# *ENDING "LEGAL" ABORTION*

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President Bill Clinton says that he wants abortion to be "safe, legal and rare." Pro-lifers vehemently disagree.

Abortion, pro-lifers say, can never be safe, certainly not to the child. Nor, they claim, are they safe for the mother, citing the growing literature, demonstrating that even the so-called "medically safe" abortion is dangerous to the mother.

Abortion, they vigorously contend, cannot be legal. It is, they assert, murder and contrary to the nation's charter commitment that all human beings are equal and entitled to the inalienable right to life. No court and no legislature can change that.

Finally, abortion, they state, will never be rare, so long as it is promoted as a constitutional right. They maintain that women will never be deterred from killing "unwanted" children unless and until abortion is once again condemned by civil society as a morally reprehensible homicide.

Without question, such pro-life rhetoric is principled and powerful. For too long, however, pro-life strategies to restore legal protection for the preborn child have been pragmatic and anemic. Sadly, their proposals for action have too often matched Mr. Clinton's slogan that abortion should be "safe, legal and rare."

Since *Roe v. Wade*, the dominant pro-life strategy at the state and local level has been to limit, not prohibit, abortion. To this day, pro-life advocates continue to promote such laws as requiring parental consent before a minor may get an abortion, a 24-hour waiting period, and informed consent. Such proposals concede that abortions are legal, but should be limited so as to make them safer and rarer.

Proposals to ban abortions after the 20th week of gestation and partial-birth abortions, also concede that abortion is legal. Again, such efforts, even if successful, would only prohibit a limited number of abortions, with the possible effect of making abortion more safe and more rare.

Even the proposal to prohibit all abortions except in cases of rape, incest and threat to the life of the mother, is based on the assumption that the killing of a baby in the womb of a mother is legal, even though the baby has done nothing to deserve death. Such a compromise of the principle of the sanctity of innocent human life presupposes that abortion should remain legal, but only very safe and very rare.

In short, the pro-life forces have unwittingly adopted strategies that reinforce the President's rhetoric and undermine their own. As a result, there are any number of politicians who qualify as pro-life so long as they support any measure, no matter how modest, limiting a woman's right to an abortion.

This must end. If it does not, then innocent human life in the wombs of American mothers will never again be protected. Rather, abortion will remain almost unlimited. And the holocaust will continue notwithstanding the pro-life protests that the taking of innocent human life should never be sanctioned by a civil society, no matter how safe or how rare.

What kind of pro-life strategy ought to be adopted that is consistent with pro-life principles and that has a realistic possibility of success? To map out such a strategy, one must first address two preliminary questions.

First, what is the constitutional framework within which the issue should be resolved? Second, what law defines personhood and does that definition include a child in the womb of the mother?

**CONSTITUTION**

Since *Roe v. Wade*, pro-life strategies have been based upon the premise that the Supreme Court's opinion in that case is the Supreme Law of the Land. Therefore, short of a constitutional amendment or Court reversal, it has been assumed that federal, state and local officials - executive, legislative and judicial, must conform their actions concerning abortion to rules handed down by the courts.

This working premise is erroneous. It is both unwise and unconstitutional.

Article VI of the United States Constitution states that three things are the Supreme Law of the Land: "This Constitution ... the laws of the United States ... made in pursuance thereof; and all treaties ... made under the authority of the United States." Conspicuously absent from this list is a court opinion.

At the time that the Constitution was written, it was universally understood that court opinions were not laws. Therefore, under no circumstances could it be contended that federal court opinions are "the laws of the United States" within the meaning of Article VI.

Nor can it be maintained that a court opinion, even an opinion rendered by the Supreme Court, determines what the Constitution means. Again, at the time that the Constitution was written, it was universally understood that a~court opinion interpreting a provision of the Constitution was not equivalent, either in design or effect, to that constitutional provision.

To the contrary, the Supreme Court itself, when exercising the power of judicial review, acknowledged that the Constitution governed the court, not vice versa. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) Thus, the Constitution is not what the Supreme Court says it is. Rather, the Constitution is what the Constitution says it is.

Accordingly, when Article VI of the Constitution states that all federal, state and local officials executive, legislative and judicial, "shall be bound by oath or affirmation to support this Constitution," it means that those officials are duty bound to support the Constitution as it is written, not as it has been construed by the United States Supreme Court.

