



The Christian Committees of Correspondence

It is Time to Denounce Roe v. Wade by Herbert W. Titus

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Monday, January 22, 1996, marked the 23rd anniversary of Roe v. Wade. The annual March for Life took place in Washington. Other pro-life demonstrations occurred throughout the country. My wife, Marilyn, and I were in Baton Rouge, Louisiana, the state capital and home of Louisiana State University. On Monday morning a pro-life student group set up a mock "cemetery. . . on the LSU Parade Ground. . . featur[ing] 4,400 crosses. . . and a tiny white casket draped by an American flag with a single red rose on top." The Advocate B1-B2 (Jan. 23,1996).

At noon a number of pro-choice demonstrators invaded the parade ground and placed coat hangers on the crosses. The hangers, the protesters claimed, symbolized the "crude tools women formerly used to obtain unsafe, illegal abortions." The crosses, the pro-lifers maintained, "were memorials to unborn children whose mothers legally aborted their pregnancies." Id. at B1.

Buried in the local newspaper coverage of this event was a brief account of another event, held later on Monday evening and on the same campus. It was a debate on the question: "Did the U. S. Supreme Court Legalize Abortion in Roe v. Wade?" The reporter informed his reader that there were two sides to this issue. But that did not deter him from stating as fact that "the Supreme Court decision. . . legalized most abortions." Id. at B2. Nor did the debate topic stop

local television news reports from making similar "factual" statements that the Court make abortion "legal" when it decided Roe v. Wade.

The Baton Rouge media treatment of the Court's opinion was no different from that of other media throughout the country. In The New York Times, for example, the reporter covering the March in Washington opened his story with reference to Roe v. Wade as "the landmark Supreme Court ruling that legalized abortion. . . ." The New York Times A12 (Jan. 23, 1996).

This opening statement also captioned the picture placed above the story headline. And the reporter found opportunity to repeat it twice in the body of the article, making it unmistakable that the Court's ruling in Roe v. Wade had made abortion legal. By repeating again and again that abortion is legal, the national media has placed itself squarely on the side of the pro-abortionists. After all, if abortion is now "legal," then the only question is whether it is immoral. Most pro-life activists and politicians have accepted these terms as the premise of the ongoing debate. While they are quick to assert that the Court was wrong and should be overruled, they accept that Roe v. Wade is, at least for the time being, the "law of the land."

Nothing could be further from the truth. Roe v. Wade is not the law of the land because, in the nature of things, a court opinion cannot be law. Second, it is not law because, by definition, a court order cannot be law. Finally, Roe v. Wade is not the law of the land because it is not the law of the Constitution. For these three reasons, the United States Supreme Court did not - indeed could not - legalize abortion in Roe v. Wade.

JUDICIAL AUTHORITY

Article VI, Section 2 of the United States Constitution lists three things as "the supreme law of the land": (1) This constitution; (2) The laws of the United States which shall be made in pursuance of it; and (3) All treaties made, or which shall be made, under the authority of the United States. Conspicuously absent from this roll is a court decision.

This omission was not an oversight. The Constitution's framers left court opinions off the list because no one believed that they were law. Instead, they believed, as did their contemporaries, that a court opinion, even if rendered pursuant to the Constitution or to a statute or to a treaty, is only "evidence of law." See 1 Blackstone, Commentaries on the Laws of England 69, 71 (1765).

This is true because of the limited nature of judicial authority. Judges, Blackstone wrote in 1765, have no authority to make law. They may only discover it, state it, and apply it. Even the common law, although unwritten, preexisted and stood independent of a court opinion expounding upon it. *Id.* at 67-69.

Thus, while a court opinion, having been written by experts in the common law, is "most authoritative evidence. . . of the existence of" such law (Id. at 69), Blackstone asserted: The law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Id. at 71.

