Standing Between the Butcher and the Baby

or

A Criticism of the Legality of Abortion and the Rights of the States to Interpose Themselves Between their Citizens and Federal Law

by

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I am an escapee of the pro-death culture – the entirety of my life has been within the "law" of Roe v. Wade. What is worse is that due to the ineffectiveness of the pro-life movement and its leaders, now a second generation of Roe refugees have been born – my wife and I have borne three ourselves. It is my intent to work toward ensuring that a third generation, the children of my children, are not born under the "law" of Roe v. Wade.

The pro-life movement estimates more than 3,700 children each day are either poisoned or butchered while still in the womb. That is, in now thirty-three years since Roe v. Wade, over 45 million children have been murdered and have received no protection from their civil governments. In these past thirty-three years, "pro-life" groups have been utterly ineffective in not only making abortion illegal, but of even passing any legislation that tends toward making abortion illegal. The pro-life lobby has become so ineffective at passing good legislation that after the Republican landslide in 2004, giving America a majority Republican Congress, Senate, State Governors and a Republican President, the director of Americans United for Life even criticised any state legislator who would introduce legislation making abortion illegal. Now, he claimed, with a Republican rule, was no time to expend the political capital given them to protect the unborn.[1] The pro-life movement offers only regulation of abortion, and education on why not to have one. However, if every pregnancy resulted in a natural end (either birth or miscarriage), but abortion was still legal, the pro-life movement would have lost the battle, and the pro-abortion "rights" advocates would have won. As such, every pro-life measure that seeks merely to chip-away at the number of abortions, while not asserting definitively that abortion is no such right, is a losing measure.

Just to cite a few examples: Parental-consent measures, or the *Child Interstate Abortion Notification Act*, have set into law that abortion is a right of every person, provided that minor abortion-seeker gets the grandparent of the to-be-aborted's permission before killing him.

Partial-birth abortion bans suggest that *abortion* is a right, but it should not

be done so distastefully, even if this form of abortion is most comfortable for the baby-victim. (Saline abortions pickle a child for hours; the D/C abortion chops the baby up while alive; whereas partial-birth abortions gently deliver the baby 2/3 of the way and instantaneously kills him.)

Seeking a Constitutional Amendment declaring abortion illegal concedes a ground we ought not be willing to concede: that presently, abortion is legal.

The worst pro-life "victory" in recent years was the *Unborn Victims of Violence Act* whereby a Republican Congress and President signed into law for the first time in American history a legislative protection of women and doctors who conspire to murder unborn children.

President George W. Bush was morally wrong when he declared in the third Presidential debate of 2004, "I believe reasonable people can come together and put good law in place that will help reduce the number of abortions." *Reasonable* people can come together on where is the best place to put a bridge – murderous tyrants come together to broker the number of lives they will permit be murdered in a country.

The above measures, or any other regulatory means of minimizing abortion, precariously chips away at the foundation of Law. As Samuel Rutherford wrote in Lex, Rex, "God's law doth not regulate a *non-ens*, a mere nothing, or an unlawful power."[2] Regulating abortion concedes its legality – prohibiting abortion denies its legality.

We have nearly 1,000 years of English Common Law history, let alone the 6,000 years of Biblical Law history, that reveals that Law exists apart from mankind, and it is man's duty to discover the Law and then faithfully to execute it. As Stephanus Junius Brutus wrote in Vindicæ Contra Tryannos, "kings are merely vicars of God, constituted on God's throne by God Himself … as guardians, rather than usurpers, of His rights."[3]

The "legal" things that men do apart from the Law are, as St. Paul called them, vain imaginations.[4] Early Christians understood that the legality of Rome did not make abortion "lawful." Our Constitution's *Supremacy Clause* is recognition that "legal" and "Lawful" are different terms. Only those laws passed in accordance with the Constitution become the Supreme Laws of the Land.