This does not mean that a civil government official may defy a court order rendered by the United States Supreme Court in a case in which that official was a party. It does mean, however, that a state or local official who is not a party has the duty and the power to act according to the constitutional text, even when the action taken is inconsistent with a court opinion interpreting that text.

In addition, under the doctrine of separation of powers, the Supreme Court cannot impose its view of the Constitution on Congress or upon the President. Both Congress and the President have co-equal power with the Court to apply the Constitution, and an independent duty to act according to the Constitution as they understand it, not as the Court has determined it to be.

This is the very essence of the rule of law. No human institution has the final and supreme power to determine what the law is. Otherwise, the rule of law would be reduced to the rule of those who possess such final and supreme power.

This wisdom is reflected in the checks and balances established by the Constitution, for as James Madison wrote in *Federalist No. 47*, "the accumulation of all powers ... in the same hands ... may be justly pronounced the very definition of tyranny."

## PERSONHOOD

In *Roe v. Wade*, the Supreme Court decided that the Constitution does not recognize a child in the womb of a mother as a "person" entitled to the protection of the due process clause of the Fourteenth Amendment. To support this conclusion, they cited a number of constitutional provisions in which person can only be understood as referring to a human being who has been born. *Roe v. Wade*, 410, U.S. 113, 156-57 (1973).

Since *Roe v. Wade*, efforts to define a pre-born child as a person have assumed that the child, to be a person, must be one according to the constitutional text in order for that child to achieve the status of personhood and, thereby, to be entitled to protection against abortion.

For example, in the early 1980's the United States Senate had before it "The Human Life Bill." This Bill defined "person" for the purposes of the due process clause of the 14th Amendment in such a way as to include a human baby in the womb of a mother from the very moment of conception. See *Report to the Committee on the Judiciary, United States Senate from its Subcommittee on Separation of Powers* pp. 1-2 (1981).

One could argue that Congress could not have done otherwise, because it was acting pursuant to its authority under the Fourteenth Amendment which limits its power to enforcing the terms of that Amendment. Hence, any Congressional definition of person must conform to the constitutional textual meaning of that word.

But the findings contained in the Report proposing the Human Life Bill were not so confined. To the contrary, they went behind the constitutional text to the common law as reflected in the nation's founding charter, the Declaration of Independence.

That law, the Report stated, established that all human beings are legally equal. Furthermore, the Report continued, the very purpose of the Equal Protection Clause of the Fourteenth Amendment was to enforce that equality rule upon the states. Such a rule of equivalent value of all human life, the Report concluded, demanded that abortion be outlawed. Id. at- 15-16.

Even though the Report drew this conclusion, it did not incorporate it into the text of the Human Life Act. Instead, it left it to the discretion of every state to decide whether to prohibit abortions, and if so, by what rules. Indeed, the Report emphasized that the Human Life Bill did not make abortions illegal, but only made it possible for state legislatures to make them illegal. Id. at 19-20.

By leaving it to the States to decide whether a child in the womb of the mother is a human being deserving the full protection of the law, the Report chose not to embrace the common law definition of personhood. That decision has plagued the pro~life movement to this day and in two distinct ways.

First, it tacitly conceded that state and local legislatures may define legal personhood in any way that they choose, notwithstanding the life principle embraced by the nation's charter. Second, it assumed that Congress has no authority to protect innocent human life in the womb of a mother if the states choose not to provide such protection. Neither of these assumptions are true.

## CONGRESS

As for Congress, the very purpose of the Equal Protection Clause was to deny to the states any power to withhold from any class of human beings the benefits and protections of the common law. As the Supreme Court observed in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873), the Clause was specifically designed to protect former slaves who were being denied their rights to life, liberty and property because states ware not enforcing the common law on their behalf.

The Equal Protection Clause was designed to guarantee such common law protection by denying to the

States any power to classify or treat any human being as anything but a legally recognized person. That is exactly what states are doing when they follow the Supreme Court's ruling in *Roe v. Wade* — denying to a class of human beings the protection of the common law solely on the ground that pre-born children are not persons.

