Reconciling The Sanctity Of Human Life, The Declaration Of Independence, And The Constitution

Paolo Torzilli
RECONCILING THE SANCTITY OF HUMAN LIFE, THE DECLARATION OF INDEPENDENCE, AND THE CONSTITUTION

PAOLO TORZILLI*

"Write down, therefore, what you have seen, and what is happening, and what will happen afterwards."**

INTRODUCTION

For those who embrace the sanctity of human life, January 22, 1973 is "a date which will live in infamy"1 because it is the date the United States Supreme Court decided Roe v. Wade.2

*J.D. Candidate, June 2001, St. John's University School of Law; B.B.A., George Washington University School of Business and Public Management.

**Revelation 1:19.

1 87 Cong. Rec. 9504 (daily ed. Dec. 8, 1941) (statement of President Roosevelt's request for a Declaration of War against Japan); see also Chemical Natural Resources v. Republic of Venez., 215 A.2d 864, 890 (Pa. 1966) (Roberts, J., dissenting) (applying quotation in judicial context). This quotation has come to signify truly horrible dates in the lives of particular individuals. See, e.g., Sunbeam Corp. v. Black & Decker, 151 F.R.D. 11, 13 (D.R.I. 1993) (describing one hearing date as "perhaps another day that should live in infamy"); Carter v. State, 746 P.2d 193, 200 (Okl. Crim. App. 1987) (analogizing to the "most terrible and tragic experiences that has ever happened to [the victims]").


In 1973, America's unborn children lost their legal protection. In the 14 years since then, some twenty million unborn babies, 1.5 million each year, have lost their lives by abortion—in a nation of 242 million people. This tragic and terrible toll continues, at the rate of more than 4,000 young lives lost each day. This is a shameful record; it accords with neither human decency nor our American heritage of
The decision spun the nation into perpetual turmoil. The source of such turbulence was the controversial position taken by the majority.\textsuperscript{3} It appears that three principles represent the respect for the sanctity of human life.

That heritage is deeply rooted in the hearts and the history of our people. Our Founding Fathers pledged to each other their lives, their fortunes, and their sacred honor in the Declaration of Independence. They announced their unbreakable bonds with its immutable truths 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.” Americans of every succeeding generation have cherished our heritage of God-given human rights and have been willing to sacrifice for those rights, just as our Founders did.

Those rights are given by God to all alike. Medical evidence leaves no room for doubt that the distinct being developing in a mother’s womb is both alive and human. This merely confirms what common sense has always told us. Abortion kills unborn babies and denies them forever their rights to “Life, Liberty and the pursuit of Happiness.” Our Declaration of Independence holds that governments are instituted among men to secure these rights, and our Constitution—founded on these principles—should not be read to sanction the taking of innocent human life.

A return to our heritage of reverence and protection for the sanctity of innocent human life is long overdue. For the last 14 years and longer, many Americans have devoted themselves to restoring the right to life and to providing loving alternatives to abortion so every mother will choose life for her baby.

We must recognize the courage and love mothers exhibit in keeping their babies or choosing adoption. We must also offer thanks and support to the millions of Americans who are willing to take on the responsibilities of adoptive parents. And we must never cease our efforts—our appeals to the legislatures and the courts and our prayers to the Author of Life Himself—until infants before birth are once again afforded the same protection of the law we all enjoy.

Our heritage as Americans bids us to respect and to defend the sanctity of human life. With every confidence in the blessing of God and the goodness of the American people, let us rededicate ourselves to this solemn duty.

Proclamation No. 5599, 52 Fed. Reg. 2213–14 (1987). It is urged that our new President continue this important tradition.

\textsuperscript{3} See Kevin C. McMunigal, Of Causes and Clients: Two Tales of Roe v. Wade, 47 HASTINGS L.J. 779, 782 (1996) (acknowledging the plethora of scholarship discussing the “controversial Roe decision”); David M. Smolin, The Jurisprudence of Privacy in a Splintered Supreme Court, 75 MARQ. L. REV. 975, 975 (1992) (suggesting that the turmoil extends to every sphere of society: people, scholars, and even Supreme Court Justices); Lynn D. Wardle, The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists, 62 ALB. L. REV. 853, 858 (1999) (characterizing the “Roe doctrine” as “controversial existing law”); Sandra L. Macklin, Note, Students’ Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies, 74 IND. L.J. 1321, 1324
THE SANCTITY OF HUMAN LIFE

underpinnings of the decision in Roe. First, a woman has a fundamental right to abort a pregnancy; states may only alienate it by showing a compelling governmental interest. Second, unborn children do not have rights worthy of constitutional protection. Third, the United States Constitution protects the abortion right, and the Supreme Court has the constitutional authority to invalidate laws seeking to curtail abortion. It seems the source of the divisiveness over abortion comes from the fact that many believe the Court drew the wrong conclusions.

In the years since Roe was decided, judges and scholars alike have castigated the result. Each of the aforementioned principles has created a source for criticism. Reconciliation of these three primary principles with their associated criticisms is critical. Our Nation must unite in support for the sanctity of human life, from conception to natural death.

(1999) (characterizing the decision as "still controversial"). Supreme Court Justices concede that the decision is controversial. See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 845, 855, 860–61, 866–67, 869 (1992) (plurality opinion); see also Smolin, supra, at 975 n.3. It seems the decision will forever be controversial, even if it is ultimately overruled.

4 See Roe, 410 U.S. at 154 ("[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."). The majority in Roe did not believe that preserving the lives of the unborn constituted a compelling governmental interest. See generally Margaret G. Farrell, Revisiting Roe v. Wade: Substance and Process in the Abortion Debate, 68 IND. L.J. 269, 305 (1993) (reviewing the State of Texas' argument on the issue).

5 See Roe, 410 U.S. at 158 ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

6 See id. at 153 (concluding that abortion is constitutionally protected); id. at 164 (invalidating the Texas criminal abortion statute).

7 See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 785 (1986) (Burger, C.J., dissenting) (calling for a reconsideration of the Roe decision); Casey, 505 U.S. at 983 (Scalia, J., dissenting) (exposing the "emptiness of the 'reasoned judgment' that produced Roe").


9 This Note deals primarily with issues related to abortion. The subject matter of this Note should not be interpreted as endorsing a limit to the concept of the sanctity of human life. The life of every human being, born or unborn, deserves our greatest respect. The sanctity of all human life must be preserved. It is the unborn, however, who have no voice to protect themselves. This is the irony of Roe. A public policy objective of the American courts is to champion anti-majoritarian interests. See Jeffrey A. Segal, Courts, Executives, and
upon which our Nation was founded, as articulated by the architects of our liberal form of government, require unified support for the sanctity of human life.

Historically, our Nation successfully transcended Supreme Court decisions that became notable for their violation of the most basic sense of justice. One may point to Dred Scott v. Sanford\(^{10}\) as an example. Unfortunately, 600,000 deaths were required to change the result in that case.\(^{11}\) Roe has led to the deaths of at least 25 million unborn Americans.\(^{12}\) Like the aftermath of Dred Scott, the years since Roe have witnessed great carnage.