I want to be clear about something – if Common Law and our Constitutional History did not protect the life of the unborn child, I would be on no less secure footing than if our Constitution contained the clause "no person shall be permitted to take the life of another person, born or unborn, without prosecution." If abortion is unlawful by God's Law, I don't much care about Common Law. Abstractions like "states rights," "rule of law," "strict constructionism" and "original intent" are dangerous constructs – they must be rooted in Christian Liberty, which

acknowledges Christ's higher Law. As Thomas Jefferson noted, "A strict observance of the written laws is doubtless *one* of the highest duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of a higher obligation. To lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."[5] Procedural law ought to always give way for Substantive Law.

Has the Christian Church *always* held the present position relative to abortion? The church does not have power over life or death, but the early church did make the penance for having an abortion life-long, indicating that abortion was equivalent to murder.[6] 1500 years later, John Calvin wrote, under his commentary on *Thou shalt not kill*, "the *fœtus*, though enclosed in the womb of its mother, is already a human being, (*homo*,) and it is almost a monstrous crime to rob it of the life which it has not yet begun to enjoy."[7]

Blackstone demonstrated in the 18th Century that under Common Law that "life is the immediate [that is to say, "directly conferred on man as a"] gift of God, a right inherent by nature in every individual. … For if a woman is quick with child, and by a potion or otherwise killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered a dead child; though this is not murder, was by the ancient law homicide or manslaughter."[8] Additionally, "the punishment of a pregnant woman condemned [to death] shall be deferred until after her delivery."[9] While Common Law required in each of the above instances that the child be quickened, Biblical Law facially makes no distinction in Exodus 21:18-19. As a side note, the Biblical Law of *Lex Taliones*, and eye for eye, tooth for tooth, life for life, is first cited in reference to the unintentional killing of a child in the womb. If the Bible requires death for the unintentional killing of an infant, certainly it requires it for an intentional abortion.

So even if the Common Law, our Constitution, the Declaration, the Communist Manifesto, or even the Burger King Bill of Rights acknowledged abortion as a self-evident right, the authority of God's revealed Law trumps any such claim.

It is the duty of all governments[10] to properly discover and administer the Law[11], for, as Blackstone taught, the "legislature in all … cases acts only … in subordination to the great lawgiver, transcribing and punishing His precepts."[12] What happens, then, if a State government has properly administered the Law, but the federal government declares such administration to be unconstitutional? The answer is found in the *Doctrine of Interposition*.

"Interposition is an official act on the part of a State government to question

the constitutionality of a policy established by the central government."[13] Our federal government is one of checks and balances; the Executive veto and the Court check the Legislature's actions for constitutionality. Likewise, the Legislature and the Court check the President's actions. But who checks the Court?

While each branch takes its own independent oath to defend the Constitution (which gives the Executive the right to refuse to enforce a Court order), "The right to challenge any usurpation of power on the part of the Supreme Court must by lack of alternative, if for no other reason, devolve upon the States."[14] What does the Tenth Amendment mean if not that a State can interpose itself as a legitimate determiner of the terms of the Constitution to which it is a consenting party? Once a contract is formed, both parties have the right to ensure the proper enforcement of the terms of the contract and are not bound by the illegitimate breaches of that contract, absent a waiver.

At the turn of the 18th century, in response to the *Alien & Sedition Acts*, Thomas Jefferson and James Madison, through the *Kentucky* and *Virginia Resolutions* respectively, declared that the U.S. Constitution defined and limited the powers of the federal government, and "in case of deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the *states who are parties thereto*, have the right, and are in duty bound, to interpose for arresting the progress of evil."[15] As co-parties to the Constitution, if the federal government breaches the contract, the states have an unquestionable right, *nay the duty*, to determine a breach.[16] As Rutherford wrote, "The law permitteth the bestower of a benefit to interpret his own mind in the bestowing of the benefit."[17] Kentucky reasoned correctly, that a federal government that exclusively held the power to determine its own limits would "stop nothing short of despotism; since the discretion of those who administer the government, and not the constitution, would be the measure of their powers."[18]

