10: The Constitution, Life, Liberty and Justice

A. Liberty and Justice in Jeopardy

Many of the most important public debates involving jurisprudential issues in the United States since World War II can be viewed as conflicts between parties who prefer as much liberty as possible and parties who prefer as much equality as possible, especially in matters involving important components of justice. Libertarian arguments have been offered against the growth of the welfare state, equalitarian arguments for it; libertarian arguments against going beyond the ending of legally enforced segregation to begin legally enforced integration of the races, equalitarian arguments for it; libertarian arguments against criminal laws protecting the lives of the unborn, equalitarian arguments for such laws.

As a comparison of the individuals and groups on either side of these and similar issues quickly makes clear, no one is consistently a libertarian or an equalitarian. Simultaneously respecting both of these basic jurisprudential principles is never easy. Moreover, as exemplified in the preceding chapters, there are considerations of either liberty or equality or both on opposite sides of many, if not of all, important jurisprudential issues.

In the course of our study we have noted many important respects in which—assuming our conclusions correct—liberty and justice are presently being violated or are threatened with violation in the immediate future.

The liberty of competent persons to consent and to refuse consent to medical treatment has been violated, and the law has failed to provide effective means by which persons can exercise this liberty with respect to a future time of noncompetence. The recently passed natural-death or right-to-die legislation is objectionable for many reasons, not least that it arbitrarily restricts the very liberty it is intended to implement. The liberty of persons who wish to commit suicide sometimes is infringed by excessive measures of restraint and

custody; such measures often infringe upon the privacy of persons who live in institutions. The liberty of members of society who oppose the death penalty to stand aloof from this form of official homicide seems to us to be violated by every jurisdiction which uses this method of punishment.

The liberty of members of society who consider abortion murder of the unborn to stand aloof from public programs which involve the state in this form of killing has been violated by every jurisdiction which has put public facilities and public funds at the disposal of those who engage in abortion. Similarly, if voluntary euthanasia is legalized and carefully regulated to the extent that it must be if it is to be safe, the liberty to stand aloof of all who regard as abhorrent such killing with the consent of the victim will be violated by the *institutionalization* of the practice. Everyone, nevertheless, will admit institutionalization to be necessary to protect the lives of those who do not consent to be killed.

The liberty of physicians to provide noncompetent patients with appropriate but not excessive medical treatment is violated to the extent that the present legal situation compels the physician to work in a context of uncertain liability, instead of facilitating a clear determination of the patient's constructive consent in cases in which there is doubt about it.

Not every limitation on liberty is a violation of it. Liberty is justly limited whenever all who are reasonable agree to its limitation for the sake of the common life they share, the social order which liberty itself creates. But every restriction of liberty without social necessity and every limitation of liberty which unfairly weighs on some for the good of others does involve injustice. The preservation of the blessings of liberty is itself a very important aspect of political society's constituting purpose.

Some proposed definitions of death would deprive living persons of their legal status as persons; such deprivation is a fundamental injustice which opens the way to a whole series of other injustices. At the same time to insist upon outdated standards for determining death is to compel the living to treat the dead as if they were alive, when the contrary can be established beyond reasonable doubt. This is unjust, especially when the dead person has made an anatomical gift which is interfered with. Competent persons are unjustly required to undergo and someone is required to pay the cost of unwanted treatment when the liberty to refuse treatment is insufficiently recognized and implemented. The noncompetent who are deprived of appropriate treatment or who have imposed upon them excessive treatment likewise suffer an injustice.

But most important is the unjust deprivation of life which is involved in the failure of the law to provide equal protection to this basic good. Those who are aborted before birth, those who are killed by omission after birth, and those for whom early death is sought as a management option are unjustly deprived of their lives. At the bottom of the present and growing tendency to

deprive some persons of life is the ascendancy of one particular world view: secular humanism with its consequentialist ethics. According to this world view, one person can decide on behalf of another that he or she has a life or prospect of life not worth living, a life which does not merit preserving and protecting.

Secular humanists, of course, are entitled to affirm this world view and to seek to live their personal lives according to it, so long as they respect the interests of society and the rights of others. This is what liberty means. But in America today—for that matter, throughout the Western world—secular humanists are seeking to have their world view established as the exclusive legitimate framework for public policy.

Thus Western societies are moving very rapidly from a jurisprudence based upon the traditional religious morality of sanctity of life to the new morality of quality of life judged from a secular humanistic perspective. From the position of protecting every individual's life as inherently inviolable Western societies are moving directly to the opposite position of withdrawing legal protection from some individuals' lives considered as useless to themselves and others—as lives which ought not to have been conceived or which ought to be quickly terminated. The kindest possible treatment for such persons is to kill them, it is argued, for they will be better off dead.

The injustice of imposing upon a noncompetent person someone else's concept and standard of quality of life is patent. So is the injustice of imposing secular humanism as the established framework of public policy upon a whole society, many of whose members do not share the secular humanist faith. Indeed, as a matter of constitutional law, the use of the secular humanist perspective as a privileged basis for public policy—which was what happened in the legalization of abortion and is proposed in the argument for legalizing euthanasia—constitutes an establishment of religion in violation of the First Amendment of the United States Constitution.

Proponents of euthanasia no doubt will vehemently deny that they are attempting to establish a religion. Their own literature is filled with attacks upon the principle of the absolute inviolability or sanctity of human life precisely on the basis that this principle is rooted in a religious view which not everyone holds in contemporary pluralistic society. In effect, those seeking to justify nonvoluntary euthanasia are urging that instead of earlier religious principles, purely rational and humanistic principles ought to be accepted as a basis for public policy. According to these principles whatever policy will have the best social consequences, judged according to utilitarian ideas of what is best, ought to be adopted.

But in taking this position the proponent of euthanasia is saying in effect: "You may not legislate your morality, because I am going to legislate mine. And I have a right to do so, because mine is areligious while yours is reli-

gious." It has seriously been suggested that any legislation which enforces a religiously rooted morality, even in purely secular terms, amounts to an unconstitutional "establishment of religion"; on this view only legislation which serves an obviously rational, "independent, secular, utilitarian, social function" is acceptable.[1]

But can utilitarianism, with its consequentialist criteria for good policy, be made the final standard of the constitutionality of legislation without establishing secular humanism as the official religion of the United States? More generally, can any of the principles embodied in the arguments of proponents of euthanasia be admitted as a basis for excluding some human individuals from the equal protection of the law forbidding homicide without the establishment of the world view which would justify this exclusion and the imposition of this world view upon those to be excluded as well as upon other citizens who still hold to a different world view—for example, one which embraces some conception of the sanctity of life?

It may seem fanciful to suggest that the preference for areligious to religious world views in the determination of public policy issues constitutes an establishment of religion. After all, secular humanism, for example, is by definition *not a religion.* However, this point is not well taken.

The United States Supreme Court already is committed to the position that "secular humanism" is a religion despite its areligious character. In *Torcaso* v. *Watkins* the Court ruled that the State of Maryland had denied secular humanists the free exercise of their religion by demanding of them profession of belief in a Supreme Being as a condition of eligibility to hold the office of Notary Public.[2] In *United States* v. *Seeger* the Court held that a conscientious objector to military service should be considered as having an adequate religious basis for objection if his objection was based upon a belief which occupied in his life the same place as belief in God holds in the life of one clearly qualified for exemption.[3]

Still, in *Seeger* there remain suggestions that reference to something more than personal moral convictions is necessary for religion. But in a subsequent case, *Welsh* v. *United States,* the Court held:

> If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons.[4]

In taking this view the Court had to contend with the fact that the statute excluded from exemption persons whose objection was based upon "essentially political, sociological, or philosophical views or a merely personal moral code." The Court held that this language does exclude those whose beliefs are

not deeply held and those whose judgment is not a matter of moral principle but rests only "upon considerations of policy, pragmatism, or expediency." But a deeply held conscientious conviction, regardless of its source or any reference to a ground beyond human relationships, qualified as religious.[5]

Presumably, proponents of euthanasia will maintain that their views are deeply and sincerely held, at least by themselves, and that these views somehow have a basis which transcends mere policy, pragmatism, and expediency—a basis for evaluation which is more than a mere personal preference. They must maintain as much to try to evade the charge of arbitrariness which we have leveled against them. But in holding their beliefs to be deeply and sincerely held proponents of euthanasia will fulfill the requirements for their beliefs to be considered religious.

Principles which would justify the limitation of the law of homicide on the basis of quality-of-life considerations, restrictions of personhood, or evaluations of the worth of contributions by various members of society thus are just as much religious beliefs as are principles which would preclude on the basis of the absolute sanctity of life the arbitrary refusal of care for themselves by competent persons who think they would be better off dead and so wish to die. Thus, while proponents of euthanasia are at liberty to hold and to live their personal lives in accord with their own world views, they are not entitled to have some sort of common denominator of their world views accepted and established as the basis for settling which human individuals until now protected by the law forbidding homicide shall be allowed in the future to be killed. Such acceptance and establishment would amount to the establishment of secular humanism and its imposition upon all members of the society, especially upon those whose right to life would be annulled in accord with it.

Commenting upon the Supreme Court decisions we have summarized, Paul Ramsey concludes:

> A well-founded conclusion from this is that any of the positions taken on controversial public questions having profound moral and human or value implications have for us the functional sanctity of religious opinions. The question concerning non-religious positions is whether they any longer exist; and whether proponents of one or another public policy are not, whether they like it or not, to be regarded as religious in the same sense in which traditional religious outlooks continue to affirm their bearing on the resolution of these same questions.[6]

We agree with Ramsey in recognizing as religious in the constitutional sense views which are on their face purely secular and humanistic.

