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# **Created Equal: How The Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn**

Mark Trapp\*

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.

-Abraham Lincoln  
November 19, 1863.

I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident; that all men are created equal."

-Martin Luther King, Jr.  
I Have a Dream, 1963.

We are committed to the proposition that all persons are created equal.

-Justice Stevens (dissenting)  
*Mathews v. Lucas*, 427 U.S. 495, 516 (1976).

## **I. INTRODUCTION**

More than 220 years ago, Thomas Jefferson wrote what is perhaps the most famous of all political documents: the Declaration of Independence.<sup>1</sup> It is easily the most recognizable document in American history. Yet many people remain unaware of the ramifications of the philosophy espoused by the document. For this document did more than merely sever the American colonists' ties with Great Britain—it established that the new nation would be founded upon and recognize

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1. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

certain fundamental rights. These rights, these *unalienable* rights, did not come from a King, or Parliament, or the State, but from the Creator. Indeed, one Justice of the Supreme Court, in an address delivered before the graduating class of the Yale Law School in 1891, referred to the Declaration of Independence and the bills of rights of state constitutions as

equally affirm[ing] that sacredness of life, of liberty and of property, are rights, inalienable rights, anteceding human government, and its only sure foundation; given not by man to man, but granted by the Almighty to everyone, something which he has by virtue of his manhood, which he may not surrender and of which he may not be deprived.<sup>2</sup>

The Declaration of Independence is part of the American psyche. Every American is aware that they possess certain unalienable rights. Many even mistakenly believe that the Declaration is a part of the Constitution, or that it is the Constitution that includes the phrase "life, liberty and the pursuit of happiness."<sup>3</sup> Certainly, all Americans believe they hold these rights, wherever they are articulated. And the Declaration, along with the ideals for which it stands, has become a symbol of America itself. One scholar has referred to the Declaration as "a statement of the nation's goals and reason for being."<sup>4</sup>

As a nation, every year Americans celebrate the signing of the Declaration with a national holiday, Independence Day, the Fourth of July. Public celebrations are held throughout the country; there are fireworks, speeches, parades, and picnics. Why do Americans do all this? Is it simply to celebrate independence from Great Britain? This author does not think so. Americans celebrate the Fourth of July primarily to recognize the birth of an independent nation founded on the fundamental rights espoused by the Declaration.<sup>5</sup> For the Constitution did not establish the

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2. Justice Brewer, Address at the Yale Law School Commencement (1891), in CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 201 (1930).

3. See Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35, 132 (1985) (Garet reports that his undergraduates think the Declaration is part of the Constitution); see also Christopher Darden, Rebuttal Argument in *People v. Simpson*, No. BA097211, 1995 WL 704342 at 5 (Cal. Super. Ct. Tr., Sept. 29, 1995). Darden tells the jury,

I also looked back at the Constitution last night. I sent my clerk to go get it for me, and I looked through the Constitution, and you know what I saw? I saw some stuff in the Constitution about Ron and about Nicole, and the Constitution said that Ron and Nicole had the right to liberty.

It said they had the right to life. It said that they had the right to the pursuit of happiness. *Id.*

Both these examples are cited by Professor Charles H. Cosgrove in *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 107-08 (1998).

4. Charles L. Black, Jr., "One Nation Indivisible": *Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17, 37 (1991).

5. Abraham Lincoln, for one, seemed to agree with this idea. He once stated:

We hold this annual celebration to remind ourselves of all the good done in this process of time, of how it was done and who did it, and how we are historically connected with it; and we go from these meetings in better humor with ourselves—we feel more attached the one to the other, and more firmly bound to the country we inhabit. In every way we are better men in the age,

United States; that task had already been accomplished by the Declaration. That is why, when Abraham Lincoln spoke at Gettysburg in 1863, he dated the founding of the country to be "four score and seven years ago"—1776, not 1787.<sup>6</sup>

The fact that Americans celebrate and revere the Fourth of July inextricably associates America with the principles espoused on that date in 1776, particularly the one line that every schoolchild can recite, the one that holds out to the world the "self-evident truth" that "all men are created equal." Thomas Jefferson himself felt that the yearly celebration should be an occasion to reflect upon the rights recognized on that day. In his last letter ever written, Jefferson stated, "[L]et the annual return of this day [the Fourth of July] forever refresh our recollections of these rights, and an undiminished devotion to them."<sup>7</sup> And so it has been.

The point here is that Americans have a special reverence for the Declaration and its philosophy. Indeed, it is "the Declaration of Independence that speaks, most fully, to who we are as a nation—our origins, purposes, and ideals."<sup>8</sup> It is today, and has been for more than two centuries, "an expression of the American mind."<sup>9</sup>

In spite of the sentiments expressed in the Declaration, and the reverence in which those sentiments are held by the people of this country, less than thirty years ago, the Supreme Court of the United States ruled that a woman has a constitutional right to obtain an abortion.<sup>10</sup> Since that decision, nearly forty million abortions have

and race, and country in which we live, for these celebrations.

ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 401-02 (Roy P. Basler ed., 1969). But that was not all. Lincoln continued, stating that "there is something else connected with it." When immigrants to this country "look through that old Declaration of Independence" then

they feel that that moral sentiment taught in that day evidences their relation to [the founders], that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh, of the men who wrote that Declaration, and so they are. That is the electric cord in that Declaration that links the hearts of patriotic and liberty-loving men together, that will link those patriotic hearts as long as the love of freedom exists in the minds of men throughout the world.

*Id.* Another American president, Calvin Coolidge, stated that "[i]t is to pay our tribute of reverence to those who participated in such a mighty event that we annually observe the fourth day of July." CALVIN COOLIDGE, FOUNDATIONS OF THE REPUBLIC: SPEECHES AND ADDRESSES 441 (1928).

6. Abraham Lincoln, Address at Gettysburg, (Nov. 19, 1863), in ABRAHAM LINCOLN: SPEECHES AND LETTERS 266 (Peter J. Parish ed., 1993) ("Four score and seven years ago, our fathers brought forth on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal."). The Declaration of Independence was written in 1776, the Constitution in 1787.

7. Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), in THE PORTABLE THOMAS JEFFERSON 585 (Merrill D. Peterson ed., 1977).

8. SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 20 (1995).

9. Letter from Thomas Jefferson to Richard Henry Lee (May 8, 1825), in 16 THE WRITINGS OF THOMAS JEFFERSON 118 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

10. *Roe v. Wade*, 410 U.S. 113 (1973).

taken place in this country.<sup>11</sup> It is the contention of this article that those forty million beings have been deprived of a fundamental and unalienable right guaranteed by the Declaration of Independence: life.

Others have made similar arguments before.<sup>12</sup> It seems however, that the debate up to this point has centered on questions that are, as one scholar has characterized them, "multiply ambiguous."<sup>13</sup> These questions are: one, when does "life" begin?; and two, is a fetus a "person"? Each side of the debate merely assumes an answer and proceeds accordingly. "Pro-lifers" assume that life begins at conception, and that a fetus is a person; therefore, an abortion is murder. "Pro-choicers" assert that life begins at viability, or birth, and a fetus is not a person, so the abortion of an unwanted fetus is a matter of "choice."<sup>14</sup>

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11. The National Right to Life Committee (NRLC) reports on their website that "there have been more than thirty-eight million abortions in the twenty-six years since the U.S. Supreme Court legalized unrestricted abortion on January 22, 1973," *available at* <http://www.nrlc.org/abortion/aboram.html>, (citing statistics from the Alan Guttmacher Institute). In 1997, the abortion to live birth ratio in America was 305 to 1,000. The total number of legal abortions performed in 1997 was 1,184,758. Abortion Surveillance. (Preliminary Analysis)—United States, 1997, *Morbidity and Mortality Weekly Report*, January 7, 2000, *available at* 2000 WL 13924959.

12. Indeed, Lewis Lehrman has recognized the same argument that this article proposes, but did not advance it in a subsequent article. See Lewis Lehrman, *The Right to Life and the Restoration of the American Republic*, NAT'L REV., August 29, 1986 at 25; Lewis Lehrman, *The Declaration of Independence and the Right to Life: One Leads Unmistakably from the Other*, AMERICAN SPECTATOR, Apr., 1987, at 21. See also Samuel W. Calhoun, *Valuing Intrauterine Life*, 8 REGENT UNIV. L. REV. 69, 81 (1997) (Professor Calhoun argues that "intrauterine life possesses the right to life recognized in the Declaration."); William J. Mitchell, *A Modest Proposal*, 39 CATH. LAW. 229, 237 n.33 (1999).

13. RONALD DWORKIN, *LIFE'S DOMINION* 21 (1993).

The natural-rights political philosophy of the Declaration of Independence *cannot* determine whether a woman has a constitutional right to choose whether to have an abortion, *until it is established when life begins* . . . Unfortunately, scientists still disagree on when life begins. The political philosophy of the Declaration of Independence therefore cannot decide the abortion question at the present time.