The suffering, death, and divisiveness associated with Roe must cease. Toward that end, it is suggested that the Supreme Court revisit the three primary principles underlying Roe.\(^{13}\) In so

---

\(^{10}\) 60 U.S. (19 How.) 393 (1857).

\(^{11}\) See Transcript, The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates, 28 ARIZ. ST. L.J. 17, 26 (1996) (remarks of Professor Lino A. Graglia) (“The result . . . was that the country was plunged into civil war.”); see also HARRY V. JAFFA, Whatever Happened to the Emperor’s Clothes? (stating that 300,000 people died opposing the Missouri law while 300,000 people died maintaining it), in STORM OVER THE CONSTITUTION 13, 21 (1999) [hereinafter STORM].

\(^{12}\) See Robert D. Goldstein, Reading Casey: Structuring the Woman’s Decisionmaking Process, 4 WM. & MARY BILL OF RTS. J. 787, 817 (1996) (indicating the abortion procedure has been performed over 25 million times since Roe).

In addition to the deaths of the unborn, abortion continues to jeopardize and even claim the lives of women who subject themselves, either voluntarily or through coercion, to abortion procedures. For example, on December 13, 1996, Dr. Bruce Saul Steir aborted a fetus carried by Sharon Hampton. See Raymond Smith, Doctor in Abortion Case Scheduled for March Trial, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 14, 1999, at B5. Sharon died on her drive home. See id. Steir was charged with second-degree murder. See id. Unfortunately, Steir continued to perform abortions, even though he “allegedly caused” two women to suffer “serious injuries” during previous abortions. Id. In Arizona, “LouAnne Herron, a Phoenix woman, died during a botched abortion by Dr. John Biskind. Biskind had been allowed to keep practicing despite a similar incident in 1995.” Chris Farnsworth, Losing Patients: Legislators Want Closer Scrutiny of BOMEX, But the Medical Board Will Seek More Secrecy, PHOENIX NEW TIMES, Dec. 24, 1998.

\(^{13}\) See supra text accompanying notes 4–6. The Supreme Court had seemingly provided itself such an opportunity. Certiorari was granted to hear an appeal by the State of Nebraska, which passed a law banning partial-birth abortions. See Linda Greenhouse, Justices to Rule on Law that Bans Abortion
doing, it is submitted that the Court draw conclusions by utilizing the Nation's political philosophy as outlined by Thomas Jefferson in paragraph two of the Declaration of Independence:

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.\textsuperscript{14}

Construing the United States Constitution in light of the concepts set forth in the Declaration of Independence is sensible jurisprudence for two reasons.\textsuperscript{15} First, the Framers intended that the Constitution protect the tenets set forth in the Declaration of Independence.\textsuperscript{16} A fair interpretation of the Constitution should not violate the purpose upon which our Nation was founded.\textsuperscript{17}

\textit{Method}, N.Y. TIMES, Jan. 15, 2000, at A1. The majority opinion, however, noted that they "shall not revisit these legal principles." Stenberg v. Carhart, 120 S.Ct. 2597, 2604 (2000) (Breyer, J.). Thirty states have identified the "ghastly practice." Wardle, \textit{supra} note 3, at 952, as violative of their public policy and criminalized partial-birth abortions in one form or another. See \textit{Stenberg}, 120 S.Ct. at 2640 (Thomas, J., dissenting). The horror of "live-birth abortion." \textit{id.} at 2621 (Scalia, J., dissenting), was highlighted in an American Medical Association report which indicated that "in the D & X [procedure,] the fetus is 'killed outside of the womb.'" \textit{id.} at 2626 (Kennedy, J. dissenting); \textit{see also} 145 CONG. REC. S12,958 (daily ed. Oct. 21, 1999) (statement of Sen. Voinovich) (associating partial-birth abortion with infanticide).

\textsuperscript{14} THE \textit{DECLARATION OF INDEPENDENCE} para. 2 (U.S. 1776).

\textsuperscript{15} Justice Blackmun, who drafted the majority opinion in \textit{Roe}, failed to take into account the Declaration of Independence when construing the Constitution in that decision. Yet, ironically, he delivered a speech on the very subject some twenty years later. See \textit{Justice Blackmun Addresses ASIL Annual Dinner}, AM. SOC'y INT'L. L. NEWSL., Mar. 1994 ("I am here tonight to speak about the Supreme Court, the law of nations, and the place in American jurisprudence for what the drafters of the Declaration of Independence termed 'a decent respect to the opinions of mankind.'").

\textsuperscript{16} \textit{See} \textit{SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE \textit{DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION} 75} (1995) ("Publius was trying to persuade his audience that the Constitution represented the best \textit{form of government} to secure the philosophical principles embodied in the Declaration of Independence.").

\textsuperscript{17} \textit{See id.} at 15 ("The Constitution . . . is a political document in the noblest sense. It establishes a framework of government through which certain underlying philosophical principles are to be advanced. And those philosophical principles are the natural-rights principles of the Declaration of Independence."); Robert N. Clinton, \textit{Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"} 72 IOWA L. REV. 1177, 1222 (1987) ("[O]ur Declaration of Independence [describes] . . . normative rights [which are] axiomatic and immutable principles."). "[T]he Declaration is 'the most fundamental dimension of the law of the Constitution.'" Charles H. Cosgrove, \textit{The Declaration of Independence in Constitutional Interpretation: A Selective
Second, people believe in the Declaration of Independence and its most basic premises; this is instilled at an early age.\textsuperscript{18} It seems as if judicial decisions are most readily understood and accepted when legal conclusions are drawn from materials that are universally embraced. Since nearly all Americans readily embrace the philosophy of the Declaration of Independence,\textsuperscript{19} one could conclude that judicial decisions based upon it enjoy instant respect and approval.

Analyzing the interplay between the Declaration of Independence and the United States Constitution has a long history. It was the Framers themselves who first dealt with the issue.\textsuperscript{20} Later, President Abraham Lincoln studied the values present in the second paragraph of the Declaration of Independence as he wrestled with the question of abolition.\textsuperscript{21}

\textit{History and Analysis,} 32 U. Rich. L. Rev. 107, 126 (1998) (quoting HARRY V. \textsc{Jaffa, Original Intent and the Framers of the Constitution: A Disputed Question} 23 (1994)). If one accepts this position, judicial decisions based on the Constitution must seemingly be harmonized with the Declaration of Independence.

\textsuperscript{18} It is a well-established “fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence.” Charles J. Russo, \textit{Prayer at Public School Graduation Ceremonies: An Exercise in Futility or a Teachable Moment?} 1999 BYU Educ. \& L. J. 1, 21 n.92 (quoting Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962)).

\textsuperscript{19} See Jerome McCristal Culp, Jr., \textit{Toward a Black Legal Scholarship: Race and Original Understandings,} 1991 Duke L.J. 39, 42 (“Most believe that American law, as derived from the Constitution and incorporated in the Declaration of Independence, deserves the respect, reverence and support of all Americans . . . “).