"Is a Supreme Court decision 'law of the land?'" Of course, the answer is "no." The delegates to the Constitutional Convention limited the "Supreme Laws of the Land" to the Constitution first and subsequent "Laws of the United States *made in Pursuance thereof*," Art. VI, § 2. Court orders are conspicuously absent from the Supremacy Clause. If "all laws which are repugnant to the Constitution are null and void," Marbury v. Madison, 5 U.S. 137 (1801) at 176-177, how much more so judicial orders? The "judiciary of the United States are not the masters of the Constitution but merely its interpreters."[19] Precariously absent from the decision in Roe v. Wade was Constitutional authority. The individual concept of "privacy" is neither in the Constitution nor the Bill of Rights. By allowing the judiciary to place "privacy" into the "penumbras of the Bill of Rights" (both alien concepts to our limited Constitutional republic[20]) we have permitted "those who

administer the general government … to transgress the limits fixed by that compact." As Jefferson warned, the Court will "stop nothing short of despotism."[21] Perhaps it will be an oligarchy consisting of 9 men in black robes, but it will nonetheless cease to be the federal republic as set up in 1787.

Does Article III of the Constitution confer subject matter or original jurisdiction to the Supreme Court over the definition of human life? If not, is not Roe v. Wade a "dangerous exercise of … powers not granted"[22] to the Courts by the Constitution? God, the author of Life, has reserved to Himself the power to define Life. He has never ceded that right to any Civil government. Thus, by taking that right to itself, the Supreme Court usurped the Legislative Authority of the Almighty Lawgiver, and compounded their sin by imposing *its* determination of life upon the States through a hellish interpretation of the Fourteenth Amendment.

Such a usurpation gives rise to the duty of a State to interpose between the Federal government and its own citizens. Civil governments, being but administrators of God for the good of the citizens, who refuse such interposition become complicit in the crime of the Federal head.

Such refusal to remain complicit to a Federal crime caused Thomas Jefferson to write in the *Kentucky Resolutions*, "[I]f those who administer the general government be permitted to transgress the limits fixed by the compact, by a total disregard to the special delegations of power therein contained, annihilation of the state governments, and the erection upon their ruins, of a general consolidated government, will be the inevitable consequence."[23]

Can we reasonably argue that, through the imposition of the *Articles of Incorporation* of the Fourteenth Amendment, our state governments are sovereign entities? As Patrick J. Buchanan wrote in The Death of the West, "Using the incorporation clause of the Fourteenth Amendment, the Court asserted a right to impose on the states all the restrictions the Constitution has imposed on Congress. At that point … the states of the Union became subject provinces of the Supreme Court."[24] But Jefferson argued in the *Kentucky Resolutions* that the "states who formed that instrument, being sovereign and independent, have the unquestionable right to judge its infraction; and that a nullification, by those sovereignties, of all unauthorised acts done under colour of that instrument, is the rightful remedy." Where have all the state's-rightists gone?

The *Virginia* and *Kentucky Resolutions* were in response to procedurally sound, but unconstitutional, Executive and Legislative action. But what can be done against procedurally sound, but unconstitutional, acts of the Judiciary? Pro-lifers like to make a comparison between the Dred Scott decision and Roe v. Wade to demonstrate the fallibility of the Supreme Court. Why not use the same tactics to overcome the pernicious Roe decision as did 22 states after Dred Scott?

Wisconsin "denounced the Supreme Court for 'assumption of power' and declared 'that the several States … have the unquestionable right' to exercise 'positive defiance' in behalf of their interpretation of the powers reserved to the States by the Constitution."[25] It has been more than 30 years and over 43 million puréed babies, and not one state out of fifty has interposed itself between the general government in Washington and a struggling life in the womb. The states have neglected their duties for 30 years; nonetheless, as guardians of God's Law and his people, they are duty-bound to interpose to arrest the evil of abortion.