GERBER, *supra* note 8, at 182-83.

14. The most extreme example of this "rights don't vest until birth" position is the partial-birth abortion. This procedure "takes three days to perform. On the first day, the physician puts dilators in the woman's cervix. On the second day, the physician removes the dilators and inserts new dilators in the cervix. On the third day, the dilators are removed and the membranes are ruptured. Then, with the guidance of ultrasound, the physician inserts forceps into the uterus, grasps a lower extremity of the fetus, and pulls the extremity into the vagina. The physician then uses his fingers to deliver the other lower extremity, followed by the torso, the shoulders, and the upper extremities. The head, which is too big to pass through the dilated cervix, remains in the internal cervical opening. At this point, while lifting the cervix and applying traction to the shoulders with his or her fingers, the physician takes a pair of blunt curved Metzenbaum scissors and forces the scissors into the base of the skull. Once the scissors has entered the skull, the physician spreads them to enlarge the opening. Finally, the physician removes the scissors, inserts a suction catheter into the hole, and removes the skull contents. The head will then compress, enabling the physician to remove the fetus completely from the woman." *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 198-99 (6<sup>th</sup> Cir. 1997); see also *Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7<sup>th</sup> Cir. 1999).

The American College of Obstetricians and Gynecologists (ACOG) defines D&X as follows: "1. deliberate dilatation of the cervix, usually over a sequence of days; 2. instrumental conversion of the fetus to a footling breech; 3. breech extraction of the body excepting the head; and 4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus."

This article will propose a new focus to the same argument. When "life" begins is irrelevant. The key to the Declaration is not the word "life," but the word "created." By shifting the focus away from the word "life," and onto the word "created," the Declaration may provide a simple answer to the abortion controversy.

## II. HOW THE DECLARATION CAN SETTLE THE ABORTION DEBATE

The second sentence of the Declaration of Independence reads, in part, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."<sup>15</sup> Here, encapsulated in that one sentence, lies the founding philosophy of America.

According to that sentence, three "self-evident" truths form the basis for this nation: First, all men are created equal; second, humanity has inherent rights that are bestowed by the Creator; and third, these rights include life, liberty, and the pursuit of happiness.

The first of these, indeed the most basic truth of all, is that "all men are created equal." All men are *created* equal. The use of the word "created" is very significant for the claims made by this article. Indeed, if the Declaration stated that "all men are born equal," there would be a much more difficult argument to make. The rights of mankind recognized by the Declaration presumably would not vest until birth, and abortion would be directly in line with this choice of words. Instead, those who wish to justify abortion must overcome the language used by the author of the Declaration. Specific words have specific meanings. "Created" does not mean "born." Whatever other arguments may be made, one cannot argue, given the explicit wording of the Declaration, that a person must be "born" to receive the unalienable rights to which mankind is entitled.<sup>16</sup>

"Create" is defined as "to cause to exist; bring into being."<sup>17</sup> While one can

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*Id.* The Supreme Court has ruled that it is unconstitutional to ban this procedure without including a vague "health exception" for the mother. *See generally Stenberg v. Carhart*, 530 U.S. 914 (2000). If this sort of "procedure" is legal in a country founded on the "self-evident truth" that "all men" have the "unalienable right" to "life," Americans might as well shred the Constitution and the Declaration right now.

15. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

16. This argument would seem, at a minimum, to disallow so-called 'partial-birth' abortions. *See supra* note 14 for a description of this procedure. Because a person does not have to be born to have rights under the Declaration, the partial-birth abortion is particularly offensive to the notion of the unalienable right to life guaranteed by the Declaration.

17. AMERICAN HERITAGE DICTIONARY (3d ed. 1996).

argue about when “life” begins,<sup>18</sup> it is much more difficult to argue about when a person was “created.”<sup>19</sup> Every person who has ever lived was “created” approximately nine months before being born. That being the case, the moment a sperm and egg unite, a human has been “created,” a human that, according to the Declaration of Independence, has the rights to life, liberty, and the pursuit of happiness.<sup>20</sup> Because abortion denies the most basic right of all, life, it cannot be justified in a country founded on the proposition that “all men are created equal.” *Quod Erat Demonstrandum.*

The second “self-evident truth” is that these unalienable rights come from the Creator. This is important because it signifies the belief of the Founders that natural rights do not depend on the approval of or bestowal by man or state. Rather, a power superior to and independent of man or government is what endows humanity with their unalienable rights. That being the case, it is not up to any man or government to decide who possesses rights and who does not. Because one’s mother, government, or the Supreme Court does not bestow these rights, it follows that one’s mother, government, or the Supreme Court may not deny these rights. The Declaration recognizes that act as beyond the authority of Man.

The third “self-evident truth” is that unalienable rights include “life, liberty, and the pursuit of happiness.”<sup>21</sup> For the purposes of this paper, the most important right is life. It also happens to be the easiest to define. The right to life means, at a minimum, that every human being is guaranteed the right to exist. This right exists by virtue of one’s humanity and cannot be alienated or infringed upon, absent forfeiture. Furthermore, because this right exists from the point of creation, the unborn enjoy this right in equal measure with those on this side of the womb.

In the context of these “self-evident truths,” then, the argument presented here boils down to this: because the Declaration says all men are “created,” rather than “born” equal, the unborn have the right to life from the moment of conception; and abortion is therefore contrary to the founding principles of this country. This article

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18. It is this author’s personal belief that life begins at conception, and medical science concurs in this judgment. See *infra* notes 37-42 and accompanying text. However, even assuming that there is not yet a definitive answer as to when “life” begins, it still does not make sense to allow abortion. As Ronald Reagan once said, “If you don’t know whether a body is alive or dead, you would never bury it. I think this consideration itself should be enough for all of us to insist on protecting the unborn.” Ronald Reagan, *Abortion and the Conscience of the Nation*, THE HUMAN LIFE REVIEW (1983).

19. *Byrn v. N. Y. City Health & Hosp. Corp.*, 286 N.E.2d 887, 888 (1972).

It is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that *upon conception* a fetus has an independent genetic “package” with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. *It is human*, if only because it may not be characterized as not human, and *it is unquestionably alive*.

*Id.* (emphasis added). This argument will be addressed further *infra* notes 37-42 and accompanying text.

20. Americans are way beyond the point of arguing that women were not included within the terms of the Declaration. “All men” in the context of the Declaration was obviously meant to be a generic term to denote human beings as such. The English language has used the generic term “man” in this way since long before the time of Jefferson.

21. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

will now explore various objections that may be raised against the proposal made here.

### III. OBJECTIONS

#### A. *The Unborn Are Not Alive*

The first objection that may be raised is that the unborn are not yet “alive,” so they do not yet enjoy a protected right to life. This objection can be dispatched by a simple reading of the Declaration. As stated earlier, the Declaration secures the rights of “life, liberty, and the pursuit of happiness” from the moment of creation. The question of life or when it begins is irrelevant to this inquiry.

#### B. *The Unborn Are Not Yet Human Beings*

Another objection might be raised in the following manner: the Declaration recognizes that human beings are the entities endowed by the Creator with unalienable rights. However, it may be argued that it still is essential to establish at what point, if any, during a pregnancy, the unborn qualify as human beings.<sup>22</sup> Because this argument strikes at the heart of this article’s proposal, this article shall address it thoroughly.

A good place to begin is with the language of the Declaration. It states: “[A]ll men are created equal, that they are endowed *by their Creator* with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.”<sup>23</sup> Note that it is the “Creator” who endows men with these rights. Because the Declaration recognizes that these unalienable rights come from the Creator, and not by man’s authority, it is presumptuous for anyone to suppose that they have the authority to determine who is a “man” that qualifies for these rights, and who is not a “man” and does not. That determination, the Declaration holds, is for the Creator alone.

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22. It must be noted here, that at the time of its writing, there was a widespread belief in America that the unborn were included within the terms of the Declaration. See Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson From the Abolitionists*, 62 ALB. L. REV. 853, 863-64 (1999). Professor Wardle summarizes the status of abortion laws at that time in the following manner:

Thus, when the United States came into existence, when the Declaration of Independence was written, and when the Constitution of the United States was drafted and ratified, abortion was a crime against the common law in all states, as it had been for at least 500 years, and the right to life protected the unborn child against abortion, at least from the time of quickening.

*Id.* at 864-65.

23. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added).