\textsuperscript{21} See Jane Rutherford, \textit{Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion,} 81 Cornell L. Rev. 1049, 1064–65 (1996) (discussing Lincoln’s commitment to the Declaration’s principles in the Gettysburg Address); Transcript, \textit{supra} note 11, at 65 (indicating President Lincoln’s platform included “the maintenance of the principles that promulgated the Declaration of Independence and are embodied in the federal Constitution”). “No one admired the Declaration of Independence more openly, interpreted it more deeply, or implemented it more practically, than did Lincoln.” \textit{Storm, supra} note 11, at xi.
Justice Clarence Thomas has produced copious scholarly work on natural rights jurisprudence and has garnered significant attention for it.

This Note asserts that a fair construction of the Constitution requires analysis of the principles underlying the Declaration of Independence. When one approaches constitutional construction in this manner, one can conclude that (1) abortion is an activity which government may alienate from the governed, (2) unborn human life has rights deserving governmental protection, and (3) courts seeking to invalidate laws curtailing abortion offend the separation of powers. This Note considers the first two propositions. Part I explores the alienability of abortion. This Part also considers the Constitution as a defender of rights, and the genesis of those rights as embodied by the Declaration of Independence. It ultimately concludes that abortion is not a right deserving the constitutional protection now required by Roe. Part II considers at what point humans obtain their unalienable rights. This Part concludes that unalienable rights attach to humans at the point of creation, and governmental protection of the right to life must begin immediately coincident therewith. Finally, this Note offers that future candidates for the Supreme Court be evaluated based upon their willingness to construe the Constitution in light of the principles set forth in the second paragraph of the Declaration of Independence, which embrace the sanctity of human life.

I. THE ALIENABILITY OF ABORTION

It is asserted that when one construes the Constitution in light of the principles enumerated in the Declaration of Independence, government may enact legislation criminalizing abortion. Historically, states have maintained statutes prohibiting abortion as part of their criminal codes. Abortion

---


23 See Roe v. Wade, 410 U.S. 113, 175 n.1 (Rehnquist, J., dissenting) (listing the 36 jurisdictions with criminal abortion laws at the time the Fourteenth Amendment was ratified by the state legislatures).
was even a crime at common law. Every exercise of governmental authority criminalizing abortion lost its effect on January 22, 1973. The majority in Roe believed the word "liberty," as it appears in the Fourteenth Amendment, extended a "constitutional right" to abortion that no government could invade, absent a compelling interest. To conclude, as this Note does, that states have constitutional authority to enforce criminal abortion laws, one must first explore the meaning of a "constitutional right."

A. The Constitution Plays the Role of Defender

The United States Constitution was designed to protect the rights of those governed by it. The Constitution does not create rights. For example, the First Amendment says, "Congress


27 See Commonwealth v. Wasson, 842 S.W.2d 487, 502 (Ky. 1992) (Combs, J., concurring) ("It is essential to understand what the Constitution is . . . . It is the instrument by which the people created a government and invested it with certain powers, directed to a specific end. The Constitution does not create any rights of, or grant any rights to, the people."); Shirley A. Wiegand & Sara Farr, Part of the Moving Stream: State Constitutional Law, Sodomy, and Beyond, 81 KY. L.J. 449, 476 (1992–93) (discussing Justice Comb's position in the Wasson case).
shall make no law . . . abridging the freedom of speech." The right to free speech was not suddenly bestowed upon people at the moment the Bill of Rights was ratified by the several states. The People obtained the right to free speech prior to the enactment of the Bill of Rights. Rather, the Bill of Rights was merely a restriction on the power of the Congress. Congress could no longer abridge the free speech rights of individuals.

Unlike the right to free speech protected by the First Amendment, no constitutional provision explicitly protects abortion. In Roe, the majority used "the concept of liberty guaranteed by the first section of the Fourteenth Amendment" to


Professor Gerber suggests that the free speech right is a natural right, though not specifically enumerated in the Declaration of Independence. Therefore, the existence of such a right would predate the limitation upon congressional power expressed in the First Amendment. See Gerber, supra note 16, at 69.


The state governments, of course, could continue to curtail free speech rights. Many state constitutions, however, were amended to restrict the power of state legislatures to abridge the free speech right. "Nine of the original thirteen states had constitutions that included free speech or free press provisions before or concurrently with the ratification of the Bill of Rights of the United States Constitution." Robert F. Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds, 63 Tex. L. Rev. 1025, 1033 n.37 (1985).

protect abortion from state criminal statutes. The relevant provision of the Due Process Clause states, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

1. Procedural Protections

Many believe the Due Process Clause was designed to guarantee that states would provide "fair adjudicatory procedures." This interpretation permits the states to enforce laws punishing people for engaging in activity proscribed under laws of that state. The Due Process Clause merely requires government to provide adequate procedures in order to alienate a person's right. Therefore, if one limits construction of the Due Process Clause to encompass only this procedural protection, states may constitutionally enforce the substance of laws banning abortion, as long as sufficient procedural safeguards protect the accused.

The thrust of the procedural aspect of due process, however, cuts both ways. Assume, once again, that "due process of law," requires adequate procedural safeguards only. Further assume, a state decides an abortion is not a criminal act. The Due Process Clause would permit an abortion, so long as the one whose right to life would be alienated, in this case the unborn child, received the benefit of "fair adjudicatory procedures."

34 U.S. CONST. amend. XIV, § 1.
37 Many take this position. For example, scholars and judges who embrace originalism, i.e., interpreting in accord with the intentions of those who ratified the provision, limit the force of the Due Process Clause in this way. "[T]he guarantee of due process ... is simply a requirement that the substance of any law be applied to a person through fair procedures by any tribunal hearing a case. The clause says nothing whatever about what the substance of the law must be." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31 (1990).
38 Monaghan, supra note 35, at 364. One might envision that a judicial hearing or administrative procedure could satisfy due process of law in this context.
THE SANCTITY OF HUMAN LIFE

If an unborn human life is not a "person" as the Fourteenth Amendment uses that term, the Due Process Clause does not require this procedural safeguard. The Fourteenth Amendment limits the protections of "due process of law" to persons. The majority in Roe held an unborn child is not a "person" for purposes of the Fourteenth Amendment. The unborn, therefore, have no standing to claim the benefits of the procedural aspects of the Due Process Clause.39

Procedural due process protections, therefore, dictate neither proscription nor permission of abortion. This reading of the Due Process Clause, however, preserves a certain level of the legislative process. It is the Legislature of a particular jurisdiction deciding whether and to what extent abortion is a crime in that jurisdiction. If one limits construction of "due process of law" to its procedural characteristics, states may satisfy its constitutional requirements if "fair adjudicatory procedures"40 accompany enforcement of the law.

