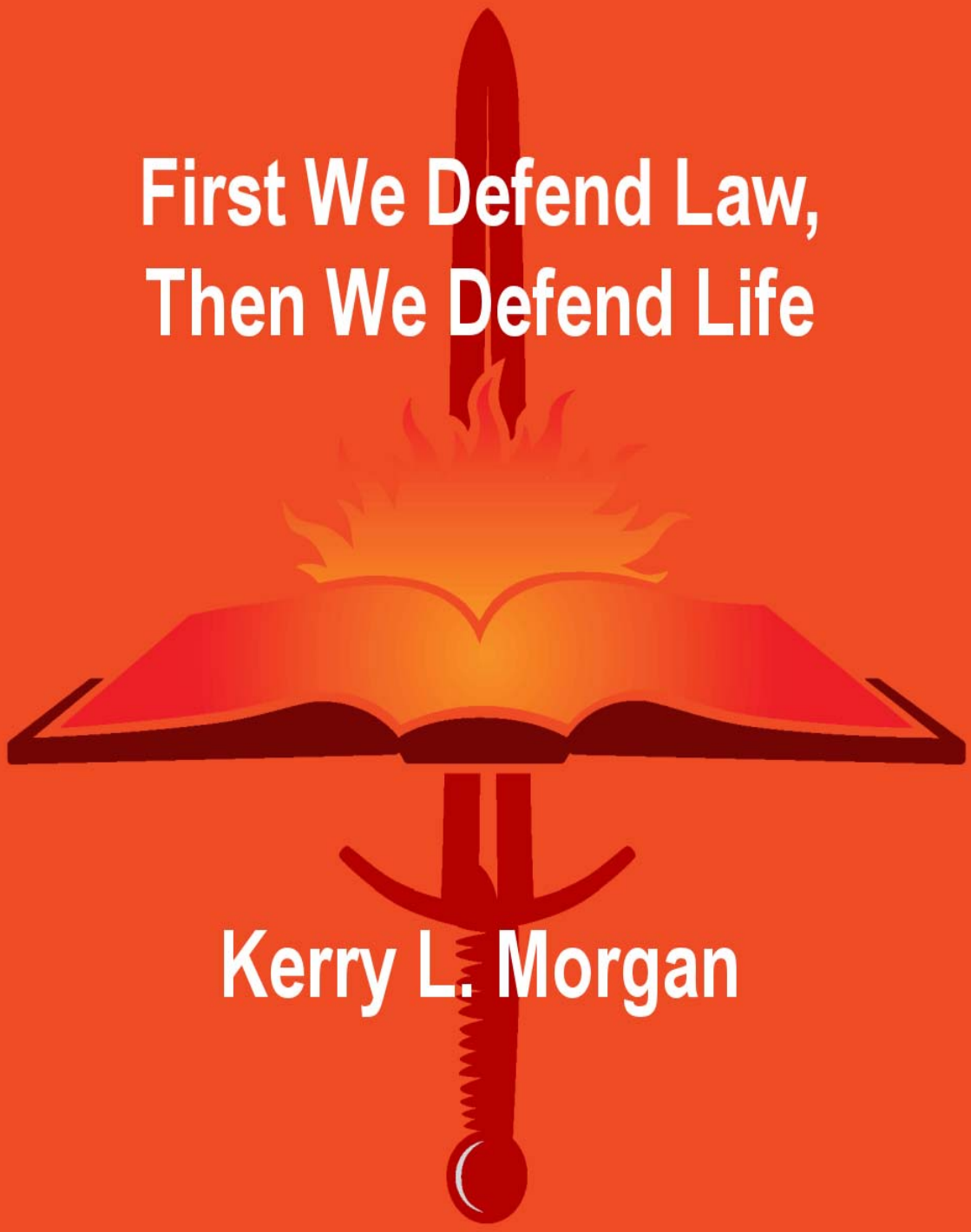
First We Defend Law, Then We Defend Life



Kerry L. Morgan

First We Defend Law, Then We Defend Life:

What the Pro-Life Movement Needs After Decades of Failure

KERRY LEE MORGAN

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INTRODUCTION

In 1973, the United States Supreme Court handed down its pro-abortion opinion and judgment in the landmark abortion case of *Roe v. Wade.* More than forty (40) years later, that opinion and judgment remains intact. Despite intense differences over whether the unborn child is a human being, potential life or simply tissue, pro-life, pro-choice and pro-abortion advocates nevertheless share the same fundamental view of the legal force and effect of *Roe v. Wade.* All agree and defend the view that *Roe* is the supreme law of the land and that it is a Constitutional decision. This one universal assumption is embraced by all factions as an undeniable truth.

Yet, it is this exact assumption itself which is wrong. More than that–it is a curse. It is a curse because this assumption undermines and destroys the rule of law itself. It substitutes in place of law a great pretender–the rule of lawless men–the rule of Justices who will not bend their collective will to conform to the pre-existing rule of law. That is the sobering truth none will hear.

Of course, the disciples of choice and abortion don't see it this way. They look upon *Roe* as a progressive decision, as the advancement of law itself to the next level of personal freedom. Nor do pro-life followers see the collapse of the rule of law as the central problem. They see the *Roe* decision as essentially a problem of *judicial selection*–who should sit on the Supreme Court, rather than as a large-scale institutional usurpation of the Constitution or law itself.

It is this singular failure and refusal, however, to understand and acknowledge that *Roe* is *not* the law of the land, which lies at the heart of over forty years of failure to protect unborn life. The legal rule and only legal rule capable of countering the judges' war against the rule of law in the abortion context, is that *Roe* is *not* the supreme law of the land. *Roe* is not the supreme law because it is not law at all. That is correct, "Roe is not law."

But isn't *Roe* about abortion? What then is all this discussion about law? *Roe* is about abortion–it is about *the law* of abortion and the power of the state government to protect unborn life from private destruction. The problem is that well-intentioned pro-life lawyers, legislators and laymen have principally thought about the substance of *Roe* as a challenge whereby they must establish in subsequent legislation and litigation, that human life be conceived of in medical terms in order to warrant legal protection. While this is one aspect of the case, it is by no means the best means to protect unborn life. The best means to protect unborn life is to first understand and accept the legal proposition that the defense of law is a necessary predicate to the eventual defense of life. In other words, we must reclaim the rule of law and defend it from lawless judges, before we can hope to defend human life.

We have failed as a nation to understand that, fundamentally, *Roe* is more destructive to the rule of law itself, than even to the right to life. Unless and until the defense of law and the unalienable right to life arising therefrom are first made the centerpiece of the pro-life movement's legislative and litigation strategy, we will never secure the unalienable right to human life under law.

Nor should we. For those *religious* lawyers or legislators who approach pro-life litigation and

legislation from the point of view that God rejects abortion and, therefore, the state should punish abortion criminally, I ask why God should sign on to your agenda when you don't honor His? God will not be mocked by lawyers or judges claiming God is on their side while disparaging His laws by their "laws." Have you not read what King David recognized about God's view of the subject in Psalm 94:20-23?

> *Can unjust leaders claim that God is on their side— leaders who permit injustice by their laws? They attack the righteous and condemn the innocent to death. But the Lord is my fortress; my God is a mighty rock where I can hide. God will make the sins of evil people fall back upon them. He will destroy them for their sins. The Lord our God will destroy them.*

But perhaps our religious leaders and litigators are wiser than David. Their mass mailings tell me so. Moreover, when God says that those who take an oath ought to uphold it, does He mean it or is that just *dicta*? Public officials, lawyers and judges all take an oath to uphold the Constitution, not to rewrite it. Do you think that God will overlook violation of such oaths for the sake of your good pro-life motive?–that He will sustain your love of life upon the foundation of your contempt for law? Its time for sober reconsideration.[1]

For those legislators, lawyers or judges who don't care about God or religion, who are pleasant though practical atheists, or simply cosmetic conservatives, and cannot abide any rule of law animated by "religious" concepts, then all you have is your own "law" itself unto which you can appeal. You can't very well call on God for justice now can you? So to such as these you must at least call on the rule of law. Yet, the outcome is nevertheless the same. Protection of life cannot arise without the *a priori* defense of the rule of law. The key to that defense is to recognize that the Constitution's text does not regard the Supreme Court's opinions as law. But legal pleading assuming supreme authority in the Court destroys law itself and enslaves us more and more every term.[2]

So whether the proposition that "God is the Lawgiver"or that the "Law is Supreme" stirs your soul to protect innocent unborn life, the result is the same if you embrace the notion that *Roe* is law or that *Roe* is the supreme law of the land. As stated earlier, the best means to protect unborn life is to first understand and accept the legal proposition that the defense of law is the necessary predicate to the defense of life. We must defend the rule of law before we can hope to defend human life under law. The best we have been able to muster thus far, however, is the defense of human life under the rule of lawless men. Failure is inevitable.

This booklet provides the grounding and argument in support of the proposition that we must

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1. Ecclesiastes 5:6 "Do not let your mouth lead you into sin. And do not protest to the temple messenger, 'My vow was a mistake.' Why should God be angry at what you say and destroy the work of your hands?"

2. Thirty years after *Roe* the Supreme Court used the same pseudo-constitutional deceit to "strike down" the anti-sodomy laws of thirteen (13) states on the basis that the Constitution guaranteed such a right. See *Lawrence* v. *Texas*, No. 02-102, June 26, 2003. This is more fruit of our failure to defend the rule of law.

defend the rule of law before we can hope to defend human life under law. It identifies the thinking of political and legal charlatans who want to defend lawless judges and have convinced themselves and you that they can protect unborn life though denying the rule of law.

Chapter One tells you why supreme court opinions are only evidence of law, not law itself and not the supreme law of the land. It discusses why *Roe* is not the supreme law of the land because it is not law at all. The chapter also discusses the key historical documents that the charlatans all declare are irrelevant. More importantly, the power of "judicial review" is contrasted with its cheap authoritarian counterpart "judicial supremacy" wherein it is shown that the power to review cases is not the power to establish law. For the Constitutional scholar, an extensive review of the case law root of judicial supremacy in *Cooper v. Aaron* is discussed along side with more balanced cases such as *United States v. Peters* and *Sterling v. Constantin*.

Chapter Two turns the corner and looks at the diverse Constitutional remedies we enjoy and shows how they are destroyed by nationalistic judicial decrees such as the Court adopted in *Roe*. Moreover, the different legal and political remedies available to strike back at the Court for its illegal and treasonous usurpation of law are also discussed in detail. For example, the lawless judgments of the Court must first be understood, viewed and judged as lawless acts. Lawless judgments such as *Roe* do not deserve to be enforced by state or federal executive officials including state Governors and the President. Nor do they need to be honored by state supreme courts which have jurisdiction to determine the Constitutionality of state abortion laws.

