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COMMENT

PERSONHOOD AND THE CONSTITUTIONAL PURITAN COVENANT: CAN THE FEDERAL GOVERNMENT DICTATE STATE CONSTITUTIONAL DEFINITIONS?

Paul M. Brodersen[†]

I. INTRODUCTION

The theological premise of Christianity is that man is made in the image of an almighty God, that we are fearfully and wonderfully made, and that we were knit together in our mother's womb. This theological premise reemphasizes a simple yet profound philosophical idea—that which is observable, namely life, can never be held less important or of less value than that which is unobservable, namely the value of nonexistence.¹ In general, when weighing the value of life against the value of nonexistence, life should prevail; and in some instances, the Supreme Court agrees.² The idea that human life has intrinsic value is not foreign to the foundation of American constitutional jurisprudence.³ Indeed, inalienable rights were

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1. *Kassama v. Magat*, 792 A.2d 1102, 1122 (Md. App. 2002) (“measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals”) (quoting *Berman v. Allan*, 404 A.2d 8 (N.J. 1979)).

2. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (“[O]ur decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to legitimate government interests This requirement is unquestionably met here.”) (citations omitted).

3. See U.S. CONST. amend. V (providing that persons shall not be “deprived of life, liberty, or property, without due process of law”); see also U.S. CONST. amend. XIV, § 1 (guaranteeing that states shall not “deprive any person of life, liberty, or property, without due process of law”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold

enumerated at the dawn of America.⁴ The fact that the legal recognizance or respect of some inalienable rights has deteriorated demonstrates the need for a national personhood amendment and similar state amendments that recognize the pre-existing and inalienable right to life. Such a standard would set forth a principled position regarding the protection of human life at all stages of biological development.

The Preamble to the United States Constitution identifies a primary purpose to “secure the Blessings of Liberty to ourselves and our Posterity.”⁵ Ideally, the Constitution would be interpreted as the Puritan Covenant it was intended to be.⁶ Early American colonization is replete with references to the importance of the divine covenants that communities would make between each other and with their God.⁷ Indeed, “[w]ithout some understanding of Puritanism, it may safely be said, there is no understanding of America.”⁸

This Comment posits that higher principles of law, namely, certain inalienable⁹ rights, govern the Great American Puritan Covenant, otherwise

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.”).

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

5. U.S. CONST. pmb.

6. It is necessary here to briefly define what is meant by a Puritan Covenant. The foundation of American constitutionalism dates back as early as 1578 when Sir Humphrey Gilbert chartered under the Letters Patent, which “required that the colonists pledge loyalty to the Crown, but left the design for local government to the settlers, so long as local law was not contrary to the laws of England.” Don S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21, 23 (1990). Additionally, the Protestants took with them the model of church covenants wherever they went, and the same model is seen in the Mayflower Compact of 1620. *Id.* “To the Puritans, the social covenant was a human need and, above all, a divine destiny. God had called them to build His society and carry out His plan of salvation in the New World.” Fernando Rey Martinez, *The Religious Character of the American Constitution: Puritanism and Constitutionalism in the United States*, 12 KAN. J.L. & PUB. POL’Y 459, 468 (2002-2003).

7. See Martinez, *supra* note 6, at 468-70; Lutz, *supra* note 6, at 24.

8. PERRY MILLER & THOMAS H. JOHNSON, *THE PURITANS: A SOURCEBOOK OF THEIR WRITINGS* 1 (2001).

9. The terms “inalienable” and “unalienable” can be used interchangeably, as both carry the same meaning. Thomas Kindig, *Unalienable/Inalienable*, USHISTORY.ORG, <http://www.ushistory.org/declaration/unalienable.htm> (last visited Feb. 10, 2012). Nevertheless, it is generally preferable in modern English writing to use inalienable except when directly citing the Declaration of Independence. See BRYAN A. GARNER, *GARNER’S MODERN AMERICAN USAGE* 451 (3d ed. 2009). Inalienable will thus be used in this Comment.