2. Defending Against Substantive State Statutes

The Court in Roe, of course, did not embrace this interpretation of the Due Process Clause. To use the Due Process Clause to strike down criminal abortion laws requires construing "due process of law" as a protection against even the substance of certain state laws.41 The Court in Roe used the Due Process Clause to stand for the proposition that no matter how much process and procedural safeguards are in place, states may not enforce laws criminalizing abortion.42 The majority believed that

39 The claimant, here the unborn, is not within the class for which the Due Process Clause was designed to protect. See Roe v. Wade, 410 U.S. 113, 157 (1973).
40 Monaghan, supra note 35, at 364.
41 See Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 456–58 (1890) (expanding due process to include the substance of state statutes); Ray Forrester, Essay, The Four American Constitutions: A New Perspective, 44 HASTINGS L.J. 963, 970 (1993) (discussing the decision in Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota). "With one master stroke of constitutional misinterpretation, Justice Field and his colleagues gave the Supreme Court the power to invalidate state laws whenever it found the substance of a state law "unreasonable."" Id.
42 The plaintiff in the case, of course, did not argue that the conviction was invalid because of improper or inadequate procedure. See Roe, 410 U.S. at 129 (noting "[t]he principal thrust of appellant's attack" is that the Texas law, a substantive criminal statute, violates the 14th Amendment).
the Due Process Clause protected people from laws seeking to alienate a fundamental right. In other words, if a right is unalienable, the Due Process Clause will protect people from laws attempting to punish them for exercising that right. Assuming this construction of the Due Process Clause is proper, how do we ascertain whether a particular activity is an "unalienable right?" If it is concluded that abortion is not an unalienable right, then neither interpretation of the Due Process Clause provides constitutional authority to prohibit states from statutorily criminalizing abortion.

B. The Source of Our Rights

It has been previously mentioned that the U.S. Constitution is not a source of rights, but rather a defender of them. In order to ascertain whether activity is an unalienable right, or more particularly for purposes of this Note, whether abortion is an unalienable right; the source of our rights must be tapped.

Determining the source of our rights is critical. To protect certain activity from governmental regulation, there must be a framework for ascertainment of exactly what is protected. Without such a framework, the unalienable rights of the governed are subject to curtailment by the whim of the sovereign. American culture and history from colonial times to today, have generally recognized three sources of rights: the monarch, the Creator, and the Rationalist Model.

1. Rights from the Throne

The King was the first recognized source of rights in American history. Monarchies in general operated on the notion

---

43 See id. at 155 ("Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest’ . . . .”). The majority later wrote that protection of unborn human life is only “compelling” in the later stages of pregnancy. Id. at 162–63.

44 See Forrester, supra note 41, at 970 (discussing the Due Process Clause’s “supervisory authority”).

45 See supra Part I.A.

46 See Charles R. Kesler, Natural Law and a Limited Constitution, 4 S. Cal. Interdisc. L.J. 549, 551–54 (1995). Professor Kesler points out that under the doctrine of natural rights, it is the role of government to secure those rights. See id. This position presupposes government is able to successfully ascertain the rights for which interference is impermissible. See id.

47 See infra Parts I.B.1–3.
that the King bestowed rights upon those he governed.\textsuperscript{48} In colonial times, the English throne was no different.\textsuperscript{49} The American Revolution and the Declaration of Independence were express rejections of this approach.\textsuperscript{50}

2. Endowed by the Creator

God is the second possible source of our unalienable rights. The text of paragraph two of the Declaration of Independence indicates that all humans “are endowed by their Creator with certain unalienable rights.”\textsuperscript{51} If one interprets the “Creator” to mean “God,” then paragraph two proclaims God as the source of natural human rights. Both the text of paragraph two and the discussion above fail to identify an additional source of unalienable rights.\textsuperscript{52} God must, therefore, be the exclusive source of our unalienable rights.\textsuperscript{53} Since God is the exclusive provider,
determining whether certain human activity is an unalienable right necessarily implicates the question of whether God endowed such a right.

Pursuant to this system of natural human rights, to determine whether the Constitution protects particular activity from governmental curtailment, one must ask to what extent has God endowed us with that right. If it is determined that God provided us with an unalienable right to engage in certain activity, the Due Process Clause prohibits government from infringing upon the exercise of that right. Only God has the authority to take those rights away, "[a]nd all laws protecting such rights are, therefore, not to be tampered with by man." Where God has not bestowed an unalienable right, government may proscribe such conduct.

If one accepts God as the source of natural human rights, abortion is not "among these" unalienable rights. God has exclusive authority to interfere with the unalienable right to life because it is God who creates life. Life is one of the unalienable rights specifically enumerated in paragraph two of the Declaration of Independence. It is God who retains the power to take away such a right. Yet, an abortion results in the

---

54 See Calvin Woodard, Thoughts on the Interplay Between Morality and Law in Modern Legal Thought, 64 NOTRE DAME L. REV. 784, 787 (1989) ("Being so endowed, human beings were assumed to have a divinely-imposed duty to exercise their unique options so as to comport with God's divine plan.").

55 See supra Part I.A.


57 Id.

58 See, e.g., Griswold v. Connecticut, 381 U.S. 479, 522 (Black, J., dissenting) (indicating that the government has authority to regulate unless such regulation would implicate an unalienable right).

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

60 See, e.g., Deuteronomy 32:39 ("It is I who bring both death and life . . . ."); Job 12:10 ("In this hand is the soul of every living thing, and the life breath of all mankind."); 1 Samuel 2:8 ("The LORD puts to death and gives life . . . .").
termination of human life. Abortion is an act that takes away another human's unalienable right of life, a power that only God may rightfully exercise. It is illogical to conclude, therefore, that, on the one hand God bestows upon all humans an unalienable right to life that only God can take away; and, yet assert that God bestowed an unalienable right to terminate human life via abortion. Thus, if one accepts God as the source of human rights, abortion is not an unalienable right.

3. The Rationalist Model

If it is assumed that God is the source of natural human rights, then the sanctity of human life, the Declaration of Independence, and the Constitution can all be reconciled based upon such an assumption. The difficulty results from non-believers. Non-believers may opt-out of the reconciliation process merely by refusing to accept that God is the source of unalienable human rights. The objective, therefore, is to broaden support for the legal protection of the sanctity of human life, as envisioned by our Nation's political philosophy.

To select a different source of human rights, however, it is necessary to develop selection criteria. The previous discussion produces the first criterion: a system of determining rights not predicated upon God's existence.

The system must also produce unalienable rights that the Constitution protects. If the purpose of the Constitution is to further the principles set forth in the Declaration of Independence, then a system of human rights must comport with the political philosophy embodied in paragraph two of that

---


62 See Peter J. Cataldo, Symposium, *Religious Law: Roman Catholic, Islamic, and Jewish Treatment of Familial Issues, Including Education, Abortion, In Vitro Fertilization, Prenuptial Agreements, Contraception, and Marital Fraud*, 16 Loy. L.A. Int'l. & Comp. L.J. 9, 37 (1993) (“An act that is in itself against innocent human life is directly contrary to God's creation of that life in His own image. Thus, every innocent human life is inviolable because it has been created by God in His own image.”).

document. The second criterion, therefore, is a system of rights dovetailing with the ideology of the Declaration of Independence.