Manifestly, if human beings have the power to decide who is human and who is not, the doctrine of God-given rights is utterly corrupted.<sup>24</sup> The same is true of constitutional rights. Professor (now Judge) Noonan illustrated this point when he wrote: "Whoever has the power to define the bearer of constitutional rights has a power that can make nonsense of any particular constitutional right."<sup>25</sup>

That power was exercised to dramatic effect in *Dred Scott v. Sanford*.<sup>26</sup> In that famous case, Chief Justice Taney ruled that blacks were never meant to be included within the protections of the Declaration or the Constitution and were merely property, devoid of any rights.<sup>27</sup> However, even a quick glance at the words of the Declaration discloses that Justice Taney was wrong, as is today universally acknowledged.

A straightforward reading of the Declaration shows plainly that it was intended to cover the whole of humanity. The document does not say "some men" or "white men" or "born men"; it says "all men." Anyone making the argument that it does not apply to a certain group of humanity must overcome the explicit language of the Declaration itself. Indeed, Justice Taney was forced to make such an argument (overcoming the Declaration) in the *Dred Scott* case.<sup>28</sup> In that case, Taney quoted the second sentence of the Declaration and then stated, "The general words above quoted *would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood.*"<sup>29</sup> The Justice was then obligated to resort to historical and legal contortions to reach the desired result: defining blacks out of humanity.

A modern equivalent to *Dred Scott* occurred in a 1972 abortion-rights case. In *Byrn v. New York City Health & Hospitals Corp.*,<sup>30</sup> during the course of

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24. It is impossible to reconcile the pronouncement that the rights of "man" come from the "Creator" with the idea that anyone other than the Creator may determine who qualifies as a "man." Because the Creator endows humanity with its rights, it is for the Creator alone to determine to whom those rights will extend. Furthermore, humanity must abide by this unalterable fact. As William Blackstone said, "The first and primary end of human laws is to maintain these absolute [God-given] rights to individuals." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 124-125 (St. George Tucker ed., 1803 & photo. reprint 1969).

25. John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668, 668 (1984).

26. 60 U.S. (19 How.) 393 (1857).

27. *Id.* However, in *The Federalist No. 54*, written seventy years prior to the *Dred Scott* decision, James Madison established that blacks *were* meant to be included within the terms of the Declaration, and had only been excluded by "the pretext that the laws have transformed the negroes into subjects of property." THE FEDERALIST No. 54 (C. Rossiter ed., 1961). He stated,

[I]t is only under the pretext that the laws have transformed the negroes into subjects of property, that a place is disputed them in the computation of numbers [for representation under the Constitution]; and it is admitted, that *if the laws were to restore the rights which have been taken away*, the negroes could no longer be refused an equal share of representation with the other inhabitants."

*Id.* at 338 (emphasis added).

28. 60 U.S. (19 How.) at 399.

29. *Id.* at 410 (emphasis added).

30. 286 N.E.2d 887 (N.Y. 1972).

determining the validity of a statute allowing abortion, the court stated that:

[I]t is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that *upon conception* a fetus has an independent genetic 'package' with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. *It is human, if only because it may not be characterized as not human, and it is unquestionably alive.*<sup>31</sup>

Remarkably, that same court went on to declare that "[w]hat is a legal person is for the law . . . to say"<sup>32</sup> and "that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence."<sup>33</sup> Thus, the statute was upheld. The *Byrn* decision, like *Dred Scott*, succeeded in defining a class of humans out of humanity.

If one can be "human" and "unquestionably alive," how, one asks, could any court state that it is "a policy determination whether legal personality should attach"? For if it truly is a "policy determination" whether or not a human will be deemed such and thus have rights, not one person is safe. The legislature could simply pass a law declaring that a certain group was no longer human, and that group would no longer have rights. As the dissent pointed out, "This argument [that legal personality is a 'policy determination'] was not only made by Nazi lawyers and Judges at Nuremberg, but also . . . conflicts with natural justice . . ."<sup>34</sup> It is interesting to compare the words of the *Byrn* majority with those found in the Declaration: in the words of the *Byrn* court, life is a "policy determination." In the words of the Declaration, however, life is an "unalienable right." The contrast is striking.

If Chief Justice Taney was wrong in *Dred Scott*, Judge Breitel (who wrote for the majority) is wrong in *Byrn*. For each of these opinions defined a class of human beings out of humanity. And abortion, much like slavery, directly conflicts with "the general words" that "seem to embrace the whole human family": the words of the Declaration which testify that "all men are created equal." Judge Breitel, like Chief Justice Taney before him, illegitimately assumed a power reserved solely to the Creator. By asserting that it is for the legislature to decide who is human and thus who obtains rights, both Judge Breitel and Chief Justice Taney have violated

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31. *Id.* at 888 (emphasis added).

32. *Id.* at 889.

33. *Id.*

34. *Id.* at 892 (Burke, J., dissenting).

the "self-evident" truth of the Declaration, that man's rights come from "their Creator." This is so because, according to the Declaration, it is not the place of man or government to make these determinations.

Even if Americans assume that one other than the Creator can make the determination of whether the unborn qualify as human beings, there is ample evidence that they do so from the moment of conception. To begin, the most logical and natural place to fix the "creation" of a human is at conception. The dictionary defines *create* as "cause to exist."<sup>35</sup> The point at which a human is "caused to exist" must necessarily be at conception. This is so because any later date ignores the fact that there was something "existing" earlier. The only point in one's existence when one cannot be said to have physically "existed" prior to that moment is at conception. The fact is, once conception occurs, a living being exists that did not exist before. That organism is a human being at the very first stage of development.<sup>36</sup>

The fact that human life begins at conception has been accepted by physicians for well over a century.<sup>37</sup> Thus, proponents of abortion find themselves in the indefensible position of arguing that a living entity that is "unquestionably human" and "alive" is somehow not a "human life." These untenable arguments cannot change the fact that conception marks the beginning of individual human life.

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35. See AMERICAN HERITAGE DICTIONARY (3d ed. 1996).

36. See *infra* notes 37-42 and accompanying text. By way of contrast, Professor Ronald Dworkin argues in his book, *LIFE'S DOMINION*, that "[i]t makes no sense to suppose that something has interests of its own—as distinct from its being important what happens to it—unless it has, or has had, some form of consciousness: some mental as well as physical life." RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 16 (1993). From this he argues that "an immature fetus cannot have interests and therefore cannot have an interest in surviving." *Id.* at 18. Professor Dworkin illustrates this by use of a "Frankenstein" analogy. *Id.* at 19. He argues that if someone were to destroy the assemblage of body parts before Dr. Frankenstein threw the switch conveying "life" to the assemblage, this act would not be harmful or unfair to the assemblage, or against its interests, because the monster did not exist yet. *Id.* Only "[i]f Frankenstein's monster were actually brought to life, and felt and acted like a real person" would it have interests to protect. *Id.* Prior to that, Dworkin says, it has no interests. *Id.*

In the first place, a fetus is in no way comparable to "an assemblage of body parts." *Id.* at 16-17. The fetal stage of development is one that every human being passes through. Certainly no human being has ever been created by gathering together body parts and throwing on a switch. Even so, Professor Dworkin's analogy may still be correct if one views a fetus as having rights only when it is deemed "alive." However, the error of his analogy becomes apparent under the reading of the Declaration advocated by this article. Under the proposal advocated here, a fetus, being human, has the right to life from the moment of *creation*, regardless of whether Professor Dworkin or anybody else thinks that the fetus is "alive" or whether it has interests or not. Therefore, the fetus does not need "some form of consciousness," nor "mental" or "physical life"; it needs only to have been *created*. Creation being the point at which humans are endowed with their rights, all other inquiries are irrelevant.

37. See Wardle, *supra* note 22, at 866 ("[I]n 1860, the fledgling American Medical Association (AMA) sent the President of the United States and the Governors of every American state and territory, a resolution recommending that abortion be prohibited during every stage of gestation, except when necessary to save the life of the mother.").

A well-known medical school textbook on embryology agrees.<sup>38</sup> It states on its very first page that, “[h]uman development is a continuous process that begins when an ovum from a female is fertilized by a sperm from a male.”<sup>39</sup> Moreover, “birth is merely a dramatic event during development resulting in a change in environment.”<sup>40</sup> The textbook further states that, “[d]evelopment does not stop at birth. Important developmental changes, in addition to growth, occur after birth: for example, the development of teeth and female breasts. The brain triples in weight between birth and 16 years.”<sup>41</sup> Thus, it is apparent that human development is a continuous process from conception to death. An adult “human” is actually the same entity as a zygote;<sup>42</sup> the only difference being the current stage of development.