known as the Constitution. Moreover, the inalienable rights expressed in the country's articles of incorporation¹⁰ are exactly what they claim to be—inalienable. The recognition of inalienable rights is merely enumerating, or perhaps more accurately, remembering or distinguishing something that already exists and that has been forgotten through judicial action.¹¹ Section II of this Comment provides a background on the importance of defining the term *person* in various constitutional texts. Section III describes the problems prevalent when the term *person* is defined inaccurately or exclusive of certain human beings. Finally, Section IV describes the solution of enumerating the existing inalienable right to life in state constitutions and the federal Constitution. Additionally, Section IV outlines why this avenue is constitutionally feasible with recent Supreme Court precedent upholding the principle of federalism. This Comment discusses how various failures by the Supreme Court to define personhood have ended disastrously¹² and explains why a personhood amendment, both a federal amendment and similar state amendments, is foreseeable and necessary. Finally, this Comment provides a review of prominent American historical records and reveals why the confusion in case precedent on the issue of life necessitates the need for a clear, enumerated explanation of the inalienable right to life for all humans.

10. The relationship between the Declaration of Independence and the Constitution can best be described as analogous to a corporation's Articles of Incorporation and its By-Laws. DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 247 (4th ed. 2005). The Articles call the corporation into existence and the By-Laws explain how to govern the corporation. The Articles are not replaced by the corporation's By-Laws, but they are guided by them. Likewise, the Declaration of Independence called America into existence, and the Constitution explains how to govern America. The Declaration has never been regarded as replaced or disannulled. Samuel Adams stated that "[b]efore the formation of this Constitution . . . [t]his Declaration of Independence was received and ratified by all the States in the Union, and has never been disannulled." 4 SAMUEL ADAMS, THE WRITINGS OF SAMUEL ADAMS 357 (New York: G. P. Putnam's Sons 1908) (1794).

11. Speaking of two different decisions resulting in judicial legislation, "each represents an act of judicial aggrandizement: a transfer of power to judges from the political branches of government—and thus, ultimately, from the people themselves." J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009).

12. See *Stenberg v. Carhart*, 530 U.S. 914, 918 (2000) (permitting the killing of unborn children moments before birth); see also *Buck v. Bell*, 274 U.S. 200, 205-07 (1927) (permitting the sterilization of what the State considered "feeble minded" persons, thereby implying the status of such individuals is somewhat less than a full person with constitutional rights); see also C. Ann Potter, *Will the "Right to Die" Become a License to Kill? The Growth of Euthanasia in America*, 19 J. LEGIS. 31, 47 (1993) (comparing Euthanasia to Nazi Germany).

Perhaps a state or federal constitutional amendment will challenge the Supreme Court to reevaluate its disrespect of higher principles of law held inalienable by our Founding Fathers. A Supreme Court decision on a state or federal personhood constitutional amendment could answer the question whether nine unelected Justices employed by the federal government can dictate state constitutional definitions, and more specifically, whether the United States Supreme Court is willing to recognize the inalienable right to life without drawing ambiguous lines as to where life begins. The biological science is clear on when life begins, and the law should also be clear on the starting point of the only inalienable right that no American can live without—life.¹³

II. BACKGROUND

The definition of personhood is paramount in legal dialogue regarding constitutional law and jurisprudence specifically regarding the sanctity of life.¹⁴ Several attempts to define personhood pervade history¹⁵ and continue to this very day.¹⁶

13. 42 AM. JUR. 2D *Infants* § 3 (2011).

[B]iologically speaking, the life of a human being begins at the moment of conception in the mother's womb, and as a general rule of construction in law, a legal personality is imputed to an unborn child for all purposes which are beneficial to the infant after his or her birth. Under this view, viability does not affect the legal existence of the unborn, and it would be a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development.

Id.

14. See Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 ISSUES L. & MED. 185, 187-91 (2010); Potter, *supra* note 12, at 46-47; Gregory J. Roden, *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 ST. THOMAS L. REV. 207, 270 (2003).

