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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

In re:

INITIATIVE PETITION NO. 406

STATE QUESTION NO. 782

CASE NO. 114704

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR - 3 2016
MICHAEL S. RICHIE
CLERK

Response to the Protest to the Initiative Petition

The purpose of these proceedings is to determine the legal sufficiency of State Question 782. In particular, the protestants object to the sufficiency of this initiative petition on constitutional grounds. In response, I submit that the effect of this measure is not only consistent with the United States Constitution, but is demanded by it.

Received 3-3-16 am

The 14th Amendment states:

> nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Likewise, the 5th Amendment states that no person shall:

> be deprived of life, liberty, or property without due process of law.

The practice of human abortion deprives an innocent person of life without due process of law. Furthermore, by allowing the killing of innocent human beings to go unpunished, the state is denying the equal protection of the laws to those so killed. On these grounds, the current laws of the State of Oklahoma that allow innocent pre-born human beings to be deprived of life without due process of law and allow those who kill them to go unpunished are unconstitutional. This petition initiative seeks to rectify this situation, establish the equal protection of the laws for the most innocent and vulnerable human beings within our state, and so bring the laws of the state of Oklahoma into compliance with the supreme law of the land. As it is written in Article VI, paragraph 2 of the United States Constitution:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; **and the judges in every state shall be bound thereby** (emphasis mine)

Now, one might object that the word "person" in the Constitution, particularly the 14th Amendment, does not include pre-born human beings. However, there is absolutely no reason to believe that the writers or ratifiers of the 14th Amendment drew any distinction between the word "person" and "human." John A. Bingham, the principal framer of the 14th Amendment, used the terms

interchangeably.[1] Bingham reasoned that, "all human beings" were "entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal."[2]

It is also clear from history that the medical establishment as well as the judiciary and legislative branches of our government viewed and treated unborn "children" (the term generally used to refer to human beings living in the womb at the time), as valuable human beings living and developing under the protection of the State.[3] The 14th Amendment, drafted in 1866 and adopted in 1868, was proposed during a period when our nation's state's passed more anti-abortion laws than at any other time in history.[4] The passage of the 14th Amendment thus occurs during the period known to historians of the abortion debate as the "Physicians' Crusade against Abortion."[5] For it was throughout this period that members of the American medical establishment consistently called for legislative action to be taken against abortion. Consistently referring to abortion as a "crime," leading obstetricians writing for the America Medical Association frequently beseeched their governing authorities to pass legislation to protect "unborn children" from "quack physicians" who practiced the "unwarrantable destruction of

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1 Furthermore, the 14th amendment specified "all persons born...," not "all born persons." The distinction here is important. "All persons born..." is denotes *all people who start there lives in the United States* and in no way comments on the value of a human being in regards to their location, size, or stage of biological development. The designation, "persons born or naturalized in the United States" is clearly written to distinguish between citizens of the United States and persons born elsewhere. It is not meant to distinguish between human persons and non-human-persons. No concept of a non-person human existed at the the time of the 14th Amendment's ratification. Such a concept is in large part the creation of the "Lochnerizing" Supreme Court Justices who imposed the right to kill one's own children into the Constitution under the guise of the so-called "right to privacy."

2 Bingham's quote was used by President Ronald Reagan in his speech on the 10th Anniversary of the Supreme Court's decision in *Roe* v. *Wade*, "When Congressman John A. Bingham of Ohio drafted the Fourteenth Amendment to guarantee the rights of life, liberty, and property to all human beings, he explained that all are 'entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.' He said the rights guaranteed by the amendment would therefore apply to "any human being." (The text of President Reagan's speech can be found at: http://www.humanlifereview.com/abortion-and-the-conscience-of-the-nation-ronald-reagan-the-10th-anniversary-of-the-supreme-court-decision-in-roe-v-wade-is-a-good-time-for-us-to-pause-and-reflect-our-nationwide-policy-of-abortion-o/)

3 From the 1860s through the 1880s, physicians crusaded against abortion arguing that each individual human's life began at conception and not "quickening" or "viability." They argued against the by then unscientific notion that there was a point at which a human being became a person. As Dr. David H. Storer, Professor of Obstetrics and Medical Jurisprudence at the Harvard Medical School wrote, "The moment an embryo enters the uterus a microscopic speck, it is the germ of a human being, and it is as morally wrong to endeavor to destroy that germ as to be guilty of the crime of infanticide." ("Duties,Trials, and Rewards of the Student of Midwifery," Dr. David H. Storer, Nov. 7, 1855)

4 Abortion was illegal in the United States when the 14th Amendment was ratified. The Texas Law at issue in Roe v Wade was first enacted in 1854 and was in no way affected by the passage of the 14th Amendment in 1868.