A *model judicial opinion* setting the record straight is also included as an aid to jurists and lawyers who want to move in the direction discussed in the booklet, but have difficulty conceptualizing how it would actually work in practice.

Finally, Chapter Three turns to the political and electoral side of *Roe v. Wade*. Here are discussed the failed political "remedies" for *Roe* that both honorable and shameless politicians have pawned off on the American electorate. Do nothing "I am Pro-life, vote for me" candidates get what they have coming–a new job. These hucksters and their plans that deserved to fail are dissected. You know the siren songs the Republicans have advanced over the years: "A pro-life Republican President will save us", "A Pro-life Republican Congress will save us!", and "A Pro-life Court will save us!" And what about the Democrats? Their slogans are less creative and boringly well worn: "I am personally pro-life, but I will abide by the court's decision." As for the Libertarians, they have got to figure out which of their principles are going to control–personal autonomy or a limited federal government.

In conclusion, the pieces are all assembled. All that remains is for those that accept the premise that *Roe* is not law, is to follow through with that conviction in whatever station they enjoy. This means stop listening to the cheerleaders for judicial supremacy in the media, courts, political parties, churches and mandatory attendance associations such as schools and state bar associations. It means going on the offensive with your public officials and promising to vote for other candidates. Yes, voting for the "evil" candidate who doesn't lie to you about his love of judicial power, as opposed to voting for the one in your party who says he is pro-life but can't bring himself to adopt this view

that the rule of law is worth defending. He thinks he has time to bide and you should send him back to office to bide his time. You're a stooge if you vote for him.

What nation can escape the consequence of the constant shedding of innocent blood? You think God will not take notice? King Manasseh of that now extinct country Judah thought that way too. He filled the nation with innocent blood, but God was not willing to forgive that offense.[3] Nor will he forgive ours. Even if we turn back today, we will still have to pay the price for past condemnation of "the innocent to death."[4] Too much blood has been shed to not notice.

CHAPTER 1
Supreme Court Opinions Are Only Evidence of Law, Not Law Itself and Not the Supreme Law of the Land

A. *Roe* is not the Supreme Law of the Land Because it is not Law at all.

If the goal is to overturn Roe, then the place to start is with obtaining a lawful view of law itself. First and foremost, those who claim to love the law must recognize that Supreme Court opinions are not the law of the land. In general, Supreme Court *opinions* are not law at all; they are merely evidence of law. The Constitution is the supreme law of the land, and the opinions of Courts are only evidence of the meaning of that law. Article VI defines what is law–the Constitution and laws and treaties made in pursuance thereof. It says nothing about Supreme Court opinions. Nothing. Nor can the Court's specific *judgment* in *Roe* itself be the supreme law. It is not based on the Constitution or any enumerated Constitutional power. Nor can it be law because the Supreme Court was granted no power to enact national legislation. *Roe's* trimester *formula* is the essence of a legislative enactment, rather than a judicial decision. The formula is how a legislature would write a statute, not a Court giving judgment in a case.

While the Court's opinions are evidence of law, they are further subject to scrutiny as to whether they are good evidence. In the case of *Roe*, that opinion is not good evidence of law because first, it is contrary to the law of nature and of nature's God--the law above the supreme law of the land. The law of nature establishes that God has exclusive jurisdiction over the developing fetus or unborn child. According to this law, the unborn child is to be nurtured by his or her mother. The child is placed in the womb by God for that child's development, care and protection. The child is not placed within the womb by God so that the mother may abort the unborn child with or without the aid of a state-licensed, paid physician.

Nor is the opinion good evidence of law because second, the mother has no *legal authority* to destroy her own offspring under the law of nature or the Constitution. Noting in the art of judging, "inherent judicial power" or Article III gives the Supreme Court legal authority, either under the law of nature or the Constitution itself, to create a human-made right authorizing such an act or barring

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3. 2 Kings 24:1-4.

4. Psalm 94:20-23.

a state from its criminal prosecution. Neither a husband nor wife have authority to enter the womb for the purpose of destroying the fruit of the womb by intentionally induce a premature *death*. The unborn child's parents may control the maternal decision to intentionally induce the premature *birth* of an unborn child for the purpose of preserving the mother from death through childbirth. The law may certainly judge the timing of that decision--whether it be for the pretextual purpose of destroying the fruit of the womb by intentionally inducing a premature *death*, or for the lawful purpose of delivery and birth, though premature. The State may only judge the timing of that decision, however, not by way of injunction, but by way of punishment after the fact, if pretextual. That is the extent of the State's legitimate authority in the matter of abortion.

But to bar a State altogether from protecting the unborn child by enacting laws to punish abortion, is not within the scope of any legitimate judicial power. It is not within the power of the judiciary to set aside the law of nature. It is not within the power of the judiciary to adopt a meaning of the Constitution to fit "the times"--a euphemism for achieving judicially that which may or may not be attainable legislatively. The Court's opinion and judgment in *Roe* is thus an exercise of lawlessness. *Roe* does not represent law or the rule of law. It does not represent good evidence of the law either. It represents lawlessness–it is outside the law. It is outside the law of the land and outside the law of nature. Roe is a model example of the lawless use of "law." Law is good if used lawfully. But if law is used unlawfully, it is lawless and has no binding legal precedent. It does not bind the executive, the legislature or the judges of any state.

Nor does it bind any judge on the federal bench under *stare decisis. Stare decisis* is actually short for *stare decisis, et non quieta movere,* which means "to stand by decisions and not disturb settled matters." Note that the doctrine is concerned with judicial decisions not legislative matters. It is also a policy proposition and not a fixed rule of law itself. Finally, the doctrine implies that principles laid down in previous judicial decisions ought to be followed unless they contravene the ordinary principles of justice. Thus, any discerning federal judge should ask if the decision in *Roe* contravenes the ordinary principles of justice before he or she blindly follows its holding. Is the proposition that human beings "are endowed by their Creator with certain unalienable rights" including the right to life an ordinary principle of justice? Is the proposition that to secure this right "governments are instituted among men" an ordinary principle of justice? Is the proposition that the courts ought not exercise legislative power an "ordinary principle of justice?" Or is the supreme principle of justice that lower courts must neurotically follow decisions which are contrary to justice, not law, not good evidence of law, legislative in character and lack any Constitutional foundation no matter what?

B. Roe v. Law

Let us now turn to a further examination of justice and its ordinary principles. In this regard the best evidence of the concept as a foundational matter in American law is found in the Declaration of Independence of 1776 and in the Northwest Ordinance of 1787. The thesis is that the People incorporated the law of nature into the Declaration of Independence and later relied upon it within the framework of our Constitutional system in establishing State Constitutions and state laws made in pursuance thereof, including laws drafted and enacted to preserve the unalienable right to life of

an unborn child. Congress later recognized in the Northwest Ordinance that the fundamental principles of civil and religious liberty are the foundation of the state governments. The principles and rights in the Declaration and Ordinance are part of the organic law of this country and of the states.

The Court's opinion and judgment in *Roe* stands in stark contrast to these rights and principles. *Roe* exceeds the law of nature regarding human life and the objects of law itself because it destroys the ability of a State to do what it was instituted to do–to secure the unalienable right of life and to secure the liberty of its citizens. It is, therefore, *ipso jure* unjust. But it is also an unconstitutional decision. It is unconstitutional because it is a judicially created tri-mester scheme–a scheme which is quintessentially legislative in nature and character and thus fails to come within any judicial power which the People extended to the Court in the supreme law of the land--the Constitution. It is also unconstitutional because the right asserted therein to an abortion is not in the Constitution or any fair reading of its text as written.

It has been observed that *Roe* is the "raw exercise of judicial power." Actually, it is not even judicial power which is being exercised. *Roe* is rather the usurpation of state legislative power because it rewrites the states' criminal statutes and replaces them with a tri-mester formula of the Court's own design. Nor is *Roe* the exercise of raw power. It is rather the exercise of jurisdiction not given to any civil government–the power to declare that a state legislature has no authority to protect unborn human life. State governments are instituted for the very purpose of securing that right. These basic principles render the decision in *Roe*, by definition, one which exceeds any legitimate judicial power extended, or which could be extended, to the Supreme Court by Article III of the United States Constitution. As such *Roe* is both lawless and unconstitutional. The Court has become a blind guide leading us into a Constitutional ditch. But have pro-life lawyers and public officials led in any other direction?

C. The Declaration of Independence as a Finite Articulation of the law of Nature and of Nature's God

We have discussed some basic ideas. The Constitution is the Supreme law. Supreme Court decisions are not the supreme law. *Roe* is not the Supreme law. The legislature makes law. Supreme Court decisions are not law. *Roe* is not law. Supreme Court decisions are evidence of law. *Roe* is thus, merely evidence of law. Decisions are good evidence of law where consistent with the Constitution, Declaration and Northwest Ordinance. Decisions are bad evidence of law if contrary thereto. Good decisions should be followed. Bad decisions should not. *Roe* is not good evidence of law. It is not good evidence because *Roe's* holding is legislative in character, not judicial. It is not good evidence because *Roe's* right to abortion is not in the Constitution.

Public officials are not bound to follow judicial decisions which are not good evidence of law and can appeal to the president not to enforce a decision which is not good evidence of law. Federal judges are not bound to follow *Roe* because of *stare decisis* because they can always point to better evidence of law than that relied upon in *Roe.* At this point it is also clear that *Roe v. Wade* ought to be accorded as much precedent and weight as *Dread Scott v. Sanford.* But people being what they

are–creatures of habit, even bad habits–a more detailed discussion is probably necessary to bring the extent of *Roe's* lawlessness to light. It is also necessary to discuss what can be done about the holding and what has not been done by those claiming to do the most.

It has also been asserted that *Roe* is lawless. *Roe* is lawless because it exercises a jurisdiction not given to Courts–the jurisdiction to bar a State from fulfilling its reason for existence in securing the unalienable right to life. This is the purpose for States established in the Declaration of Independence. But before this purpose of state governments is discussed, it is first necessary to discuss the law which gives and limits the objects of state governments-the laws of nature and of nature's God.

