are no "milder" forms of murder. Pro-life people, therefore, do not have the moral luxury of being able to compromise or settle for half-a-loaf in the interim. So the "stages" which I recommend for pro-life victory cannot be stages in which some abortions are explicitly tolerated, some children left cruelly unprotected. I am arguing for stages, rather, in which different Amendments do different jobs, each Amendment being exception-free, and each stage being morally acceptable, exactly as our ancestors eliminated slavery. The Prohibition analogy merely illustrates how an entrenched practice can defeat the best intentions of an over-hasty one-Amendment strategy.

I turn now to another illusion which feeds the idea that we can eliminate abortion through a single Amendment.

Dred Scott was a narrowly conservative decision. It overthrew a gentleman's agreement called the Missouri Compromise, but it altered absolutely nothing in the meaning of the Constitution, as it was then understood. Roe v. Wade, by contrast, was an aberrant decision, inventing a "right to privacy" which no one ever knew existed, and departing from long-settled Constitutional principles with respect to the protection of the unborn child. So, we are tempted to think that it will be a lot easier to correct an isolated mistake, like Roe v. Wade, than it was for our ancestors to alter a deep pattern of the Constitution. Therefore one Amendmen will be enough.

What is overlooked in this illusion is how bad a mistake Roe v. Wade was. A hundred and thirty years ago, stricter anti-abortion laws began to spread among the several states and federal territories, at roughly the same time as people began to absorb the scientific discoveries about fertilization, the

Starting-point of human life. This rough simultaneity had an odd consequence: the Courts never had to deal explicitly with the unborn childs status as a person. Since its life was already protected de facto, as were certain property rights, beyond which the unborn child had no practical interests, the Courts did not have to face the person-hood question. Thus, for 110 years, from the 1850s to the 1960s, the status of the unborn child in American law was secure in practice but ambiguous in theory. Was it legally a person, or wasn't it? Were the states obligatedto protect it (e.g., under the 5th and 14th Amendments), or weren't they? The Courts never directly said. Then came the crisis. In the late 1960s, certain states began to liberalize their abortion laws, with the result that fetal lives lost all effective protection in those states.

Now we all know what should have happened. The liberalized laws should have been challenged as unconsitutional (e.g. under the 5th and 14th Ammendments). It was hard for pro-lifers to get standing to sue, but the federal courts should have accepted such suits, and the upshot should have been a Supreme Court decision doing three things: (1) acknowlegding the facts of life, (2) interpreting 'person' to include the unborn, and so, (3) striking down the liberalized statues. Of course, none of that ever happened. But in order to appreciate the gravity of what did happen it is necessary to think about another outcome which might have happened.

Suppose the same sort of challenge to a liberalized law had reached the Supreme Court, and suppose the court had once again (1) acknowledge the facts of life, so as to acknowledge that the state had a compelling interest in protecting fetal life from conception onward, if it wanted to; but suppose the court had (2) declined to hold that the unborn were "persons" in the legal sense of the 5th and 14th Amendments, so that the

state was not obligated to protect them, if it didn't want to; and suppose that the court had therefore (3) let stand the liberalized law. Now such a decision would have been bad enough! In fact, it would have created for abortion just the same sort of legal situation as Dred Scott inherited and re-affirmed for slavery. One and the same class of human beings would have been treated as persons in same states and as non-persons in others.

How much worse than Dred Scott, therefore, was the real Roe v. Wade! By (1) ignoring the facts of life and (2) rejecting the claim of legal personhood, the court was able to (3) invent a Constitutional right-to-privacy, thanks to which (4) all state and federal legislative bodies were denied permission to protect unborn life in virtually all circumstances. So Roe v. Wade was not a single mistake, easily undone, but four huge mistakes very complicated to undo in a single Amendment.

Now to tie all of these thoughts together: what conclusion do I draw from the slavery-abortion analogy? It is that we need to recognize two things. First, the overthrowing of an entrenched evil requires a step-wise approach, and second, the correction of Roe v. Wade's mistakes will require two Amendments rather than one. We need an initial Amendment which will restore legislative authority to protect unborn life by outlawing abortion, and which will locate this authority primarily in the Congress of the United States. This Amendment will undo the third and fourth mistakes of Roe v. Wade, and it will do so on the national level as a matter of policy to which all states must conform. A second and definitive Amendment is also needed, such as the NRLC Amendment or the Helms-Dornan "Paramount," which will undo the first two mistakes of Row v. Wade, specifying, and grounding in their status as human beings, the nation's obligation to protect the unborn.