However, we differ from his view to the extent that it implies that there can be no nonreligious or neutral basis for resolving controversial public questions. There is such a basis in the commonly recognized principles of liberty

and justice which we have appealed to throughout this book. These principles required us to forgo any appeal to the traditional principle of the sanctity of life; the same principles equally require proponents of euthanasia to forgo any appeal to contemporary conceptions of the quality of life, the requirements for personhood, or the value of various sorts of contributions to society.

It is clear that in certain contexts the United States Supreme Court has been ready and willing to recognize secular humanism and other nontheistic, deeply held foundations of personal morality as religious. This recognition cannot fairly be extended to adherents of such religions when it is to their benefit and them conveniently forgotten when the same Court undertakes to adjudicate on abortion and other matters.

As we pointed out in chapter eight, section A, advocates of legalized abortion and nonvoluntary euthanasia such as Glanville Williams argue that the alternative to retaining a traditional morality of the sanctity of human life as the basis for public policy is adopting a utilitarian conception of quality of life which would justify legalizing some forms of murder or near-murder forbidden in the past by Anglo-American law.

Against Williams, and without invoking a moral principle of sanctity of life, we argued that utilitarian, consequentialist conceptions of the social function of homicide laws ought not to determine to whose lives these laws will extend protection. The distinct and neutral principle of justice—equal protection of the laws—should settle the issue. Even legitimate public policy concerns about problems such as poverty, pollution, and population ought not to be allowed to be weighed in a consequentialist scale against the value of the lives of members of society.

Of course, in the *Abortion Cases* the United States Supreme Court pretended to maintain judicial neutrality and reserve, especially in regard to the question when human life begins. But the Court's professed uncertainty about this well-known matter of biological fact was exposed as a pretense when it legalized the killing of the unborn—by attributing to them only *potential* life, which at most is *possibly* meaningful if the live birth occurs, and by refusing even to consider their interest in life—while it balanced women's interests against various state interests which it held become compelling as pregnancy progresses.

In *Roe* v. *Wade* the Supreme Court of the United States did not maintain judicial neutrality. Rather, it adopted one religious perspective, established it, judged in accord with it, withdrew from one group of living human individuals the legal protections hitherto afforded their lives, and imposed a new constitutional provision on American society in violation of the liberty of all who do not share the secular humanist perspective.

Someone will object that the Court had to decide the case one way or another, to please one side or the other. Strictly speaking, this is not true.

The Court could have declared itself and other courts incompetent to decide the issue on constitutional grounds and unable to decide it on other grounds. Such a decision would have left all parties to the debate free to promote their positions by political means in the legislatures, including Congress, and also free to seek the amendment of the Constitution to bring it into harmony with their own understandings of the conflicting claims of liberty and justice.

Instead, the Court chose to exercise raw judicial power to amend the Constitution in a manner other than those ways provided for in the Constitution itself. The amendment consisted in giving the right of privacy of pregnant women an absolute constitutional status, so that the states would no longer be permitted to protect as they had done—in some cases for more than a century and one-half—the lives of the unborn.

John Hart Ely remarked that *Roe* v. *Wade* was not constitutional law and showed almost no sense of an obligation even to try to be.[7] The reason is that in this case the Court exercised the only legally recognized policy function which is superior to constitutional law: the deliberation and consent which creates and amends the constitution. The American conception of free government demands that this deliberation and consent be the supreme exercise of the liberty of the people: "We the People of the United States . . . do ordain and establish this Constitution." In usurping this function, the Supreme Court most grievously violated the liberty of the people. The legitimacy of American government is severely wounded; powers which are not *just powers* are exercised with specious authority.

Thus, although the United States today remains in many ways unlike Nazi Germany, in many ways which are very important it has become like that lawless regime of might claiming to make right. Moreover, discrimination which rationalizes killing is equally vicious whether it is rooted in an ideology of racial perfection or in an ideology of individualistic perfection, which asserts that no unwanted child should ever be born and no life below a certain standard of quality should any longer be protected.

What is more important is that—as we argued in chapter eight, section G—the Supreme Court could have decided the legality of abortion without assuming as established either the traditional morality based upon the sanctity of life or the new morality based upon quality of life. The question should have been one of whether the law, which had never been consistent in regarding the unborn either as persons or as nonpersons, would better accord with the basic, common principles of justice and liberty if it were rendered consistent in one or the other way. Since the only thing common to all already recognized by law as natural persons is membership in the human species, and since the unborn of human genesis are members of the species, no nondiscriminatory basis exists for excluding the unborn from legal personhood. Once the unborn be admitted to be persons, equal protection of the laws

demands that a society which cannot exist without a law of homicide protecting its strong members and those defended by strong protectors should also protect its weak and unwanted members by the same law of homicide.

In the preceding chapters we have suggested many ways in which laws might be reformed without alteration in the Constitution to conform better to the requirements of liberty and justice. Death can be defined, thus to protect those at this margin from being unjustly considered dead when they are not and to protect the living from being required to treat dead bodies as legal persons. Once the significance and breadth of the problem is recognized, we think this definition would best be made by an act of Congress under its enforcement power of the Fourteenth Amendment.

The impositions on liberty in relation to those who have attempted suicide can be eliminated easily. The liberty of competent persons to refuse treatment and the rights of the noncompetent to appropriate but not excessive care can be facilitated and protected by appropriate statutes, which we have outlined in chapters four and nine. Capital punishment can be abolished by statute, for if the practice is not unconstitutional, neither is its abolition.

However, in the United States, at least, not all of the existing violations of liberty and justice can be remedied so easily.

The rectification of the injustice to the unborn of denying their lives protection will require either a reversal by the Supreme Court of its decisions in *Roe* v. *Wade* and *Doe* v. *Bolton* or a constitutional amendment to make clear the requirements of justice which the Constitution formerly respected and implemented but now—in the state of the law as it is after the Court's action amending the Constitution—ignores and blocks.

Moreover, the rectification of the violation of the liberty of the people involved in the establishment of the secular humanistic world view as the sole legitimate framework for the determination of questions of public policy will require either a reversal by the Supreme Court not only of the abortion decisions but also of certain others, which we shall discuss in section D, or a constitutional amendment to make clear the requirements of liberty in a pluralistic society with respect to every theistic and nontheistic religion, every world view which provides an ultimate foundation for any set of deeply held conscientious convictions by which citizens can live their personal lives within the common society.

B. Every-Human-a-Person Amendment

Various commentators on the Supreme Court's decisions in the abortion cases set forth the reasons why an attempt to amend the Constitution must be made in order to reverse the Court's denial of equal protection of their lives

to the unborn. Various formulae of a possible amendment have been proposed.[8] Probably the simplest amendment which would reverse the Court's decisions would be one stating; "Nothing in this Constitution shall be construed as providing any foundation for any challenge to the laws respecting abortion which were in force in the year 1966, or to laws similar to them in protecting the lives of unborn human individuals."

Such an amendment would leave entirely open all of the questions which were raised by political efforts to modify the laws but would firmly exclude the courts from questioning the constitutionality of even the most conservative laws in force in 1966, before Colorado enacted the first of the so-called "liberalizations" of the antiabortion statutes. But an amendment of this sort would in fact be a form of states' right amendment and would have all the defects of that approach—defects we believe have been pointed out sufficiently by others.[9]

One difficulty with an attempt merely to turn the clock back is that the practice of denying the right to life of some persons already has extended, as we have shown, beyond the unborn to others, especially defective infants. We believe that the Supreme Court in *Roe* v. *Wade*—regardless of intent—laid the foundation for the extension of quality-of-life considerations to serve as a rationale for denying the right to life of persons already born when it said:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.[10]

The key expression here is "meaningful life." Implicit in the use of this expression is the concept that some lives are not meaningful, that some are so lacking in quality as not to merit equal protection of the law.

Someone will object that this reading of the Court's remark is unfair. All the Court intends in the context, it will be pointed out, is what could have been expressed as an explicit tautology: only when a fetus is developed sufficiently to survive after birth does it have the capability of surviving after birth. Prior to viability an aborted fetus by definition cannot live.

The objection probably correctly expresses what the Court intended. But the fact is that nonviable aborted fetuses do live for various lengths of time after they are born alive, since viability technically means the possibility of surviving not only birth but also the neonatal period—that is, the first twenty-eight days of life *after* birth.[11] Tiny embryos only about five and one-half weeks after conception have been delivered alive and lived long enough to determine by experiment that some reflex arcs already are established in the nervous system at this stage of development.[12] Some such individuals survive

only for a few minutes, but more developed individuals survive for hours, days, or weeks, yet are considered nonviable after they die if they do not in fact survive twenty-eight days.

Now it is this life which nonviable infants live *after they are born* for any period up to twenty-eight days which the Supreme Court refers to as nonmeaningful. But it is clear that these individuals are considered not only persons but also citizens by virtue of the Fourteenth Amendment. While courts have had some difficulty in deciding when a person is born, they have never questioned that birth of a live—not a stillborn—infant begins the condition of one who is a potential victim of homicide.[13] In other words, the killing or the intentional shortening of the life of a nonviable person and citizen is the same crime of homicide as the killing or the intentional shortening of the life of anybody else. A nonviable infant is in no different condition than someone who is dying at a later stage in human existence. It is no defense against a charge of homicide to say that one's victim was certain to die within twenty-eight days regardless of one's deadly deed.

