

# *Standing Between the Butcher and the Baby*

*A Criticism on the “legality” of Abortion and the Rights of the States to Interpose Themselves Between their Citizens and Federal “Law”*

by Scott T. Whiteman, Esq.

## **Abort Abortion**

The pro-life movement estimates that 4000 children each day are either poisoned or butchered while still in the womb. That is, in the thirty years since *Roe v. Wade*, over 43 million children have been murdered and have received no protection from their civil governments. In these thirty years, reports indicate that the mood of the culture has changed, with teens being more likely than just ten years ago to oppose abortion; however, abortion is still considered a legally protected right. Except for possibly the population control advocates, abortion advocates are not as ideologically concerned with murdering children as much as they are about preserving abortion as a right. Certainly, I recognize that abortion providers have a fiscal interest in increasing the number of abortions provided;[1] however, if every pregnancy resulted in a natural end (either birth or miscarriage), but abortion was still legal, the pro-life movement would have lost the battle, and the pro-abortion “rights” advocates would have won. As such, every pro-life measure that seeks merely to chip-away at the number of abortions, while not asserting definitively that abortion is no such right, is a losing measure.

Parental-consent measures suggest that abortion is a right of every person, but one that may not be asserted by a youth without having met certain requirements. Partial-birth abortion bans suggest that abortion is a right, but it should not be done so distastefully, even if this form of abortion is most comfortable for the baby-victim. (Saline abortions pickle a child for hours; the D/C abortion chops the baby up while alive; whereas partial-birth abortions deliver the baby 2/3 of the way and instantaneously kills him.) Seeking a Constitutional Amendment declaring abortion illegal concedes a ground I am not willing to concede: that presently, abortion is legal. The above measures, or any other regulatory means of minimizing abortion, precariously chips away at the foundation of Law. As Samuel Rutherford wrote, “God’s law doth not regulate a non-ens, a mere nothing, or an unlawful power.”[2] Regulating abortion concedes its legality – prohibiting abortion denies its legality.

We have nearly 1,000 years of English Common Law history, let alone the 6,000 years of Biblical Law history, that reveal that Law exists apart from mankind, and it is man’s duty to discover the Law and then faithfully to execute it. The “legal” things that men do apart from the Law are, as St. Paul called them, vain imaginations. Early Christians understood that the legality of Rome did not make abortion “lawful.” Our Constitution’s Supremacy Clause is recognition that “legal” and “Lawful” are different terms. Only those laws passed in accordance with the Constitution become the Supreme Laws of the Land.

## **The Path to Victory – The Interposition Solution**

What does this jurisprudential history hold concerning abortion? The church does not have power over life or death. The early church did, however, make the penance for having an abortion life-long, indicating that abortion was equivalent to murder.[3] John Calvin wrote, under his commentary on Thou

shalt not kill, “the foetus, though enclosed in the womb of its mother, is already a human being, (homo,) and it is almost a monstrous crime to rob it of the life which it has not yet begun to enjoy.”[4] Blackstone demonstrated that under Common Law that “life is the immediate gift of God, a right inherent by nature in every individual. ... For if a woman is quick with child, and by a potion or otherwise killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered a dead child; though this is not murder, was by the ancient law homicide or manslaughter.”[5] Additionally, “the punishment of a pregnant woman condemned shall be deferred until after her delivery.”[6] While Common Law required in each of the above instances that the child be quickened, Biblical Law facially makes no distinction in Exodus 21:18-19. It must be under the authority of this revealed Law that we seek to end abortion.

It is the duty of all governments[7] to properly discover and administer the Law[8], for the “legislature in all ... cases acts only ... in subordination to the great lawgiver, transcribing and punishing His precepts.”[9] What happens, then, if a state government has properly administered the Law, but the federal government declares such administration to be unconstitutional? The answer is found in the Doctrine of Interposition.

The Doctrine of Interposition has not been widely written on, so I am forced to rely on unpublished analysis[10] as well as some older and/or obscure texts[11] to those who are not likely to read a magazine such as this. Simply, “Interposition is an official act on the part of a State government to question the constitutionality of a policy established by the central government.”[12] Our federal government is one of checks and balances; the Executive veto and the Court check the legislature’s actions for constitutionality. Likewise, the Legislature and the Court check the President’s actions. But who checks the Court? “The right to challenge any usurpation of power on the part of the Supreme Court must by lack of alternative, if for no other reason, devolve upon the States.”[13] What does the Tenth Amendment mean if not that a State can interpose itself as a legitimate determiner of the Constitution to which it is a consenting party? Once a contract is formed, both parties have the right to ensure the proper enforcement of the terms of the contract and are not bound by the illegitimate breaches of that contract, absent a waiver.