15. See generally Raymond B. Marcin, *God's Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of Roe*, 25 J. CONTEMP. HEALTH L. & POL'Y 38 (2008) (arguing that defining personhood must be accomplished through legal positivism); Esther Zimmerman, *Legal Rights of Unborn Children Injured in the Workplace*, 11 J. JUV. L. 88, 89 (1990) (noting the majority rule that a viable fetus "may maintain a separate civil action for personal injury"); *The Fetus as a Legal Entity-Facing Reality*, 8 SAN DIEGO L. REV. 126, 126 (1970).

16. *Hughes v. Hosemann*, No. 251-10-546 (Cir. Ct. 1st Jud. Dist. Hinds Cnty., Miss. Oct. 26, 2010) (denying the plaintiffs' motion to prevent an Initiative that attempted to define the term *person* in the Mississippi State Constitution from being delivered to the legislature for placement on the election ballot); Complaint, *Hughes v. Hosemann*, No. 251-10-546 (Cir. Ct. 1st Jud. Dist. Hinds Cnty. Miss. July 6, 2010) (initiating suit by the ACLU and Planned

References throughout the founding documents to the Laws of Nature and of Nature's God provide a legal foundation for the American experiment.¹⁷ Along with the right to liberty, property, and the pursuit of happiness, the Constitution and the Declaration of Independence enumerate a fundamental and inalienable right that no human can live without—the right to life for all persons.¹⁸ Therefore, defining the term *person* in the Constitution for purposes of legal rights is essential for the sole purpose of reiterating the inalienable right to life that pre-existed the Constitution.

A. *Defining Personhood in the Constitutional Covenant*

The purpose stated in the Preamble of the Constitution is to “secure the blessings of Liberty to ourselves and our Posterity.”¹⁹ Posterity, however, is not defined in the Constitution, and the persons to whom the term posterity pertains is of the utmost importance. Since the Constitution and the Declaration of Independence are the nation's founding documents, both should be examined before attempting to define personhood.

The Declaration uses the term *people* ten times relating to several rights and grievances.²⁰ Additionally, the Constitution references the terms *person* or *persons* forty-nine separate times.²¹ Defining a term correctly when referencing it continually throughout the supreme law of the land is critical.²² Only two conclusions logically follow from the absence of a specific definition of person in the Constitution—either the founding fathers believed the term had already been defined, either explicitly or implicitly, or they thought an enumerated definition was unnecessary. Each possible conclusion is addressed in turn.

Parenthood attempting to prevent the Mississippi Personhood initiative from being placed on the ballot).

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

18. U.S. CONST. amend. V, XIV, § 1; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

19. U.S. CONST. pmb. l.

20. THE DECLARATION OF INDEPENDENCE paras. 1, 2, 5 (twice), 7, 8, 12, 26, 30, 32 (U.S. 1776).

21. U.S. CONST. art. I, §§ 2, 3, 6, 7, 9, art. II, § 1, art. III, § 3, art. IV, § 2, amends. IV, V, XII, XIV, XX, XXII.

22. *Id.*

1. The definition of a constitutional person already exists and simply needs further clarification through enumeration.

Several references in the founding documents refer to certain inalienable rights and several enumerated rights, but little attention is directed to whom those rights pertain.²³ Such references in the nation's founding documents, like the Declaration of Independence, could substantiate the claim that beneficiaries of these rights need only satisfy the requirement of being a human being.²⁴ One scholar²⁵ remarks that

the rights were invested in human beings as a class, so that no one who satisfied the criterion "human" was to be excluded from having the rights and having them secured by government. Conversely, those beings in the world such as animals and plants did not share this unique and high status of rights, or protection of rights.²⁶

The numerous references to the terms person, persons, or people throughout the Declaration and the Constitution must refer to humanity. The Declaration states that "all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."²⁷ Therefore, expanding the term *human* to include *men, person, or persons* is a reasonable inference.²⁸

23. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. I-X.

24. H. Wayne House, *Influence of the Natural Law Theology of the Declaration of Independence on the Establishment of Personhood in the United States Constitution*, 2 LIBERTY U. L. REV. 725, 729 (2008).