Thus in *Roe* v. *Wade* the Court—regardless of intent—took the startling and unprecedented step of declaring not to be meaningful the lives of a certain class of citizens. While it did not in that decision declare these citizens to be unprotected by the law of homicide, it did predicate the state's interest in preventing their abortion on the possibility of their extended survival. Hence, when a fetus is aborted alive, the Court implied that the nonviable had no meaningful life. The Court thus suggested that such citizens might not be able to be significantly deprived of what they did not meaningfully have.

This construction of what the Court meant in *Roe* v. *Wade* would be highly implausible were it not for subsequent events. Even prior to *Roe* v. *Wade* there were widely published reports of the killing of aborted infants delivered alive. One of the states which attempted to ensure protection for such citizens was Missouri, which in its 1974 abortion statute provided:

> No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter.

In challenging this statute before the Supreme Court the appellant in *Planned Parenthood of Central Missouri* v. *Danforth* argued that the provision was intended to prevent all abortions. Despite the implausibility of this contention and the declaration by Danforth, Attorney General of Missouri, that the section was meant to protect the lives of infants already born, the Court held that

the section could not survive constitutional attack, for, "It does not specify that such care need be taken only after the stage of viability has been reached. As the provision now reads, it impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of the pregnancy." Moreover, the court refused to sever the second sentence from the first, claiming that the provisions must fall as a unit. Then the Court added, "And a physician's or other person's criminal failure to protect a live-born infant surely will be subject to prosecution in Missouri under the State's criminal statutes."[14]

This final sentence might be taken to mean that the Court is working on the standard assumption that an infant born alive, whether viable or not, is protected by the same statutes as anyone else. However, in the context of the Court's renewed insistence on the importance of viability the sentence also could be taken to mean that a nonviable infant henceforth is not to be regarded as live-born even though it is living apart from its mother after the abortion is completed. This interpretation is supported by the fact that the Court refused to sever the provisions of the section. Also, the Court's statements here at least can be read as a bit of free legal counsel for abortionists; Make certain there are no live-born infants and you have our protection.

The United States Court of Appeals, Eighth Circuit, dealt with the 1974 Minnesota abortion statute shortly after the Supreme Court decided *Danforth*. The Minnesota Statute had two separate and distinct sections, one requiring a physician to choose methods of abortion when feasible which would protect the life of a potentially viable fetus, the other clearly and explicitly concerned with the live-born infant:

> A potentially viable fetus which is live born following an attempted abortion shall be fully recognized as a human person under the law.
>
> If an abortion of a potentially viable fetus results in a live birth, the responsible medical personnel shall take all reasonable measures, in keeping with good medical practice, to preserve the life and health of the live born person.

The court of appeals held that this provision could not stand because it incorporates "potentially viable" and so requires a physician performing an abortion after the twentieth week "to exercise the prescribed standard of care and use only those procedures and techniques calculated to preserve the life and health of the fetus."[15] One might charitably assume that the court simply was confused, but this assumption is hard to sustain, inasmuch as one of its own members dissented and also pointed out the sense of the provisions which were struck down, just as Justice White, joined by Justice Rehnquist and the Chief Justice, had done in *Danforth*.[16]

In any case, the Supreme Court's reference to meaningful life in *Roe* v.

Wade clearly implies that the lives of nonviable citizens are not meaningful. The reason why they are not, presumably, is that they are going to be short: at most less than twenty-eight days from birth. If this fact deprives these lives of meaningfulness, however, a similar value judgment will deprive of meaningfulness the life of anyone who is about to die. And once some lives are agreed to be meaningless, it will be very hard to distinguish from them many other lives which are widely thought to have no more worth than they do. On this basis one should not be surprised that infanticide has become an acknowledged practice since 1973.

Apart from what the courts have done, we saw in chapter eight that there already is a significant movement to deny the humanity or the personhood of certain individuals already born, on the ground that they lack what some regard as minimal qualifications for inclusion in the human community. As we showed in chapter eight, section E, even those advocates of nonvoluntary euthanasia who do not explicitly deny the personhood of those whose lives they consider to be of poor quality hold principles which in practice will lead to the establishment of a system allocating persons with lives of diverse quality to diverse castes.

Under these conditions we do not consider it a sufficient response to *Roe* v. *Wade* to declare the personhood and protect the lives of the unborn. We do not criticize the efforts already made to draft an appropriate amendment; several of these are excellent and deserve support. But we do think that since no amendment has yet been passed, a broader approach which will better meet the present and developing denial of the equal protection of the law of homicide would be preferable.

We think an amendment should make explicit the legal personhood of all members of the human species. It also ought to reject explicitly the subordination of the protection of anyone's life to any other public or private interest or right, for there are many who argue that the lives of persons must be subordinated. The amendment also should make clear that classifications based upon quality of life considerations are just as suspect as racial classifications. Furthermore, while an amendment can exclude discrimination against the unborn as a class, there will remain problems of detail concerning the beginning of life and concerning death. These issues seem to us more appropriately resolved by a legislative process than by constitutional enactment. So we propose an enforcement power which would explicitly include legislative determination of doubts concerning classes of entities which might or might not be individuals belonging to the human species.

> Section one. Every living individual which is a member of the species homo sapiens whether born or not yet born shall be a person within the meaning of the word "person" in the Fifth and Fourteenth Amendments to this Constitution. No part of such an individual shall be a person even

though such part be living, whether within or apart from the person of whom it is a part.

Section two. No private or public interest or right shall be deemed sufficient to subordinate any person's right to equal protection of laws respecting homicide, nor shall protection of any person's life be conditional upon a belief that such life is meaningful, worth living, or of use or benefit to the person whose life it is.

Section three. Legal classifications of persons on the basis of age, mental or physical normality, ability to take care of themselves, vigor, and strength shall be suspect, but shall be held permissible if such a classification is used to provide special advantages, privileges, or protections to persons who are not in the prime of life, are retarded, defective, deformed, dependent, declining, or weak.

Section four. Nothing in this Article alters the status at law and the rights of corporations and other nonnatural persons.

Section five. Congress shall have the power to enforce this article by appropriate legislation. This power shall include but not be limited to deciding disagreements which may arise in any jurisdiction subject to this Constitution concerning whether any class of individuals is a class of entities each of which is a member of the species homo sapiens.

We first explain the provisions included in this proposal and then indicate why some other possible provisions have been omitted.

Section one identifies the legal personhood of natural human individuals with the only thing they have in common—membership in the same biological species. It has been argued that those who supported the Fourteenth Amendment intended to do this.[17] We propose to make the point as explicit as possible. The second sentence, concerning parts of individuals, is added to make clear that only a whole organism of the human species will count as a natural person. Thus, the various organs which survive the death of a person are not persons; a man's sperm or a woman's ovum is not a person; one's cells growing in a culture are not persons. Neither is one's head or one's foot a person. This does not mean that a person's head cannot be legally protected. It and other parts of a person can be protected, but only in function of the protection of persons whose parts they are.

Section two attempts to establish equal protection of the lives of all persons against any and all supposedly conflicting claims, even claims based upon an individual's own interest in achieving the better condition of being dead rather than living a life of poor quality. We think that some formulation along these lines is essential if a right-to-life amendment is to be effective, since many are arguing that the right to life of some persons must yield to other's interests or the public's interest in avoiding a burden of welfare dependency, and many are arguing that for some persons death is a benefit.

Section three is intended to give the same protection to those whose quality

of life is regarded by many as poor as the Fourteenth Amendment (as it is now understood) gives to those whose race is regarded by many as inferior. Classification which tends toward alleviating inequality is permitted, but classification for other purposes on such bases must be considered suspect and worthy of the closest scrutiny.

Section four is inserted only to avoid misunderstandings which might arise, since the amendment will define natural legal persons very carefully and might erroneously be understood to change the status of other legal persons.

Section five places an enforcement power in Congress, especially in order to be definite about where authority lies to settle doubtful cases. However, the enforcement power is not limited but is extended as far as the power granted Congress by the Fourteenth Amendment extends. For the most part the amendment as we have drafted it directs the courts and legislatures in their substantive work.

The first section does not limit itself to the right to life. We understand why proponents of other human life amendments have limited their scope. However, we think that logic and justice require that legal personhood be recognized where it reasonably exists and not restricted to certain purposes. Furthermore, we do not think that legal difficulties of any great magnitude will be created if the unborn are considered persons not only for the right to life but absolutely.[18]

The second section does deal with the right to life. However, we have put the matter not in terms of life itself, but in terms of equal protection of laws of homicide, to conform to our position that justice, not life itself, is the good directly at stake in political society. If a society could exist without any laws prohibiting homicide, then there would be nothing wrong in that society leaving all equally unprotected.

The approach by way of equal protection also avoids a serious difficulty, namely, that of either specifying a discriminatory exception allowing the subordination of the life of the infant to that of the mother or leaving open the possibility of even more extensive discriminatory exceptions.[19] Our approach, we think, would require any permission for killing to be formulated in a nondiscriminatory way, along the lines of the law we formulated in chapter seven, section G, which would permit killing when necessary to preserve the best chance of survival for the largest number of persons involved in a difficult situation.