If a judge was mistaken about that law, then, according to Blackstone, his opinion was not "bad law, but that it was not law" at all. Id. at 70. If this is true about judicial authority at common law, where law is determined by unwritten custom, it must be true of judicial authority under a system of positive law, where law is determined by the authority of some body other than the courts. A written constitution is law, Chief Justice John Marshall claimed in the famous case of *Marbury's v. Madison*, 5 U. S. (1 Cranch) 137 (1803), not because the judges say so, but because the people have made it so: The people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. Id. at 176. By definition, judges have absolutely no authority to substitute their principles for those adopted by the people. To ensure that the judges, and other government officials do not overstep their authority, the American people put their principles in writing lest they "be mistaken, or forgotten." Once put in writing, according to Marshall, that writing "form[s] the fundamental and paramount law of the nation" and any act "repugnant to the constitution, is void." Id. 176-77.

After determining that the Constitution was law because the people made it so and because it was written, Chief Justice Marshall turned his attention to the authority of the Supreme Court to decide constitutional questions. To answer this question, he stated the common law premise upon which all judicial authority rests:

It is emphatically the province and duty of the judicial department to say what the law is. Id. at 177. By this statement he did not mean that the courts have the authority to make constitutional law. He had already affirmed that only the people had that authority. What he meant is what Blackstone had written just a generation earlier, namely, that the judge was to discover the law and to state it.

Marshall had already done that. He had read a statute enacted by Congress and discovered that it commanded the Court to take jurisdiction of the case before it. He had also read the Constitution and had discovered that it prohibited Congress from conferring such jurisdiction. The "very essence of judicial duty," Marshall wrote, was to "determine which of these conflicting rules governs the case." Id. at 178. In deciding that the constitutional prohibition governed, rather than the statute, Marshall did not claim that the Court was making law; rather, he wrote that the Court was merely deciding that the law of the constitution was "superior to any ordinary act of legislature." Id.

In making his decision, Marshall did not pretend that the Court's ruling was equivalent to the law of the Constitution. To the contrary, Marshall concluded that the Constitution governed the Court, just as it governed the Congress. He supported this conclusion with particular reference to language in the Constitution.

First, he noted that a number of provisions in the Constitution directly limited the power of the courts: From these, and other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of the courts, as well as of the legislature. *Id.* at 179-80. Second, he observed that judges, like members of Congress, were bound "by oath or affirmation to support this Constitution:" How immoral to impose it on them, if they were to be used as the instruments, and knowing instruments, for violating what they swear to support. . . Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if th a t constitution forms no rule for his government? *Id.* at 180.

Finally, he turned to Article VI, Section 2 with the comment "that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States, but those only which shall be made in pursuance of the constitution, have that rank." *Id.* at 180.

From this clause, and the previous ones mentioned, Marshall concluded that the Constitution as it is written is superior to the courts, as well as to Congress and the President: . . .The particular phraseology of the constitution of the United States confirms and strengthens the principle supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. *Id.*

For Marshall to have claimed otherwise would have been to elevate the Court above the people, and a court opinion above the constitution. That would have contradicted the very foundation upon which Marshall had concluded that the constitution was law.

JUDICIAL POWER

Presidents from Thomas Jefferson to Abraham Lincoln understood this point quite well and acted accordingly. For example, Congress enacted the Sedition Act of 1798, making seditious libel a federal crime. Led by Jefferson and James Madison, the Kentucky and Virginia legislatures passed Resolutions charging that the sedition Act was unconstitutional. In the Virginia Resolution, Madison included a provision rejecting the contention "that the judicial authority is to be regarded as the sole expositor of the Constitution, in the resort": . . .Dangerous powers, not delegated, may not only be usurped and executed by other departments, but. . . the judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution; . . . consequently, . . .

the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations. . . by the judiciary, as well as by the executive, or the legislative. The Virginia Report. 196 (J. Randolph, ed. 1850).

According to this view, then, the "parties to the constitutional compact, from which the judicial, as well as the other departments hold their delegated trusts" must be the final expositor of the constitution: On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with others in usurped powers, might subvert for ever, and beyond the possible reach of any rightful remedy, the Constitution which all were instituted to preserve. Id.