5 In 1859 and 1871 the American Medical Association identified the victims of abortion as "innocent and helpless unborn children" who were "killed." In the 1871 report of the AMA on "Criminal Abortion" they refer to the practice of abortion as "foul, unprovoked murder." See also, "Why Not? A Book for Every Woman" published by the American Medical Association in 1868, where abortion is refereed to as one person killing another person and not just a surgical procedure carried out on a woman's body.

human life," and "foul, unprovoked murder," of abortion.[6] It was the writing of these medical professionals which prompted many of the congressmen who voted for the 14th Amendment to create and enact laws seeking the criminalization of abortion in their state legislatures and they did not view their prohibitions of killing unborn children to be violations of the Constitutional Amendment they ratified.[7]

The protestants claim that our measure "bans abortion in direct violation of the United States Constitution." However, the "right" to kill one's own pre-born children is in no way, shape, or form established by the **text** of the Constitution itself. Rather, this purported "right" owes its existence to the written opinion of seven unelected officials in *Roe v. Wade* — a decision that is legally, intellectually, and morally bankrupt. I submit that the protestants might have something approaching a substantial argument if *Roe v. Wade* actually made a coherent argument from the **text** of the Constitution itself. However, it clearly does not. In the words of legal scholar Michael Stokes Paulsen:

> The result in *Roe v., Wade* was, to put the matter simply and directly, not warranted by any plausible argument from constitutional text, structure, or history. I begin with the obvious: Roe is utterly indefensible as a matter of constitutional **text**. The suggestion that the Due Process Clause of the Fourteenth Amendment ("[n]o state shall . . .deprive any person of life, liberty, or property, without due process of law ...") actually entails an affirmative right to abortion, immune from government restriction, is hard to take seriously as a matter of constitutional language or of the original understanding of its drafters or ratifiers. In fact, I know of no serious scholar, judge, or lawyer who attempts to defend *Roe*'s analysis on textual or historical grounds. A first year law student who argued for such a position would likely get a "C-" in any good Constitutional Law course, and that's only because of grade inflation.[8]

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6 As Dr. David H. Storer, Professor of Obstetrics and Medical Jurisprudence at the Harvard Medical School wrote, "The moment an embryo enters the uterus a microscopic speck, it is the germ of a human being, and it is as morally wrong to endeavor to destroy that germ as to be guilty of the crime of infanticide" (*Duties, Trials, and Rewards of the Student of Midwifery*, Dr. David H. Storer, Nov. 7, 1855). Similarly, Professor of Obstetrics at the University of Pennsylvania Hugh Lenox Hodge referring to abortion as "Foeticide" called it a "crime" when "mothers," "voluntarily destroy their own progeny, in violation of every natural sentiment, and in opposition to the laws of God and man" (*Foeticide, or Criminal Abortion: A lecture Introductory to the course on Obstetrics and Disease of Women and Children,* University of Pennsylvania, 1869). Rhode Island Physician John Preston Leonard writing in response to the growth in criminal abortion being practiced in his state called upon the legislature to pass strong laws insuring the prohibition of abortion and help true physicians stand against a growing cadre of abortionists whom he called a "class of physicians who, Herod-like, have waged a war of destruction upon the innocent" ("Quackery and Abortion," *Boston Medical and Surgical Journal*, 43, January 15, 1851, 447-81). "No other doctrine appears to be consonant with reason and physiology but that which admits the embryo to possess vitality from the very moment of conception." American Medical Association policy statement on Criminal Abortion (1871).

7 To argue that the Congress which passed the 14th Amendment would have approved of its use as a basis for depriving unborn children of the "right to life" or to give "a woman then being with child" the right to end her child's life is ignorant of the historical context and intention of the authors and ratifiers of 14th amendment at best. On the part of the lawyers, brief writers, and Supreme Court Justices who ruled in favor of the right to abortion in Roe v Wade, the suggestion that the right to abortion is covered by the 14th amendment is flat out devious and conniving. The 14th Amendment itself was written in part to correct the Supreme's Court's erroneous, unjust, and dehumanizing ruling in the infamous 1857 case of *Dred Scott v. Sandford.*

8 Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995 (2003)

Planned Parenthood v. Casey does not add any constitutional muster to the protestants' position beyond establishing the rather questionable position that our nation's commitment to the "rule of law" is better maintained by refusing to overrule itself when it is (or could be) wrong, as opposed to making decisions that comport with the supreme law of the land, **as it is actually written**.[9] One shudders to think what the Supreme Court means by the phrase "rule of law" when such "rule of law" would be better served, in principle, by preserving immoral and unconstitutional decisions such as *Dred Scott v. Sandford* and *Korematsu v. United States* than by overturning them in compliance with the supreme law of the land.