It will be objected that our approach would require that every abortion be treated as first degree murder and that the woman undergoing the abortion be treated as a principal in the crime. We think that if the unborn are really to be considered persons, there is nothing unreasonable in considering killing them the same as killing other persons. But the usual requirements for proving someone guilty of murder would still apply. First, it would be necessary to

show that a living individual had existed and been killed by the procedure. Second, it would be necessary that the intent and premeditation required for first degree murder were given. Furthermore, not all who are guilty of murder are punished with great or equal severity.

There would be nothing unfair in considering murder a crime which might be aggravated if the victim were deprived of other goods and if other persons and society were made to suffer other losses besides the life which every person stands to lose. Thus, the murder of a public official or of a person with dependents could be made a more serious crime, since in such cases more mischief is done than the killing itself. A law of homicide along these lines might provide equal protection of all against being killed, while providing supplemental protection to some lives in virtue of the related interests.

The third section is intended to protect the interests of those who are thought to have a poor quality of life against discrimination other than that which would permit homicide. It might be thought that this section is superfluous. Yet these persons are not always fairly treated, and a society which does not license killing them might well continue to neglect and mistreat them. Affirmative action programs cannot be written into the Constitution; different jurisdictions under varying conditions might have more or less ability to improve the condition of the disadvantaged. But the Constitution can make clear that any form of discrimination against these disadvantaged persons is excluded and can at the same time explicitly open the door to programs which would enhance the quality of their lives.

The fifth section, concerning enforcement, does not refer to laws prohibiting homicide. No one doubts that Congress and the state legislatures have power to make such laws for their respective jurisdictions, and no new grant of power is needed if such laws are to be framed in the terms the amendment specifies. However, Congress may need and would by this section be given the power to override discriminatory state legislation and to preempt the protection of the rights of the disadvantaged if the states fail in this respect. Moreover, some continuing authority is needed—and experience suggests that this authority had better not be the courts—to settle the problems which are bound to arise in borderline cases.

Even if one extends the protection of life to the unborn at every stage of their biological development or from fertilization on, factual issues still must be resolved—for example, whether a birth control device which prevents implantation is an attack upon a person or not, and whether cortical death is the death of a person or not. A uniform policy on such issues would be desirable, and a sound and uniform policy is more likely to be achieved by the Congress than by the courts or the state legislatures. Also, what is at stake here is legal personhood—as we pointed out in chapter three with respect to

the definition of death—with all of the rights and privileges which attend it, not merely some part of these rights and privileges which are consequent upon citizenship at either the state or federal level, or both.

C. Need for Protection of Liberty

Although the enactment of a human life amendment along the lines that we or others have proposed might be difficult, the concept of such an amendment is easy in comparison with the concept of an amendment to remedy the infringements and threatened infringments on liberty which we have noticed. The difficulty here, primarily, is that the Supreme Court of the United States, which has itself determined that secular humanism and other nontheistic world views are religious, tends to treat the secular humanist view with its consequentialist ethic as if this view merely gave neutral form to the common principles of American society. In doing this—for example in *Roe* v. *Wade*—the Court, as we have argued, is establishing a religion and judging according to its sectarian tenets.

Leo Pfeffer, a professor of political science at Long Island University, serves as special counsel to the American Jewish Congress. He is a noted practitioner of constitutional law, especially in the domain of church-state relationships, and has argued many cases successfully before the United States Supreme Court, urging separation between religion and government, the exclusion of religion from the public schools, and the denial of public funds to nonpublic schools. In 1975 Pfeffer published a book concerning church-state relationships and the Court as referee in these relationships. This work is remarkable because of what it concedes from the point of view of a person who is both knowledgeable and friendly—or, at least, not hostile—about the direction which the Supreme Court has taken in recent years.

In chapter six, section I, we pointed out that government interests in the field of birth control and abortion go beyond a permissive attitude taken out of respect for liberty—invoked by the Court under the title of "privacy." In fact, the government has extensively promoted birth control, both at home and abroad; abortion also in various ways has become an instrumentality of public policy to deal with the welfare problem. Euthanasia already is seen by some as an extension of this approach to human problems.

Pfeffer offers a similar analysis of the Court's decisions concerning contraception and abortion.

The anticontraception laws were not a real obstacle to the liberty of persons who wished to use contraception. But they were an obstacle to a state policy encouraging contraception. Pfeffer notes:

> The middle income and the affluent, married and unmarried, use contraceptives; the poor have babies. When the poor, often racial minorities, are on the welfare roles, taxpaying Americans rebel and expect the state to do something about it.[20]

Other solutions being unacceptable, the practical way to limit the costs of public welfare programs was to get the poor to control births. Although the national government already was taking this approach in foreign aid programs, the states were obstructed by their own laws against contraception. Pfeffer speculates that the reason the Supreme Court struck down these laws as unconstitutional "may lie in the fact that the justices recognized the need to get the laws off the books" so that either the states themselves or private agencies could openly promote birth control. Pfeffer then adds a remarkable statement, which agrees entirely with the views of the most severe critics of the Court's decisions concerning abortion:

> In this respect the nine justices on the Supreme Court, being immune to political reprisal since they serve for life, may be performing a significant though quite controversial function; they may be compelling the people to accept what the judges think is good for them but which they would not accept from elected legislators.[21]

In other words, the Court is legislating, and in legislating is imposing on the people the justices' own conceptions of what is good and right. Pfeffer does not observe one important implication: that in so acting the Court is usurping a power which does not rightfully belong to it, to place itself above the law and infringe upon the liberty of the people.

Pfeffer extends his explanation of the Court's decisions from birth control to abortion. After mentioning other reasons why the Court may have legalized abortion, he adds:

> All this is true, yet it is probable that a major factor here, as in the case of contraceptive birth control, is the taxpayers' revolt against rising welfare rolls and costs. Legalization of contraception not having worked to an acceptable degree, and other measures . . . proving too Draconian for public acceptance, permissible abortion, encouraged by the state, is the next logical step.[22]

The Court's first dealing with the abortion law, in *United States* v. *Vuitch,* was inconclusive, because this decision allowed the laws to remain in force, although it limited their effectiveness. Apart from other inadequacies Pfeffer notes:

> . . . and perhaps more important, the decision did not meet the needs of the poor who receive their medical services from municipal and county hospitals and clinics. So long as an anti-abortion law was in the State's criminal code, the physicians and nurses were not likely to perform an

abortion or even counsel one where the only reason for it was that the mother was a welfare recipient with seven children and no husband.[23]

Again, after summarizing the argumentation in *Roe* v. *Wade* and *Doe* v. *Bolton,* Pfeffer says that it "is difficult to escape the conclusion that nonlegal factors significantly influenced the decisions: our socioeconomic situation calls for the availability of abortion as a birth-prevention technique . . . "; but, Pfeffer adds, the legislatures were unable to act to repeal the abortion laws because of the "image of Catholic political power."

Actually, as everyone involved in the matter knows, the opposition to repeal was broadly based, and by 1973 it was beginning to become effective in many places where the Catholic contribution was a negligible factor. However that may be, Pfeffer concludes that "the Court had to do what had to be done and did it." He concludes the discussion on abortion with a parenthetical note regarding a 1973 New York City study which indicated that abortion had kept 24,000 children off the city's welfare rolls.[24]

Subsequently, in considering the efforts to repeal antihomosexuality laws, Pfeffer, reiterating his explanation of the contraception and abortion decisions, says that in the case of homosexuality those who advocate decriminalization "lack the most potent motivating factor possessed by the abortion reform movement, the economic factor. Homosexuality is not a practical or effective means of curbing the fruitfulness of welfare recipients."[25]

On June 20, 1977, The United States Supreme Court decided three cases related to the institutionalization of abortion. A whole series of lower court decisions had compelled the states to fund abortion under Medicaid and public hospitals to provide facilities for performing abortions.[26] Two of the 1977 cases concerned a Pennsylvania statute and a Connecticut Welfare Department regulation which limited state payment for abortion to those cases certified to involve medical necessity, thus to exclude payment for elective, nontherapeutic abortions.[27] The third concerned a directive by the mayor of St. Louis prohibiting abortions in public hospitals in the city except when there was a threat of serious physiological—not merely psychological—injury or death to the mother.[28]

The lower federal court decisions would have compelled Pennsylvania and Connecticut to remove their restrictions on funding and St. Louis to facilitate abortions in its city hospitals. The United States Supreme Court reversed these holdings, to permit governments at the various levels to settle through the political process to what extent abortion would be carried out as a state action. Thus, the Court recognized the distinction between the liberty of persons to have and to do abortions without criminal sanctions and the supposed right of such persons to the cooperation of the public at large, including those who consider abortion to be the killing of unborn persons and who for

that reason find it utterly repugnant. In other words, the Court refrained from holding that the Constitution *requires* everyone to participate in the killing of the unborn.

However, the Court did not reach its conclusions on the basis of the liberty of those who consider abortion abhorrent to stand aloof from such killing. Rather, the Court merely denied that equal protection of the laws *requires* that the public facilitate abortion to the same extent that it facilitates childbirth. On the Court's analysis Pennsylvania, Connecticut, and the city of St. Louis had adopted a policy favoring childbirth. The Court held that the public could adopt such a policy without violating the Constitution, but the Court also said that nothing prohibited the adoption of a public policy funding and facilitating abortion.[29]

Those who oppose both abortion and the drafting into cooperation with it of the public at large could take some satisfaction in the Court's refusal to impose the institutionalization of abortion as a matter of constitutional obligation on every jurisdiction in the United States.