As a prefatory matter, whenever *God* or the notion of *the law of Nature's God* are discussed, however, the usual response is to whine that religion is being "forced" upon the public, that religion and politics or church and State do not mix, or that no one can know the substance of the law of nature and nature's God, so it is a useless legal concept. There is also the rallying cry that such talk violates the Establishment clause of the Constitution's First Amendment or various state Constitutions. Heaven forbid if a judge cites the Declaration's acknowledgment of the laws of "Nature's God" in a judicial opinion incorporating a substantive limitation on civil power! While these views are interesting and predictable, they are essentially irrelevant. They are irrelevant because the substance of the law of nature and nature's God was not first articulated by the Declaration of Independence only to be subsequently disestablished by the Constitution's First Amendment or a state law. Neither is the substance of the laws of nature a function of religion or rendered useless by a lack of knowledge about its legal concepts or rules. In fact, the law of nature existed thousands of years before any nation or the establishment of any church on the face of the earth.

The critical substance of the law of nature and of nature's God, as far as it is relevant to the American system of government, can be known by recourse to the Declaration of Independence itself and the nature of things. We may look to other evidence if that is helpful just like the Framer's did, but we need not exclusively consult with clergymen or justices for a dispensation of this knowledge. The evidence is plainly written before us. The substance of the law, as far as it was essential to the necessary governmental and natural rights predicates of the American experience, was written down in the Declaration of Independence. It was codified in part in that document. It can be read, discussed and applied. It can even be cited without being degraded to "dicta." The law's basic principles are not left to endless whining, speculation, or demagoguery. An understanding of the specific implications of the law of nature is basically a function of the Declaration's text, and not of mistaken Constitutional adjudication, religious doctrine, clerical pontificating or political wrangling.

Consequently, the legal principles of the Declaration of Independence are not merely nice ideas, or simply ideas that have interesting historical or moral dimensions. *Magna Charta* and the Declaration of Independence are printed in the organic law sections of most state Codes for a reason--they inform what follows. They animate the state constitutions and statutory codes subsequently promulgated upon their foundations. They also guide the separate branches of state government in

their form and organization. In the case of the American system, the Declaration of Independence is a critical foundational legal document. It is not a political document only, but also a legal document with legal force and binding legal effect. It states principles that are binding as a rule of law on the various branches of the governments–state and federal. The Declaration identifies principles in the law of nature and asserts that they ought to control those constitutions, governments, and codes which follow. *In America, the controlling rule of law is that no civil government or any branch thereof may act in any way that is repugnant to the stated principles of the Declaration of Independence*. Those principles are especially legally binding on every State in the Union and are binding on an equal basis in all respects whatsoever.

D. The Northwest Ordinance of 1787 also Articulates Fundamental Principles upon Which the State Governments Are Forever Established.

Turning to the Articles of Compact in the Northwest Ordinance, a reaffirmation of the idea that certain preexisting principles arising from the law of nature animate, as well as limit, the state governmental power which was then being established in the territories. Section 13 declares the legal purpose of the Compact. It states that the Compact is established:

> for extending the fundamental principles of civil and religious liberty, which form the basis whereupon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide also for the establishment of states . . . ."

What does this mean? It means that the State of Michigan, for instance, was created, established and admitted to the Union upon this foundation. It means that the fundamental principles of civil and religious liberty are the basis whereupon the State of Michigan is erected. It means that the principles of civil and religious liberty are the basis of *all* of its laws and constitution and government. It means that in Michigan, those principles "forever hereafter shall be formed."

What does all this mean to a state judge or legislator or governor in the 21st century? It means that, in judging cases or controversies, state judges and justices are duty bound to acknowledge the binding legal effect of "the principles of civil and religious liberty" in their opinions, and with respect to the state supreme court in the administration of their oversight over the state bar, to ensure that its rules do not trample down these principles. It means that the governor ought not enforce or sanction laws or orders of courts which trample down these principles. It means that the legislature ought not enact laws or adopt internal rules contrary to these principles. And it means that every public official ought to sit down and familiarize themselves with the nature and scope of these principles as a public duty.

Perhaps it may be objected that the foregoing construction of state officials' obligations is incorrect. Very well. What then do theses principle require? Nothing? Some application of the words is necessary, lest the words are made to have no effect by construction and the foundations of the states be destroyed. This would be tantamount to saying that "the fundamental principles of

civil and religious liberty, which form the basis whereupon these republics, their laws and constitutions, are erected" mean nothing. Why then not also conclude that these republics, their laws and constitutions can be thereby declared to mean nothing either? And *ipso facto*, the power of the governors, legislatures and courts of "these republics" can be thereby declared to mean nothing either. To nullify these foundational principles by interpretation, construction or dislike destroys the law itself and must invariably destroy the governments and branches of governments based thereupon. "If the foundations are destroyed then what can the righteous do?" Why nothing of course, except to submit to the slavery which they have helped to bring about because they refused to defend the foundations from both usurpers and the destruction of foundational ideas well written in books they never opened.

Let us return to the point. The point is that both the Declaration of Independence and the Northwest Ordinance contain foundational principles of law, government and rights which judges, legislators and governors are duty bound to acknowledge and follow in the administration of their respective branches. These principles bind each and every state in the Union.

These principles bind not only those thirteen states which signed the Declaration, and not only those states formed out of the Northwest territory-- Michigan, Ohio, Indiana, Illinois and Wisconsin. These principles bind all the states. Subsequent Congressional statutes for admitting Louisiana, Mississippi, Alabama, and Tennessee into the Union refer to the Articles of the Northwest Ordinance as authoritative even though those states are clearly *south* of the Ohio river. In fact, all admission statutes passed by Congress contain the words "equal footing" or, to identical effect "same footing," with the "original States" with respect to their admission into the Union.

So what is the point that all states have equal footing with the original states? By affirming "equal footing" with the original states in the Articles of Compact and in subsequent state admission statutes, Congress intended to bind new states to the legal principles adopted by the original states--namely, the principles of the Declaration of Independence. Congress made this mandate abundantly clear when it expressly provided that the respective state constitutions of various newly admitted states shall be both republican in form and "not repugnant to the principles of the Declaration of Independence."[5] Because every state is admitted "on equal footing with the original States," they are each admitted equally in all respects whatsoever, including the proposition that the states shall be both republican in form and "not repugnant to the principles of the Declaration of Independence."

For thirty years, pro-life advocates and attorneys have simply not understood this legal proposition. Pro-life attorneys have not first been pro-law attorneys. We have failed to see that a state's highest law–its constitution--ought not contain anything *repugnant* to the principles of the Declaration. Among those principles is the proposition that human beings "are endowed by their Creator with certain unalienable rights, that among these are life . . . ." Among these principles is

5. These States include Nevada (1864), Nebraska (1867), Colorado (1876), Washington (1889), Montana (1889), Utah (1896), North and South Dakota (1899), Arizona, New Mexico (1912), Alaska (1958) and Hawaii (1959). *See generally*, EDWARD DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY (Norman, OK: University of Oklahoma Press, 1950) 63.

that state governments are instituted for the very purpose of "secur[ing] these rights." A state constitution which provides a state legislature with power and authority to protect human life, and which gives its judiciary the power and authority to hear cases involving deprivation thereof, and which gives its executive the power and authority to enforce those laws and judgments, is a constitution which is consistent with the Declaration's principles.

But, when a state constitution, and state statutes established pursuant thereto, are judicially nullified and rendered contrary to the unalienable right to life by the dictates of the Supreme Court, and thus a state whose legislature, judges and executive are made to fail in their duty to preserve, protect and defend human life by the dictates of the Supreme Court,–then such a constitution, its officers and officials, their offices and functions are rendered most repugnant to the legal principles upon which they are actually based. That state government's operation is first, repugnant to the "fundamental principles of civil and religious liberty" imposed in the Compact of the Northwest Ordinance, and second, is rendered repugnant to the principles of the Declaration–the principle that governments, including state governments and the legislative, executive and judicial branches of that state government, exist and are instituted to secure the unalienable rights of its citizens–including the unalienable right to life of the unborn citizen within its jurisdiction.

Does any state official honestly believe that the Supreme Court has a Constitutional authority to nullify the foundations of state government or declare inapplicable the laws of nature upon which they are established? If so, then we have no government of law and only rule of men. Let us not then complain about our servitude.

What state officials may lawfully do about the purported judicial nullification of their fundamental and foundational legal duty is discussed a little bit below, but it is important to pause and consider that this is a watershed matter. It is concerned with the legitimate ends of civil government. It involves whether public officials have an ability or inability to discern the lawful from the lawless. It requires an understanding that no judicial decision is lawful if against the law of nature, the foundational principles of the Declaration or the Northwest Ordinance. It mandates that no Supreme Court abortion decision is Constitutional if grounded upon imposition of a judicially created tri-mester scheme of abortion, which scheme is legislative by its nature and nothing other than an unlawful legislative enactment wrapped up in judicial clothing parading as constitutional law.

Justice Blackmun's opinion creating the tri-mester abortion scheme is just such a legislative creation, the imposition of which on the states is a usurpation of state legislative power to prohibit abortion. The Court's decision, therefore, is truly repugnant to the "fundamental principles of civil and religious liberty"and repugnant to the "unalienable right" to life–the principles and rights upon which the very foundation of state governments is legally erected. If the Supreme Court can disembowel and decimate the very foundation of state governments by merely fabricating a right to abortion and declaring it in an judicial opinion, and no other governmental entity, state or federal, and no official, state or federal can do anything about it, then we have no government on any principles whatsoever and we are slaves of the Supreme Court.

E. Judicial Review v. Judicial Supremacy: The Power to Review Cases Is Not the Power to Establish Law.

Now many lawyers, politicians and judges by and large simply reject this view of the Northwest Ordinance and the Declaration of Independence and of law. Some do so with all the arrogant passion they can muster. Others simply were taught the Declaration or law of nature is not relevant and that was the end of their inquiry. We have all been there. But among the legally educated, perhaps they disdain it because they have been taught or believe that *Cooper v. Aaron,* 358 U.S. 1 (1958) or opinions like it, reflect the pinnacle of legitimate judicial power. That famous desegregation case dealt with a plan of gradual desegregation of the races in the public schools of Little Rock, Arkansas. Let us turn to that cardinal judicial opinion and consider how the Court itself has been infected by the doctrine of judicial supremacy in order to recognize how much we are already believers in it ourselves. Then perhaps we can see clearly to remove this beam from our own eye, and speck from the Court's eye.