The Rationalist Model developed by Professor John Finnis,64 meets both criteria. First, the Rationalist Model does not require reference to God.65 Second, the natural law forms the basis of Finnis's system of rights.66 Similarly, natural law forms the basis for the principles set forth in the Declaration of Independence.67

Finnis bases this system of natural human rights upon practical reason.68 He asserts that there are certain basic values that are self-evident.69 One of those basic values is practical reasonableness.70 Practical reasonableness means that one lives one's life in pursuit of the basic forms of good.71 If one lives their life in a practically reasonable way, "human rights and minimal morality will result."72

Having set forth the framework of natural human rights based on reason, the question of the sanctity of unborn human life can be considered in this context. Reason governs the content of natural human rights; they are not limitless. "Reason requires that every basic value be at least respected in each and every action."73 Life is a basic value. That includes "the transmission

64 See generally JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).
65 See id. at 49 (offering "a theory of natural law without needing to advert to the question of God's existence or nature or will").
66 See Ronald R. Garet, Deposing Finnis, 4 S. CAL. INTERDISC. L.J. 605, 605–06 (1995) ("John Finnis... has developed an ambitious and attractive reformulation and restatement of the defining insights of the natural law tradition.").
67 See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("Laws of Nature").
68 See Mark R. Discher, A New Natural Law Theory as a Ground for Human Rights?, 9 KAN. J.L. & PUB. POL'Y 267, 267 (1999) ("The object of Finnis's project is to show that the liberal morality of human rights can be derived from the requirements of reason.").
69 See FINNIS, supra note 64, at 59.
70 See id. at 88.
71 See id. at 100.
72 Discher, supra note 68, at 267.
73 FINNIS, supra note 64, at 120.
of life by procreation of children." Actions failing to respect the basic value of life do not comport with the principles of practical reasonableness and are not natural human rights under the Rationalist Model.

C. Historical Understanding

Whether one accepts God or reason as a basis, neither seemingly establishes a natural human right to violate the sanctity of unborn human life. This comports with our Nation's historical understanding because "when the United States came into existence, when the Declaration of Independence was written . . . abortion was a crime against the common law in all states, as it had been for at least 500 years." Perhaps, the collective understanding is no longer a palatable public policy pursuit. In other words, what happens if we no longer care about the historical perspective on an issue of an unalienable human right?

The Declaration of Independence continues to proclaim our national political philosophy and even flourishes as collective judgments of morality change. The Declaration of Independence embodies natural law principles, and "[t]he most important element of natural law is its capacity to evolve with time as the morals of a culture change." If the set of natural human rights changes, this necessarily implicates the question of whether the Constitution exhibits similar flexibility. Two examples from American history suggest a change in our Nation's collective moral judgments requires a corresponding positive law change to the document protecting natural human rights.

The Declaration of Independence was drafted under the assumption that freedom from involuntary servitude was not an
unalienable right.\textsuperscript{77} We are certain of this because the drafter of the document, Thomas Jefferson, owned slaves.\textsuperscript{78} The Constitution established a governmental system best suited to secure the rights embraced by the Declaration of Independence.\textsuperscript{79} The Constitution was ratified under the assumption that freedom from involuntary servitude was not endowed upon all humankind; it, therefore, did not protect such a right.\textsuperscript{80} \textit{Dred Scott v. Sanford}\textsuperscript{81} reinforced the idea that the Constitution did not protect slaves' unalienable right to be free from involuntary servitude. In that case, the United States Supreme Court concluded that ownership of slaves was an unalienable right to property, which the Due Process Clause of the Fifth Amendment protected from curtailment by Congress.\textsuperscript{82} Ratification of a constitutional amendment\textsuperscript{83} was necessary to reconcile the unalienable right of freedom from involuntary servitude endowed by God to all humans, with the protections of the United States

\textsuperscript{77} See Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857), in 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 398 (Don E. Fehrenbacher ed., 1989). "Chief Justice Taney, in his opinion in the \textit{Dred Scott} case, admits that the language of the Declaration [of Independence] is broad enough to include the whole human family, but... the authors of that instrument" did not contemplate the equality of all people. Id.


\textsuperscript{79} See Michael Potemra, \textit{Born on the 4th of July}, NAT'L REV., Nov. 22, 1999, at 58 (discussing how Harry Jaffa's \textit{Storm over the Constitution} justifies the Declaration of Independence as central to American values).

\textsuperscript{80} See U.S. CONST. art. IV, § 2, cl. 3, repealed by U.S. CONST. amend. XIII.

\textsuperscript{81} 60 U.S. (19 How.) 393 (1857).

\textsuperscript{82} See U.S. CONST. amend. V ("No person shall ... be deprived of ... property, without due process of law ... ").

\textsuperscript{83} See U.S. CONST. amend. XIII, § 2 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); see also GERBER, supra note 16, at 141–42 ("The thirteenth, fourteenth, and fifteenth amendments reversed \textit{Dred Scott v. Sanford} (1857) ... ") (footnote omitted)).
Constitution. The Constitution, in its role as defender, was not equipped with the protective power to allow Congress to legislate a curtailment of slavery.

Women's suffrage was another example of an unalienable right for which our historical understanding as a Nation was wrong. At the time the Constitution was ratified, the unalienable right to vote was not protected. Reconciliation of the unalienable right to vote and the defense of this right by the United States Constitution occurred on August 18, 1920. On that date, Tennessee ratified the Nineteenth Amendment, "securing forever women's right to vote." Like slavery, only a constitutional amendment could change this improper historical assumption and equip the United States Constitution with the power necessary to protect voting rights for women.

Similarly, the United States Constitution was ratified with an implicit assumption that abortion was not an unalienable right because every jurisdiction that ratified the Constitution as supreme law of the United States also had a criminal abortion law. The Constitution, therefore, did not contemplate defending an unalienable right to abortion from governmental curtailment. Until the ratification of the Thirteenth Amendment, the Constitution did not contemplate protecting the unalienable right to be free from involuntary servitude. The same holds true for the Nineteenth Amendment and suffrage for women.

---

84 See supra Part I.A (explaining the role of the United States Constitution as defender of unalienable rights).
85 See Gerber, supra note 16, at 166. In fact, the Constitution specifically embraced slavery. See U.S. Const. art. IV, § 2, cl. 3, repealed by U.S. Const. amend. XIII.
86 See Jules Lobel, Losers, Fools & Prophets: Justice as Struggle, 80 Cornell L. Rev. 1331, 1371 (1995) ("[W]omen were citizens at the time the Constitution was ratified and ... voting in national elections was a fundamental right of such citizenship.").
88 Id. ("On August 18, 1920, Lucy Somerville watched from the gallery of the Tennessee statehouse in Nashville as Tennessee became the thirty-sixth state to approve the Nineteenth Amendment to the United States Constitution ... "); but see Heidi Gorovitz Robertson, If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and Their Role in Environmental Inequity, 45 Cath. U. L. Rev. 131, 131 n.3 (1995) (indicating full ratification by the states did not occur until August 26, 1920).
89 In fact, it seems every jurisdiction that has ever ratified the United States Constitution simultaneously maintained criminal abortion laws.
Perhaps, our national moral judgment with respect to the sanctity of human life will change in the future. Nevertheless, American history suggests vesting a national human right with constitutional protections requires a constitutional amendment.\footnote{This implicates the extent to which United States Supreme Court Justices can decide cases with the effect of a constitutional amendment. Some argue that cases, resulting in de facto constitutional amendments, are an impermissible exercise of judicial power. Roe is the victim of such criticism. See Ely, supra note 8, at 935–37 (criticizing the judicial “activism” that embodied Roe).}

The Constitution protects natural human rights from governmental curtailment. Determining those rights requires utilization of the natural law principles embodied in the Declaration of Independence. If one establishes a natural law system with rights derived from God, the sanctity of unborn human life is preserved because only God has the power to take away an unalienable right. Alternatively, if one endorses the Rationalist Model of natural rights, humans must preserve the sanctity of unborn life in the pursuit of basic forms of good.

