

Abortion Is NOT Legal!

The following article by Herbert W. Titus, JD, and Christine Ross first appeared in the May/June '99 issue of "Life Advocate" magazine.

The mainstream media tell us that the Supreme Court legalized abortion with its *Roe v. Wade* decision in 1973. The media also tell us that there is nothing we can do about it because *Roe v. Wade* is the "law of the land."

Nothing could be further from the truth. Abortion is not legal in America! Recognition of this fact is the first step for the pro-life movement in its campaign to turn back the murderous scourge on innocent babies. Indeed, heart disease (738,781 deaths per year) is not the number one cause of death in the United States - abortion is, at well over a million deaths per year.

Article VI of our nation's founding document declares that "[t]his Constitution, and the laws of the United States.. .made in pursuance thereof; and all treaties...made...under the authority of the United States shall be the supreme law of the land."

What is clearly missing from this Constitutional list of supreme laws is a court opinion. This was not an oversight. Our Constitution's writers knew that a court opinion could never be law; much less the supreme law of the land. This is especially true if that court opinion contradicted the Constitution itself.

As can be plainly seen from the Constitutional text, a statute enacted by Congress is the supreme law of the land only if made "pursuant to" (in conformity with) the Constitution. If a statute passed by the people's representatives is not law unless it conforms to the Constitution, then how can a court opinion decided by unelected judges be given a higher status?

When Chief Justice John Marshall established judicial review-the right of the court to review a statute to see if it conformed to the Constitution-he said that the written Constitution was just as binding on the courts as it was on Congress. Marshall, then, did not establish the supremacy of judges over the Constitution-but the supremacy of the Constitution over Congress, the President and the courts.

Our Founding Fathers resoundingly rejected the idea of judicial supremacy. They did not empower judges to usurp a power, rightfully belonging to the people and thereby become a law unto themselves. That is why they put the Constitution in writing-so that the original founding laws and principles would not be mistaken or forgotten. In this way they believed that the Constitution would become the fixed law of the land.

Just a little more than 100 years ago, the American people knew that Supreme Court opinions did not become the law for the whole country, but bound only the parties to the case. That is why Abraham Lincoln rejected the Supreme Court's decision in the infamous Dred Scott case. Lincoln knew that even though the Court declared-in the name of the Constitution that black people had no rights that white people were bound to respect, that ruling was not the law of the land.

What has happened to America since the days of Lincoln?

Things began to change when Oliver Wendell Holmes, Jr., ascended to the Supreme Court. He introduced the idea that law changed with changing times, and that it was the business of judges to make the necessary changes.

Holmes's evolutionary philosophy of law soon transformed the Constitution from a document of fixed rules and principles to one reflecting the latest court pronouncements. In this way, the judges became the nation's supreme lawmakers, displacing the Congress and legislatures on matters ranging from abortion to pornography.

But judges have no right to make law. Their job is to discover the law, state it and apply it. Their role is like that of an engineer who designs a bridge according to the discovered laws of the natural world, not according to "laws" that he has made up.

If an engineer should design a bridge contrary to natural law, there is no question that the government officials who employed that engineer would reject his design. So it should be with a court opinion. If it is contrary to the Constitution, then the president, the Congress and the fifty states' governors and legislators should reject that opinion.

This is what their oath of office demands. The president takes an oath to "preserve, protect and defend the Constitution," not Supreme Court opinions. Further, Article II, Section 3 states that the president is duty-bound to "take care that the laws be faithfully executed." Any court opinion that is contrary to the Constitution is, by definition, not law. Therefore, the president must not enforce it.

That was what President Lincoln did with the Dred Scott decision. He refused to enforce it as the law of the land.

That is what presidents today should do about *Roe v. Wade*. Pursuant to his Constitutional oath, the president should issue a proclamation declaring *Roe v. Wade* to be illegal, and declaring that the human fetus is a person entitled to the full protection of the right to life by the states.

At the state and local level, the people should insist that the laws that are still on the books be enforced against abortionists. In Virginia, for example, abortion is still a Class 4 felony. While other Virginia statutes have incorporated the Supreme Court's ruling in *Roe v. Wade*, those statutes are unconstitutional. They violate Article 1, Section 1 of the Virginia Bill of Rights which denies to the state legislature or any other civil authority any power to deprive the state's "posterity" (the yet-to-be-born) of their "inherent" rights to "life, liberty, and property."

In Virginia, then, pro-lifers do not have to change the state law to protect innocent life. They don't have to look to the president or Congress for action. They don't have to elect a pro-life governor or state attorney general. They can act now, petitioning their local Commonwealth's Attorney to prosecute abortionists under the state law and defend the right to life of the preborn under the state Constitution. And if the Commonwealth's Attorney chooses not to prosecute, then the people can vote him out of office and elect another who will do his prosecutorial duty consistent with his Constitutional oath.

A petition drive has already begun in Virginia. The governor and the attorney general have been petitioned to speak out, urging the Commonwealths' Attorneys to prosecute the abortionists. While neither office has the authority to command such prosecutions,

such a statement would have a profound moral impact. Some local prosecutors have also been petitioned to take action now.

As concerned citizens, it is our duty to petition the Commonwealth's Attorneys to make decisions according to what the Constitution demands, and not according to what the Supreme Court decides. And it is our further duty to continue to seek justice until we receive it.