Simply because a human at conception is not as fully developed as a human at adulthood is not a valid reason to classify one as “human” and the other not. If an embryo can be defined out of humanity, based on its level of development, why not a three-year old girl? After all, she is not a full “human” yet, either. She does not have her adult teeth, breasts, or a fully developed brain. The point here is this: there is something more than the act of birth, something more than a checklist of attributes, something more than whether a woman intended to become pregnant or is happy being so, that makes one human. One scholar recently grasped what defines a human being, stating:

We recognize our innate equality not because we value the intelligence, the memory, the capacity for language, or any other particular feature of other human beings. *We recognize each other as human, and our equality as humans, because we grasp our non-analyzable resemblance.* We relate not by partaking of a single feature that distinguishes us from

38. KEITH L. MOORE, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 1 (4th ed. 1988).

39. *Id.*; see also BRADLEY M. PATTEN, *HUMAN EMBRYOLOGY* 54 (2d ed. 1952) (“It is the penetration of the ovum by a spermatozoön and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual.”) (emphasis added).

40. MOORE, *supra* note 38, at 1. This “change in environment” does not affect the rights of the human being. As Justice Harlan stated, “[t]he law regards man as man, and takes no account of his surroundings . . . when his civil rights as guaranteed by the supreme law of the land are involved.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (emphasis added).

41. MOORE, *supra* note 38, at 1. See also *Crosby v. Glasscock Trucking Co., Inc.*, 532 S.E.2d 856, 864 n.14 (S.C. 2000) (Toal, J., dissenting) (noting “that a person’s development continues even after a successful live birth. The respiratory system is not completed until approximately eight years of age, the reproductive system develops at puberty, and the human brain does not attain its full development until the age of sixteen.”).

42. MOORE, *THE DEVELOPING HUMAN* 1 (4th ed. 1988) (“A zygote is the beginning of a new human being.”).

animals but by way of sharing a common image. . . . If a single feature defined the quality of humanness that precluded the intentional killing of human beings, we might have endless debates about whether the prohibition extended to people of low intelligence, to those without speech, to those in comas, to those with no enjoyment of life. We would have the same debate about homicide that many proponents of easy abortion propose with regard to fetuses that lack some supposedly essential feature of "personhood."<sup>43</sup>

The Declaration of Independence is an aspirational document, a statement of an ideal. The Constitution, which allowed slavery and is currently allowing abortion, was a provisional embodiment of that ideal.<sup>44</sup> That the Founders recognized the political necessity of tolerating slavery does not change the fact that the ideal of the Declaration is a world where all men are created equal. President Lincoln stated this best when he said:

[The fathers who issued the declaration] meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and the *value of life* to all people of all colors everywhere.<sup>45</sup>

Who today will assert that blacks do not fall within the definition of "all men" contemplated by the Declaration?<sup>46</sup> Who would rewrite history and keep the slaves in chains? No one with a shred of human decency. That is because the Declaration says "all men" and that is exactly what it means.<sup>47</sup> Those who suggest that the unborn are not included within its terms have taken the first step down the road toward genocide and slavery. For what is to stop one with that awful power from restricting the definition of "all men" to whomever they choose? Once Americans sit idly by and allow some people to be defined out of existence, it is but a few short

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43. George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1619-20 (1999) (emphasis added).

44. Theodore Parker, a 19th century author, stated:

Here is the American programme of political principles: All men are endowed by their Creator with certain natural rights; these rights can be alienated only by the possessor thereof; in respect thereto all men are equal. . . . But the means to that end, the Constitution itself, is by no means unitary; it is a provisional compromise between the ideal political principle of the Declaration, and the actual selfishness of the people North and South.

GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 109 (1992).

45. *Id.* at 102 (emphasis added).

46. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

47. *Id.*

steps until they lose their own rights.<sup>48</sup> “Self-evident” rights cannot be dependent upon the whims or beliefs of others. By definition, they must be permanent and unchanging.

#### IV. THE DECLARATION HAS LEGAL AUTHORITY

The next objection that may be raised against this article’s proposal is that the Declaration of Independence is not the supreme law of this country, and the Constitution is. Therefore, some assert that since the Supreme Court has ruled that abortion is a constitutional right, that is the end of the matter.<sup>49</sup>

This article will answer this argument by demonstrating that the Founders of this country, including those who wrote the Declaration and the Constitution, along with many subsequent leaders, thought the matter beyond dispute—they assumed the Declaration stated principles that were guarantees of the natural rights of man which government was powerless to alter.<sup>50</sup> This article will then show that the Constitution itself presupposed and was meant to incorporate the principles of the Declaration.<sup>51</sup> In the course of showing this, it will become apparent that the Constitution has been (and should be) interpreted in light of the natural rights philosophy and principles of the Declaration.

##### A. *The Unalienable Rights of the Declaration Are Secured by the Constitution*

It is beyond dispute that the revolutionary leaders, the Founders of this country, and the framers of the Constitution all felt that human beings have fundamental natural rights that exist independent of the Constitution. They felt that the Declaration was the fundamental law of this nation. The Constitution was merely the means of achieving the ends established by the Declaration.<sup>52</sup>

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48. Abraham Lincoln once said, “I should like to know if taking this old Declaration of Independence, which declares that all men are equal upon principle, and making exceptions to it, where will it stop? If one man says it does not mean a negro, why may not another say it does not mean some other man?” ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 402-03 (Roy P. Basler ed., 1969).

49. *Roe v. Wade*, 410 U.S. 113, 164-66 (1973).

50. *See infra* Part IV.A.

51. *See infra* Part IV.B.

52. Indeed, the Declaration uses the term “ends” in defining the purpose of government: “That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,— That whenever any Form of Government becomes destructive of *these ends*, it is the Right of the people to alter or abolish it . . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added); *see also* James Wilson, Speech to the Pennsylvania Ratifying Convention (November 26, 1787), in 2 THE WORKS OF JAMES WILSON 769-70 (Robert G. McCloskey ed., 1967) (referring to the Constitution as a “means” to secure the philosophical “ends” of the Declaration); GERBER, *supra* note 8,

The Declaration explicitly states the purpose of the American government. After declaring that “all men are created equal” and that all men are “endowed” with the “unalienable” rights to “life, liberty and the pursuit of happiness,” it goes on to state:

*That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*<sup>53</sup>

The Constitution was established to carry out the purpose of the Declaration—in other words, “to secure these rights.” One of the framers of the Constitution, Roger Sherman, stated as much at the Constitutional Convention when he declared, “The question [faced by the Convention] is not what rights naturally belong to men . . . , but how they may be most equally and effectually guarded in society.”<sup>54</sup> Another framer, Gouverneur Morris, stated that government was “instituted for [the] protection of the rights of mankind.”<sup>55</sup>

Samuel Adams echoed the principles of natural law when he wrote that it is “by the eternal and immutable laws of God and nature” that all men are entitled to “just and true liberty.”<sup>56</sup> Shortly after the Declaration was adopted, Adams also stated that “[w]e have this day restored the Sovereign to whom alone men ought to be obedient.”<sup>57</sup> Alexander Hamilton once defended the natural rights of man against a British loyalist by arguing, “[T]he fundamental source of all your errors, sophisms and false reasonings is a total ignorance of the natural rights of mankind.”<sup>58</sup> Other

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at 64. (“For the revolutionary leaders the assignment was to articulate the ends of government; for the Framers of the Constitution it was to create a form of government that would best secure those ends.”).

53. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

54. GERBER, *supra* note 8, at 64-65.

55. RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 222 (Charles C. Tonsill ed., 1989).

56. See WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 7502 (1865).

57. MARVIN OLASKY, FIGHTING FOR LIBERTY AND VIRTUE: POLITICAL AND CULTURAL WARS IN EIGHTEENTH-CENTURY AMERICA 157 (1995).

58. Alexander Hamilton, *The Farmer Refuted* (February 23, 1775), in 1 THE PAPERS OF ALEXANDER HAMILTON 104 (H. Syrett ed. 1961). Hamilton went on, stating, “Were you at once to become acquainted with these, you could never entertain a thought, that all men are not, by nature, entitled to parity and privileges. You would be convinced that natural liberty is a gift of the beneficent Creator to the whole human race.” *Id.* Hamilton also once stated that “[t]he sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature . . . and can never be erased or obscured by mortal power.” *Id.* at 122.

Founders, such as James Madison,<sup>59</sup> George Mason,<sup>60</sup> George Washington,<sup>61</sup> John Adams,<sup>62</sup> and James Wilson,<sup>63</sup> all held the same belief regarding the natural right tradition that government was instituted to protect.<sup>64</sup>

Plainly, the Founders of this country were convinced of the concept of natural rights. The foremost authority on natural rights, and the source of many of the Founders' ideas, was John Locke. Locke's idea of a limited government established by the consent of the governed had a profound influence on the framers of the American system of government. Indeed, many of the ideas embodied in the Declaration can be traced back to Locke.<sup>65</sup>

Locke's ideas heavily influenced Thomas Jefferson, in particular. When Jefferson expressed his views on the basic purpose of government, "he invariably invoked the Lockean liberal concept of a limited state charged with protecting the natural rights of the governed."<sup>66</sup> This is apparent in Jefferson's Declaration.