National moral judgments may change. In what way should this metaphysics be recognized in our tripartite system? American history suggests the legislature must identify these changes and codify them.

II. THE RIGHTS OF THE UNBORN

Some argue that analyzing whether abortion is an unalienable right frames the issue too narrowly.\footnote{See Laurence H. Tribe, Abortion: The Clash of Absolutes 100–01 (1990) ("[D]efining it broadly—for example, as 'the right to make such intimate decisions as the decision whether to have a child'—makes it sound more like a right whose recognition is consistent with American tradition."); but cf. Robert J. Araujo, S.J., Abortion, Ethics, and the Common Good: Who Are We? What Do We Want? How Do We Get There?, 76 Marq. L. Rev. 701, 751 (1993) ("Ironically, many pro-abortion advocates term their movement the 'pro-choice' position. But what real choice is there in taking the narrow view that a woman has a fundamental right to an abortion; this is not a position of choice, it is rather a position of absoluteness without alternative." (emphasis added)).}

The majority in Roe agreed. They considered "[t]his right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."\footnote{Roe v. Wade, 410 U.S. 113, 153 (1973) (emphasis added).} The majority suggests, therefore, that choosing an abortion is an exercise of
the unalienable right of liberty that is protected from state criminalization by the Due Process Clause of the Fourteenth Amendment. For purposes of this Part, assume that abortion is a valid exercise of an unalienable right. The valid assertion of an unalienable right leads to the important question of whether the exercise of that unalienable right adversely impacts the unalienable rights of another human.

There are two possible answers to that inquiry. One possibility is that abortion does not implicate the unalienable rights of another human. If it does not, one can conclude that abortion is truly a privacy decision. By privacy, it is supposed that a decision to exercise a right does not adversely affect someone else. Alternatively, abortion may take away the natural human right to life of an unborn child. The privacy rationale disappears if abortion jeopardizes the unalienable right to life. This Part contends that the natural right to life attaches at conception. Then, the question becomes whether the unalienable right to liberty allows one to end another’s life. This Part asserts both that the exercise of liberty, in the form of abortion, impermissibly curtails another individual’s right to life; and this “clash” between life and liberty must be resolved in favor of the unalienable right to life. This Part concludes with a discussion of alternatives to reconcile these principles with constitutional protections.

A. An Unalienable Right to Life

Paragraph two of the Declaration of Independence says that all “Men” meaning, individual humans, have an unalienable right to life. The language of paragraph two indicates that the

---

93 See Merriam Webster’s Collegiate Dictionary 927 (10th ed. 1993) (defining “private” as “belonging to or concerning an individual . . . ”).
94 Cf. Tribe, supra note 91, at 230 (explaining the conflict between both apparent absolute rights).
95 See Merriam Webster’s Collegiate Dictionary 705 (10th ed. 1993) (defining “man” as an individual person); see also Faustine C. Jones-Wilson, The Constitution and Universal Education: What Might Have Been, 30 How. L.J. 1103, 1103 (1987) (“‘Man,’ in this most basic document, I would have argued, means mankind, the human race . . . ”); Michel Rosenfeld, The Identity of the Constitutional Subject, 16 Cardozo L. Rev. 1049, 1054 (1995) (“‘All ‘men’—meaning all ‘human beings’—are created equal . . . .”).
96 The Declaration of Independence para. 2 (U.S. 1776) (“‘All Men . . . are endowed . . . with certain unalienable Rights, that among these are Life . . . .”).
unalienable rights of one “Man” are “equal” to the unalienable rights of everyone else. If everyone’s unalienable rights are equally important, we are left to address when a human accrues his or her unalienable rights. A textual analysis of paragraph two leads to three possibilities. First, unalienable rights attach when human life is “created.” If the unborn are “created,” an unalienable right to life necessarily accrues. A second possibility is that “all Men” have the unalienable right to life. This textual construction implicates the question of whether the unborn are “Men.” Third, these two constructions are functionally equivalent. Each calls for a determination of the point at which unalienable rights attach. This Note embraces the third possibility, and asserts that the ideals of paragraph two are best understood as extending unalienable rights to the unborn. This Note advocates the third possibility because the concern surrounds the question of when humans obtain their unalienable rights, not whether or at what point in time, human life has its biological genesis. In addition, the mere words “all Men are created equal” appear to suppose that “Men” are “created.” In other words, it seems, therefore, at the point of “creation,” “Man” enters existence.

A reading of paragraph two suggests that the unalienable right to life attaches to anyone that is “created.” Use of this language seems to lead one to conclude that the right to life accrues at conception, not birth. This position enjoys wide support from religious, governmental, and scholarly sources.

Various religious and secular entities indicate that human life is “created” before that life is born. More specifically, human life is “created” at conception. For example, the Roman Catholic position is that life begins at conception. States, such as Missouri, have concluded that “[t]he life of each human being begins at conception.”

97 See id. (“[A]ll men are created equal . . . .” (emphasis added)).
98 See EVANGELIUM VITAE § 97 (Mar. 25, 1995) (discussing the “value of life from its very origins” (emphasis in original)); VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 955 (Austin Flannery, O.P., ed. 1992) (“God, the Lord of life, has entrusted to men the noble mission of safeguarding life, and men must carry it out in a manner worthy of themselves. Life must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes.”).
Some who study the political philosophy of the Declaration of Independence, however, disagree. For example, Professor Scott Douglas Gerber takes the position that the “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.”

Does Professor Gerber ask the right question? In other words, is the Declaration of Independence announcing a right to life for those to whom life has begun, or does it protect life for those who are created? This distinction is more than mere semantics. Someone could be “created” and thereby have the full range of unalienable rights, but not have life, at least in a biological sense.

The story of creation in the Book of Genesis illustrates that a human can be “created,” but does exhibit biological “life.” One may interpret the story of God’s creation of the universe, as a construction of both space and time. God clearly made the universe during that six-day period. One could infer that God also created a vision of time, from the beginning of time through eternity. If that creation of time included all the future inhabitants of the universe, one could conclude every human life to inhabit this universe was envisioned by God, or created during that six-day period. This example merely illustrates the possibility that whether one is “created” and whether one has exhibited a certain set of biological characteristics, can be two different questions.

Not all scholars agree with the “conundrum position” embraced by Professor Gerber. For example, Lewis Lehrman asserts that the Declaration of Independence provides an unalienable right to life for the unborn. In his influential work, Mr. Lehrman supports the position that unalienable rights are associated with life, rather than creation.

---

100 GERBER, supra note 16, at 182.
101 See generally Genesis 1 & 2.
102 See id. at 2:4 (“Such is the story of the heavens and the earth and their creation.”).
103 See id. at 2:2 (“Since on the seventh day God was finished with the work he had been doing, he rested on the seventh day . . . .”).
105 See Lewis E. Lehrman, The Declaration of Independence and the Right to Life, AM. SPECTATOR, Apr. 1987, at 21, 23 (“Are we finally to suppose that the right to life of the child-about-to-be-born . . . may be lawfully eviscerated . . . ?”).
106 See, e.g., MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL
rights attach to humans upon their conception. He summarizes his position by asking the following rhetorical question: "[I]s it to be maintained that human life 'endowed by the Creator' commences in the second or third trimester and not at the very beginning of the child-in-the-womb?"