Jefferson, Madison, and their fellow Republicans, therefore, rejected any notion that the courts, by upholding the constitutionality of the Sedition Act, had thereby "legalized" federal prosecutions for seditious libel. See Levy, Freedom of the Press from Zenger to Jefferson (1966)

After he became President, Jefferson pardoned everyone convicted under that Act because, in his opinion, the law was unconstitutional. In a letter written to Abigail Adams in 1804, Jefferson explained his action: You seem to think that it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, any more than for the Executive to decide for them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. 8 The Writings of Thomas Jefferson 310 (Ford ed. 1897).

Jefferson was right. Article II, Section 3 states that the President "shall take care that the laws be faithfully executed." It does not say that he take care that "court orders" be faithfully executed. A court order is not the law of the land; only the Constitution and laws conforming to it are. Nothing that Chief Justice John Marshall wrote in *Marbury v. Madison* undermines Jefferson's claim. If a legislative act "repugnant to the constitution, is void," as Marshall penned in *Marbury*, then a court order repugnant to that constitution is void.

For, as Marshall stated, "the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. *Marbury v. Madison*, supra, 5 U. S. at 179-80.

In 1832, President Andrew Jackson followed in Jefferson's footsteps. He vetoed on constitutional grounds an act to recharter the bank of the United States, even though the Court had upheld a previous measure as constitutional. In his veto message, Jackson wrote:

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered well settled. 2 Messages and Papers of the Presidents 576-589 (Richardson ed. 1897).

Later in his message, Jackson put the Court into its proper place in relation to Congress and the President: It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their Legislative capacities, but to have only such influence as the force of their reasoning may deserve. *Id.*

Finally, Abraham Lincoln refused to accept the Supreme Court's decision in *Dred Scott v. Sanford*, 60 U. S. (19 How.) 393 (1857) as the law of the land. In the campaign for United States Senate in 1858, Lincoln denounced *Dred Scott*, suggesting that it was a part of a conspiracy to nationalize slavery.

Lincoln's opponent, Stephen Douglas, responded: The right and province of expounding the Constitution, and construing the law, is vested in the judiciary established by the Constitution. -- As a lawyer, I feel at liberty to appear before the Court and controvert any principle of law while the question is pending before the tribunal; but when the decision is made, my private opinion, your opinion, all other opinion must yield to the majesty of that authoritative adjudication. Quoted in Brest and Levinson, *Processes of Constitutional Decision Making* 211 (3d Ed. 1992).

A week later, Lincoln refuted Douglas: . . . [I]n respect for judicial authority . . . Judge Douglas . . . would have the citizen conform his vote to that decision; the member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all departments of government. I would not. *Id.* at 212. All that Lincoln would concede to Douglas was that *Dred Scott* was binding on the parties to the case. By limiting the scope of the court's order to the parties, Lincoln correctly confined the reach of judicial power. Judges, by the nature of the office, have no right to issue rules of general applicability, but only to apply preexisting rules to the facts and parties to the case. *Marbury v. Madison*, *supra*, 5 U. S. at 178. Having no authority to promulgate rules, no court opinion or order can possibly be law, because law by

definition is a rule binding on people generally, not just upon individuals who happen to be parties to a case. | Blackstone, Commentaries at 38-39, 44.

To conclude otherwise would, as Jefferson argued, install unelected federal judges as "despots:" Our judges see as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. . . Their power is the more dangerous as they are in office for life, and not responsible . . . to elective control. The constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all departments co-equal and co-sovereign within themselves.

CONSTITUTIONAL LAW

To guard against judicial despotism, the people chose a written Constitution, the text of which is binding on courts as well as on the legislature and the executive. What is striking about the Supreme Court's opinion in *Roe v. Wade* is that the Court made no attempt whatsoever to ground its opinion in the constitutional text. Justice Blackman candidly admitted that the "Constitution does not explicitly mention a right to privacy." *Roe v. Wade*, 410 U. S. 113, 152 (1973). Notwithstanding the absence of a specific text, he approvingly observed, "the Court has recognized that a right of personal privacy . . . does exist under the Constitution." *Id.* (Emphasis added).