At the turn of the 18th century, in response to the Alien & Sedition Acts, Jefferson and Madison, through the Kentucky and Virginia Resolutions respectively, declared that the U.S. Constitution defined and limited the powers of the federal government, and “in case of deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of evil.”[14] As co-parties to the Constitution, if the federal government breaches the contract, the states have an unquestionable right to determine a breach.[15] As Samuel Rutherford wrote, “The law permitteth the bestower of a benefit to interpret his own mind in the bestowing of the benefit.”[16] Kentucky reasoned correctly, that a federal government that exclusively held the power to determine its own limits would “stop nothing short of despotism; since the discretion of those who administer the government, and not the constitution, would be the measure of their powers.”[17]

Article III of the U.S. Constitution, which established and governs the courts, is the shortest of the first three articles establishing and granting powers to the United States government. There is a clue there. Further, while it is unconstitutional to diminish the salary of judges while they hold their office, it is entirely constitutional for the Congress to strip the Supreme Court down to one member, namely a Chief Justice[18], or to further limit the jurisdiction of the courts, as suggested by Chief Justice Roy Moore of Alabama in his proposed Constitution Restoration Act.

Is a Supreme Court decision “law of the land?” The delegates to the Constitutional Convention limited the “Supreme Laws of the Land” to the Constitution first and subsequent “Laws of the United States made in Pursuance thereof,” Art. VI, § 2. Court orders are conspicuously absent from the Supremacy Clause. If “all laws which are repugnant to the Constitution are null and void,” *Marbury v. Madison*, 5 U.S. 137 (1801) at 176-177, how much more so judicial orders? The “judiciary of the United States are not the masters of the Constitution but merely its interpreters.”[19] Precariously absent from the decision in *Roe v. Wade* was Constitutional authority. The individual concept of “privacy” is neither in the Constitution nor the Bill of Rights. By allowing the judiciary to place “privacy” into the “penumbras of the Bill of Rights” (both alien concepts to our limited Constitutional republic[20]) we have permitted “those who administer the general government ... to transgress the limits fixed by that compact.” As Jefferson warned, the Court will “stop nothing short of despotism.”[21] Perhaps it will be an oligarchy consisting of 9 men in dresses, but it will nonetheless cease to be the federal republic as set up in 1787.

Does Article III of the Constitution confer subject matter or original jurisdiction to the Supreme Court over the definition of human life? If not, is not *Roe v. Wade* a “dangerous exercise of ... powers not granted”[22] to the Courts by the Constitution? It was in recognition of this duty to interpose which caused Thomas Jefferson to write in the Kentucky Resolutions, also in response to the Alien & Sedition Acts, “[I]f those who administer the general government be permitted to transgress the limits fixed by the compact, by a total disregard to the special delegations of power therein contained, annihilation of the state governments, and the erection upon their ruins, of a general consolidated government, will be the inevitable consequence.”[23] Can we reasonably argue that, through the imposition of the Articles of Incorporation, our state governments are sovereign entities? As Patrick J. Buchanan wrote, “Using the incorporation clause of the Fourteenth Amendment, the Court asserted a right to impose on the states all the restrictions the Constitution has imposed on Congress. At that point ... the states of the Union became subject provinces of the Supreme Court.”[24] But Jefferson argued that the “states who formed that instrument, being sovereign and independent, have the unquestionable right to judge its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy.” Where have all the state’s-rightists gone?

The Virginia and Kentucky Resolutions were in response to procedurally sound, but unconstitutional, Executive and Legislative action. But what can be done against procedurally sound acts, but unconstitutional acts of the Judiciary? Pro-lifers like to make a comparison between the *Dred Scott* decision and *Roe v. Wade* to demonstrate the fallibility of the Supreme Court. Why not use the same tactics to overcome the pernicious *Roe* decision as did 22 states after *Dred Scott*? Wisconsin “denounced the Supreme Court for ‘assumption of power’ and declared ‘that the several States ... have the unquestionable right’ to exercise ‘positive defiance’ in behalf of their interpretation of the powers reserved to the States by the Constitution.”[25] It has been more than 30 years and over 43 million puréed babies, and not one state out of fifty has interposed itself between the general government in Washington and a struggling life in the womb. The states have neglected their duties for 30 years; nonetheless, they are duty-bound to interpose to arrest the evil of abortion.

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

people who consorted to have the unborn child “hit” under accomplice liability theory.

One aspect of Interposition which is not well-known (if it can be said that the former aspect was well-known) is that Interposition goes both ways. What would be the effect if a state declared murder legal? Such a law would be most likely a violation of that state’s constitution, but it certainly is the foundational premise fostered in the July 4, 1776, Unanimous Declaration, that to secure the unalienable right to life, governments are instituted among men.