Such a strategy not only has what it takes to meet the complexity of the moral and Constitutional crisis manufactured by Roe v. Wade but also and more importantly, has what it takes to arrest, roll back, and eliminate the entrenched evil unleashed and fostered by Roe v. Wade. I mean the two-Amendment strategy will maximize our political strengths, minimize the enemy's, and dis-entrench abortion in such a way that our definitive Amendment, when it comes, will not be a pyrrhic victory like the 18th but a solid victory like the 14th.

Let me now argue for each of these contentions. I have done with historical analogies; I turn to contemporary facts.

First fact: the best demonstrated strength of the pro-life movement is in Congressional politics. In a remarkable number of states, we have enough grass-roots organization, enough dedicated volunteers, to tip the scales in favor of the otherwise viable candidate who endorses our position. To speak of the Senate alone, we have made the crucial difference in the elections of Humphrey, Jepsen, Grassley, Denton, D'Amato, East, Symm, and many other Republicans. We even saved two Democrats: Eagleton and Hart. This is the sort of thing we do well, and from that fact I draw a very simple criterion for what our over-all, long-range strategy ought to look like. It is this: <u>The more our strategy allows us to approach our final goal by rewarding and punishing, electing and defeating members of Congress, the better our strategy matches the real talents and resources of our movement.</u>

Neither the one-Amendment strategy, nor the interim plan based on pushing the Human Life Bill alone, meets this criterion. Both would have the effect of removing the substantive abortion issue from Congress altogether after a single initial vote. Suppose, by a miracle, that our definitive

Amendment succeeded in winning two-thirds support in both Houses of the present Congress. Then, for the next seven years, our Congressional friends and contacts would be largely useless to us, as the battle shifted to the 99 Houses of the state legislatures, where our opponents would need to do nothing more than delay and hold 13. And suppose, by another miracle that the Human Life Bill not only passed the Congress but survived an initial round of Court challenges. Then again our Congressional friends and contacts would be useless to us, as the battle shifted to the terrain which is, for us, the worst of all, the state and federal Courts, where a savage struggle would have to be waged over the Bill's scope.

By contrast, the two-Amendment strategy assigns a crucial and on-going role to Congressional politics. Our initial Amendment would be a "federal power" Amendment, giving to Congress (and concurrently to the states) Court-proof authority to protect unborn life and to prohibit abortion by simple majorities. Hence the number and quality of our friends in Congress would be crucial not only after the Amendment is ratified but also <u>while it is being ratified</u>. Nervous or undecided state legislators could be briefed and lobbied by pro-life members of Congress, who would be in a position to give assurances, and to make deals as to what sort of abortion legislation Congress would be likely to pass, in the event of ratification. And no doubt many deals would be made. But as long as the deals garnered votes for ratification, I would not shed a single tear over them. For with ratification once secured, Congress would again be under pressure <u>from us</u>. Year after year we would be back to tighten the language and to close every loophole in the national standard of protection, until respect for human life was once again the national custom and the ground was prepared for the final Amendment.

In sum: the other strategies use our best talents and resources solely for an initial vote, after which they become useless to us. But the two-

Amendment strategy uses them beyond the initial, Congressional vote on Amendment I to meet three further needs: 1) to help secure the Amendment's ratification, 2) to put the abortionists out of business through the passage of Court-proof national legislation, and finally 3) to prepare the way in Congress and in the country for our definitive, second Amendment.

Next fact: our string of electoral victories is out of all proportion to our organized strength. NOW also has its grass-roots chapters; the NEA can turn our an army of volunteers; but their left-liberal positions are unpopular. The liberal-Democratic coalition of which they are a part is in eclipse. We, however, have been fortunate in the choice of our coalition partners, to the popularity of whose issues we have been able to add the popularity of our own. Our ability to make the difference in anyone's election depends upon the rest of that coalition, and we shall continue to be welcome in the coalition only so long as our issue remains, on the whole, an asset to its candidates, that is, only so long as our pro-life position remains higher in popularity than the perceived alternative to it. In this respect, too, we have been fortunate. So long as the perceived alternative to pro-life was radical feminism, our popularity was assured. The people were solidly with us too, in our fight to cut off the federal funding of abortions. But now things are changing. When the High Court upheld the Hyde Amendment, the irritant value of the funding issue disappeared from the public mind. In about a year, when the ERA finally dies, the feminist organizations will melt from the national scene (and from the national memory) like dirty snow in a spring thaw. The days are coming, if they are not already here, when the perceived alternative to pro-life action will be nothing but the permissive status-quo, supported by situation ethics and that family network of abortion-sympathy mentioned earlier.