By choosing the word, "under," instead of the word, "in," to describe the source of the right of privacy, Justice Blackman justified the Court's decision to ignore the specific texts of a number of constitutional provisions, and to probe below the surface to the "roots" of the First Amendment, to the "penumbras of the Bill of Rights," and to "the concept of liberty . . . of the Fourteenth Amendment." *Id.*, 410 U. S. at 152-53.

By digging beyond the constitutional text, the Court declared its independence from it, substituting words and phrases in court precedents for the language of the Constitution. The Constitution simply served as the Court's springboard to leap from the "privacy rights" of marriage, procreation, contraception, child rearing and education to a right to terminate a pregnancy, none of which are found in the constitutional text. Thus, it really did not matter to the Court whether it anchored its decision "in the Fourteenth Amendment's concept of personal liberty . . . or in the Ninth Amendment." *Id.*, 410 U. S. at 153.

The Court's cavalier treatment of this issue was deliberate. It was designed to hide the fact that neither the text of the Fourteenth Amendment nor the text of the Ninth Amendment lends an iota of support to the Court's opinion. As for "liberty" in the Fourteenth Amendment, prior to *Roe v. Wade* the Court had consistently defined liberty as a legal term.

In Roe, the Court for the first time considered liberty to be a psychological, sociological, and economic expression. "The unwanted child," Justice Blackman contended, would cause a woman psychological stress, would impose family responsibilities, and occasion economic hardships. Therefore, he concluded, the woman had a liberty interest protected by the Fourteenth Amendment. *Id.*, 403 U. S. at 153.

What an astounding claim! If taken seriously, it could be extended to any situation that interferes with a person's desire to be free from responsibility from another, including a handicapped infant, a dying parent, or even a cantankerous spouse. What is even more astounding is that the Court elevated the woman's desire to be free from her parental responsibilities above the interest of innocent human life in the womb. The Court did so by labeling that life less than fully human. And it camouflaged that ruling with repeated assertions that the Constitution only protects "post-natal" life. *Id.*, 403 U. S. at 158-62.

That is not true. The Ninth Amendment, cited by the Court in favor of its decision, in reality directly contradicts it. That provision states that the "enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." (Emphasis added).

The word, retain, denotes that the rights expressly guaranteed by the constitutional text should not be construed in such a way as to deny rights not specified, but that preexisted in the Constitution. This rule of construction should have led the Court to ask the question whether its reading of the liberty provision of the due process clause - granting a right to terminate a pregnancy - would "deny or disparage" a right "retained" by the people. Had the Court asked this question - which it did not - it would have found that its distinction between "potential" and "full" human life violated the unalienable right to life as stated in the nation's charter, the Declaration of Independence. That document, in pertinent part, states that "all men are created equal" and endowed by their Creator with the unalienable right to life and, further, that to secure these rights governments are instituted among men. As for the right to life, the Declaration is clear, that right belongs equally to all human beings - without regard to race, sex, or birth. According to the law of the Creator, as confirmed by the science of biology and genetics, human life begins at conception. Senate Report on The Human Life Bill - S. 158 pp. 10-16 (97th Cong., 1st Sess. 1981).

Under this definition of the right to life, there can be no distinction based upon whether the life is in the womb or out of it, whether the life is "potential" or full. Yet, that distinction lies at the very heart of Roe v. Wade in direct contradiction of the right to life retained by the people in the Ninth Amendment.

CONCLUSION

In its Preamble, the Constitution states, as one of its purposes, "to secure the blessings of liberty to ourselves and our posterity." A document designed to secure the blessings of liberty to posterity - the yet to be born - cannot be construed to deny to the posterity the right to life.

Roe v. Wade has done just that. It is, therefore, not law, but an unconstitutional and illegal act usurping the people's right to laws that secure the unalienable right to life. It is time to denounce Roe v. Wade as completely void and of no legal effect whatsoever.

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