59. James Madison once said, "Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of . . . pursuing and obtaining happiness and safety." 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1789).

60. Mason stated that the "primary object" of the Constitutional Convention of 1787 was "the preservation of the rights of the people." RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 222 (Charles C. Tonsill, ed., 1989).

61. Washington once stated that the foundation of American Government "was not laid in the gloomy age of ignorance and superstition, but at an epocha [sic] when the rights of mankind were better understood and more clearly defined, than at any former period." 8 THE WRITINGS OF GEORGE WASHINGTON 439, 441 (J. Sparks ed., 1835).

62. John Adams, the Second President of the United States, once declared that men "have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe." JOHN ADAMS, 3 ADAMS, LIFE AND WORKS 449 (C.F. Adams ed., 1850).

63. See *infra* note 98 and accompanying text.

64. The idea that the Declaration embodies the principles of "natural law" may be best expressed by an episode from the life of former President John Quincy Adams. Adams, who was elected to the House of Representatives after he left the Presidency, referred to the Declaration as "law" during his argument in front of the Supreme Court in *United States v. The Amistad*, 40 U.S. 518 (1841). In that case, the former president argued for freedom on behalf of 54 Africans captured in their native land to be sold into slavery in Cuba. *Id.* at 587. The Africans had mutinied and taken over the ship, which was subsequently taken possession of off the shore of Connecticut. *Id.* at 527. In his closing argument, Adams declared, "I know of no law,"—here he raised his arm to the copy of the Declaration of Independence hanging on a pillar across the room—"except that law. I know of no other law that reaches the case of my clients but the Law of Nature and of Nature's God on which our fathers placed our own national existence." LEONARD FALKNER, *THE PRESIDENT WHO WOULDN'T RETIRE* 236 (1967). This case was recently the subject of a Steven Spielberg movie, *AMISTAD* (Dreamworks 1997).

65. See GERBER, *supra* note 8, at 23-56; see also FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN*, 153 (1992) ("The principles underlying American democracy, codified in the Declaration of Independence and the Constitution, were based on the writings of Jefferson, Madison, Hamilton, and the other American Founding Fathers, who in turn derived many of their ideas from the English liberal tradition of Thomas Hobbes and John Locke.") (emphasis added).

66. GERBER, *supra* note 8, at 33.



Indeed, in the opening lines of the Declaration, Jefferson argues that the colonies are entitled to their independence, or, as he put it, their “separate and equal station” by “the Laws of Nature and of Nature’s God.”<sup>67</sup> Another example of Jefferson’s esteem for natural law and for Locke was his recommendation of Locke’s *Second Treatise* as a means of understanding the American political system, calling the work “perfect as far as it goes.”<sup>68</sup>

But one need not rely solely on natural law to conclude that the Declaration has authority. The federal government’s official compilation of all the “General and Permanent Laws of the United States of America,” the United States Code, has titled as its very first section, “The Organic Laws of the United States of America.”<sup>69</sup> This section contains both the Declaration of Independence and the Constitution. In fact, the Declaration of Independence is found on the very first page of the United States Code.<sup>70</sup>

These “organic laws” are quite important. For “it is the organic law which states the purposes of ‘We the People of the United States’ and the frame of government which [was] ordained and established in the Constitution.”<sup>71</sup> The argument that the Declaration has no legal authority loses some of its force when one realizes that it is found in the same section of “organic laws” as the Constitution. If the Constitution is “ordained and established” for the sole purpose of “securing the rights” espoused in the Declaration, how can it be that the rights found in the Declaration are not found in the Constitution? The answer is inescapable: the “self-evident truths” of the Declaration are incorporated, protected and secured by the Constitution.

This was the view espoused by the dissent in the *Byrn*<sup>72</sup> case, mentioned earlier. In that dissent, Judge Burke stated his view of the relationship between the “unalienable rights” of the Declaration and the Constitution.<sup>73</sup> He claimed that:

The Constitution is misread by those who say that these rights are created by the Constitution. The men who wrote the Constitution did not doubt that these rights existed before the nation was created and are dedicated by God’s word. By the Constitution, these rights were placed beyond the power of Government to destroy.<sup>74</sup>

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67. DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

68. GERBER, *supra* note 8, at 34.

69. 1 U.S.C. XXXIX (1994).

70. 1 U.S.C. XLI (1994).

71. RICHARD H. COX, FOUR PILLARS OF CONSTITUTIONALISM 14-15 (1998).

72. *Byrn v. N. Y. City Health & Hosp. Corp.*, 286 N.E.2d 887, 891-97 (1972).

73. *Id.* at 891 (Burke, J., dissenting).

74. *Id.* at 892 (Burke, J., dissenting) (quoting Chief Judge Lehman). Chief Justice Warren, for one, seemingly agreed with this conception of government. He once wrote:

What is this Government, whose power is here being asserted? And what is the source of that power? The answers are the foundation of our Republic. To secure the inalienable rights of the individual, “Governments are instituted among Men, deriving their just powers from the consent

Assume for a moment that Judge Burke is wrong, and that the rights guaranteed by the Declaration are not embodied in the Constitution. Does that then mean that people do not possess those rights? No. The reason is obvious: the unalienable rights recognized by the Declaration need not be found in the Constitution. They are self-evident. On April 7, 1866, William Lawrence, a representative from Ohio, stated the principle well when he said:

It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution *as existing anterior to and independently of all laws and all constitutions*. Without further authority I may assume, then, that there are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him.<sup>75</sup>

Abraham Lincoln, the sixteenth President of America, also had a sincere and profound reverence for the principles embodied in the Declaration of Independence, once stating: "I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence."<sup>76</sup> He likewise believed

of the governed." I do not believe the passage of time has lessened the truth of this proposition. It is basic to our form of government. This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.

Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). Chief Justice Warren went on to assert that "[c]itizenship *is* man's basic right for it is nothing less than the right to have rights." *Id.* It is difficult to see, however, how "citizenship" can be a more basic right than "life."

75. THE RECONSTRUCTION AMENDMENT DEBATES 206 (Alfred Avins ed., 1967) (1866) (emphasis added). This statement echoed the sentiments of Caleb Cushing, a representative from Massachusetts who, nearly thirty years prior, in 1837, in the course of arguing about the right to petition, stated "We did not constitute this Government as the means of acquiring new rights, but for the protection of old ones, which nature had conferred upon us; which the constitution rightly regards as pre-existing rights." WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY 261-62 (1995). Cushing's statement itself recalls Thomas Paine, who in 1791 asserted that "Man did not enter into society to become worse than he was before, nor to have less rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights." THOMAS PAINE, RIGHTS OF MAN 48 (1992).

76. BENJAMIN P. THOMAS, ABRAHAM LINCOLN 241 (1952). Lincoln continued:

[A]ll the political sentiments I entertain have been drawn, so far as I have been able to draw them, from the sentiments which originated, and were given to the world from this hall in which we stand. I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence. I have often pondered over the dangers which were incurred by the men who assembled here and adopted the Declaration of Independence—I have pondered over the toils that were endured by the officers and soldiers of the army, who achieved that independence. I have often inquired of myself, what great principle or idea it was

that the Constitution enshrined the truths recognized by the Declaration. A certain scripture reads, “[a] word fitly spoken is like apples of gold in pictures of silver.”<sup>77</sup> Lincoln analogized the principle of the Declaration, “all men are created equal,” or in his words, “liberty for all,” to the apple of gold, around which the Constitution was the picture of silver. He stated:

The expression of that principle, in our Declaration of Independence, was most happy, and fortunate. . . . The assertion of that *principle*, at *that time*, was the word “*fitly spoken*” which has proved an “apple of gold” to us. The *Union*, and the *Constitution*, are the *picture of silver*, subsequently framed around it. *The picture was made, not to conceal or destroy the apple; but to adorn, and preserve it. The picture was made for the apple—not the apple for the picture.*<sup>78</sup>

For Lincoln and the Founders, the Constitution was written for the specific purpose of embodying the principles of the Declaration.<sup>79</sup> One could argue that the Civil War, fought and won by Lincoln, was fought to impress the principles of the Declaration onto the Constitution. Certainly, it was a difficult proposition to assert that “all men are created equal” in the face of a society allowing slavery. It is instructive, then, that during the ratification debates on the reconstruction Amendments (the Thirteenth, Fourteenth and Fifteenth Amendments),<sup>80</sup> members of both the Senate and the House referenced the Declaration repeatedly.

One notable example is found in a speech given by James Monroe, a newly elected representative from Ohio. In his speech on behalf of a proposed law to enforce the Fourteenth Amendment, Monroe was obviously referring to the

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that kept this great Confederacy so long together. It was not the mere matter of the separation of the colonies from the motherland; but something in that Declaration giving liberty not alone to the people of this country, but hope to the world for all future time. It was that which gave promise that in due time the weights should be lifted from the shoulders of all men, and that *all* should have an equal chance. This is the sentiment embodied in that Declaration of Independence.