As such, if by "United States Constitution" we mean the actual written Constitution that has been ratified by the States and approved by the People, then not only is there is no constitutional support for legal abortion, but there is plenty of constitutional opposition against it. If, however, by "United States Constitution," we mean the unconstitutional opinions of unelected officials, then I would fully agree that this measure is repugnant to **that** "Constitution." However, if we, as a nation, do not bother to obey the supreme law of our land, **as it is written**, then one is left to wonder why we even bother to write down any laws at all!

Now, one might object that *stare decisis* mandates that the Oklahoma Supreme Court must follow its prior rulings and strike down this measure. However, as even the U.S. Supreme Court itself has reminded us in *Agostini v. Felton*, *stare decisis* is "not an inexorable command" but "a policy judgment." Surely it stands to plain reason that judicial policy must submit to the supreme law of the land as it is written and be overruled in cases of conflict such as this. And surely this is even more the case given that thousands of innocent human beings are killed in our state every year!

Lastly, one might object that Oklahoma Supreme Court is duty-bound to follow the United States Supreme Court rulings in this matter. However, according to the written U.S. Constitution, this is not the case. As legal scholar Michael Stokes Paulsen notes:

> The courts possess "[t]he judicial Power of the United States" and that power extends to "Cases, in Law and Equity, arising under this Constitution," but nothing in the logic or language of such a statement of constitutionally authorized judicial *jurisdiction* implies judicial *supremacy* over the other branches of government. Jurisdiction to decide cases does not entail special guardianship over the Constitution.[10]

As such, I submit that the Oklahoma Supreme Court is bound by neither law nor oath to follow Supreme Court precedent when such precedent is repugnant to the Constitution of the United States. And as such is clearly the case where this measure is concerned, I submit that the Oklahoma Supreme Court is not bound by Supreme Court precedent and is free to make its own independent ruling concerning the constitutionality and legal sufficiency of this measure.

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9 "A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law."

10 Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 Mich. L. Rev. 2706 (2003)

Former Supreme Court Chief Justice John Marshall once commented on related issues in *Marbury v. Madison*. His original argument concerns instances where a court must decide on a case where the Constitution is in conflict with a legislative act. But his argument applies equally well to instances where a court must decide on a case where the Constitution is in conflict with a prior judicial decision. To paraphrase and apply his argument to this particular situation, the relevant portion of his opinion would read as follows:

> The powers of the Supreme Court are defined and limited; and that those limits may not be mistaken or forgotten, **the Constitution is written**. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that either the Constitution controls any judicial decision repugnant to it, or that the Supreme Court may alter the Constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary judicial decisions, and like other decisions, can be overruled when a court shall please to overrule it.
>
> If the former part of the alternatives be true, then a judicial decision contrary to the Constitution does not carry the force of law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that a judicial decision repugnant to the Constitution is void [that is, at the very least, that it does not carry any legal force beyond the parties to the case at hand]. This theory is inseparably attached to a **written** Constitution, and consequently should be considered by any court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.
>
> If a decision of a court repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind other courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.
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> It is emphatically the province and duty of the courts to say what the law is [that is, in the case of a written Constitution, to faithfully interpret the written text of the law in question]. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If a written law and a judicial decision conflict with each other, the courts must decide on the operation of each.

So, if a judicial decision be in opposition to the Constitution, and if both decision and the Constitution apply to a particular case, so that the court must either decide that case conformably to the decision, disregarding the Constitution, or conformably to the Constitution, disregarding the decision, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of any branch of Government, then the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of main taining that courts must close their eyes on the Constitution, and see only judicial precedent.

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Supreme Court shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Supreme Court a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

...

In some cases [such as this very case itself], the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or obey?

For example, "No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here, the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the Supreme Court should rule instead that one witness, or a confession out of court, is sufficient for conviction, must the constitutional principle yield to the judicial decision for any other court?

From this 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 courts, as well as of the other branches of government.

Why otherwise does it direct the judges, both at the state and federal level, to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The Oklahoma oath of office is in these words:

"I, ..., do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States, and the Constitution of the State of Oklahoma, and that I will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or nonperformance of any act or duty pertaining to my office, other than the compensation allowed by law; I further swear (or affirm) that I will faithfully discharge my duties as ..... to the best of my ability."

Why does a judge solemnly swear to support, obey, and defend the Constitution of the United States if that Constitution forms no rule for his government? If it is closed upon him and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe or take this oath becomes equally a crime.

As such, I submit that an argument put forward by none less than the Chief Justice of the United States Supreme Court applies to this very case, and so applied gives the Supreme Court of the State of Oklahoma both the right and the duty to interpret the United States Constitution independently of Supreme Court precedent in *Roe v. Wade* and *Planned Parenthood v. Casey* in determining the legal sufficiency of this initiative petition.

WHEREFORE, I respectfully request that this Court find that State Question 782 is not repugnant to the written Constitution of the United States, and as such is sufficient as a matter of law, and valid for all purposes.

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Thomas R. Hunter