Under that plan, black students were ordered admitted to a previously all-white high school at the beginning of the 1957-1958 school year. Due to actions by the Legislature and Governor of the State opposing desegregation, these children were first unable to attend the schools until troops were sent and maintained there by the Federal Government for their protection. The students then attended the school for the remainder of that school year. Finding that these events had resulted in tensions in the school, the District Court thereafter granted the school board's request that operation of their plan of desegregation be suspended for two and one-half years, and that the children be sent back to segregated schools. The Court of Appeals reversed that decision and the Supreme Court affirmed.

Not content, however, with this correct judicial result, the Court took the added opportunity to address the argument of the Governor and Legislature of Arkansas that they were not bound by the Court's holding in *Brown v. Bd. Of Education,* 349 U.S. 294 (1955). That decision ordered that the public schools in Kansas and elsewhere be desegregated "with all deliberate speed." Consequently, the Court launched into a discussion of law which was not necessary to the disposition of the case before it. The Governor had already been enjoined by the District Court from interfering with its desegregation order through intervention of the Justice Department as *amicus curiae*, and that decision was affirmed on appeal in *Faubus v. United States*, 254 F.2d 797.

Yet, the Supreme Court could not resist advancing its argument to expand the power of *judicial review* into the power of *judicial supremacy*. Pay close attention to their reasoning and you can spot the flaws. First, it remarked that Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the case of *Marbury v. Madison*, 1 Cranch 137 (1803) that "It is emphatically the province and duty of the judicial department to say what the law is." This is the power of judicial review which is found in Article III, Section 2.

It is profound, however, that the *Cooper v. Aaron* Court did not *quote* any Constitutional

provision in support of its opinion, but only chose to *cite* to the Constitution and its own prior opinions--opinions which are only evidence of law and not law itself. Nevertheless, from this legitimate recognition of the power of judicial review, the *Cooper v. Aaron* Court took a forbidden step further. It first re-characterized its *own opinion* in *Marbury* asserting that *Marbury* "declared the basic principle that the federal judiciary is *supreme* in the exposition of the law of the Constitution." 358 U.S. at 18 (emphasis added). This assertion is both false and deceptive. It is false because *Marbury* itself did not recognize the power of judicial *supremacy,* but rather only the power of Constitutionally grounded judicial *review*. It is deceptive because *Marbury* is only evidence of law and not law itself. *The power to review cases is not the power to establish law*.

To know the law, one has recourse to the Constitution. Now it becomes clear why the Court did not first *quote* the Constitution, because the forbidden step it took advancing from legitimate judicial review to the judicial supremacy is not found in the Constitution's text. The Constitution simply grants no "supreme" expository power to the Court. Read Articles III and VI and you will not find it. What will be found in Article VI is the truth–that the Constitution, laws and treaties "shall be the supreme law of the land." Nothing is said about Supreme Court opinions being supreme law, let alone being law at all. Nothing–not one iota. The Constitution extends no power to the Court to claim that its constitutionally based opinions, which are not law, are the sole and exclusive meaning of the Constitution itself. The judicial power to review *cases* arising under the constitution, laws and treaties is clearly stated Article III, section 2, but that power is not the power to rewrite the Constitution itself. Remember, the power to review cases is not the power to establish law, let alone the supreme law.

F. *Cooper v. Aaron* and the Subjugation of the States

Ignoring this Constitutional lack of power, the *Cooper v. Aaron* Court took pains to lecture State officials that "No State legislator or executive or judicial officer can war against the Constitution without violating his [oath] undertaking to support it." Do you hear that Governor and Legislator? Do you hear that State Supreme Court Justice? The Court is accusing you. It is saying that if you don't go along with what we tell you in our opinions, that you are warring against the Constitution itself. You better be careful.

But wait a minute. The Court has no power of judicial supremacy under Article III. Its opinions are nowhere granted a supreme status in Article VII. Yet, it is warning you not to "wage war against the Constitution." Did you miss that? Did your mind equate this *dicta* with a true exposition of the Constitution? The irony should have hit you. The Court has perfected the trick of concealing guilt through accusation. The Court is guilty of waging war against the Constitution. It is even guilty of waging war against the legal foundations of state power embedded in the Declaration and Northwest Ordinance. Now it tries to conceal that guilt by accusing the state governments of the same offense–warring against the Constitution. Don't be misled.

1. United States v. Peters

Having shot this warning over the states' bow, the Court then hearkened back to an opinion

written by Chief Justice Marshall who spoke for a unanimous Court in saying that:

> If the legislatures of the several States may at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . .

See 358 U.S. 18, *quoting United States v. Peters,* 5 Cranch 115, 136 (1809). The Court knows it needs to bring in the big guns. It needs to reach back to Chief Justice John Marshall for some credibility so it can say "See we aren't making this up, why Marshall himself believed this." But is this true? In *Peters* two private parties sued in federal court each attempting to obtain possession of certain property in admiralty. The federal court awarded title to one and not to the other. The State of Pennsylvania, however, claimed an interest in title tied to the loser and rather than litigating its interest in federal court as a Plaintiff, the State instead passed a state law which authorized and required the governor to use any means necessary to prevent the property from being subjected to "any process whatever, issued out of any federal court" for its seizure and delivery to the prevailing party.

It is in this context that Chief Justice Marshall remarks that "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals." If there ever was *dicta*, this is it. Why is this *dicta*? It is *dicta*, because the state of Pennsylvania was not even a party to this action. The Court had no jurisdiction over the State. Thus, for Marshall to discuss the power of a non-party is *dicta*. For the *Cooper* court, however, to make this *dicta* stand for the proposition of judicial supremacy is a judicial fraud. They honor the Constitution with their lips, but their hearts are far from its literal text.

The inquiring legal mind should be asking how the case came to the Court in the first place. The action came to the Supreme Court by way of mandamus. The federal judge below had returned the original mandamus directing him to exercise the sentence pronounced by himself in the case or to show cause for not so doing. The lower court federal judge stated that the legislature has passed a law which would oppose his process. The federal judge did not know what to do so he asked the Supreme Court, the head of his branch of government for direction.

Now what remedy did the Chief Justice order? The Court ordered a "peremptory mandamus." To whom was the mandamus directed? The State of Pennsylvania? The Governor? The Legislature? No, none of these. They were not parties. The Court had no jurisdiction over them. The Court ordered a peremptory mandamus to the federal court. More significantly, did the Supreme Court "strike down" the state law? No. Did it declare the state law "unconstitutional"? No. He simply ordered the lower court judge to issue process. Did the Chief Justice even argue that the federal marshals had to obey the lower court judge or did he command the President to follow through and make sure the federal marshals who worked for the President ignore the State law? No. Chief Justice Marshall offered *dicta* sure enough, but at least he understood that his jurisdiction in this case was over his own branch, not that of the states or the federal executive. *Peters* stands for

the proposition that the Supreme Court has authority over inferior federal judges, not that it has jurisdiction to nullify the laws of state legislatures not at issue or commandeer state officials who are not parties to the action.[6]

Undaunted by the actual rule of the *Peters* case, however, the *Cooper* Court then opined that "A Governor who asserts a power to nullify a federal court order is similarly restrained." Of course under *Peters* he is not restrained at all. Having now dissected the *Peters* case and recognizing that the only restraint that the Supreme Court actually imposed was on its own lower federal court and not on the legislature or non-parties, it becomes obvious that the Court's attempt to jump from its *Peters*' *dicta* about the legislature, to the Governor of Arkansas, is unpersuasive. It is unpersuasive because the parties in *Cooper* were private petitioners seeking to accelerate the desegregation of the little Rock School System and the Superintendent of that District. The Governor was not a party defendant, nor was the legislature. This means that any commentary which the Court offers about the views of the legislature or Governor, which were not at issue in this case, is also *dicta.* Is it *dicta* because the only holding and order in the case was to immediately reinstate "the orders of the District Court enforcing petitioners' plan of desegregation."

In other words, the actual legal result was remarkably like *Peters'* result–the Court ordering its lower court to take action. Yet the *Cooper* Court showed no such restraint which Marshal showed in the *Peter's* case. No, the *Cooper* Court used the case to go well beyond any claim of judicial review. It used *Cooper v. Aaron* to claim the ultimate power of equating its opinion with the supreme law of the land.

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6. The former Attorney General of Alabama, Bill Pryor, was served with a certified copy of the injunction issued against Chief Justice Moore in the Ten Commandments case. *Glassroth v Moore* 229 F. Supp. 2d 1290, 1297 (M.D. Ala. 2002).

The Attorney General however, was not a party to that case nor was his client the State of Alabama. Nevertheless, the Attorney General stated that "I will not violate nor assist any person in the violation of this injunction. As Attorney General, I have a duty to obey all orders of courts even when I disagree with those orders. In this controversy, I will strive to uphold the rule of law. We have a government of laws, not of men. I will exercise any authority provided to me, under Alabama law, to bring the State into compliance with the injunction of the federal court, unless and until the Supreme Court of the United States rules in favor of Chief Justice Moore." Statement of Attorney General Bill Pryor Regarding Announcement of Chief Justice Moore That He Will Not Obey The Injunction of The Federal Court, August 14, 2003.

While it is beyond the jurisdiction of a federal judge to issue injunctions to non-parties in the first instance, it is all the more unfortunate that the Attorney General believed he was bound thereby–and not only bound, but bound as a matter of his purported defense of the "rule of law." Had the Attorney General understood the *Peters* case, he would have seen that it was the federal judge that rejected the notion that we have a government of laws. He would have seen that he has not one iota of responsibility to follow an injunction issued in a case to which he was not a party. He would have seen that whether or not he disagreed with the order was irrelevant. What was relevant was whether the order could bind him as a legal proposition. He would have seen that upholding the rule of law would require him to return the writ to the issuing court stamped: "No jurisdiction–service of process refused." He would have also directed U.S. District Judge Myron Thompson to take the matter up with the executive branch by asking the President to send out his federal marshals to come and take the monument if that is what the Court wanted to do, while also demanding that the President himself refuse to send his marshals to support such a lawless injunction.

By following the court's lawless injunction, however, the Attorney General himself trampled down the rule of law. By stating he would follow the federal court's injunction until told otherwise by the Supreme Court proves he believes the Court is supreme over all the states and the branches of its government and his only duty is unlimited submission.

2. Sterling v. Constantin

Moving further into its *dicta*, the Court said, quoting this time Chief Justice Hughes in 1932, also for a unanimous Court, that if the Governor of Arkansas had "power to nullify a federal court order" then

> it is manifest that the fiat of a State Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of State power would be but impotent phrases. . . .