What will happen to our popularity then? In our kind of politics, it can be dangerous to outlive the ugliest of one's enemies.

From all of which I derive a second simple criterion: the more our strategy allows us to act now, while our popularity survives and our coalition is riding high, and the more it allows us to act in ways which the whole coalition supports, the better strategy it is.

By this criterion also the two-Amendment strategy is superior to its one-Amendment rival. As of this writing, and for the foreseeable future, our Reaganite Republican and conservative Democratic coalition partners are far more willing to accept a federal-powers Amendment that they are to accept a definitive Amendment of the kind satisfactory to us. The reason is well-known: Congressional support for exception-clauses for rape, incest, fetal deformity, and perhaps even maternal "health" is so strong that neither the Paramount Amendment nor the NRLC Amendment has a ghost of a chance of passage in clean form. Neither in this session nor in any foreseeable session will a definitive Amendment come out of Congress without one or more of these crippling and morally indefensible attachments. But the federal powers Amendment invites no exceptions and needs none. It can garner a wider spectrum of support now and still come out clean. It tends to unite us with our coalition partners instead of dividing us from them as isolated "purists". (And frankly, given the current Congressional mood of hostility against the social-issues Conservatives, following the O'Connor debacle, we could use a little fence-mending.) Then, after passage, the first Amendment gives us seven more years (or however long ratification takes) to educate, influence and improve Congressional thinking on the subject of exceptions.

Which brings me to my third fact: only one part of our total position has

consistently enjoyed majority or near-majority support, namely, the part about abortion-on-demand. Yet even there the public is so confused that everything depends on the precise wording of the question. We have all watched with amazement the dizzying swings in reliable polls. 70% of the electorate will deny that a woman should have the right to abortion upon demand, while the same 70% will agree that abortion ought to be a decision purely between a woman and her doctor, apparently unaware that the purport of the two propositions is exactly the same. What is worse, every poll shows the public to be 80% to 90% against us when the question concerns one of the "hard cases" of rape, incest, fetal deformity, or even the mother's mental health. The pinch of this particular shoe in Congress will be as nothing compared to its pinch in the ratification battles in the several states. The lesson to be drawn from these dismal numbers, however, is not the lesson of cowardice or moral compromise. In fact, the numbers prove that if we were so foolish as to grant even one of these exceptions in our proposed Amendment the general public would <u>eat us alive</u> for not granting them all. An exception-free Amendment is our only chance of retaining public respect! Nevertheless, these numbers do carry a lesson of sobering realism. I formulate it in a third criterion: <u>the more our strategy positions us to fight the ratification battle on our own ground, i.e., on the basic issue of ending a wholesale slaughter, rather than on the enemy's ground of hard cases, the better strategy it is.</u>

A one-Amendment strategy has no hope of meeting this criterion. Any definitive Amendment which we could in conscience support, if it were reported out in the present climate of opinion, would run into a withering fire of media outrage. Planned Parenthood, NOW and the ACLU would step up their campaign of full-page ads, which are already having a serious effect. Within the last two months, survey research done for a state-

wide race in New Jersey has revealed grim slippage in our support. If the data is to be believed, 68% of the people oppose a human life Amendment, while only 12% support it, in this heavily Catholic state. We cannot hope to ratify a definitive Amendment under these conditions. A one-Amendment strategy gives us no choice but to go down in flames, or else to wait and wait, delay and delay, in the hope of better times, while the helpless millions die.

The two- Amendment strategy offers real hope. It presents to the state legislatures but a single issue: yes or no, should abortion be subject to reasonable regulation? Shouldn't unlimited abortion, demand-abortion, be stopped? This is the sole point in question. The hard cases are excluded from the debate. Handling them will be the responsibility of Congress after the Amendment is ratified. This is the only way to handle an entrenched evil. Such an evil <u>generates</u> sympathies which are morally obtuse. Those sympathies cannot be damped down, nor the moral vision restored to clarity, while the evil itself is in full operation. <u>First</u> the evil must be checked, its <u>widespread</u> practice curtailed, its institutions disrupted, its profits dried up, and <u>then</u> the nation is ready for a definitive cure. This is the lesson of social realism, and the two-Amendment strategy is the only one which respects it.

My positive case is done.

I have but one more task, to answer an often-heard objection. It runs like this.