ABRAHAM LINCOLN, SPEECHES AND LETTERS 158 (Peter Parish ed., 1993).

77. *Proverbs* 25:11.

78. COX, *supra* note 71, at 53 (emphasis added).

79. Another President, John Quincy Adams, also felt that the Constitution embodied the principles of the Declaration. In a famous speech given before the New York Historical Society on April 30, 1839, Adams said that the Constitution “was the complement to the Declaration of Independence; founded upon the same principles, carrying them into practical execution, and forming with it, one entire system of national government.” JOHN QUINCY ADAMS, *THE JUBILEE OF THE CONSTITUTION* 11-12 (1839). Adams also stated, “The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, founded upon one and the same theory of government . . .” *Id.* at 40. Indeed, his entire speech was premised on the notion that the Constitution was based upon and incorporated the principles of the Declaration.

80. U.S. CONST. amend. XIII-XV. These Amendments outlawed slavery, guaranteed the “equal protection” of the law, and enfranchised all citizens, regardless of color or previous condition of servitude. *Id.*

Declaration when he said the following:

A constitution is a means, and not an end. Life, liberty, and happiness do not exist for the sake of the constitution, but *the constitution exists and was framed for their sake. In interpreting the constitution of any great, free country there is a fair presumption that it contains sufficient grants of power to the legislative body to secure the great primal objects for which constitutions and Governments exist.* In addressing ourselves to the examination of the great organic act of any free country, *we have a right to presume that its framers did not, in preparing the means, lose sight of the end; that they did not, in disputes about words, forget the foundations of society.* We feel that we ought to find in such an instrument protection for the people; that we have a right to take some pains to find it there; and that, in case of obscure or ambiguous phrases, *we should give to the natural rights of man the benefit of the doubt.*<sup>81</sup>

Henry Wilson, a Senator and future Vice President, stated that Congress' "great purpose" was to "make the Declaration of Independence the living faith, the practical policy of the nation."<sup>82</sup> Still another Senator, Richard Yates of Illinois, during a debate on the Fifteenth Amendment, claimed that the way to "accomplish our purpose" was to "assert that which the Constitution . . . meant to assert."<sup>83</sup> He then explained that what the Constitution "meant to assert" were the principles of the Declaration:

[The Constitution] *meant to assert the principles of the Declaration of American Independence.* The Constitution of the United States was made and framed by the men who framed and made the Declaration of Independence; and *if they did not in the Constitution of the United States carry out the principles contained in the Declaration of Independence, then history does not do them justice, because they never by any act that we know of in history ignored the principles of the Declaration of American Independence.* Not in the Constitution of the United States, not in any act of Congress, did they ever ignore the Declaration of American Independence, which proclaimed the great doctrine which we stand maintaining to-day, that all men are created, not by man but by

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81. THE RECONSTRUCTION AMENDMENT DEBATES, *supra* note 75, at 514 (emphasis added).

82. *Id.* at 285.

83. *Id.* at 374.

God himself, equal and entitled to equal rights and privileges.<sup>84</sup>

The documents themselves also demonstrate that the Constitution was written to secure the principles of the Declaration, even though it did not specifically list every right of citizens. The Declaration states that "Governments are instituted among men" to "secure these rights."<sup>85</sup> The Preamble to the Constitution states that it was established to "secure the Blessings of Liberty" to mankind.<sup>86</sup> And most important, the Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>87</sup> This amendment specifically admits the existence of other rights, independent of the rights enumerated within the Constitution, which are retained by the people.<sup>88</sup>

It is true, as President Coolidge said early in this century:

[N]o progress can be made beyond [the propositions of the Declaration]. If anyone wishes to deny their truth or their soundness, the only direction in which he can proceed historically is not forward, but backward toward the time when there was no equality, no rights of the individual, no rule of the people.<sup>89</sup>

Having demonstrated that the whole purpose behind the Constitution was to secure the rights of the Declaration, and that these rights exist with, without, or perhaps even in spite of the Constitution, this article will now show that the Constitution must be interpreted with deference to the natural-rights principles of the Declaration of Independence.

### *B. The Constitution Must Be Interpreted in Accord with The Principles of the Declaration of Independence*

There is ample evidence that the principles of the Declaration are an acceptable or even a preferred means of interpreting the Constitution. As a matter of fact, the Supreme Court has stated that "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."<sup>90</sup> This author believes, as one scholar has said, "that the Declaration of Independence is more than a propaganda instrument or legal brief . . . in fact it is fundamental to a proper understanding of

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84. *Id.* (emphasis added).

85. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

86. U.S. CONST. pmbl.

87. *Id.* amend. IX.

88. *Id.*

89. CALVIN COOLIDGE, FOUNDATIONS OF THE REPUBLIC: SPEECHES & ADDRESSES 451-52 (1926).

90. *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897). The rest of Justice Brewer's quotation is interesting. He said: "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." *Id.*

the Constitution."<sup>91</sup> Indeed, "the Constitution presupposes the Declaration . . . ."<sup>92</sup> Another scholar has stated it this way: "The natural-rights principles embodied in the Declaration are not 'above' or 'beyond' the Constitution; they are at the heart of the Constitution."<sup>93</sup> As will be abundantly demonstrated, not only the Founders, but Supreme Court justices, Presidents,<sup>94</sup> scholars,<sup>95</sup> and statesmen throughout American history have adhered to this view.

The Father of the Constitution, James Madison, stated that the Declaration was the "best guide" to interpretation of the Constitution.<sup>96</sup> The author of the Declaration, Thomas Jefferson, referred to it as this country's "great charter."<sup>97</sup> James Wilson, an intellectual leader during the Constitutional Convention of 1787, and later a Justice of the Supreme Court, also subscribed to the view that the Constitution was based on the Declaration. In the Pennsylvania ratifying convention, he quoted the second paragraph of the Declaration and then declared, "This is the broad basis on which our independence was placed; [and] on the same certain and solid foundation this system [the Constitution] is erected."<sup>98</sup>

Charles Sumner may be best remembered for the caning he sustained on the floor of the Senate in 1856 following a speech in which he denounced slavery. However, in addition to being a famous Senator from Massachusetts for more than 20 years, he was also a lecturer at Harvard Law School, and perhaps the most ardent proponent of the Declaration as binding on the Constitution. He once stated that

91. Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169, 170 (1990).

92. *Id.* at 175.

93. GERBER, *supra* note 8, at 3.

94. For example, George Washington, John Adams, Thomas Jefferson (Author of the Declaration), James Madison, John Quincy Adams, Abraham Lincoln, and Calvin Coolidge were all presidents who subscribed to this view. Indeed the current president, George W. Bush, also feels that the Declaration's promises protect the unborn. He recently stated that his goal is "to build a culture of life, affirming that every person, at every stage and season of life, is created equal in God's image. The promises of our Declaration of Independence are not just for the strong, the independent or the healthy. They are for everyone-including unborn children." George W. Bush, Statement to March for Life, (January 22, 2001).

95. See, e.g., Douglas W. Kmiec, *Natural-Law Originalism—Or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J. L. & PUB. POL'Y 627, 630-31 (1997) ("[T]he first principle of human natural right flows from the self-evident premise that we exist—from the fact of being, itself. In Jefferson's terminology, '[we] are endowed by [our] Creator with certain unalienable rights.' Furthermore, the securing of these rights is the entire point of the practical workings of government specified in the Constitution."). See also, GERBER, *supra* note 8.

96. Letter to Thomas Jefferson from James Madison, (Feb. 8, 1825) in 9 THE WRITINGS OF JAMES MADISON 218, 221 (G. Hunt ed., 1910).

97. Letter from Thomas Jefferson to the Department of State (Nov. 18, 1825) in J. HAZELTON, THE DECLARATION OF INDEPENDENCE: ITS HISTORY 155, 155 (1906).

98. James Wilson, Speech given in the Pennsylvania Ratifying Convention, (December 4, 1787), in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 472-73 (Merrill Jensen et al. eds., 1976).