358 U.S. 18-19, *quoting Sterling v. Constantin*, 287 U.S. 378, 397-398 (1932). What is the factual context in which the *Sterling* Court made this statement? The Governor of Texas had declared martial law and ordered the military to control several counties in Texas. As part of this military oversight the Governor established a Commission to control oil production in those counties thereby interfering with the private rights of the land owners. A federal district court had given the private land owners relief against the Commission, but the Governor maintained that his military authority to direct the Commission to control oil production was unimpaired. When the federal court, finding the Governor's action to have been unjustified by any existing exigency, gave the relief appropriate in the absence of any other adequate remedy, the Governor who was a party to the action asserted that the court was powerless to intervene, and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government. The Governor claimed this power due to the state of war. That was his legal argument.

The *Sterling* Court concluded that there was no factual basis for the declaration of war and thus the necessity for martial law and control of oil failed. It is in this context that the *Sterling* Court stated:

> If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity [287 U.S. at 397-398].

What is the extreme position? The extreme position is that the Governor can assert the power of a military commander in a state of war and can then commandeer private property when, in fact, no justified factual basis for the state of war existed in the first place. In short, the extreme position is that when the state claims a fraud to deprive persons of their rights, then the Constitution is impotent. Moreover, a Governor who is a party and against whom an injunction has been issued, must obey the injunction or be subject to the coerced enforcement of the injunction by the federal executive branch if the executive is persuaded of its lawfulness. That is the context.

So what do these *Sterling* quotations mean? What principle is embodied therein? The principle is that the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. This is the rule of the case and good evidence of the law. But nothing in this principle proves that the Supreme Court's decisions in cases or controversies are the supreme law of the land on equal par with the Constitution itself, or that the Court has the power to craft legislation or commandeer the federal executive power. Nothing in *Sterling* makes the lawless claim that Supreme Court opinions are the supreme law of the land or prove "the federal judiciary is *supreme* in the exposition of the law of the Constitution." Nor does it limit the Constitutional and legal remedies which a State legislature enjoys in regards to unconstitutional or erroneous decisions of the Court to which it may be a party. These remedies are discussed more fully below in the section entitled "Diverse Constitutional Remedies or Nationalistic Judicial Decrees?" The Court simply affirmed the injunction against the Governor issued in the court below and, unlike the *Cooper* Court, was satisfied with the result.

G. State Fiat v. Judicial Fiat?

As mentioned before, the *Cooper* Court is quick to quote *Sterling* to the effect that if "the *fiat* of a State Governor, and not the Constitution of the United States, would be the supreme law of the land; th[en] the restrictions of the Federal Constitution upon the exercise of State power would be but impotent phrases. . . ." In other words, there has to be one Constitutional meaning across the fifty States. But, of course, nothing in this rule mandates or appoints the Court to be the supreme or final prophet of that meaning.

If fiat power is the problem, what about *judicial fiat*? It also stands to reason that if the *fiat* of the Supreme Court, "and not the Constitution of the United States, would be the supreme law of the land," then the restrictions of the Federal Constitution upon the exercise of judicial power would also be but impotent phrases. The analogy is perfect. Fiat power is fiat power. Fiat power exercised by a Governor is fiat power. Fiat power exercised by the Supreme Court is fiat power. Labeling an executive order or judicial opinion "fiat power" does not change its nature. The critical reason we cannot see all this is because we simply cannot bring our minds to accept the notion that the Constitution has meaning apart from the judiciary's pronouncements. We act as if the framers wrote a document with the idea that its meaning would thereafter be discovered by the Court and the Court alone.

What is the word "fiat" in the above quotation to really mean? The Court is trying to argue that "fiat" is only something which Governors undertake. But, frankly, the judiciary is as capable of "fiat" as a State Governor. What is *Roe v. Wade* but fiat? What is *Roe v. Wade* but a universal rule of purported Constitutional construction? What is the woman's right to privacy which is broad enough to include abortion announced in *Roe v. Wade*? It is not in the Constitution of the United States. It is only in *Roe v. Wade*. The Constitution is not shown its due respect as the "supreme law of the land;" *Roe v. Wade* has become the supreme law of the law. The restrictions of the Federal Constitution upon the exercise of judicial power are cast down and trodden under judicial foot. The Constitution itself has become "impotent phrases" rendered as such by the Court.

Cooper falsely declared "the basic principle that the federal judiciary is *supreme* in the exposition of the law of the Constitution." But *Roe went further* and declared the principle that reference to the Constitution's actual text is not necessary to the federal judiciary's supreme exposition thereof.

Perhaps we still cling to the belief that the Justices are not taken from the body of People but poses a wisdom which is beyond our mere understanding–a divine right to judge? At least the Governors are not claiming that their "fiat" should be the one rule governing the entire nation. But the Supreme Court makes this boast and we plead submission and approval. Our best lawyers willingly succumb.

Moreover, the Court is also quick to proclaim that "If the legislatures of the several States may *at will,* annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . ." Well then, how much more true is the parallel assertion that if the Supreme Court of the United States "may at will, annul" the text of the Constitution, "and destroy the rights acquired under that document, the constitution itself becomes a solemn mockery. . . ."

Having puffed its own Constitutionally limited and enumerated power into a *supreme* power of judicial (not Constitutional) exposition, the Court then crowned its argument with the ultimate usurpation:

> [the] interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "anything in the Constitution or Laws of any State to the Contrary notwithstanding." Every State legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 "to support this Constitution."

Notice how the Court jumps from false premise to false application. From the false premise that its opinions are *equal* to the supreme law of the land, the Court then uses Article VI to bludgeon State officials into servitude to its opinions. Of course, a reading of Article VI indicates only that the Constitution is the supreme law of the land and laws made in pursuance thereof, and treaties made under the authority thereof. Article VI says not one word about Judicial decisions, judgments, or chain citations to its own judicial opinions being supreme or entitled to the slavish obedience of State officials. As a matter of fact, Article VI says that all legislative, executive and judicial officers shall be bound by oath or affirmation to "support this Constitution." Article VI does not say that all legislative, executive and judicial officers shall be bound by oath or affirmation to "support the opinions of the Supreme Court" especially when cited by the Court. The Supreme Court, however, now does not care about nor affirm the actual text. But do "pro-life lawyers"or judges care either?

CHAPTER 2
Diverse Constitutional Remedies or Nationalistic Judicial Decrees?

A. Legal and Political Remedies

We now turn to remedies–both legal and political. What option does a Governor, for instance, have when faced with a Supreme Court decision which is bad evidence of law? What about the other branches? Do they have to sit idly by and let the Supreme Court rule the land? What about political options? Do we just have to wait for the Justices to move from this world to the next and hope for a better Court in the future?

Consider the marvelously diverse remedies the Constitutional and our system of government provides. Its called checks and balances but is not like what you were taught in your government run and controlled high school civics class. Look at the Arkansas case again. Had the Governor refused to adhere to the District Court's injunction against interference with the school board's desegregation plan, and simply disregard it as a matter of his Constitutional views on the subject,(as he was perfectly entitled to disagree with the Court's decision and not follow it), then the proper remedy would have been for the Court to issue an order to show cause why he should not be held in contempt. If the Governor failed to appear for the hearing, then the correct remedy would have been to dispatch the U.S. Marshals to forcibly bring him into court to "show cause." If he was found in contempt of court, the proper remedy would be to impose appropriate sanctions, incarceration or punishment. If the Governor called out the State militia to prevent his arrest or incarceration, the proper remedy would be for the President to independently review the lawfulness and Constitutionality of the Court's decision and order.

If the President was persuaded that the decision and order were lawful and Constitutional, he would nationalize the State militia and ultimately order them to deliver the Governor into federal custody. The Governor would either submit or resign. On the other hand, if the President was persuaded that the decision and order were unlawful or unconstitutional, (as the President is perfectly entitled to disagree with any court decision or order,) then he would instruct the U.S. Marshals (who work for the President and not the court) to decline to enforce the decision or order of the lower court, wherein the matter could be appealed eventually to the Supreme Court.

After the Supreme Court rendered its decision, and if contrary to the President's view, the President would still be perfectly entitled to refuse to enforce the Supreme Court's decision. The correct remedy for this refusal would be that Congress could then consider impeachment of the President for treason, bribery or other high crimes or misdemeanors if it was of the opinion of Congress that the President's refusal constituted such an offense–an unlikely and historically untenable conclusion. See Article II, Section 4. If the Congress, however, believed that the Court had acted lawlessly or usurped legislative or executive power, and that such conduct was not in keeping with a Justice's good behavior, then it could remove specific Justices. See Article I, Section 3, clauses 6 & 7, and Article III, Section 1. If Congress failed to take sides and skirted the issue, the next election would then serve as a national referendum on the understanding of the President versus the understanding of the Court versus the action or inaction of Congress. The People would also

decide if their Governor acted properly or improperly and if their own legislature did likewise. Elections are brutally efficient when the People have it in their mind to move in one direction and public officials and courts in another.

Moreover, what could the People of the States do either through their legislatures or in a convention called for a specific purpose? They could propose amendments to the Constitution (as could Congress) according to Article V. They could advance their own views in a State Constitution regarding federal Judicial supremacy and its limits. Their legislatures could also direct their respective Senators in the United States Senate to reconsider the adverse legal or political effect of a specific law or judicial decision and its impact on the people, the State or the Republic. They could seek to repeal or amend that legislation, protest or refuse enforcement of a judicial decision, or craft amendments for consideration by the House of Representatives and then the People. There are many remedies. But they are all rendered irrelevant if the People, and their elected officials, all mistakenly believe in the slavish doctrine of judicial Constitutional supremacy.

Now the reason such a lengthy chain of events and remedies is described herein is to illustrate how wonderful our Constitutional system is when it comes to opportunities to understand, interpret and apply the Constitution. The Constitutional system is miraculously diverse in its checks and balances in not letting any branch, or any government for that matter, gain an unfair advantage over the other. It recognizes that every weighty question of Constitutional significance will necessarily entangle the judiciary, State and local officials, the President and the Congress. It recognizes that ultimately the People will decide the matter through the ballot box and then, if necessary, by Amendment under Article V. Beyond that lies the right of lawful revolution under the terms and conditions articulated in the Declaration of Independence.