A Constitutionally-minded state's Attorney General could open-up his copy of the state's laws, pull out the statutes still on the books declaring abortion illegal and prosecute, interposing himself between the Federal government and the unborn person he is trying to protect.[26] Absent an abortion law, is not a personal service contract to terminate a life (called a "hit" when the mark is born) homicide or manslaughter under Common Law, if not statute? A governor could pronounce that the shield of Justice will extend into the womb, unborn children will be protected against the enforceability of such illegal contracts and that he will call upon the Attorney General to prosecute the murdering abortionist and the people who conspired to have the unborn child "hit" under accomplice liability theory.

If I may divert from the scope of my article just a moment to demonstrate what the Federal government could do if it were so willing. There are Constitutional, procedural grounds for a federal interposition which is not violative of "states rights," since as an abstract that concept is dangerous. Does a State have the right to condemn all its citizens to the gas chambers? Would there not be an affirmative duty on the part of the other states to interpose?

Constitutionally, the Doctrine of Interposition goes both ways. What would be the effect if a state declared murder legal? Such a law would be most likely a violation of that state's constitution, but it certainly is the foundational premise fostered in the *July 4, 1776, Unanimous Declaration*, that to secure the unalienable right to life, governments are instituted *by God* among men.

The U.S. Constitution guarantees to each state a "Republican form of Government." Can it really be said that a state that refuses to prosecute murder is a republican government and is adherent to the organic law of the *Unanimous Declaration*? If that state government is non-republican, Madison argued in The Federalist number 43 that the Federal government could interpose itself between the states citizens and the state without denying Article IV, § 4 of the U.S. Constitution.

If they had the temerity, either the President or the Congress could recognise that America's charter declared that men are "endowed by their Creator with certain unalienable" and self-evident rights, including the right to life. The

Preamble to the U.S. Constitution states that such rights and liberties are secured for "our posterity," which means the following generations as yet unborn. The President, or the Congress, can declare that Justice will extend into the womb and that a refusal to prosecute murder is the epitome of denying justice and a willful breach of the federal compact, and stand between the state protecting the abortionist and the baby. This is a much larger conversation to be had if we ever elect a pro-life President upon which I hope to write and speak in the future, but for now, this will have to do.

Returning to the scope of this article, "*Rights of the States to Interpose Themselves Between their Citizens and Federal Law*," one common objection to the Doctrine of Interposition by the States comes from an anti-secessionist group which fears that the Union necessarily must be undone if a State interposes itself between its own citizens and the Federal Government, or the "consolidated union" as it would have to be called in such circumstances.

Let us not forget, the *Virginia* and *Kentucky Resolutions* and the refusal to recognise the Alien & Sedition Acts as Supreme Law of the land did not fracture the Union. Jefferson wrote "to secure these rights, Governments are instituted among men" and "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it." Let us also heed Jefferson's and Madison's advice from the *Kentucky* and *Virginia Resolutions*. Therein Virginia expressed "its deep regret, that a spirit in sundry instances, been manifested by the federal government, to enlarge its powers by forced constructions of the constitutional charter" as well as its "warm attachment to the Union of the States." Kentucky considered the federal union to be "conducive to the liberty and happiness of the several states," and that it would be "among the last to seeks its dissolution." It is with respect to the Union and the Constitution that the Doctrine of Interposition can be offered.

Interposition concedes no argument that "abortion is legal," or that we have to wait for a pro-life Judiciary or a Constitutional Amendment, and to obtain that we must continue voting Republican while allowing 4,000 babies to get butchered daily. Interposition allows the principles of the Constitution to be obeyed without conceding validity to the *Articles of Selective Incorporation*. Simply, Interposition declares that the terms of the Constitution ought to be obeyed. Interposition is not Secession – it is sound contract theory that requires both parties, the Federal and the State, to obey the terms of the contract.[27]

In fact, we can agree again with Jefferson, who wrote, "[Virginia] would, indeed, consider such a rupture [of the union] as among the greatest calamities which would befall them; but not the greatest. There is yet one greater, submission to a government of unlimited powers."[28] Prior to the secession of the Southern

States, Jefferson Davis had argued against secession and was for the maintenance of the Union.[29] As the *Declaration of Independence* demonstrates, "Prudence … will dictate that Governments long established should not be changed for light and transient causes."