“the Declaration has a supremacy grander than that of the Constitution, more sacred and inviolable, *for it gives the law to the Constitution itself.*”<sup>99</sup> For Sumner, the Constitution merely “supplied the machinery” whereby the “great rights” of the Declaration were “maintained.”<sup>100</sup>

Senator Sumner made his grandest, most eloquent, and most explicit appeal to the Declaration on January 31, 1872. During a debate on civil rights legislation, Sumner compared the American Declaration to the English Magna Carta. The Magna Carta was “not an act of Parliament, nothing constitutional,” it was “simply a declaration of rights; and such . . . was the Declaration of Independence.”<sup>101</sup> The Declaration was, in Sumner’s mind, America’s Magna Carta. Because legislation of the English Parliament had to comply with the Magna Carta, all legislation of Congress had to comply with the Declaration. Thus, Sumner explicitly called for the Constitution to be interpreted in light of the principles of the Declaration:

Sir, I insist that *the Constitution must be interpreted by the Declaration.* I insist that *the Declaration is of equal and coordinate authority with the Constitution itself.* I know, sir, the ground on which I stand. I need no volume of law, no dog eared book, no cases to sustain me. . . . And now, sir, I am prepared to insist that, whenever you are considering the Constitution, so far as it concerns human rights, you must bring it always to that great touch-stone; the two must go together, and *the Constitution can never be interpreted in any way inconsistent with the Declaration.* Show me any words in the Constitution applicable to human rights, and I invoke at once the great truths of the Declaration as the absolute guide in determining their meaning.<sup>102</sup>

A modern champion of civil rights, Martin Luther King, Jr., was also a firm believer in the Declaration. He echoed the beliefs of prior statesmen when he stated, “When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.”<sup>103</sup>

“Over the course of American judicial history, the United States Supreme Court has articulated constitutional rights of liberty and the pursuit of happiness as grounded in the Declaration of Independence,”<sup>104</sup> and infused constitutional law with natural

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99. THE RECONSTRUCTION AMENDMENT DEBATES 612 (Alfred Avins, ed., 1967) (emphasis added).

100. *Id.* at 611.

101. *Id.* at 597.

102. *Id.* (emphasis added).

103. Martin Luther King, Jr., I Have a Dream, (August 28, 1963) in 18 ANNALS OF AMERICA 156-57 (1968).

104. Cosgrove, *supra* note 3, at 109 (footnotes omitted).

law principles.<sup>105</sup>

In 1798, Justice Chase contended that “[t]here are certain acts which the federal or state legislature cannot do, without exceeding their authority.” Justice Chase continued, stating:

[There are certain vital principles in our free republican government which] will determine and over-rule an *apparent and flagrant* abuse of legislative power; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established. *An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.*<sup>106</sup>

Justice Chase concluded, “the genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.”<sup>107</sup> This echoes the Declaration’s decree of “self-evident truths,” “unalienable rights” and its language stating that governments are instituted among men “to secure these rights.”<sup>108</sup>

The influence of natural law on the Supreme Court was apparent in an 1815 case in which the Court voided a Virginia statute that deprived the Episcopal Church of its property.<sup>109</sup> Justice Story remarked that “*we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals*” in voiding the statute.<sup>110</sup>

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105. See, e.g., GERBER, *supra* note 8, at 95-124; CHESTER J. ANTIEAU, *THE HIGHER LAWS: ORIGINS OF MODERN CONSTITUTIONAL LAW* 80 (1994). See also *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304 (1795). In that case, Justice Paterson, sitting on circuit in Pennsylvania, held that a statute was void on the ground that it violated natural law principles not explicitly stated in the Constitution. Paterson first declared that “the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.” *Id.* at 310. It followed, then, that a divestiture statute, without compensation “is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary to both the letter and spirit of the Constitution.” *Id.*

106. *Calder v. Bull*, 3 U.S. 386, 388 (1798) (holding that revised Connecticut law was not an impermissible *ex post facto* law and that a state is able to revise laws without them being an *ex post facto* law).

107. *Id.*

108. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

109. *Terrett v. Taylor*, 13 U.S. 43 (1815).

110. *Id.* at 52 (emphasis added).



In the famous *Slaughter House*<sup>111</sup> cases, Justice Field cited the natural law principles of the Declaration, not simply as the basis for the Constitution, but as the basis for society itself. He stated:

*[C]ertain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: "We hold these truths to be self-evident"—that is, so plain that their truth is recognized upon their mere statement—"that all men are endowed"—not by edicts of Emperors, or decrees of Parliament, or acts of congress, but "by their Creator with certain inalienable rights."—that is, rights which cannot be bartered away, or given away, or taken away, except in punishment of crime—"and that among these are life, liberty, and the pursuit of happiness, and to secure these"—not grant them, but secure them—"governments are instituted among men, deriving their just powers from the consent of the governed."*<sup>112</sup>

In 1887, Justice Harlan stated for the Supreme Court that, "if a statute . . . is a palpable invasion of *rights secured by the fundamental law*, it is the duty of the courts to so adjudge, *and thereby give effect to the Constitution*."<sup>113</sup> Just over a decade later, the Court stated that "there are certain immutable principles of justice which inhere in the very idea of free government," obviously referring to principles of natural law.<sup>114</sup>

The Declaration and its principles continue to appear in opinions to the present. In one famous opinion, Justice Douglas explicitly stated that the Constitution "enshrined" the principles of the Declaration.<sup>115</sup> In *McGowan v. Maryland*,<sup>116</sup> decided in 1961, he stated:

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the state is powerless to alter; that *the individual possesses rights, conferred by the Creator, which government must respect*. The Declaration of Independence stated the now familiar theme: "We hold

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111. *Butcher's Union Slaughter-House and Livestock Landing Co. v. Crescent City Live-Stock and Slaughter-House Co.*, 111 U.S. 746, 756 (1884).

112. *Id.* at 756-57 (Field, J., concurring) (emphasis added).

113. *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (emphasis added).

114. *Holden v. Hardy*, 169 U.S. 366, 389 (1898).

115. 366 U.S. 420 (1961).

116. *Id.*

these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." *And the body of the Constitution as well as the Bill of Rights enshrined those principles.*<sup>117</sup>

The phrase "all men are created equal" or its equivalent, "all persons are created equal," has appeared in ninety-one federal court opinions, twenty-three of them in the Supreme Court.<sup>118</sup> In a 1976 decision, *Mathews v. Lucas*,<sup>119</sup> Justice Stevens stated his belief that "we are committed to the proposition that all men are created equal."<sup>120</sup> More recently, Justice Stevens stated that "[o]ur Constitution is born of the proposition that all legitimate governments must secure the equal right of every person to 'Life, Liberty, and the pursuit of Happiness.'"<sup>121</sup> Justice Brennan once stated that "[o]ur Nation was founded on the principle that 'all Men are created equal.'"<sup>122</sup> In the recent case of *Sandin v. Conner*,<sup>123</sup> Justice Ginsburg also relied on the Declaration in finding a liberty interest to be an "unalienable Right[]" with which all persons are endowed by their Creator.<sup>124</sup>

Justice Clarence Thomas, however, is perhaps the contemporary champion of the values of the Declaration. During his confirmation hearings, in response to the

117. *Id.* at 562-63, (Douglas, J., dissenting) (emphasis added).

118. According to a Westlaw search in the ALLFEDS, ALLFEDS-OLD, SCT, and SCT-OLD databases.

119. 427 U.S. 495 (1976).

120. *Id.* at 516 (Stevens, J., dissenting). Note that Stevens' language copies the words used by Lincoln in his Gettysburg Address, substituting only the word "committed" for Lincoln's "dedicated." See *supra* note 6.

121. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 330 (1990) (Stevens, J., dissenting) (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)). Stevens then cited to the second sentence of the Declaration. Justice Stevens has referred to the Declaration in several other opinions, notably in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In that case, the Supreme Court held that general societal discrimination did not provide a compelling state interest to justify a race-conscious provision in a collective bargaining agreement with public schools. In his dissent, Justice Stevens argued that there is "a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason." *Id.* at 316 (Stevens, J., dissenting). Justice Stevens then invoked the phrase "all men are created equal" from the Declaration, stating: "The inclusionary decision is consistent with the principle that *all men are created equal*; the exclusionary decision is at war with that principle. *One decision accords with the Equal Protection Clause of the Fourteenth Amendment*; the other does not." *Id.* (emphasis added). Stevens thus suggested that the 14th Amendment incorporated the rights guaranteed by the Declaration. *Id.*

122. *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J., concurring in part and dissenting in part) (quoting the DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)). Just one year before he concurred in *Roe v. Wade*, Justice Brennan referred to American society as one that "strongly affirms the sanctity of life." *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

123. 515 U.S. 472 (1995).