In contrast to this exceptional Constitutional system, however, notice how dogmatic and uniform is the Court's monolithic approach. Observe how it cuts the entire process of political participation and accountability short by gutting many of these remedies and destroying their wonderful ability to check the abuse of judicial power and balance lawless decisions, judicial or otherwise. Under the Court's autocratic "divine right of judicial supremacy" model every elected official, both high and low, and the People also, must submit to the Court's judicial *and* extra-judicial edicts. Our options are now mistakenly limited to either persuading our judicial masters to have mercy and overrule their own lawless decision, or amend the Constitution.

Well, these are certainly options, but they are not the only options as will be discussed shortly. When we try to exercise the first and foremost options of appealing to the other two federal branches or to our State legislatures or governors, they all bleat in one voice: "the federal judiciary is *supreme* in the exposition of the law of the Constitution." They, therefore, pervert their oaths of office to support the Constitution into judicial cheerleading. While some say, "we are pro-life," their creed is not "pro-law." Their words seek life, but their hands ensure death. The eyes of God search out the legislatures and courts and the branches of the federal and State executives for one who will say "the federal judiciary is not *supreme* over the Congress or President in the exposition of the law of the Constitution."

See also how the doctrine of judicial supremacy insulates all legislative and executive officials from Constitutional and political accountability. See how it politically insulates those who are "pro-life?" They campaign for State office, as such, but do not have to do the one "pro-life" thing they were elected to do: adopt and enforce a State criminal abortion statute. "Well, we can't do that because of *Roe v. Wade*" they croon. They thereby admit they are indentured to the Court, rather than representatives of the People. See also how those officials who might think about standing against judicial lawlessness fear they will be beaten down (as the slaves they are) with the rod of judicial supremacy? If you look closely, you can also see pro-life lawyers cheering on their judicial masters in their pleadings and briefs by droning that "*Roe* is law."

Permit the point to be pressed further. Do we understand how the Court's claim to be the *supreme* living embodiment of the Constitution also chops *the People* off at the knees by stunting open discussion of national questions of Constitutional import, rendering impotent their power to demand the President and their Congressional representative exercise independent judgment. Fascism has nothing to fear from the Court when it short circuits the Constitutional process, and renders impotent the *structural accountability* and power of the States and People by declaring that "the federal judiciary is *supreme* in the exposition of the law of the Constitution." The Court overplayed the sense of national calamity in *Cooper* and used the opportunity to commandeer power through arrogance, fear and force. *Roe* is its legal prodigy.

B. Lawless Judgments Must be Viewed and Judged as Lawless

What else can be done about judicial lawlessness and unconstitutional conduct? Is there a game plan? The *first* remedy for a judicial decision which is lawless ought to be proportionate to the wrong. Thus, the most elementary remedy is to reverse, overrule and remand. The Court has overruled itself over 200 times in its history. The approach of seeking a ruling which would reverse or overrule *Roe v. Wade* is therefore plausible. But, the history of the present Court and the efforts of pro-life advocates to achieve this objective have failed miserably. Why? Horribly absent from the legal arguments of pro-life lawyers is a direct frontal assault on the unconstitutionality of the Court's *lawmaking power*. The Court's powers are defined and limited by Article III of the Constitution. Enactment of a national legislative tri-mester ban on enforcement of State abortion laws through the judicial mechanism of rendering judgments in cases or controversies is not found among those powers. The tri-mester formula in *Roe* is the essence of such an enactment and the exercise of legislative power. The Court's opinion and judgment is written as if it were a legislative decree.

Pro-life lawyers have also neglected to defend the law of the Constitution by their meek acceptance of the Court's claims that it may amend the Constitution's substantive text itself, as it did in *Roe,* by writing into that document a *constitutional* right to abortion. Absent are direct challenges to the Court's assertion that its opinions are the Supreme law of the land, rather than evidence of that law. Are legal arguments advanced which assert that Supreme Court opinions are merely evidence of law to be judged according to the supreme law of the land--the Constitution itself? Absent are arguments that attack *Cooper;* that show *Roe* cannot be good evidence of law because it attacks and nullifies the foundations–the Declaration of Independence and the Northwest

Ordinance.

Finally, absent are legal arguments which acknowledge that the purpose of the womb, as far as any human law is competent to *recognize under the law of Nature*, is to foster and not destroy human life. Absent is the proposition that State legislators enacted their respective State anti-abortion laws on the basis of the law of nature. Absent are arguments establishing that no woman therefore has a legal right to use her womb to destroy the life which God has placed therein--a limit *established* by the law of nature and recognized by the consent of the people through their representatives in State law.

How is it that lawyers have not understood that the law of nature has *legal force and effect* by its recognition in the Declaration of Independence and Northwest Ordinance, recognition in Congressional State admission statutes, and enactment of a corresponding statutory right to life into State law? Pro-life lawyers have done a legal disservice to their clients by failing to challenge the lawlessness of a judicial body in declaring a right regarding human life that is contrary to the law of nature itself. This is also a *moral* failure because it reflects a blindness to the popular claim of civil government, yea, even a single branch thereof, that its opinions can supercede the unalienable right to life which God embedded in the law of nature and the people adopted into statute law–a right and law which no man, branch or government has the power to nullify.

C. Lawless Judgments Must not be Enforced by Executive Officials

The *second* remedy for a lawless judicial decision, which should be considered alongside arguing for reversal, is to demand that the executive branch at the State and federal levels refuse to enforce the lawless decision. All executive officials must take an oath of office which swears fidelity to the Constitution, not fidelity to the judicial branch of the federal government created by the Constitution. It means that the people must call upon the Governor of their State to look into the State's statute books and determine whether State legislation contains an anti-abortion provision which, but for *Roe v. Wade,* would now be enforceable. If such legislation exists, then the people must demand that the Governor direct that his or his executive resources be put to the enforcement of that law.

Likewise, the people must demand that their local County prosecutor, to the extent he or she may have jurisdiction to bring indictments for violation of State law, likewise make the prosecution of abortion offenses a priority. If the State does not recognize the crime of abortion, then the people of that State should prevail upon their legislators to articulate the offense and place it in the criminal code. If the Attorney General of the State is of the opinion that *Roe* is law, then the people should seek to remove the Attorney General through the regular and established means of recall or election.

In practice, this means that when State prosecutors prosecute persons practicing abortion, and a federal judge issues an injunction against such a prosecution, that the people must call upon the President (and all Presidential candidates) to refuse to call out the United States Marshals or other federal executive enforcement officials to enforce that injunction. It means that when State executive officials commit those convicted of abortion to the State's penitentiaries and a writ of

habeas corpus is sought in a federal district court, that the President order his Marshals not to enforce the writ if granted.

Abraham Lincoln was very cognizant of this responsibility and stated with clarity his views in a speech which he gave during his famous debates with Senator Douglas in and around Springfield, Illinois, in 1858. Lincoln's view in this matter was expressed with respect to the *Dred Scott* case, a case which Lincoln considered an abomination. In his speech at Chicago dated July 10, 1858, he stated his view on the authority and duty of the federal executive branch to faithfully discharge its constituted powers pursuant to its oath under the Constitution. Lincoln does not consider that the executive branch of government is an administrative division or department of the Supreme Court or of the Federal Judiciary.

Lincoln fondly quotes President Jackson's assertion "that the Supreme Court had no right to lay down a rule to govern a coordinate branch of the government, the members of which have sworn to support the Constitution as he understood it." Then turning to the *Dred Scott* case specifically, he says that while the parties before the Court are certainly bound by the judgment of the Court, that by the same token the Court's jurisdiction merely extends to the parties and their opinions are not to be taken as general legislation covering all persons under all circumstances no matter if they are even similarly situated to *Dred Scott.* Lincoln is emphatic when he says about the *Dred Scott* decision, "all that I am doing is refusing to obey it as a political rule."

Thus, Lincoln criticizes the shameful argument of Judge Douglas--that the executive and the legislative branches are bound by the opinions of the Court with respect to non-parties or that in some way the opinions of the Court form a political rule of actions governing the other branches of government. Lincoln's view is simply that each branch will do what it can to have the Court change its mind. Notice that Lincoln doesn't give the obtuse Republican and Democrat response that the Supreme Court has spoken and this settles all discussion among the other branches.

In all elections, the pro-life community should have but one political *litmus test* – will this elected official stand against the lawlessness of *Roe* in whatever jurisdictional capacity they enjoy? It is well past the time to go beyond the legally meaningless and politically impotent "Are you Pro-Life?" test. The Republicans have sold that snake oil to gullible pro-lifers for countless elections (and then ignored them thereafter). It is well past time for adoption of the "Are you Pro-Law?" test. The fight is over law first, then life.

D. State Supreme Courts and the Constitutionality of State Abortion Laws

Third, what can a State Supreme Court do? Many state legislatures are adopting state laws attempting to navigate the fringes of *Roe* while providing some measure of protection for the unborn. Where a state law is the subject of litigation and comes before a state Supreme Court in a case or controversy, that Court will be required to consider the impact of *Roe* and its progeny on the state legislation. Though most litigation will proceed to federal court, a State Court may find it present with just such an issue. A opinion on this point might read as follows:

Petitioner seeks to enjoin Public Act x of 2003 on the basis that its prohibition of abortion during the third tri-mester and regulation during the second contravenes the constitutional right to an abortion affirmed in *Roe v. Wade*. The statue in question prohibits abortion upon a partially delivered child during the third trimester and does not provide an exception for the health of the mother. We begin our analysis with an examination of the Constitution itself. We are unable to identify the right to an abortion purportedly contained therein and conclude that it is not guaranteed or secured by that document. Second, the right does appear in *Roe v. Wade*. An examination of that opinion shows that the Court created a tri-mester scheme which is at issue here. We find however, that the Court's trimester scheme is the exercise of a legislative, not a judicial power and for that reason is not a Constitutional holding in that the Supreme Court is not extended a legislative power. We decline to follow that holding.

Third, we note that the Declaration of Independence establishes the principle that the States in this Union, including this State, are created for the purpose of securing the unalienable rights of the people. A review of the history of the framing of this state's constitution and government and the legal principles articulated in the Declaration which are equally binding upon all States in all respects whatsoever, firmly establish that the right to life is among those guarantees which are unalienable and God given. A like review also establishes that the right to abortion finds no such corresponding legal footing. Since the principles of the Declaration of Independence regarding the inalienability of the right to life was recognized (though perhaps weakly) by the legislature in the statue at issue, we are duty bound to sustain the Act with due regard to these principles and their legally binding requirement. *See also* the Northwest Ordinance of 1787 to the same effect.