In objective fact, an unborn human being <u>is</u> a person. In the <u>true</u> meaning of the Constitution, such persons are already protected under the 5th and 14th Amendments, and hence the state and federal governments are <u>obligated</u> to ban abortion. The lies and fictions of <u>Roe v. Wade</u> can obscure

this truth but cannot change it. Therefore, an acceptable pro-life Amendment must be one which simply declares the truth, that is, one which recognizes and re-invigorates the already existing obligation of the states to protect the unborn. In this light, the essential flaw of a states-rights Amendment is not the glaring one which lies on the surface, namely, that under it some states would predictably remain abortion meccas, but rather the deeper flaw that such an Amendment declares no obligation. It is permissive. Even if every state were likely to pass a strict law, the Constitutional status of those laws would be that they are nothing more than optional. Hence nothing could prevent a new abortion crisis in the future. Now this same deep flaw attaches to the federal-powers type of Amendment, which is Amendment I of the two-Amendment strategy. Since it merely permits Congress and the states to legislate it implicitly denies their obligation to do so. Hence, at the theoretical level, it is really no better than a states-rights Amendment, since both are subversive in the same way of the true meaning of the Constitution. Finally, this merely permissive character is disastrous on the practical level. We could work ourselves to the bone, get Amendment I ratified, only to have Congress refuse to act. The hapless unborn could end up with an Amendment in their honor and no protection!

Thus far the objection. I answer it with two points on the theoretical level and two more on the practical.

(1) The objection assumes that there is some incompatibility between permission (to legislate) and obligation (to legislate), such that to affirm the former is to deny the latter. This assumption, as a matter of pure logic, is flatly false. The proof lies in the fact that, in a consistent system of law or ethics, there cannot be an obligation to do what is forbidden. Rather, whatever is obligatory is also at least permitted. From

this it follows that some permitted things are also obligatory. As a result, there is no contradiction whatsoever in saying that anti-abortion legislation shall be permitted under one article of the Constitution, while being obligatory under another.

(2) You might object: precisely because obligation implies permission, there is no need to assert permission where the obligation is acknowledged. Hence, such an assertion would normally have no practical point but to deny obligation, that is, to assert that anti-abortion legislation is at most permitted. I reply that this appearance of denial can be avoided very easily. Our initial federal-powers Amendment could include a clause reading thus: "Nothing in this article shall lessen the right and obligation of the Congress and the states to protect human life as provided elsewhere in the Constitution.", or similar words to a similar effect. Armed with such a clause, Amendment I will leave intact any and all obligations arising under the 5th and 14th Amendments, while doing its own distinctive job of overturning Roe v. Wade and federalizing the protection of the unborn.

(3) The objection assumes an odd theory about the "true meaning" of legal documents. It seems to identify what is the meaning of the Constitution with what ought to be its meaning, and it seems to suggest that the Supreme Court, despite its recognized authority to construe the text, does not in fact construe the Constitution when it misconstrues it. Such assumptions are highly dubious in theory, but I have not chosen to quarrel with them. Rather, I have chosen to accept the view that there is a "true meaning" to the 14th Amendment which includes unborn children and hence that an obligation to protect them already exists in principle or in theory. I concede all that. What I reject is the attempt to confuse this realm of theory with the practical realm of fact, in which the as-

sumptions we have just been discussing have no color of reality. In practice, the 14th Amendment means, alas, what the Court says it means. In practice, there is no such thing as a state obligation to protect the unborn. In practice, babies die by the millions while the state is forbidden to protect them. What is therefore needed in practice is precisely a Court-proof permission to bring the slaughter to an end. Given this practical context, it is perverse to insinuate that Amendment I's assertion of permission denies the 14th Amendment's assertion of obligation, when its obvious force is rather to deny Roe v. Wade's assertion of non-permission.

(4) The fear that we could work ourselves to the bone, ratify Amendment I, and then get nothing out of Congress is politically absurd. The only way such a thing could happen is if the pro-life movement itself collapse as a political force, somewhere toward the end of the ratification proces giving us a paper victory and no muscle to make use of it. Why would suc a thing happen? Why would a movement, marching to victory from state to state, suddenly fall apart? I don't see it. Either we shall not have the strength to ratify anything, or else we shall have that strength, in which case we shall also have the strength we have already demonstrated so often, the strength to get favorable legislation through Congress.

On these four grounds, the principal objection to a two-Amendment strategy fails. I commend that strategy to the entire pro-life movement as our best course of action.