124. *Id.* at 489 (Ginsburg, J., dissenting).

question, "Is the belief that all men are endowed with certain inalienable rights one that you would consider well accepted within the judicial mainstream and consistent with most Americans' values and principles?"<sup>125</sup> Justice Thomas stated: "I think that most Americans, when they refer to the Declaration of Independence and its restatement of our inherent equality, believe that. And I believe that our revulsion when we think of policies such as apartheid flow from the acceptance of our inherent equality."<sup>126</sup>

Thomas also stated that he "would advocate . . . a true jurisprudence of original intent, *one which understood the Constitution in light of the moral and political teachings of human equality in the Declaration.*"<sup>127</sup> This was born out in his concurring opinion in *Adarand Constructors, Inc. v. Peña*,<sup>128</sup> where Justice Thomas recognized in the Declaration "the principle of inherent equality that underlies and infuses our Constitution."<sup>129</sup> Prior to joining the Court, Justice Thomas stated in a law review article that "the Constitution is a logical extension of the principals of the Declaration of Independence . . . . The higher-law background of the American Constitution . . . provides the only firm basis for a just, wise, and *constitutional* decision."<sup>130</sup>

Although not an opinion of the Supreme Court, the dissent in *Byrn v. N.Y. City Health & Hospital Corp.*, makes a strong argument that the Constitution is bound by the principles of the Declaration.<sup>131</sup> In his dissent, Judge Burke called for the Constitution to conform to the natural law principles of the Declaration.<sup>132</sup> He stated that the unconstitutionality of legislation allowing abortion "stems from its inherent conflict with the Declaration of Independence, the basic instrument which gave birth to our democracy. *The Declaration has the force of law and the constitutions of the United States and of the various States must harmonize with its tenets.*"<sup>133</sup>

This brief summary of cases establishes that the natural law principles, if not the Declaration itself, have played a prominent role in many cases adjudicated by the Supreme Court and other courts. Although it must be admitted that this author's

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125. 17-A ROY M. MERKSY and J. MYRON JACOBSTEIN, *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1991*, 1420 (1995).

126. *Id.*

127. *Id.* at 1352 (emphasis added).

128. 515 U.S. 200 (1995).

129. *Id.* at 240 (Thomas, J., dissenting). Leaving no doubt that it is the Declaration's "principle of inherent equality that underlies and infuses our Constitution," Justice Thomas specifically cited to the second sentence of the Declaration following the above quote.

130. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J. L. & PUB. POL'Y 63, 64, 68 (1989). It should be pointed out, however, that during his confirmation hearings, Justice Thomas denied having ever implied that the Declaration should be used as a basis for constitutional interpretation.

131. *Byrn v. New York City Health & Hosp. Corp.*, 286 N.E.2d 887, 891 (Burke, J., dissenting).

132. *Id.*

133. *Id.* at 893 (emphasis added). President John Quincy Adams, for one, also referred to the Declaration as "law." See *supra* note 64 and accompanying text.

call for interpreting the Constitution in light of the Declaration is a minority position,<sup>134</sup> it is one that is quite consistent with the notion of “unalienable rights” that come from the “Creator.”

## V. SUMMARY

Throughout this article, it has been this author’s goal to make evident several conclusions. First, the Declaration guarantees the right to life for all persons from the moment of creation. Second, the moment of creation must be fixed at conception. Third, the Declaration thus recognizes the fact that humans have the unalienable right to life from the moment of conception. Finally, the Constitution should be interpreted in light of the transcendent principles of the Declaration. These four points lead one to the unmistakable conclusion that abortion is a violation of the inherent rights of man as espoused in the “great charter,” the Declaration of Independence. Therefore, any decision of the Supreme Court allowing abortion as a “constitutional right” goes against the “self-evident” truths recognized by the Declaration and cannot stand.

This raises one of the most famous cases of all time, *Roe v. Wade*.<sup>135</sup> That decision granted to women the constitutional right to terminate their pregnancy.<sup>136</sup> Given the conclusions reached herein, it should be apparent that that decision cannot stand. The unborn, as this article has shown, have equal rights with humans at any stage of development, and thus cannot be denied the fundamental right to life. Further, because the Creator bestows a person’s rights, no one else has the power

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134. See generally Himmelfarb, *supra* note 91, at 169 (“[C]an [the words of the Declaration] offer us any guidance in our attempt to understand the Constitution? Few legal historians or constitutional theorists would answer in the affirmative: those scholars who do not ignore the Declaration are likely to mention the document only in order to dismiss it.”) (footnote omitted). However, Himmelfarb himself maintains that the Declaration “is fundamental to a proper understanding of the Constitution; and that abundant support for this proposition can be found in the leading writings and debates of the Founding Era.” *Id.* at 170. See also GERBER, *supra* note 8.

135. 410 U.S. 113 (1973). It should be noted that the right of a woman to abort her unborn child remains intact, in spite of the ruling in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* merely allowed for more governmental regulation of abortion, it did not restrict in any way the right of a woman to decide to have an abortion. *Id.* Indeed, the Court affirmed *Roe*’s essential holding recognizing a woman’s right to choose an abortion before fetal viability, changing only *Roe*’s trimester framework. *Id.* The new standard is whether the restriction imposes an “undue burden” on the woman’s right to choose. More recently, the Supreme Court has ruled that it is an “undue burden” on a woman’s right to choose for a state to enact a ban on killing an infant in the process of being delivered. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2617 (2000). See *supra* note 14 for a description of this procedure. This article’s criticisms of *Roe* apply doubly to this disgraceful opinion.

136. *Roe*, 410 U.S. at 153.

either to grant or withhold these inviolable rights.<sup>137</sup> Nor may a government founded on the proposition that “all men are created equal” legitimately define a person out of the “unalienable rights” to which he is entitled any more than that government can deny those rights outright.

Two particular assertions in *Roe* merit special criticism. First, the Court found the right of a mother to kill her child included within a vague “right to privacy” that supposedly resides within the Fourteenth Amendment. The majority, in effect, took it upon itself to determine who was deserving of the natural rights of man. The Court held that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>138</sup> In doing so, the Court assumed a power that is beyond the power of the Court to assume—that of determining who is a human being. As stated throughout this article, the Declaration recognizes that the rights of man come from the Creator, and for any court to usurp that authority goes against the founding laws of America, as well as centuries of common law and statutory protection for the unborn.<sup>139</sup>

Second, the Court stated, “We need not resolve the difficult question of when life begins.”<sup>140</sup> To begin with, that question had already been resolved—medical science had long since established that human life begins at conception.<sup>141</sup> But even assuming that the point had not been decided, how could the Court declare that women have the right to terminate their pregnancies without first determining if the unborn are alive? For if the unborn are alive, they cannot be deprived of their life without due process of law.

This brief exposition of *Roe* shows that that decision has no more lawful authority than did the *Dred Scott* decision justifying slavery. Both decisions conflict with this nation’s inherent principles of justice. One day *Roe* will be overturned and regarded with the same abhorrence as the *Dred Scott* case. And as with the *Dred Scott* decision, future generations will “look back . . . with astonishment at the

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137. For the thoughts of the author of the Declaration on the subject of whether government or the Creator should be considered the giver of rights consider the following quote:

[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God? That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that His justice cannot sleep forever.

NOBLE E. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 62-63 (1987).

138. *Roe*, 410 U.S. at 158.

139. See Wardle, *supra* note 22, at 863-65 and accompanying text.

140. *Roe*, 410 U.S. at 159.

141. See *supra* notes 37-42 and accompanying text. This criticism does not mean that the author feels it is important to determine when life begins under the approach advocated in this article—had the Supreme Court approached *Roe* within the framework of the Declaration, it would have been unnecessary to make the determination when life begins. Under the approach adopted by the Court, however, it seems incredible that they felt it was not necessary to determine when life begins. Moreover, this distinction falls apart in the face of partial-birth abortions. No one can dispute that these abortions are being performed on “live humans.”

daring outrages committed . . . on the . . . rights of man . . . .”<sup>142</sup> This will come about because of the “self-evident” nature of the truths embodied in the Declaration. Anyone who truly believes that “all men are created equal” will come to see that abortion contradicts this truth and makes hypocrites of those who love freedom. For these reasons, this author believes that *Roe* will eventually fall.

## VI. CONCLUSION

This article has attempted to show that the Declaration of Independence guarantees the right to life for the unborn.<sup>143</sup> The argument is as simple, familiar, and straightforward as the language of the Declaration itself: “All men are created equal . . . endowed by their Creator . . . with the unalienable right to life.”<sup>144</sup> Because the sole purpose of the American government is “to secure these rights,” the legal right to an abortion, like the prior legal right to own another human being, must be brought to an end. Those who seek legally to protect abortion are on the wrong side of history. The fundamental truths of the Declaration, which formed this nation and freed a people from bondage, will one day rescue the unborn. As Abraham Lincoln said: “Let us re-adopt the Declaration of Independence, and, with it, the practices and policy which harmonize with it . . . If we do this, we shall not only have saved the Union, but we shall have so saved it as to make and to keep it forever worthy of the saving.”<sup>145</sup>

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142. James Madison, *Charters* (Jan. 19, 1792), in IV LETTERS AND OTHER WRITINGS OF JAMES MADISON 467 (1884).

143. This article has not addressed the implications of its approach on topics such as artificial insemination, birth control, or fetal endangerment statutes.

144. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

145. Abraham Lincoln, 1854 Speech on the Kansas-Nebraska Act, in GARY WILLS, LINCOLN AT GETTYSBURG 89 (1992).