However, despite their disappointment and frustration, proponents of abortion as an instrument of public policy did not lose much of what they gained by the abortion decisions of 1973. In many places abortion has become institutionalized and what has been done will not be undone. Furthermore, private agencies, such as Planned Parenthood, can devote much of their resources to funding abortion and seek increased governmental support to replace such funds diverted from their other activities.

At the same time the liberty of persons to have and to perform abortions is recognized and protected by the Court, while the liberty of others to stand aloof is ignored. Had the Court carried through an adequate and consistent libertarian treatment of the issues, even without reversing its 1973 decisions, it should have held that while the state cannot interfere with abortion, neither can it facilitate it. The former violates the liberty the Court has ascribed to pregnant women and physicians, but the latter, in the absence of an overriding public necessity, violates the liberty to stand aloof of all who consider abortion abhorrent and who in no way consent to its inclusion in the activities conducted by a government which must derive its just powers from the consent of the governed.

One of the most interesting aspects of the 1977 decisions is that they contain explicit statements in the dissenting opinions of Justices Blackmun, Brennan, and Marshall which support Pfeffer's interpretation of the 1973 abortion decisions.

Brennan's remarks are the least telling of the three. He merely states that the 1977 decisions "can only result as a practical matter in forcing penniless pregnant women to have children they would not have borne if the States had not weighted the scales to make their choice to have abortions substantially

more onerous."[30] Blackmun in a brief dissent denies the distinction between a liberty and a right to have an abortion, speaks of the plight of poor women, and attacks the people of St. Louis for electing a mayor who ran on a platform promising to close the city's hospitals to nontherapeutic abortion. The people of St. Louis, according to Blackmun, "impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost." The Court had argued that jurisdictions have their own priorities and must be allowed to spend limited funds in accord with them. To this argument Blackmun replies:

> The Court's financial argument, of course, is specious. To be sure, welfare funds are limited and welfare must be spread perhaps as best meets the community's concept of its needs. But the cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatsoever with the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead.

Blackmun concludes his dissenting opinion by noting the existence of another world "out there," thus to appeal to the public policy considerations which apparently prevailed over the principles of legality in the 1973 decisions. He says, "And so the cancer of poverty will continue to grow."[31]

Perhaps it is not surprising that Blackmun accepts as a strategy for a public war on poverty the elimination of this cancer by the elimination of the poor who are its victims. Of course, this rationale is terrifying when one thinks of its application to the problems which we have been examining, because all of the human misery which is involved in conditions which some regard as constituting a poor quality of life can finally be eliminated only in one way, by killing the miserable and afflicted. This one perfect and final solution also has the essential cost-benefit feature which Blackmun points out in respect to abortion.

What is surprising, however, is that Marshall is no less clear on his views:

> The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed race children now spend blighted lives in foster homes, orphanages, and "reform" schools. Many children of the poor will sadly attend second-rate segregated schools. And opposition remains strong against increasing AFDC benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. I am appalled at the ethical bankruptcy of those who preach a "right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children [citations omitted].[32]

Marshall obviously *accepts* the evils he describes as inevitable and unalterable. He sees them as evils but fails to see them as challenges to be overcome. Poor black people who exist in utter misery are to be saved from misery by being killed before birth.

Someone who did not know otherwise might suppose that Marshall was an unreconstructed racist. One who does know better must suspect that while the United States Supreme Court is located only a few blocks from the Washington, D.C., ghetto, a man who has achieved the status of a member of the Court is so far alienated from the people of the ghetto that he can burn with hatred at the evils from which the people suffer without ever feeling true compassion for the people who suffer these evils, so that he has embraced the solution of the upper-middle-class establishment, which has set itself against the social change necessary if America is to be transformed into a good and just society. Or perhaps Marshall speaks from some dark depth of depression, disillusion, and despair, a melancholy which can no longer believe that children who are scorned can yet receive the respect they deserve, that children whose lives are blighted can yet know the love of which they are deprived, that children who attend second-rate segregated schools can yet enjoy the educational opportunities to which they are entitled, that children of poverty can yet be helped to grow in a minimally decent environment, that those who live a bare existence in utter misery need not even now be deprived of that bare existence to be redeemed from that utter misery.

Whatever Marshall's personal views, his dissenting statement together with the statements of the others provide fresh evidence that Pfeffer's explanation of the 1973 decisions was a sound hypothesis. The Court has been "compelling the people to accept what the judges think is good for them." Fortunately in this instance the Chief Justice and Justices Powell and Stewart were unwilling to impose public support of abortion to the extent that Brennan, Marshall, and Blackmun would have imposed such support. However, Blackmun's resentment against the legitimate policy decision of the people of St. Louis, who elected a mayor committed to excluding abortion from the city's hospitals, means that citizens cannot refuse to cooperate in killing the children of needy minorities, because this refusal amounts to imposing the people's "own concepts of the socially desirable, the publicly acceptable, and the morally sound."

Blackmun obviously thinks that only the elite who sit at the bench of the high Court, far above the mass of the people who live on the land below, are entitled to impose their own concepts of the socially desirable, the publicly acceptable, and the morally sound. And from the olympus of the Court these few men have the power to hand down their personal convictions, shaped by a secular humanist world view with its consequentialist ethic, not merely as

advice, not merely as ordinary law, but as constitutional requirements—as the supreme and very difficult to amend law of the land.

It is hard to know how best to proceed in trying to disestablish the world view which the Court is effectively establishing. Congress and the various states are forbidden to establish a religion, but the Supreme Court cannot be prevented from doing so while it pretends that the world view it accepts is no more than the commonly held principles of liberty and justice which constitute the minimal public morality without which government would lack legitimacy. Nevertheless, a constitutional amendment could make clear at least that secular humanism and other nontheistic world views are on a par with traditional religions and could direct the Court to avoid confusing the moral convictions of its own membership with the minimal public morality.

Further, as our discussion in chapter six, section F, of the liberty to stand aloof made clear, a truly pluralistic society must avoid so far as possible making into public activities in which all must participate modes of action to which many citizens take profound conscientious objection. In some cases society must act despite the conscientious objections of a minority of its members. But such action is only justifiable if there is a substantial public purpose, recognized as such even by the objecting minority, to which the mode of action they find abhorrent seems to be a suitable and even necessary means, and if the adoption of this mode of action is by a general consensus reached by the majority despite its awareness of and respect for the views of the dissenting minority.

These conditions were fulfilled by World War II, to which strict pacifists objected on grounds of conscience. They were hardly clearly fulfilled at any stage of the Vietnam war and clearly were not fulfilled by the end of 1966. The conditions likewise clearly are not fulfilled by the use of abortion to eliminate misery by eliminating the miserable. Yet abortion is more or less extensively done by state action throughout the United States.[33] And there is every reason to expect that euthanasia will deeply involve public action, primarily to make it safe for those who do not wish to be killed and who are powerful enough to ensure that the state will protect them, secondarily to make it effective alongside contraception and abortion as an instrument for solving the problems of those who live miserably in public institutions at great expense to productive taxpaying citizens.

Thus, it seems to us, there is a need for constitutional recognition of the liberty to stand aloof, a declaration of the narrow conditions under which the state should proceed with forms of action to which some citizens conscientiously object, and a provision for the protection of such citizens from any more intimate involvement than necessary in the actions they find abhorrent. The diminishing foundation of consensus about goods other than liberty and justice themselves makes increasingly necessary provision for conscientious

objection if there is to be any possibility of maintaining social unity with a government having even a plausible appearance of legitimacy.

D. Life, Liberty, and the Education Establishment

In chapter six, section F, we admitted that it is difficult to reconcile the monopoly which the public school system has on public support of education with the implications of the principle of liberty which we there articulated. Many people have conscientious objections to what the public schools are doing; a great many have felt compelled by their deeply held conscientious convictions to provide an alternative means for educating their children. While the problem of educational freedom is too large a one for us to attempt an adequate treatment of it here, this problem is relevant to the issues regarding life, liberty, and justice with which this book is primarily occupied. The question of educational freedom must be given some consideration here, because such consideration will help to clarify the very important point that secular humanism does not offer a neutral approach to public policy issues.

Moreover, the public school system is being used to inculcate the principles appealed to by the supporters of most of the important public policy proposals bearing upon life and death which we have criticized throughout this book. Across the United States the children are being formed in the new quality-of-life morality, especially but not only in courses of sex education which have been promoted by organizations closely connected with the groups which have promoted contraception and abortion. Moreover, seizing the opportunity presented by parents and other concerned persons who are anxious about the moral formation of the young, a great many schools have established programs in values clarification, which very effectively undermines the claim of traditional moral standards to objectivity and prepares the minds of the young to be as receptive as possible to the consequentialist ethic which is the moral doctrine of secular humanism.[34]

The first thing to understand about the American public school system is that until the last few decades it did not even pretend to be religiously neutral. What it claimed to be was nonsectarian. In fact it was only nonsectarian in relation to various forms of Protestantism. By and large the public school system of the United States has been a publicly financed, common Protestant educational system. The Protestant version of the Bible was used in the schools for religious instruction, Protestant prayers and hymns were said and sung, Protestant ideals and standards inculcated, and very often Protestant interpretations of history, literature, and other sensitive subject areas were given, in some cases by Protestant clergy.