What if the Courts refuse a State's plea? Is the un-prosecuted murder of over 43 million babies a light and transient cause? The time is closing before we can no longer rein in the judicial, the executive and legislative branches, state and federal, of civil government. Before long it will be a "long train of abuses and usurpations" which gives rise to our "duty to throw off such Government." Our personal, individual duty to seek the dissolution of these united States has not yet arisen, since as of late, no State has even attempted to stand between the butcher and the baby.

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To learn more about this important doctrine, obtain the book *The Doctrine of the Lesser Magistrates: A Proper Response to Tyranny and A Repudiation of Unlimited Obedience to Civil Government*. The book is available through Amazon.com or at LesserMagistrate.com. The doctrine - which is found in Scripture and history - has been employed by men for thousands of years and has proven successful at reining in tyranny.

1 See Clark D. Forsythe, *A Pro-Life Mistake*, National Review Online, December 16, 2004 and the author's rebuttal, *Republicans Offer the Unborn 32 More Years of Roe v. Wade*, The American View Online, http://www.theamericanview.com/index.php?id=9

2 Samuel Rutherford, Lex, Rex; or The Law and the Prince, Sprinkle Publications, 7 (1982).

3 Stephanus Junius Brutus, Vidicæ Contra Tyrannos, Cambridge University Press, 19 (1994).

4 Romans 1:21.

5 Thomas Jefferson, *Letter to John B. Colvin*, September 20, 1810. Recorded in Thomas Jefferson Writings, The Library of America, p.1231, 1984.

6 R.J. Rushdoony, *Rushdoony on Abortion: Distant Early Warning*, Gary North Editor, Institute for Christian Economics, 11 (1989).

7 John Calvin, Calvin's Commentaries, vol. III, Baker Book House, 41-42 (1996)

8 Sir William Blackstone, Commentaries on the Laws of England, vol. I, 129 (1765).

9 Blackstone, *op. cit*, at vol. IV, 395.

10 Ultimately, there are only three forms of government: democratic, aristocratic and monarchical. The glory of the civil governments in these united States is that they appropriately melded the benefits, thereby mitigating the detriments, of each of them. See Blackstone, *op. cit.*, vol. I, 49.

11 Romans 13

12 Blackstone, *op. cit.*, vol. I, 54.

13 Morley, *op. cit*, 240.

14 Morley, *op. cit*, 241.

15 *Virginia Resolutions in General Assembly*, para. 3, December 24, 1798. (emphasis added)

16 *Kentucky Resolutions in General Assembly*, para. 4. December 3, 1799

17 Rutherford, *op. cit.*, 60.

18 *Kentucky Resolutions*, para. 4.

19 Viscount Bryce, The American Commonwealth, as quoted in Morely at 233.

20 United States Constitution, Tenth Amendment

21 *Kentucky Resolutions in General Assembly*, December 3, 1799.

22 *Virginia Resolutions*, para. 2.

23 *Kentucky Resolutions*, para. 4.

24 Patrick J. Buchanan, The Death of the West, Thomas Dunne Books, St. Martin's Press, New York, 2002, p. 183.

25 James F. Kilpatrick, The Sovereign States, Henry Regnery Co., Chicago, 1957 pp. 269-270 as quoted in Morley at 245.

26 Titus, "Ending 'Legal' Abortion," *The First 100 Ways*, presented to the Board of Trustees

of the Conservative Caucus Foundation on January 13, 1997.

27 Rutherford, *op. cit.*, 201

28 Thomas Jefferson, *Draft Declaration in Protest of the Commonwealth of Virginia on the Principles of the Constitution of the United States and on the violation of them*. December 1825.

29 Jefferson Davis, A Short History of the Confederate States of America, Sprinkle Publications, Harrisonburg, Virginia, pp. 23, 36 (2002).

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