Following the adoption of the Fourteenth Amendment, Congress enacted a number of criminal statutes designed to outlaw such practices. One of these statutes protects "any inhabitant" from acts "under color of any law, statute, ordinance, regulation or custom" that "willfully" deprive him "of any rights, privileges, or immunities secured or protected by the Constitution" or of "full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 18 U.S.C. Section 242.

This law should be enforced by a President of the United States against abortion providers and women seeking such services, especially when those services are funded by state law or otherwise given special encouragement or protection by that law.

To be sure, such a prosecution would succeed only if there is proof that the abortion providers and women intended to deprive the preborn child of rights secured by the Constitution or by the laws of the United States. Such proof could be provided by reference to the "rule of law" governing life in the Declaration of Independence and, thereby, meet this burden. See *Screws v. United States*, 325 U.S. 91, 103 (1945).

Obviously, this problem could be resolved if Congress acted by declaring that human life begins and conception and by redrafting the Human Life Bill in terms of the Equal Protection Clause. Such a Bill would make it clear that all human life is to be equally protected and that any state that does not afford such equal protection is violating the common law definition of person.

**PRESIDENT**

In addition to the enforcement of existing or future criminal statutes, the President may instruct the Attorney General to bring civil suits seeking injunctions against abortion clinics and abortion doctors on the grounds that they are public nuisances.

Such a suit would be based upon the same grounds that are set forth in the civil rights statutes set forth above.

Such a suit could very well succeed, especially if based upon evidence that the failure of states to protect the unalienable right to life imposes serious adverse consequences upon the "general welfare" of the country. In defining the general welfare in this context, emphasis should be placed upon the adverse impact that abortion has upon the national economy. Such a strategy is not unprecedented. *In re Debs*, 158 U.S. 564 (1895).

The President may also, under his constitutional authority to "take care that the laws be faithfully executed," refuse to spend any money appropriated by Congress for the purpose of supporting any activity that facilitates or promotes abortion- This means that the President may cut off all federal funds to such abortion promoting organizations as Planned Parenthood and to such abortion facilitating activities as fetal tissue research.

This power is available to the President even if Congress should mandate that the funds that it has appropriated must be spent. Such a mandate violates the constitutional vesting of all of the executive power in the office of the President because the very essence of executive power is the discretion not to enforce a law. See *Marbury v. Madison*, supra.

Finally, the President has the power to appoint only judges to the federal bench, including the United States Supreme Court, who have clearly and consistently affirmed the legal personhood of the preborn.

Indeed, his constitutional oath of office to "preserve, protect and defend the Constitution of the United States" requires him to exercise his appointment power consistent with his understanding of the Constitution, independent of either the judicial or the legislative branches.

In fact, the President's oath of office, the only one spelled out in the Constitution, makes him the primary protector of the Constitution. Only the President is, by the constitutional text, commanded to "preserve, protect and defend" the Constitution. All other officers are commanded by the Constitution only to "support" it.

As the nation's chief constitutional officer, the president has the duty and authority to issue a Presidential Proclamation affirming the right to life of the preborn child and to call upon state governments to protect that right with all deliberate speed and appropriate means.

Such a Proclamation would set the stage for aggressive action at the state level to restore the laws prohibiting the taking of innocent human life from the womb to the tomb.

**STATES**

In many states, statutes prohibiting abortion remain unrepealed and available to local prosecutors to bring criminal actions against abortion providers. While such laws may very well provide for an exception to protect the life of the mother, they afford statutory authority to a prosecutor who takes seriously his duty to "support" the Constitution's high regard for the right to life.

The problem today is that state prosecutors assume that their duty to support the Constitution means obedience to Supreme Court opinions even when they were never parties to the cases. Rightfully understood, their duty is to interpose their office between *Roe v. Wade*, a constitutionally erroneous opinion, and the people whose rights they are duty bound to protect.

Even in states where the statutes have been changed to conform to the *Roe* formula, a prosecutor may still have ample authority under the state's law and constitution to bring criminal actions against abortion promoters and providers.

In Virginia, for example, producing an abortion, except to preserve the life of a mother, remains a felony. At the same time, by statute, a physician is permitted to perform abortions according to different rules governing the first, second, and third trimesters of a woman's pregnancy.