Anyone who takes the trouble to talk with elderly Catholics and other persons who were not like their Protestant peers in the schools of the early decades of the twentieth century will hear many stories which make clear what the situation was. But numerous court cases—none of them ever reaching the United States Supreme Court—also provide unquestionable evidence.[35]

Leo Pfeffer quite frankly summarizes the situation. American public education was initially Calvinist. As it spread, there were problems due to sectarian differences with other Protestants. The solution was to use the Authorized (King James) Version of the Bible as a textbook in religion but to exclude sectarian comment and interpretation. When Roman Catholics began coming to the United States in large numbers in the 1830s, they could not conform to the established arrangement:

> In some schools the teachers and authorities did not insist that Catholic children participate in the exercises, but in others Protestant fervor or anti-Catholic prejudice dictated a different course, and non-compliance by Catholic students led to corporal punishment, expulsion, and other forms of discipline.
>
> As a result Catholic parents brought many lawsuits in state courts. In these cases the legal issue was whether the King James Version of the Bible was a sectarian book and hence not permissible for public school use. Because most of the judges were themselves Protestants the decisions in most cases favored the status quo. The frequency of such decisions did much to encourage an exodus of Catholic children from public schools and establishment of Catholic parochial instruction, usually under diocesan auspices.[36]

Many state constitutions and statutes prohibited the funding of "sectarian" schools—that is, of schools other than the common Protestant system, which in this way gained a monopoly on public funding.[37] In short, the American public school system simply was a common Protestant school system.

In 1947 the Supreme Court of the United States—holding the First Amendment clause concerning establishment of religion applicable to the states by way of the Fourteenth Amendment—declared that there must be separation between church and state. Nevertheless, it approved as a service to the children rather than as aid to the schools the provision of bus transportation to pupils attending parochial schools.[38] In 1948, having laid the groundwork, the Court, deciding the case of *McCollum* v. *Board of Education,* held unconstitutional an arrangement by which Illinois children were released from other work for a time each week to receive religious instruction in classes approved by their parents and taught at the school by religion teachers who came in from outside at no cost to the school system.[39] Pfeffer indicates an important aspect of this landmark decision:

> As indicated, all the pre-*McCollum* lawsuits challenging religion in the public schools had been brought by Catholics. With *McCollum,* the burden of litigation shifted to atheists (McCollum, Doremus), humanists (Schempp), Jews (Engel, Gluck), and occasionally liberal Protestants (Zorach).[40]

Following *McCollum* a series of cases were decided which purged the public schools of the vestiges of the old Protestant establishment. The most important of these cases were *Engel* v. *Vitale* (1962), in which the Court held unconstitutional the recitation of a short, public-school-sponsored prayer, and *Abington School District* v. *Schempp* (1963), in which the Court rejected as establishment of religion the vestigial devotional use of the Bible and the saying of the Lord's Prayer.[41]

What happened is clear enough. For about a century Catholics complained about the establishment of Protestantism in the public schools to little or no avail. The First Amendment restrained Congress but not the states, and the Supreme Court was uninterested in the problem. After World War II persons standing outside the common Protestant establishment attacked its privileged position in the public schools. The Court discovered that the First Amendment's prohibition of establishment does apply to the states, thus to give itself power to drive religion altogether out of the public schools. Presumably the result would be to make them religiously neutral.

But can this be done? Justice Jackson, dissenting in 1947 from the decision permitting the public to provide bus transportation for children attending parochial schools, strongly emphasized the religious function of the Catholic school system and contrasted it with the public school approach:

> It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.
>
> Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840 [citation omitted]. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.[42]

Although this contrast ignored the true history of the public schools and propagated a myth as to their neutrality—a neutrality Jackson interestingly characterized as "lofty," suggesting a position of superiority to religion—it at least makes clear that there is more to the matter of religion in schools than saying a short prayer or reading a few verses from the Bible.

Different approaches to education are grounded in different religious conceptions of faith. On a Catholic conception one receives faith as a member of the church to which he or she belongs; on a Protestant conception one chooses one's religion and subsequently may or may not associate with those who are like-minded in a church. Jackson is admitting that the public school system by its very "neutrality" favors the Protestant over the Catholic conception of how one receives Christian faith.

By the following year, when *McCollum* was decided, Jackson was ready to discuss the questions about the very possibility of neutrality which he had claimed characteristic of "our public school." Jackson concurred in the decision that released-time was unconstitutional, but he was worried about the Court's seeming readiness to lay down the sweeping constitutional doctrine as demanded by complainant: "to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools." Jackson observed that there were 256 separate and substantial religious bodies in the United States, and that if the Court were to eliminate everything objectionable to any of these sects from the public schools it would leave public education in shreds, cause educational confusion, and discredit the system.

Perhaps some subjects such as mathematics, physics, or chemistry can be completely secularized, but most subjects cannot be sterilized of the religious, because everything in the culture worth transmitting is saturated with religious influences.

> One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.
>
> But how can one teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found "a Church without a Bishop and a State without a King," is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohamet. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry.[43]

And so belatedly realizing that the schools could not maintain strict and lofty neutrality, Jackson urged the Court to proceed with judicial restraint:

> It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions.[44]

Unfortunately Jackson did not draw the appropriate conclusion: The monopoly of public funding enjoyed by schools which could not be thoroughly and loftily neutral amounts to establishment of religion, and this establishment chills the right of free exercise of all those who find the nonneutral public schools less consistent with their religious beliefs than would be their own, alternative system of openly religious schools.

The case of *Abington School District* v. *Schempp* (1963) is especially interesting because of the manner in which the Court carefully skirted the problem of the nonneutrality of the public schools. In *amicus curiae* briefs the American Ethical Union and the American Humanist Association expressed their interest in the issue, identifying themselves as religious in the constitutional sense which the Court recognized in *Torcaso* v. *Watkins,* where both Ethical Culture and Secular Humanism had been mentioned by name and identified as nontheistic religions.[45]

The Ethical Union brief makes clear that its nontheism is not necessarily atheism; members are at liberty to believe in a Supreme Being. What is essential is freedom of thought and privacy of judgment. Ethical societies take an attitude of strict neutrality toward worship, theism, and prayer; their positive thrust is toward the enhancement of ethical fellowship or human relations. The methods of religious formation adopted by this group are as follows:

> In their Sunday Schools, Ethical Culture Societies carefully avoid developing in their children a view of life that is dependent upon the dogma of the divine word or the worship of a Supreme Being. The program seeks to impart to the children instead an understanding of the religious and cultural heritage of other groups and of the dignity and worth of each individual in order that they may better understand their own Ethical and humanistic heritage.
>
> In part, the study by the children of the traditions of other religions is based upon religious literature, including the Old and the New Testament. The curriculum of the Sunday School of the New York Society for Ethical Culture states that: "The Old and the New Testament are examined as literary documents with great ethical import which have exerted a far-reaching influence on Western civilization." [citation omitted] The study of the Bibles and the doctrines therein contained is made under the supervision of a Sunday School teacher who can aid the children in comparing one with another so that their similarities and differences may be brought forth as well as their religious and moral significance.

> The Ethical Movement does not subscribe to the claims of any of the various Holy Books of mankind as being the ultimate word. Leaving to each of its members the personal decision as to their divine nature, Ethical Culture draws from various scriptures their moral and ethical principles. "It starts where the Jewish and Christian communions stop, seeing in the ethical precepts of the Old Testament and in those of the New, stages in the evolution of moral standards beyond which we are now to advance."[46]

The Humanist Association brief explains its view of religion:

> As an approach to living, as a philosophy and a religion, Humanism is free from any belief in the supernatural and dedicates itself to the happiness of humanity on this earth through reliance on intelligence and the scientific method, democracy and social sympathy. . . .
>
> It is not attempting to form another church but to supplement and relate the Humanists in various churches and to join them with secularists in common study and fellowship.
>
> In 1933 "A Humanist Manifesto" was issued by 34 distinguished persons, including John Dewey, Robert Morss Lovett, John Herman Randall, Jr. and Charles Francis Potter, most of whom considered themselves religious in a non-theological sense. Religion to them meant the group quest for good life and the pursuit of the ideal, but unlike traditional theistic religions that ideal was grounded in nature rather than in the supernatural. Humanists endeavor to keep the human spirit free from binding dogmas and creeds and to search for truths rather than "The Truth".
>
> It firmly believes in the fundamental American doctrine of complete separation between church and state and that this principle must be maintained in its broadest aspects.
>
> It regards the public school as one of the most democratic American civil institutions and that its idea of secular education should not be compromised by using it as an agency for religious activities or instruction.[47]

On this basis the Humanist Association quite reasonbly found the reading of the Bible and the saying of the Lord's Prayer abhorrent practices in the public schools and demanded that they be excluded as unconstitutional mingling of church and state.

Both the Ethical Union and the Humanist Association considered themselves religions, and quite correctly in terms of the Court's acceptance of the position, which we discussed in section A, that anything which takes the place of religion in one's life is constitutionally a religion. One's ultimate concern, one's way of valuing most intensively and comprehensively, the source of one's deeply held conscientious convictions is one's religion, whether one belongs to any church, engages in any conventional religious practices, or even thinks of oneself as religious.[48]

The Ethical Union makes clear exactly how in its *religious* perspective the

writings others consider sacred are to be regarded. They are to be treated with respect as great literary documents, studied with care for their human and ethical significance, but never accepted as the ultimate word.

The Humanist Association proudly declares its allegiance to democracy as it understands democracy. While it eschews any search for "The Truth," it "firmly believes" in the absolute separation of church and state and regards the public school as the most democratic of institutions.