Defining creation as the point of conception has support from the text of paragraph two of the Declaration of Independence, religious sources, codification of public policy, and even constitutional theorists such as Lewis Lehrman. Critics of the protections for the unborn can nevertheless refuse to accept such a position. One ground upon which to opt-out is based on notions that a human life is not created until it is born. The difficulty with this position is that it does not reflect the spirit of the political philosophy of our Nation as embodied in paragraph two. It is submitted that the words "created equal" should be considered in a metaphysical, not a biological, sense.

Paragraph two is best understood by taking the philosophical approach embraced by Lewis Lehrman. The purpose of paragraph two is to provide a statement of the political philosophy of the United States. In addition, it announces our shared beliefs, such as the composition and source of our rights. As previously discussed, God provides humans

---

The text includes a note citation:

107 See supra note 105.
108 Lehrman, supra note 105, at 23.
109 See GERBER, supra note 16, at 22 ("The [second paragraph] addresses issues of political philosophy.").
110 See id.
111 See, e.g., Patricia M. Wald, Judge Arnold and Individual Rights, 78 MINN. L. REV. 35, 58 (1993) ("The source of rights was not the State, but, as the Declaration of Independence put it, the 'Creator.'") (internal quotations and citation omitted)).
with their unalienable rights.\textsuperscript{112} If God gives humans their unalienable rights, it is God who determines \textit{when} to bestow those rights and when to take them away.\textsuperscript{113} Fashioning law to give effect to God's will is not a biological exercise.\textsuperscript{114}

How does one deal with the question of the right to life for the unborn under the Rationalist Model? Professor Finnis outlines certain "absolute human rights."\textsuperscript{115} Humans, in order to pursue the basic good, must act with practical reasonableness. Finnis says "it is always unreasonable to choose directly against any basic value, whether in oneself or in one's fellow human beings."\textsuperscript{116} A question still remains as to when the natural human right to life attaches under the Rationalist Model. Finnis seemingly asserts that the natural right to life begins upon conception because he describes the basic value of life to include "every aspect of the vitality." This suggests that since one \textit{aspect} of life is its unborn form, that there is a natural right to life under the Rationalist Model.

B. \textit{The Right to Liberty and the Right to Life}

A stand-off exists between the unalienable right to life for the unborn and the broad notion of liberty fashioned by \textit{Roe}. Under such circumstances, the right to life must prevail; the exercise of all other natural human rights presupposes the

\begin{footnotesize}
\begin{enumerate}
\item See supra Part I.B.2.
\item See Casey, supra note 56, at 823 (indicating that only God has the rightful authority to take away any of our unalienable rights); see also \textit{Evangelium Vitae}, supra note 98, § 39 ("Human life and death are thus in the hands of God.").
\item See Robert P. George, \textit{One Hundred Years of Legal Philosophy}, 74 \textit{Notre Dame L. Rev.} 1533, 1548 (1999) ("Positive law is a human creation—a cultural artifact—though it is largely created for moral purposes, for the sake of justice and the common good.").
\item For it is not those who hear the law who are just in the sight of God; rather, those who observe the law will be justified. For when the Gentiles who do not have the law by nature observe the prescriptions of the law, they are a law for themselves even though they do not have the law. They show that the demands of the law \textit{are written in their hearts} . . . .
\end{enumerate}
\end{footnotesize}

\textit{Romans} 2:13–15 (emphasis added).

\textsuperscript{115} \textit{Finnis}, supra note 64, at Part VIII.7 ("So we too need not hesitate to say that, notwithstanding the substantial consensus to the contrary, there are absolute human rights.").

\textsuperscript{116} \textit{Id.} at 225.
existence of a life in favor of whom the right is exercised.\textsuperscript{117} Again, Lehrman emphasizes this conclusion with a rhetorical question: "May it be reasonably supposed that an expressly stipulated right to life, as set forth in the Declaration [of Independence] and the Constitution, is to be set aside in favor of the conjured right to abortion in \textit{Roe v. Wade}...?\textsuperscript{118}

\textbf{C. Constitutionally Defending the Right to Life}

\textit{Roe} never addressed the question of the unalienable right to life of the unborn.\textsuperscript{119} Yet, the majority determined that an unborn child does not have rights protected under the Fourteenth Amendment because an unborn child is not a "person" for purposes of the Due Process Clause.\textsuperscript{120} This position makes the question of the right to life of the unborn irrelevant. Even though paragraph two of the Declaration of Independence bestows an unalienable right to life upon the unborn, \textit{Roe} suggested that the Fourteenth Amendment does not defend that right because an unborn child is not a "person."

The majority in \textit{Roe} reviewed all instances in the Constitution where the word "person" appears.\textsuperscript{121} They concluded that "[n]one indicates, with any assurance, that [the word person] has any possible pre-natal application."\textsuperscript{122} This position has suffered from substantial criticism, relating to the intent of the state legislators that ratified what would become the Fourteenth Amendment.\textsuperscript{123}

\textsuperscript{117} \textit{See Gerber, supra} note 16, at 182 (assuming that the Declaration of Independence would resolve this dispute in favor of the right to life).

\textsuperscript{118} Lehrman, \textit{supra} note 105, at 23.

\textsuperscript{119} \textit{See Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins.").}

\textsuperscript{120} \textit{See id.} at 158 ("[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.").

\textsuperscript{121} \textit{See id.} at 157–58.

\textsuperscript{122} \textit{Id.} at 157.

\textsuperscript{123} \textit{See Ely, supra} note 8, at 925–26 (identifying the argument in \textit{Roe} that the word "person," as it appears in other parts of the Constitution, refers to "postnatal" beings and the legislators intended to transfer that identical meaning to the 14th Amendment); Wardle, \textit{supra} note 3, at 866–67 (arguing that states were enacting criminal abortion statutes contemporaneous with Fourteenth Amendment ratification); Robert A. Destro, Comment, \textit{Abortion and the Constitution: The Need for a Life-Protective Amendment}, 63 \textit{Cal. L. Rev.} 1250, 1290 (1975) ("There is no evidence that the authors intended to exclude the unborn... ").
Many states responded to concerns expressed by the American Medical Association (AMA). The AMA proposed "a resolution recommending that abortion be prohibited during every stage of gestation, except when necessary to save the life of the mother." Many states adopted this recommendation and enacted legislation more strict than common law. At the same time, these same legislators were ratifying the words that would become the Fourteenth Amendment to the United States Constitution—the same amendment that, a century later, would be the tool used by the United States Supreme Court to invalidate these same criminal abortion statutes.

While an unborn child may not be a "person" for purposes of the Fourteenth Amendment, it appears unlikely that the state legislatures intended to exclude the unborn from the Fourteenth Amendment. Nevertheless, one can easily conclude that the legislatures did not intend to ratify an amendment that would nullify their newly enacted criminal abortion statutes. Based upon this analysis of legislative intent, it seems that the criticism of the majority in Roe is proper.