While such a statutory scheme may pass the judicial test laid down in *Roe v. Wade*, it does not meet the constitutional test laid down by Article I, Section 1 of the Virginia Constitution which reads:

> *That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact, deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*

While the United States Constitution may not afford protection to the pre-born, this provision clearly does. And what does a state do when it fails to protect innocent life in the womb of a mother, but "divest ... posterity" of the rights of life, liberty and property.

Virginia laws that permit the taking of the lives of pro-born children violate this constitutional principle. And where a state constitution lays down a higher standard than the United States Constitution, the state constitutional provision provides an independent and adequate state ground for a state law prohibiting abortion.

In addition, *Roe v. Wade* can be avoided by any state legislature that challenges its factual

underpinnings. The *Roe* decision is based upon a number of factual assumptions that, if true in 1973, are no longer true today.

The major factual premise of *Roe* is that a medically safe abortion poses no significant health risks to the mother. Numerous studies since *Roe* have proved that assumption false. Physiological complications, including uterine perforations, excessive bleeding and endotoxic shock, attend even the normal abortion process. Other physiological complications, such as cervical and ovarian cancer, placenta previa, pelvic inflammatory disease, appear after an abortion and are causally linked to it.

And there are numerous psychological and emotional side effects. Among the significant emotional risks are guilt and depression, suicidal ideation and sexual dysfunction. Among the psychological disorders are Posttraumatic Stress Disorder and Postabortion Syndrome.

These emotional and psychological traumas contribute to a variety of sociological impairments, including psychic numbing, substance abuse and relationship instability. This, in turn, adversely impacts family and other intimate associations.

None of this came before the Court in *Roe v. Wade*. Nor did the Court have before it evidence that the medical profession does not adequately protect the interests of women who obtain abortions in clinics. Nor did it have before it the threat that permitting abortion poses to the sanctity of life generally or to the economy.

Given these glaring factual omissions, *Roe v. Wade* is no longer a binding legal precedent for, as the High Court itself has observed, changes in the facts upon which a court ruling rests is sufficient reason not to follow that ruling. *Planned Parenthood v. Casey*, 505 U.S. ---, 120 L Ed 2d 674, 703-06 (1992).

**CONCLUSION**

It is time for a new pro-life strategy, one based squarely upon the principle that the taking of innocent life is never justified. Such a strategy would seize the moral and constitutional high ground in the abortion debate and has a realistic chance to succeed.

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## About Herbert W. Titus

Born in Baker, Oregon on October 17, 1937, Herbert W. Titus attended Baker public schools, graduating co-valedictorian of his class in 1955. In 1959 he graduated Phi Beta Kappa from the University of Oregon, where he served as student body president. In 1962 he graduated cum laude from the Harvard Law School.

After two years as a trial attorney with the U.S. Department of Justice, Titus served from 1964 to 1979 as a professor of law at the state universities of Oklahoma, Colorado, and Oregon. During this time he was active in various left-wing cases, opposing the war in Vietnam and supporting abortion and homosexual rights. As a cooperating attorney with the American Civil Liberties Union, Titus worked with attorneys and clients on a number of Constitutional cases.

In 1975, Titus was dramatically converted to Christ on the last weekend of July. In 1976-77, he studied with Dr. Francis Schaffer at L'Abri in Switzerland. In 1979, left his tenured position as professor of law at the University of Oregon, becoming a member of the charter faculty of a Christian law school at Oral Roberts University. After three years at ORU, Titus moved to Regent University, where he served for eleven years, first as the founding Dean of the School of Law.

In July 1993, Titus established *The Forecast*, a monthly journal on law and public policy. This unique journal is designed to provide a Biblical and Constitutional analysis to current issues. A Constitutional and common law scholar, Titus is an educator and author offering seminars, books, and monographs on law and public policy for both lawyers and non-lawyers alike.

An active member of the Oregon State Bar, Mr. Titus is a practicing attorney serving of Counsel to the Virginia Beach, Virginia law firm of Troy A. Titus, P.C. Specializing in Constitutional litigation and strategy, Mr. Titus serves several public interest organizations. He is the author of numerous articles and a book entitled *God, Man and Law: The Biblical Principles*.

In August, 1996, Mr. Titus was chosen at the National Convention of the U.S. Taxpayers Party in San Diego, California to serve as its Vice Presidential candidate.

He and his wife, Marilyn, reside in Chesapeake, Virginia. They have four children and nine grandchildren.