One of the founders of the Humanist Association, John Dewey, articulated a tremendously influential educational philosophy, which has shaped the education of the teachers in many of the faculties of education in the United States and elsewhere for much of this century. Dewey considered the school a small-scale but actual democratic society in which children would learn by practice how to reform and humanize the larger society. The stress on problem-solving, on social adjustment, and on situational factors which is so characteristic of modern educational theory and public school educational practice is in no small measure indebted to Dewey's educational philosophy, which includes a psychology, an ethics, and a secular humanistic religious attitude.[49]

The decision of the Court in the case excluded devotional Bible reading and prayer from the public schools. In doing so the Court surely was correct inasmuch as these are religious practices and the public schools have a monopoly on public support, so that religious practices in them constitute an establishment of religion.

But the Court failed to face up to the issue of the nonneutrality of the residual educational system. It came closest in saying:

> It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." [citation omitted] We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[50]

The Court certainly is correct in holding that the exclusion from the public schools of the vestigial religious exercises at issue in the case does not establish a religion of secularism.

But the Court ignores the fact that the public schools do in fact embody and

put into practice deeply held conscientious convictions. To some extent these convictions are a generalized residue of Jewish and Christian religion and morality, a nondenominational residue which plays a part in American public life generally—for example, in the simple ceremony of the pledge of allegiance to the flag. This residue, which has been called "civil religion," is almost inseparable from the conventional patriotism and attitude of civic responsibility inculcated in the public schools in more conservative sections of the United States.[51] To the extent that all conventional religion, including American civil religion, is successfully excluded from the schools, they inevitably embody other deeply held convictions. In many schools a secular humanist educational philosophy, developed by Dewey and others, is in fact given the dominant position. In such schools, whether by forthright indoctrination or by the subtle communication of the organization of the educational experience, the methods of teaching, and the like, children are formed in secular humanism.

Perhaps the Court forgets its own extremely broad definition of "religion," which as we have seen was invoked by the Ethical Union in its brief. Nevertheless, the Court approves as the acceptable way of dealing with the Bible in public schools precisely the way in which the Ethical Union deals with it in the religious education of the children of its own members in the Sunday Schools conducted by their groups. Moreover, the Court misdefines "religion of secularism" as affirmatively opposing or showing hostility to all religion, so that this would be established only if the public schools actively propagated nonbelief in anything at all.

Obviously, they cannot do this, and the Humanist Association never proposed it. The Humanist Association is dedicated to the happiness of humanity on this earth through reliance on the scientific method and intelligence, democracy and social sympathy. Its founders considered themselves religious in a nontheological sense but with an ideal grounded in nature. This is the sort of religion which secular humanists want in the public schools, and with the support of the Court this is the sort of religion which the public schools propagate.

In a concurring opinion Justice Brennan argued that the public schools really are neutral:

> It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.

Brennan then proceeds to contrast "public secular education with its uniquely democratic values" with forms of "private or sectarian education, which offers values of its own."[52]

This way of looking at the matter is deeply confused. If the public schools embody a unique set of values, they are teaching a religion. The supposition is that this religion is acceptable to everyone, because it is common to all American groups and religions. But, one wonders, what is this common body of values? We of course do not deny that there are common standards of liberty and justice. On particular points persons whose religious views differ greatly can come to agreement in moral intuitions—for example, that racial discrimination is unjust. By ending segregation and undertaking integation, by striving to develop a school community in which children of various races learn to live together in mutual respect and cooperation, the school system embodies this intuition without necessarily establishing a religion.

But teachers do have foundations for their deeply held conscientious convictions in this matter, and children are curious. Moreover, not all children are going to share the intuition that racial discrimination is wrong. What are teachers to tell them? Shall they say: It is wrong because the Supreme Court has said so, and that is all there is to it? This would be an extreme legal positivism, which is one religion among others—"religion" being understood as the Court has defined it. Some teachers might be tempted to say: Because God is our Father, and all of us are his children, and we ought to treat one another as brothers and sisters who share in his dignity. Clearly, to say this is religion—it is an example of the common, nondenominational religion which is called "American civil religion." The teacher can avoid this explanation, of course, but any alternative explanation also will manifest deeply held conscientious convictions and so, on the Court's own definition, will be religion of one sort or another.

And so we come back to the admission which we made in chapter six that the principle of liberty cannot be reconciled with the monopoly which the public schools enjoy. They try to contribute to the growth and health of children but must adopt one conception of maturity and healthiness rather than another.

If one is a secular humanist, sex education which helps children to understand and accept their sexual feelings, to appreciate the possibilities of sexual gratification, to avoid such undesirable consequences as venereal disease and unwanted pregnancy, and to be tolerant of persons with varying sexual preferences makes very good sense. If one's religion is not secular humanist, such sex education too easily accepts what must be dealt with cautiously, too quickly approves gratification over restraint and sublimation, too exclusively emphasizes public health considerations as the parameters of bad sex, and too quickly tolerates masturbation, premarital sex, adultery, homosexuality, and other forms of behavior which many parents still consider wrong.

More broadly, if one is a secular humanist, it makes good sense to invite

children to clarify their own values by discussion of problems in a context of social interaction with their peers, for the secular humanist believes that all values ultimately emerge out of human social experience with concrete situations. Thus, problems such as abortion and euthanasia will be discussed, by using as material cases in which killing has some emotional appeal, and the children will be asked to give their own opinion: "Johnny, how do you feel about the Eskimo family leaving their grandma behind?"

If one's religion is different, courses in value clarification amount at best to indoctrination in a dangerous relativism which contradicts the objectivity of moral norms and the authority of their source—for example, in God. At worst, such courses more or less openly propagate secular humanist beliefs and attitudes, for example, by using materials which suggest on cost-benefit consequentialist grounds that those whose quality of life is poor ought to be "allowed to die."

Obviously, even if secular humanism is not inculcated, still schools must form the minds and characters of children if they are to educate, and any effort at formation flows from a source of values, for such formation is an exercise in the communication of values. Talk about health and growth is no less religious, taking "religion" in the sense the Court has given it, then talk about holiness and grace.

While the Supreme Court has excluded certain manifestations of conventional religion from the public schools while it evades the issue of their nonneutrality, it also has firmly been refusing to allow any substantial public assistance to nonpublic schools. As we saw, it permitted the states to fund bus transportation as a benefit to the children. Subsequently it allowed the furnishing of standard textbooks to nonpublic school students, on the ground that neither the purpose nor the primary effect of furnishing such books was to advance religion but rather was to advance the secular component of the education which children receive even in the context of a religious or other nonpublic school.[53] If this approach had been applied consistently, it would have opened the way to public financing for a substantial part of the education of children in nonpublic schools which met common standards for recognition as legitimate educational institutions.

However, in *Lemon* v. *Kurtzman* (1971) the Court held that programs enacted by Pennsylvania and Rhode Island to compensate church-related schools and their teachers for instruction of children in secular subjects violate the religion clauses of the First Amendment. The Court argued that the statutes would bring about excessive entanglement of religion and government, because the schools have a religious purpose, because the children are being formed in religion by the school, because the state would have to be involved in the schools to make sure the restriction of assistance to secular purposes was respected, because the state would have to audit the schools'

books, because the grants would become a political issue and lead to political division along religious lines, and because any entanglement would be a step onto a slippery slope.[54]

In the opinion of the Court there were only mild suggestions of a point stressed very much in a concurring opinion by Douglas: The religious and secular aspects of education in a religiously oriented school cannot be separated in practice, religious principles permeate the curriculum and the operation of the school, and teachers cannot avoid dealing with even the most secular subject matters in a way marked by their profound beliefs.[55] Douglas ignored the fact that permeation by deeply held, conscientious convictions also is inevitable in public schools.

It is not altogether clear whether entanglement is establishment or interference with free exercise of religion. Perhaps it is both. The concurring opinion of Brennan suggests that the restrictions in the state programs would interfere significantly with free exercise.[56]

In a dissenting opinion White argues that the subsidies would not violate the establishment clause and that they could be viewed as required by the free exercise clause. His argument is that when the state undertakes to further education, considerations of free exercise tell against refusing support to students attending parochial schools merely because there they also receive instruction in the religion they are free to practice. But White also undertook to argue the implausible proposition that a strict separation between secular and religious activities within the schools was possible and could be carried out in practice.[57]

It seems to us that a stronger argument might have been made by suggesting that the subsidies could be paid without state involvement in the schools and an entanglement of any very real sort could thereby be avoided. The impossibility of teachers maintaining neutrality is not peculiar to parochial school settings, and so special surveillance of such schools would be unwarranted.