Where does this leave the unalienable right to life of the unborn? The Fourteenth Amendment, as construed by Roe, does not protect this unalienable right, even though the ratifying legislatures seemingly intended for criminal abortion statutes to protect the unborn. Two potential solutions exist for this dilemma.

---

124 See Wardle, supra note 3, at 866–67 ("Between 1849 and 1875,... 14 [states] enacted statutes that substantially complied with the... 1859 AMA resolution....") (quoting Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong. 5–30 (1976) (testimony of Professor Joseph P. Witherspoon)).

125 Id. at 866.

126 See id. at 867 (identifying "the campaign to extend greater protection of anti-abortion laws").

127 See id. at 866–67 ("Thus, it is one of the coincidences of history that the same state legislatures that amended abortion laws to extend the prohibition of abortion in order to protect the right to life of the unborn throughout pregnancy also considered and ratified the Fourteenth Amendment....").

128 If someone is a "person" for purposes of the Fourteenth Amendment, state murder statutes protect their unalienable right to life. The unborn could then claim equal protection of the murder laws. See TRIBE, supra note 91, at 115 ("[I]f a state legislature [thereafter allows] abortion, it is... denying to the fetus the equal protection of the state's murder laws.").
First, the United States Supreme Court could construe the Due Process Clause of both the Fifth and Fourteenth Amendments as a protection of the unalienable rights expressed in paragraph two of the Declaration of Independence from federal and state curtailment. This requires selection and confirmation of Justices committed to a construction of the United States Constitution consistent with the principles embodied in paragraph two of the Declaration of Independence. Commentators often refer to this as "natural rights" jurisprudence. Some of that attention, however, was an attempt by Thomas in his confirmation hearings "to distance himself from his previously articulated theory that the Constitution should be read in light of the political philosophy of the Declaration of Independence."

The purpose of the United States Constitution is to advance the principles of the Declaration of Independence. It would seem that United States Supreme Court Justices should interpret that document in accordance with "the natural-rights principles of the Declaration of Independence." The nomination and confirmation process should, therefore, embrace, not scorn, constitutional construction that gives effect to paragraph two of the Declaration of Independence.

Second, a constitutional amendment could help preserve the right to life for the unborn. For example, Senator Orrin Hatch supports the Human Life Amendment (HLA). It states "[t]he right to abortion is not secured by this Constitution. The Congress and the several states have the concurrent power to

---

129 See, e.g., GERBER, supra note 16, at 9 n.† (discussing the "natural-rights principles underlying" the words of the Constitution).
130 GERBER, supra note 106, at 38.
131 See supra note 15.
132 GERBER, supra note 16, at 15.
133 The purpose of the United States Constitution is to advance the principles of the Declaration of Independence. It makes sense that United States Supreme Court Justices interpret that document in accordance with such a purpose.
restrict and prohibit abortions; provided that the law of a state more restrictive than the law of Congress shall govern.\textsuperscript{135} All constitutional amendments are difficult to ratify, but one dealing with abortion would no doubt be a tall order. Yet, ratification of an amendment similar to the HLA is not such an absurd fantasy. More and more Americans overtly acknowledge the right to life of the unborn.\textsuperscript{136} For example, "[a] Gallup-CNN-USA Today poll [in 1999] found that 48 percent of U.S. residents considered themselves ‘pro-choice,’ down from 53 percent in 1996. The percentage who considered themselves ‘pro-life’ had risen from 36 percent to 42 percent in the same time."\textsuperscript{137} Acknowledgement of the right to life for the unborn necessarily supposes support for protecting that right from alienation by abortion.

A constitutional amendment would go a long way to preserve the right to life for the unborn. Yet, that amendment would not require that the Due Process Clause be construed to protect the unalienable rights bestowed by God. The HLA is a double-edged sword. On one hand, it may preserve human life and diminish the “culture of death.”\textsuperscript{138} On the other hand, one may consider the HLA a tacit approval of the construction of the Due Process Clause that has produced \textit{Roe} and \textit{Dred Scott}. Continued construction of the Due Process Clause in that manner jeopardizes the sanctity of human life in areas such as the death penalty, physician-assisted suicide, euthanasia, and infanticide.\textsuperscript{139}

\textsuperscript{135} Forsythe, \textit{supra} note 134, at 44 (quoting Sen. Orrin Hatch).

\textsuperscript{136} In other words, “[t]here’s a growing understanding that what’s destroyed in abortion is human and alive.” Carl Weisser, \textit{2000 Holds Pivotal for 27-Year Abortion Battle}, \textit{Des Moines Register} (Iowa), Jan. 23, 2000, at 10 (discussing the significance of the abortion debate in the year 2000).

\textsuperscript{137} \textit{Id.} A more recent Los Angeles Times poll agrees. In fact, “43% of current survey respondents express support for \textit{Roe}, compared with 56% in 1991.” Alissa J. Rubin, \textit{Americans Narrowing Support for Abortion}, L.A. TIMES, June 18, 2000, at A1. The poll also produced evidence that women support bans on abortion to a greater degree than men. For example, “72% [of women] believe second-trimester abortions should be illegal, compared with 58% of men.” \textit{Id.}

\textsuperscript{138} See \textit{Evangelium Vitae}, \textit{supra} note 98, § 95 (“In our present social context, marked by a dramatic struggle between the ‘culture of life’ and the ‘culture of death,’ there is need to \textit{develop a deep critical sense}, capable of discerning true values and authentic needs.”).

\textsuperscript{139} \textit{Cf. id.} §§ 3–4 (discussing “the extraordinary increase and gravity of threats to the life of individuals and peoples, especially where life is weak and defenceless.”).
CONCLUSION

The principles and spirit of paragraph two of the Declaration of Independence indicate that God bestowed an unalienable right to life upon all humans at creation. The purpose of the United States Constitution is to protect the political philosophy announced in paragraph two. This protection afforded by the Constitution is not self-executing, however. The set of unalienable rights for which the Constitution acts as defender originally included those rights the Framers believed were embodied in paragraph two. Later, it was understood that their notion of unalienable rights was underinclusive. This Nation incorporated this expansion of rights into constitutional protections via amendments, such as the Thirteenth and Nineteenth Amendments. One day, our collective conscience may acknowledge that the Constitution defends the unalienable right to life for all humans from the point of creation, in accordance with practical reasonableness and the will of God and the understanding of the Framers. Each human life is created equal. This proposition takes two forms. The collective natural right to life existed at the moment of human creation, whether one supports the underlying narrative of that instant in anthropological terms or through biblical references. An individual natural right to life accrues at creation. Sentient beings are created in unborn form; for humans, it is the moment of conception.

A construction of the United States Constitution that does not acknowledge the possibility of positive law to adequately secure the rights of the unborn, jeopardizes both the societal consciousness of a coherent system of natural human rights, as well as the promise of self-government. Favorable reconciliation of the sanctity of human life, the Declaration of Independence, and the Constitution is an objective worthy of our national political and jurisprudential discourse.

140 Cf. Jeremiah 31:31 ("The days are coming, says the LORD, when I will make a new covenant." (emphasis added)).