The U.S. Constitution guarantees to each state a “Republican form of Government.” Can it really be said that a state that refuses to prosecute murder is a republican government and is adherent to the organic law of the Unanimous Declaration? If that state government is non-republican, Madison argued that the Federal government could interpose itself between the states citizens and the state without denying Article IV, § 4 of the U.S. Constitution. See Federalist No. 43 (6). If they had the temerity, either the President or the Congress could recognize that America’s charter declared that men are “endowed by their Creator with certain unalienable” and self-evident rights, including the right to life. The Preamble to the U.S. Constitution states that such rights and liberties are secured for “our posterity,” which means the following generations as yet unborn. The President, or the Congress, can declare that Justice will extend into the womb and that a refusal to prosecute murder is the epitome of denying justice and a willful breach of the federal compact, and stand between the state protecting the abortionist and the baby.

### **Interposition, Not Secession**

One great objection to the Doctrine of Interposition comes from an anti-secessionist group which fears that the Union necessarily must be undone if a governor interposes himself between his state’s citizens and the federal government. Let us not forget, the Virginia and Kentucky Resolutions and the refusal to recognize the Alien & Sedition Acts as Supreme Law of the land did not fracture the Union. Jefferson wrote “to secure these rights, Governments are instituted among men” and “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it.” Let us also heed Jefferson’s and Madison’s advice from the Kentucky and Virginia Resolutions. Virginia expressed “its deep regret, that a spirit in sundry instances, been manifested by the federal government, to enlarge its powers by forced constructions of the constitutional charter” as well as its “warm attachment to the Union of the States.” Kentucky considered the federal union to be “conducive to the liberty and happiness of the several states,” and that it would be “among the last to seeks its dissolution.” It is with respect to the Union and the Constitution that the Doctrine of Interposition can be offered. Interposition concedes no argument that “abortion is legal,” or that we have to wait for a pro-life Judiciary or a Constitutional Amendment while allowing 4000 babies to get butchered daily. Interposition allows the principles of the Constitution to be obeyed without conceding validity to the Articles of Selective Incorporation. Simply, Interposition declares that the terms of the Constitution ought to be obeyed. Interposition is not Secession – it is sound contract theory that requires both parties, the Federal and the State, to obey the terms of the contract.

In fact, we can agree with Jefferson, who wrote, “[Virginia] would, indeed, consider such a rupture [of the union] as among the greatest calamities which would befall them; but not the greatest. There is yet one greater, submission to a government of unlimited powers.”[27] As the Declaration demonstrates, “Prudence . . . will dictate that Governments long established should not be changed for light and transient causes.”

What if the Courts refuse our plea? Is the un-prosecuted murder of over 43 million babies a light and

transient cause? The time is closing before we can no longer rein in the judicial, the executive and legislative branches, state and federal, of civil government. Before long it will be a “long train of abuses and usurpations” which gives rise to our “duty to throw off such Government.” Our personal, individual duty has not yet arisen, since as of late, no state has even attempted to stand between the butcher and the baby.

[1] Carol Everett, *What I Saw in the Abortion Industry*, Easton Publishing Company (1988)

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

[3] R.J. Rushdoony, *Rushdoony on Abortion: Distant Early Warning*, Institute for Christian Economics, 11 (1989).

[4] John Calvin, *Calvin’s Commentaries*, vol. III, Baker Book House, 41-42 (1996)

[5] Sir William Blackstone, *Commentaries on the Laws of England*, vol. I, 129 (1765).

[6] Blackstone, *op. cit.*, at vol IV, 395.

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

[8] Romans 13

[9] Blackstone, *op. cit.*, vol. I, 54.

[10] Herbert W. Titus, “Ending ‘Legal’ Abortion,” paper, *The First 100 Ways* presented to the Board of Trustees of the Conservative Caucus Foundation, January 13, 1997.

[11] Felix Morley, *Freedom and Federalism*, Liberty Fund, Inc., Indiana (1981) at ch. 15; James McClellan, *Liberty, Order and Justice: An Introduction to the Constitutional Principles of American Government*, Liberty Fund, Inc., Indiana (2000) at 493.

[12] Morley, *op. cit.*, 240.

[13] Morley, *op. cit.*, 241.

[14] Virginia Resolutions in General Assembly, para. 2, December 24, 1798. (emphasis added)

[15] Kentucky Resolutions in General Assembly, para. 4. December 3, 1799

[16] Rutherford, *op. cit.*, 60.

[17] Kentucky Resolutions, para. 4.

[18] McClellan, *op. cit.*, 506-507

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

[20] United States Constitution, Tenth Amendment

[21] Kentucky Resolutions in General Assembly, December 3, 1799.

[22] Virginia Resolutions, para. 2.

[23] Kentucky Resolutions, para. 4.

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

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

[26] Titus, "Ending 'Legal' Abortion."

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

Scott T. Whiteman is a Reformed Christian, husband, and father of three. He is a practicing attorney in the State of Maryland, and served as Campaign Manager for Michael A. Peroutka as he ran for President in 2004. He is available for radio or TV interviews, or for speeches, by contacting him at (410) 760-7897.