More basically, the Court has admitted the liberty of citizens to educate their children in a religiously oriented manner. The state requires all children to attend schools. It collects taxes and provides a school system, which naturally accepts the views of the socially dominant group and tries to mold all students in accord with them.[58] Those who dissent from the views of the dominant group nevertheless either submit their children to this molding process or they exercise their liberty by finding alternative means of education which meet common minimal standards. To deny public funding to such dissenting groups for their service to the commonly accepted educational purpose obviously chills the free exercise of religion and denies to those who dissent the equal protection of the laws.[59]

Many who would not accept this argument in the present context nevertheless presented a similar but far weaker argument for the public funding of

abortions, which the 1977 decisions *accepted as permissible* although not constitutionally required. The argument for public funding of openly religious schools is stronger for at least two reasons. First, the public does compel children to go to school; it does not compel anyone to become pregnant. Second, although some dislike religiously shaped education and consider it harmful to children, no one regards the policy of allowing parents to educate their children according to their own world views as a grave injustice; many people find abortion not only repugnant but abhorrent as a grave injustice to unborn persons. Yet some who urge that the denial of public funding to impoverished pregnant women annuls their right to abortion also urge that the denial of public funding to impoverished religious parents is altogether compatible with their right of free exercise of religion. If they were free in the extreme case to keep their children out of school altogether, the argument might have some plausibility, but since the law will compel attendance if the parents do not send their children to the only schools they can afford—the publicly supported ones to which they conscientiously object—the argument is wholly lacking in plausibility.[60]

E. Freedom of World View Amendment

Thus, let us sum up our current discussion. We have been suggesting that a clarification of the Constitution is needed to point out the parity of secular humanism and other nonreligious world views with the traditional religions and to warn against treating the former as neutral and equivalent to the public morality of liberty and justice. We also explained why the right of conscientious objection is in need of formal, constitutional recognition without restriction to one or another narrow subject matter or area of public activity.[61] Now, with the discussion of the school question we have tried to clarify why the myth of public neutrality in education should go the way of the myth of separate-but-equal facilities for the races.

In education and other positive public programs—such as health care—public involvement may be essential for the common welfare, which is an aspect of the common good which serves a whole variety of goods of individuals and voluntary organizations. But when people with varying world views would take diverse approaches to forming such programs, respect for the liberty of all in a pluralistic society demands that any group which can develop its own alternative program receive public recognition and support to the extent that its program serves the common welfare. Otherwise, free exercise loses all practical meaning in the modern welfare state, and equal protection of the laws has a meaning only for those who share the dominant world view which manages to shape the public programs.

With these purposes in mind we propose the following "Freedom of World View" amendment as a point of departure for a discussion of this subject:

> Section one. Neither Congress nor the legislature of any State shall make any law respecting the establishment of Secular Humanism or any other world view, nor shall the free exercise of any world view be prohibited. The liberty of free exercise hereby guaranteed shall be subject to the same limits as the liberty of free exercise of religion guaranteed by the First Amendment to this Constitution.
>
> Section two. No court of the United States or of any State shall adopt as normative for the interpretation of this Constitution or the constitutions of the various States principles of the right and the good rooted in the world views adhered to by the judges themselves as distinct from the principles of liberty and justice about which there is general consensus among the people, despite their diverse world views.
>
> Section three. Neither the United States nor any State shall engage in any activity repugnant to the deeply held conscientious convictions of the majority of its citizens; nor shall they engage in any such activity repugnant to a minority without declaring the necessity of the activity for a substantial public purpose. Upon making such a declaration, Congress and the legislatures of the various States in their respective jurisdictions shall provide means by which conscientious objectors can stand aloof so far as possible and be exempt from direct participation. The means provided shall avoid creating either an advantage or a disadvantage for conscientious objectors in comparison with other citizens.
>
> Section four. Both the United States and the various States shall respect the equal liberty of all citizens to contribute to the public welfare by participating in institutions and programs of activity formed by their own world views. Congress and the legislatures of the various States in their respective jurisdictions shall not fund public programs directed toward health, education, and welfare without funding equitably privately organized programs directed toward the same purpose.
>
> Section five. Congress shall have the power to enforce section two of this Article with respect to judges of the courts of the United States by the process of impeachment. Whenever one-third of the members of the House of Representatives petitions their Speaker for a vote whether to impeach any civil officer of the United States, the Speaker shall call the issue to a vote within thirty days.

We propose the preceding only as a sketch of the constitutional reform we think is needed. Clearly the matter is very difficult and requires a great deal of thought and discussion.

The first section would make explicit what the Supreme Court already has held but not consistently adhered to: All world views are on an equal footing. This means that nontheistic world views must not be treated as if they repre-

sented the common basis of the society and thus be given a status preferential to traditional religious views.

Our second section sets down an ideal for judicial neutrality between their own moral views and those of other citizens. The ideal is a high and difficult one. Probably it could be more clearly formulated. The ideal would have no legal force if it were not somehow enforced. We propose in section five that the power of impeachment be used to enforce judicial neutrality. In proposing this we also suggest that the process be expedited by requiring a vote on a possible impeachment—not only of judges but of any civil officer of the United States—whenever a substantial part of the House demands it. Apart from expediting this vote, the impeachment process would be no easier than it now is. The Senate would remain the ultimate court and would still convict only by the votes of two-thirds of those present.

This very likely would mean that judges would seldom if ever be impeached for their nonneutrality. But the possibility of impeachment would create a decent caution on the part of the judges and a beneficial scrutiny of their grounds for decisions on the part of their critics. Under such conditions *Roe* v. *Wade* might not have been ventured.

Our third section does three things with respect to conscientious objection. First, it establishes this as a constitutional right, which seems to us essential if a pluralistic society is not going to infringe constantly upon the liberty of many of its members. Second, it eliminates the restrictions of conscientious objection to a few isolated instances. Third, it requires that efforts be made to equalize the situations of conscientious objectors with other citizens.

Had a constitutional provision such as this been in effect during the Vietnam war, everyone who objected to it on grounds of conscience could have been exempted from military service but would have been required to accept equally onerous service in the public interest in some nonmilitary capacity. But by the same token all who served would receive similar benefits. If a provision like this would lead to a general refusal to serve in a particular war, that would be an excellent sign that the war did not enjoy public support.

Our fourth section goes beyond cases in which people wish to avoid an activity to which they take conscientious objection to cover cases in which groups of people wish to serve the public interest in their own ways—for example, by providing their own school or health-care facilities as an alternative to public programs. We have argued at length for the justice of such an arrangement in the case of the schools. The same principles would apply as well to health care and other fields of activity. This provision would go a long way toward making society truly pluralistic, not only at the level of individualism but also at the level of the subcultures which are far more significant for cultural richness than is individual idiosyncrasy. Individualistic pluralism is for

an elite few; subcultural pluralism is something which can be enjoyed by the many.

Someone will object that provisions to protect the liberty of all to stand aloof from activities to which they take conscientious objection and to enable many people to enjoy the liberty of pursuing the public good in their own ways will be difficult to administer and will lead to waste and inefficiency. This may be true, but ease of administration and efficiency in pursuing the public good concern only means to it, while liberty and its just protection are very important components of this very good. An argument based upon ease of administration and efficiency, if taken to its ultimate implications, is an argument for a totalitarian state, which simplifies administration, pursues its ends with efficiency, and crushes liberty.

F. Concluding Practical Considerations

We have outlined two amendments: one to protect human life as it should in justice be protected and the other to insure liberty and enhance its exercise. Many have sought an amendment along the lines of the first of these for several years with little practical result. One might wonder whether the second has any better prospect of success, and whether it is worth the work of pursuing either or both of these lines of reform.

One point worth noting is that distinguishing the issues as we propose would have the advantage of creating two distinct movements which could share many common members but also could appeal to somewhat different groups. Progress toward the goals of either of these proposals would be very worthwhile and would mitigate significantly the dangers in which American society now stands. It would be a serious mistake to suppose that the establishment of secular humanism and its new morality is less a threat to the liberty of those who adhere to other world views than it is to the rights of those, for example, who are being killed because no one cares to protect them and many prefer to lessen the welfare burden.

Still, we are not optimistic about obtaining the passage of constitutional amendments along the lines of either of our proposals. Why, then, propose them?

First, the effects of both proposals could be achieved by new decisions of the United States Supreme Court itself. Neither of these proposals makes any substantial change in the Constitution; both merely make clear how the Court should be interpreting it. A reversal by the present Court of positions it has taken is unlikely. But the present Court is not immortal. There are only a few persons who are likely to be appointed to the Court in the future. The task is to try to learn who these persons might be, to try to educate them, to find

which of them would join in judgments reversing the errors of the Court, and to seek the appointment of such persons.

Perhaps as things now stand persons who are eligible by virtue of their socioeconomic status and other qualities to be appointed to the Court are likely by these very same factors to be impaired in understanding the meaning and implications of the fundamental American commitment to liberty and justice for all. But times do change and nations sometimes suffer shocks which bring them back to their fundamental commitments.

Second, the movement for the reform of the Constitution must be a mass one and as such it needs a clear focus. Yet even if this goal is not reached, the movement can achieve a great deal. The Constitution cannot be effective in a vacuum. If the United States has an overreaching Court which imposes bad law, this is partly because people do not sufficiently understand what good law is, do not insist upon having it, are not eager to live under it, and are not willing to work to make it effective.

Laws must be understood, appreciated, and respected by the people subject to them if they are to be more than arbitrary rules imposed to govern behavior irrespective of the desire of members of a society to cooperate together in a truly common life. If by some miracle a properly astute Court were given America today, the present situation would change little without changes throughout the body politic. Yet even with an overreaching Court and some bad law the nation need not be wholly corrupt if people know what is just and continue to strive after it despite infringements upon their liberty.

Persons who are working hard to achieve a good are themselves less likely to yield to a temptation to violate that good. Young people who are committed to seeking just laws to protect the lives of the unborn are less likely than others to be tempted to share in unjust killing.

Thus infringements on liberty and justice can at least be slowed, and many human lives which otherwise would be lost can still be saved. For this all who love life, liberty, and justice may hope, and in the light of this hope work through the night which is our time.