We are reminded by the dissent that the decisions of the Supreme Court according to *Cooper v. Aaron* are the Supreme law of the land and that we as state officials are bound thereby. A review of that case certainly does stand for the afore stated proposition. We decline to follow it, however, for the following reasons. First, opinions of the Supreme Court are not the supreme law of the land. We find not one *iota* in Article VI which establishes any such supremacy. Second, court opinions by and large (including the one we now publish) are not law in the first place as they do not bind any but the parties before them and are not rules of general applicability binding the public at large as does legislation. It cannot be doubted that the Article III power to review cases and declare acts of the legislature unconstitutional is not a power to establish laws of general applicability. The judicial power is not the power to create rights which contradict the law of nature. Whether it is the power to elevate statutorily unarticulated God-given unalienable rights to a federal constitutional status, however, is not before us. But third in any event, our judicial oath binds us to support the Constitution of this State and of the United States, not to support the opinions of the Supreme Court. This later mandate we cannot find written therein. Thus, we aim to keep our oath of Office to support these

> Constitutions against contrary judicial opinions.
>
> The dissent further objects to our course here today on the basis of *stare* decisis–the principle that courts should stand by previous decisions and not disturb settled matters. We affirm *stare decisis*, but we reject judicial supremacy. Judicial opinions are evidence of law. *Roe* is not good evidence, however, because it is legislative in nature and fabricated a right from a wrong. Therefore, the rule of *stare decisis* would have us stand by the rule of law first and then decisions based upon the rule of law thereafter. Since *Roe* does not stand upon the rule of law, the doctrine does not apply.
>
> Finally, the dissent warns that our decision here today will unravel the entire system of law in this Country and inject uncertainty into Supreme Court cases. The dissent is correct to show concern for our system of law. We too are concerned. The practice of regarding Supreme Court opinions as the equivalent of the Constitution's sole and exclusive meaning has been the central force in subjugating the rule of constitutional law to the will of a majority of the Supreme Court. We can think of no greater destructive force marshaled against the rule of law than to place all power of constitutional construction is one body alone and make the other coordinate, equal and independent branches of the federal government kowtow thereto, or to bind the state governments to decisions upon principles foreign and hostile to the very foundations upon which they are duly erected by the People for the security and happiness of this and future generations.
>
> If the state executive is of a different view than the majority of this Court, then his or her independent authority to execute or refuse to execute the statute at issue is not herein questioned. We are confident that the People will ultimately decide which rule will prevail if not unnaturally stripped of their ultimate political authority by the unilateral dictates of any judicial body. That matter, however, is not now before us.

A federal judge could also adopt this type of opinion, but would also have to address the notions of mandamus and superintending control as a subordinate judicial officer in the federal system.

E. Supreme Court Justices Must Be Prosecuted

The *fourth* remedy for a lawless judicial decision which should be considered alongside of arguing that the law should be reversed or overruled, demanding that current State and federal executive officials should refuse to enforce a lawless decision, and persuading state Supreme Courts to uphold the abortion laws of their states still on the books, is to hold the judicial malefactors themselves accountable for their lawlessness.

That the slavish doctrine of judicial supremacy was bound to come cannot be denied. Such is human nature unchecked by law. While such a doctrine was bound to come, woe to those by whom it comes. All things being equal, it would have been better for Justice Blackmun in particular, *Roe's*

principle architect, to have had a large millstone hung around his neck and to be drowned in the depths of the sea than to have suffered him to lead this country away from the Constitution's central legal object–the security of every man's life and the legal injunction against its depravation without due process of law. But all things are not equal. Summary execution is harsh. The Justice's hypothetical execution would have been lawless. He would have been deprived of his life without due process of law. The Justice should rather have been subjected to an impeachment trial and afforded due process guaranteed him. How much more then ought the unborn be guaranteed such protection and process? The Constitution requires due process of law, not due process of informed consent, 24 hour waiting periods or parental consent. It requires this for the unborn's security. Apparently, not even pro-life attorney's think due process is good enough.

If the Court has lead us away from the rule of law, then they must be cut off through impeachment of its chief charlatans. It is better to replace them with honest justices who recognize their limited authority-- limited by a higher written constitutional rule-- then to hypocritically defend the Court as a landmark of western civilization's testimony to the rule of law. *Roe* is no landmark of a civilized society. The holding is an adornment on the tombstone marking the Constitution's prior death in *Cooper*.

The Constitution recognizes that impeachment is the job of the Congress. Thus, every election for any member of Congress should have a *political litmus test* – will this candidate move to hold the Justices accountable to the Constitutional limits on their power through the impeachment process? Whether the candidate is or is not pro-life is not the controlling issue as we have falsely believed.

The controlling issues are whether or not any candidate for a Congressional office will:

1. Declare that *Roe v. Wade* is an unconstitutional judgment usurping legislative power;

2. Promise to hold Congressional hearings on the legal dimensions of the "good behavior requirement;" and

3. With respect to the House of Representatives, promise to consider Articles of Impeachment against Justice Stevens and Justice O'Connor, for their *repeated* and *unwavering* judicial defiance of the Constitution's limits on judicial power through post-*Roe* decisions which reaffirm that *Roe* is Constitutionally mandated as a matter of due process;

4. Assemble the evidence into an Article of Impeachment which indicates that such open defiance of the Constitution fails to meet its good behavior requirement. (Justice Stevens is the most senior member of the Court's pro-abortion majority. Justice O'Connor also has longevity. I would not fault Justices Souter, Kennedy, Ginsberg or Breyer at this time because of their relative junior status and because the good behavior requirement ought not be invoked except in more severe cases where the defiance of law is fixed and certain from the record); and

5. With respect to the United States Senate, demand that senatorial candidates promise (*i.e.*, ask

them to take the "Pro-law/Pro-Life Pledge to America") to promptly receive any Articles of Impeachment from the House and judge the matter as Judges, not as political Senators, on the basis of the *evidence* submitted by the house managers accordingly. (Then watch what they say and do and take action the next election.)

In other words, the *litmus test* for congressional candidates is to demand that the House prefer Articles of Impeachment, and that the Senate will consider same as provided for in the Constitution.[7]

However, if the President and Congress follow the whoreson legal tradition of regarding the Court's opinions to be the master of the Constitution itself–a tradition begotten by the Supreme Court in *Cooper* and blindly propagated in our American Bar Association accredited law schools--then our country will continue to stagger behind this blind elected rabble into a slavish pit. The tradition is slavish because the tradition perpetuates an obsessive way of nationalist thinking about Constitutional law which renders irrelevant. The pit is also slavish because the tradition renders all questions regarding the Constitution's meaning a function of the judicial branch alone without regard for the Constitutional checks and balances of the other two branches on all questions of Constitutional law.

Of the Congress and president may try a political diversion–a national constitutional sham. They may propose a Constitutional amendment. Constitutional amendments, however, are not "checks and balances" for judicial malconstruction thereof. The purpose of an amendment is to add that which is missing, not check judicial abuses in the construction of the instrument. Impeachment checks abuses, not amendments and the Congress and the President should stop using proposed amendments as a Constitutional remedy for judicial abuse when the Constitution already provides for the remedy of judicial impeachment. If the President and Congress continue to insist on an amendment as a means to "remedy" judicial decisions, then they too have broken faith with their oath to support the Constitution itself. Let our friends and enemies be counted.

CHAPTER 3
Failed Plans That Deserve to Fail

A. "Pro-Life Republican Presidents will Save Us!"

In lieu of these appropriate Constitutional remedies, however, the pro-life community has demanded protection for the "right to life" without first demanding accountability to the "rule of law." This strategy is like demanding chastity from prostitutes or honor among thieves. The pro-life community's approach to *Roe v. Wade* is not to embrace remedies which are or were within its political hand but, rather, to wait for the judicial malefactors to retire or die and then encourage the

7. For a fine discussion of pre-constitutional and extra-constitutional limitations which Courts have invoked in regard to legislation that offends the law of nature and which have the same force where applied to judicial decisions likewise offensive *see* Haines, The Law of Nature in State and Federal Decisions, 25 Yale L.J. 617, 628-636 (1916); Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures, 2 Tex.L.Rev. 257 (1924), 3 Tex.L.Rev. 1 (1924); The Revival of Natural Law Concepts (1930).

appointment of pro-life justices. This is hardly an activist strategy–wait until they die. Essentially, this "avoid law" approach has been justified as a means to cajole Republican Presidents to appoint pro-life candidates. In this respect, the pro-life movement has both failed and been duped by con-artist Republicans.

For instance, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992) regarding informed consent, Republican appointees Stevens, O'Connor, Kennedy, and Souter voted to *affirm* the holding of *Roe*. Republican Presidents have appointed seven of the current nine justices of which four of the seven voted to affirm *Roe*. Yes, affirm. This is not a strategy of overcoming lawlessness. In every election, Republican presidential hopefuls play the same political trump card claiming that unless a Republican is elected president, *Roe* will never be overturned. Prostitutes only have one thing to sell and the Republicans sell fear every four years. Stevens was a Ford appointee. O'Connor and Kennedy were Reagan appointees. Souter was a Bush appointee. Three Republican Presidents failed to deliver. What evidence do we have to believe that a fourth Republican President will make the difference even if he has the Senate with him and has a vacancy?

As for the pro-life appointees, Rehnquist, appointed by Nixon, Scalia by Reagan, and Thomas by George Bush Senior--these justices have only opined that they appear poised to "reconsider" *Roe*. Even the pro-life Republican appointees are timid. They too believe that their opinions are the supreme law of the land and that *Roe* is law. This is the real problem with the conservative justices. Republican Presidents had seven appointment chances and came through only 42 percent of the time. This is not a winning strategy. It is a Republican strategy to use the pro-life vote for its own political gain and to deceive dedicated pro-life activists into believing we are making progress – well, at least 42 percent of the time, which means zero percent in practice.

Or consider the recent case of *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000), striking down Nebraska's law prohibiting partial or live birth abortions. The statute prohibited partially delivering a living unborn child, intentionally killing an infant or completing the delivery of a then dead child. Justice Breyer delivered the opinion of the Court, in which Justices Stevens, O'Connor, Souter, and Ginsburg joined. The majority predictably observed that "considering the matter in light of the Constitution's guarantees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose. *Roe v. Wade*, 410 U. S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992). We shall not revisit those legal principles." They cite themselves, not the Constitution, for their "legal authority."

Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas joined together in dissent. Justice Scalia's dissent was the most articulate and vitriolic, yet it stopped short of demanding that *Roe* be overruled. To his credit, however, he observed that the "Court, armed with neither constitutional text nor accepted tradition . . . should return this matter to the people -- where the Constitution, by its silence on the subject, left it -- and let them decide, State by State, whether this practice should be allowed." This is a defense of law–though weak. At least he demanded that *Casey* should be overruled, but only because its test was unworkable, not because it was lawless to

begin with.

Justice Kennedy also felt betrayed and argued that *Roe,* being good law, did not warrant the present result. The Chief Justice and Justice Thomas argued that "*Casey* professed to be, in part, a repudiation of *Roe* and its progeny. The *Casey* joint opinion expressly noted that prior case law had undervalued the State's interest in potential life . . . and had invalidated regulations of abortion that in no real sense deprived women of the ultimate decision." This is hardly a striking defense of law. They strain at a gnat and swallow a camel.

The dissenters felt betrayed. They went along with *Casey* thinking that the case turned the corner on abortion, only to find they were duped, in part by their own vanity in judicial supremacy. The best they can muster in opposition, is that the Court is engaging in "ad hoc nullification"of statutes it dislikes. While this is true, it is hardly the point. The dissenters are unable to recognize that *Roe* is simply not law.

If we want to reverse *Roe*, lawyers are going to have to argue in Court, in the halls of the Executive Branch and in the Legislature -- that Supreme Court opinions are not law; that *Roe* is not law; that *Roe* is not good evidence of law; that *Roe* is lawless and ought not be followed by any government official, State or federal; and that the most senior members of the pro *Roe* majority should be impeached and tried on the charge that their unwavering commitment to such a lawless decision contravenes the good behavior requirement of the Constitution.

B. Let us Regulate Lawlessness

In addition to the lamentable "Republican Presidents will appoint pro-life Justices" strategy, the pro-life community has parroted the dissenter's feebleminded strategy of arguing that we should *accept Roe*'s legal framework and then embrace both State and federal legislation designed to *regulate* lawful abortion or curtail it in the last tri-mester of pregnancy. Of course, abortion is a matter of State criminal law and there is no basis in the Constitution to federalize it through Congressional legislation or regulation. Thus, the strategy of purportedly defending the "Constitution's integrity" (actually the Court's treachery) is based on an unconstitutional expansion of federal power over a classic State criminal law provision. This only proves that the pro-life lawyers and lobbyists can trammel down law on par with the best judicial malefactors.

To the extent that State legislatures attempt to work within the *Roe* framework through informed consent, or partial-birth abortion legislation, or other imaginative legislation, they must first admit that *Roe* is binding as a matter of law. Thus, our stated public defense of life is premised on an acknowledgment of lawlessness and a renunciation of the principles of the Declaration of Independence. Every good tree bears good fruit, but a bad tree bears bad fruit. A bad tree of law cannot produce the good fruit of life.

Moreover, this approach of incremental State legislation based upon a false premise, by definition, will never achieve reversal of *Roe* because its legitimacy is falsely based on the lawfulness of *Roe itself*. The recent case of *Stenberg v. Carhart*, previously discussed, striking

down Nebraska's law prohibiting partial or live birth abortions is a classic case in point. No doubt pro-life lawyers will scour that decision in order to help their State Legislatures fit within the Court's latest *ad hoc dicta.* "What might O'Connor accept?" is their inquiry. But this approach to lawyering shows what perfect fools for lawlessness we really are. We carry the Court's *dicta* to the ends of the earth only to make our clients twice the heirs of lawlessness we have become. Then the lawyers ask you and I for contributions to support "the cause."

C. "A Pro-Life Republican President and Republican Congress will Save Us!"

Hope springs eternal, even against reality. After all that has been said about the misguided approach of making judicial appointments the principle mechanism to overrule *Roe v. Wade*, many are now renewed in their hope that the Republicans can get their judicial appointments right this time since they have a majority in both houses of Congress and a Republican in the White House. But how can appointment of a majority of pro-life justices, committed to judicial supremacy in Constitutional adjudication, be considered a victory for law?

Open the eyes wider and perhaps it will be seen that the push to appoint "pro-life" justices has essentially blinded us to the truth that the defense of law is a necessary predicate to the ultimate defense of life itself. We have failed to understand that fundamentally the appointment of a "pro-life" Court, committed to judicial supremacy, is more destructive to law itself, than even to life. Unless and until the defense of law is made the centerpiece of the pro-life movement *and of judicial appointments*, and not the appointment of "pro-life" justices *per se*, we will not experience the ultimate victory of securing the unalienable right to human life under law or restrain the judiciary to its Constitutional limits.

D. Which Part of the Constitution is Actually Defective?

There is also a strong drive among pro-life conservatives to "remedy" the lawlessness of *Roe* by amending the Constitution. But the Constitution is not the problem. The problem is that the Court has repeatedly handed down lawless judgments affirming abortion. Amending the Constitution will not solve the law question. It will not make the Court respect the law any more than it does now. The problem is not the Constitution, but the Justices who interpret the Constitution.

Suppose there was a chicken house with a sign posted "Only Chickens Admitted." And suppose that a fox was asked to guard that house. At some point, however, the fox decided on his own that this sign did not apply to him because it did not *expressly prohibit a fox* from entering. And thus, he went into the house despite the posted sign and enjoyed his stay.

Now what remedy ought there be to deal with this fox? Should we say that the fox had a right to enter the house but we need to regulate the time, place and manner associated with his entry and stay? Should we say that he has a right to enter the house as long as he leaves during the last third of the day? Should we appeal to the farmer to wait until this fox dies and replace this honorable guardian with another fox who will pledge to obey the sign before he gets the job? Why, "none of

these will work" you say. What we really need to do is post another sign which says explicitly "No Foxes Allowed." This will solve the problem we are told because the problem lies with the fox's knowledge, not his will.

It ought to be clear, however, that the fox had no problem reading the original sign, he simply justified ignoring it And how will another sign change his approach to this now familiar practice of justifying his usurpation of the farmer's decision to bar his entry? Will the fox simply find another justification to allow his entry sooner or later in spite of the "No Foxes Allowed" sign?

Yet this is our precise strategy today. The framers posted a sign in Article III of the Constitution which gave federal courts authority to judge cases and controversies under the Constitution. Not content with obeying this posted limitation, the Supreme Court disregarded the sign and declared it had authority to also make law and, moreover, that the other two branches of the federal government had a duty to defer to and enforce its lawmaking power. Our failed solution toward this disregard of the Constitutional sign, is to post another sign that says "No Foxes Allowed." We falsely believe that this second sign clears the judicial foxes of any ambiguity purportedly existing in the sign "Only Chickens Admitted." We also falsely believe that the problem is that our foxes have difficulty reading. The truth of the matter, however, is that our foxes read perfectly well.

The problem is not their literacy, the problem is their arrogance in believing that they are entitled to: 1) set aside the law of nature by an act of their judicial will; and 2) usurp Tenth Amendment recognized pre-existent power, which is reserved to the people of the States and the States respectively, to determine the meaning, scope and application of the law of nature and embody that understanding in State legislation through the constituted processes. No number of Constitutional sign posts, however clear, are a sufficient deterrent to the twin evils of idolatry against the law of nature on the one hand, and usurpation of the law of the land on the other hand.

In short, the Constitution is not defective. The remedy ought not "fix" something which is not broken. This approach involves a massive disregard of the real problem of judicial usurpation and presently existing Constitutional remedies for those abuses. Amending the Constitution closes our eyes to these twin evils with a vain hope that the foxes won't do it again.

CONCLUSION

The sooner that the pro-life community and pro-life organizations recognize the following, the closer we will be to reviving the rule of law and overcoming the rule of lawless Justices;

–Recognize that Court opinions are not law, but only evidence of law, often good, but sometimes bad evidence;

–Recognize that Supreme Court opinions are not the Supreme Law under Article VI and that the oath of all state and federal officials is to support the Constitution, rather than unconstitutional judicial opinions;

–Recognize that the legitimate power of judicial review is not also the power to make law;

–Recognize that *Roe* is not Constitutional because it is the exercise of legislative power and because the Court has no power to create a human right which is contrary to the law of nature;

–Recognize that the Declaration of Independence and Northwest Ordinance contain principles that bind the state governments and legitimate their existence, and that a judicial opinion that construes state power contrary to its very foundations are void;

–Recognize that the defense of law is a necessary predicate to the defense of life;

–Recognize that the legal remedies which have been pursued are flawed because: 1) they accept the legitimacy of the Supreme Court to make law; 2) assume the legitimacy of *Roe* as law; 3) fail to evaluate *Roe* as good or bad evidence of law; 4) expand federal power over State statutory and common-law crimes; 5) deprecate the Constitution itself; and 6) as a practical matter don't work 58 percent of the time;

–Recognize that stare decisis requires no court to follow a case contrary to the foundations of a state government;

–Recognize that we need to adopt at least a threefold approach as discussed above-- seek to overrule *Roe* on the basis that it is an unlawful usurpation of legislative power and contrary to the law of nature as expressed in State criminal statutes, make refusal to enforce *Roe* by executive officials the critical *litmus test* for political election rather than the legally meaningless "Are You Pro-life?" criteria, and pursue impeachment proceedings through Congress;

–Recognize that executive and legislative elected officials are bound to 1) support the Constitution, 2) have a duty to declare judicial opinions unconstitutional where contrary thereto and 3) have a duty to consider impeachment as a remedy for usurpation,

–Finally, recognize that we have no choice but to pursue these remedies. The present tactics are themselves built on a flawed view of law. Continued reliance on our own devotion to lawlessness is unlikely to receive the blessing of God or the assent of the community simply because we seek to achieve a good pro-life objective through a doomed lawless means.

Our present condition is woeful. The Congress, President and Court honor the Constitution with their lips, but their hearts and minds are far from its literal text. They profess it in vain, but their politics are but rules taught by men. Thus, they nullify the words thereof for the sake of modern political traditions. They are blind guides true enough, but we too are blind–blinded to the Constitution's principles and in love with our political party and its elevation of our sense of self-importance. Can the blind lead the blind? Will they not both fall into a pit? As we follow them along the broad road we will certainly fall into their slavish pit. Rightly condemned is the politician or judge who leads the blind astray on this road. But those who love the rule of law and disdain slavery ought and can do better then being blind and following blind guides. A return to the law will

lead the blind by ways they have not known, along unfamiliar paths. It is, however, the way we must go. If we do nothing:

> God will make the sins of evil people fall back upon them.
> He will destroy them for their sins.
> The LORD our God will destroy them.
> Psalm 94:23

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