Written by **Selwyn Duke** on March 7, 2016

Supreme Trespass: High Court Blocks LA Law Regulating Pre-natal Infanticide

Thomas Jefferson once said that judicial supremacy would reduce our Constitution to a "suicide pact." Now the Supreme Court is once again vindicating that assessment: On Friday it blocked a Louisiana law that would have saved babies' lives by reducing the number of facilities licensed to commit pre-natal infanticide.

At issue is 2014 legislation that — mirroring laws in Texas and seven other states — requires "doctors who perform abortions to have admitting privileges at a nearby hospital. Lawmakers said this rule would help ensure consistent care for a patient who has a medical emergency that sends her to a hospital," reports the *Los Angeles Times*. Admitting privileges enable a physician to admit a patient to a hospital and personally provide him with care at the facility (as opposed to the hospital's doctors on staff assuming that responsibility).

Only Justice Clarence Thomas dissented from the Friday stay of the Louisiana law, an action that restores a lower court order blocking the law; this itself had been overturned by the Fifth Circuit Court of Appeals, which also upheld the Texas law. After the Fifth Circuit ruling, Louisiana began enforcing its legislation, prompting two prenatal-infanticide mills to announce they'd cease seeing patients and a third to say it planned to follow suit.

This doesn't mean that all justices but Thomas oppose the law. As the *Times* also reports, "In Friday's order, the court said putting the Louisiana law on hold was 'consistent with the court's action granting a stay in *Whole Woman's Health vs. Cole*,' the Texas case. Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. mostly defended the Texas law during oral arguments Wednesday, but agreed Friday to put the Louisiana measure on hold."

Yet one might point out that it is only judicial activism — stoked by the fires of judicial supremacy — that's causing the courts to consider these cases in the first place. Consider that the *Times* tells us, "The Supreme Court is engaged in a fierce debate over whether state laws that impose strict regulations on doctors and abortion clinics put an unconstitutional burden on women seeking to end pregnancies. The justices established this 'undue burden' standard in 1992, but they have yet to decide what it means in practice. The Texas case, which was argued before the court Wednesday, may give the justices a chance to clarify the issue."

It's not surprising that, almost a quarter century after the "undue burden" standard, the court still

wouldn't have defined it. (Yet they're nonetheless comfortable ruling on what they can't define.) How could they? Such things are quite subjective, which is why the Founders would never have attempted to define such matters in the Constitution.

And that is the point. The federal judge, in New Orleans, who originally blocked the Louisiana law, said that "the medical benefits of this requirement were minimal," writes the *Times*. But how "substantial" must benefits be for a state regulation to be constitutional? In the same vein, how burdensome must they be to be unconstitutional? After all, many medications requiring prescriptions here are available over-the-counter in other countries. Does requiring people to see physicians and pay a perhaps large fee place an "undue burden" on those of modest means?

The answer is that, *according to the Constitution*, these questions are to be decided by a state's residents via their representatives — that's the whole idea behind representative government. Even if we accepted that prenatal infanticide is merely a legitimate "medical procedure," there's no constitutional provision stating that burdens can't be placed on those seeking medical procedures or that the benefit of those burdens must not be "minimal." States have great power to legislate in a host of areas and, while this may sometimes result in stupid laws, it's up to the people to decide when it has and to apply a legislative remedy. Of course, there's no constitutional right to commit prenatal infanticide in the first place, notwithstanding the flawed *Roe v. Wade* ruling, which even über-liberal Justice Ruth Bader Ginsburg called "badly settled law."

Yet this is what happens when we accept the suicide-pact notion that courts "settle law" in the first place. Under the Constitution, they can issue opinions on law and constrain their own judicial branch with them. But to accept the judicial-review standard that unelected lawyers' rulings must constrain all three governmental branches — thus giving a majority of nine judges the power to rule over 320 million people — places "us under the despotism of an oligarchy," as Thomas Jefferson also wrote. Note that this "power" is extra-constitutional to begin with, having been declared by the court itself in the 1803 *Marbury v. Madison* ruling.

This black-robed oligarchy has seized control over ever-increasing areas of law over time, ruling on matters their distant predecessors wouldn't even consider. And is this surprising? Chief Justice John Roberts once said that a judge's job was merely to call "balls and strikes," yet judicial supremacy creates a dynamic akin to baseball umpires being given the power to strike down rules of baseball they don't like ("No more strikes. Strikes are only for unions and judges!"). Given man's nature, you'd have to expect the umpires to become ever more brazen and usurpative.

So what's occurring with the courts is the inevitable result of unchecked power — which itself is a function of Congress' failure to exert its power. For example, the Constitution's Article III states, "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This means only the Supreme Court must exist. All the inferior federal courts, which had subsequently been established, can also be *disestablished*.

Imagine the effect this would have. If Congress simply eliminated the New Orleans federal court that stayed the Louisiana law, not only would the judge in question never issue another unconstitutional ruling, but it would send a message to all the lower courts: Do your job — or you'll be seeking a new one.

Yet there's more legislators can do. Article III's Section 2 grants Congress the power to limit the

jurisdiction of federal courts below the Supreme Court and the appellate jurisdiction of the latter; via this power, the legislature could essentially eliminate courts' ability to apply judicial review in various areas. In other words, the only reason why the courts are able to rule on abortion (and marriage, as another example) in the first place is that Congress hasn't been doing its job.

In addition, while Congress can't eliminate the Supreme Court, it *can* control the number of justices on it. It has set the number at nine, but can reduce or increase it. Thus, instead of confirming any Constitution-violating Antonin Scalia replacement nominated by a leftist president, Congress can simply reduce the number of justices to eight.

As for the executive branch — the president and state governors — it has no constitutional obligation to abide by unconstitutional court rulings. It can simply nullify (ignore) them, which Jefferson called the "rightful remedy" for all federal usurpation.

Only power negates power. If Congress is going to be asleep at the wheel, we shouldn't be surprised that the judiciary is driving the agenda — and our Republic off a cliff.