25. *Id.* at 725. H. Wayne House is a distinguished research Professor of Biblical and Theological Studies at Faith Evangelical Seminary (Tacoma, WA) and Adjunct Professor of Law at Trinity Law School of Trinity International University. He is the New Testament editor of the Nelson Study Bible and Nelson Illustrated Bible Commentary and the General Editor of Evangelical Exegetical Commentary, has received a Certificate in International Human Rights, Institut International des Droits de l'Homme, Strasbourg, France; J.D., Regent University School of Law; Th.D., Concordia Seminary; M.A., Abilene Christian University; M.A., M.Div., Western Conservative Baptist Seminary; B.A. Hardin-Simmons University.

26. *Id.* at 729.

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

28. Another issue to consider is the order of importance of the inalienable rights mentioned. Perhaps listing these rights was specific and intentional. Indeed, one's pursuit of happiness should never override another's liberty, and one's claim to liberty should never override another's inalienable right to exist—the right to life.

The Constitution establishes a protection of the rights that the Declaration defines as inalienable in the Preamble,²⁹ the Fifth Amendment,³⁰ and the Fourteenth Amendment to the Constitution.³¹ The founding fathers may have believed the terms person or persons to be implicitly defined by several references to the inalienable right to life and the Constitution's purpose to "secure the Blessings of Liberty to ourselves and our Posterity."³² Black's Law Dictionary defines posterity as "[f]uture generations collectively . . . [or] . . . [a]ll the descendants of a person to the furthest generation."³³ If posterity includes all generations of people, and the Declaration and the Constitution set out an inalienable and fundamental right to life, then perhaps the constitutionally protected persons were positively identified as the future generations of unborn persons since the beginning of the country. Even if this is the case—that constitutional jurisprudence has forgotten that the right to life is inalienable—perhaps enumerating the existing inalienable right to life is precisely the reminder America needs.

2. An enumerated definition of "person" should not be necessary, except to correct incorrect interpretations of the covenant.

Alternatively, it is possible that an enumerated definition of personhood was not deemed necessary due to the obvious nature of the inalienable right to exist. An inalienable right to life, liberty, and the pursuit of happiness applies to all constitutional persons. Scientifically, a person is a human being from the beginning of biological development until natural death.³⁴

29. U.S. CONST. pmb. (stating the purpose is to "secure the Blessings of Liberty to ourselves and our *Posterity*") (emphasis added).

30. U.S. CONST. amend. V (stating, "nor [shall any person] be deprived of life, liberty, or property, without due process of law").

31. U.S. CONST. amend. XIV, § 1 (stating, "nor shall any State deprive any person of life, liberty, or property, without due process of law").

32. U.S. CONST. pmb.

33. BLACK'S LAW DICTIONARY 1285 (9th ed. 2009) (defining "posterity").

34. 42 AM. JUR. 2D *Infants* § 3 (2011).

[B]iologically speaking, the life of a human being begins at the moment of conception in the mother's womb, and as a general rule of construction in law, a legal personality is imputed to an unborn child for all purposes which are beneficial to the infant after his or her birth. Under this view, viability does not affect the legal existence of the unborn, and it would be a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development.

Thus, defining the term *person* or *persons* could be considered restating the obvious.³⁵ It was not until this inalienable right was threatened by various United States Supreme Court decisions that the need arose to make known the existing definition of person.³⁶ Several state initiatives, bills, referenda, and the national Personhood Amendment movement are attempts to reiterate an inalienable right that pre-existed the Constitution.³⁷

3. Personhood initiatives and state constitutions as a source of rights

Several movements to amend state constitutions to define personhood are prevalent throughout the United States.³⁸ “There is a powerful educational component to the Personhood Amendment . . . [such an amendment] would present the opportunity to expose the truth about the unborn child . . . not only [for] thousands who have assisted in the procedure, but [to] all conscientious Americans.”³⁹ The idea behind these state initiatives is that if enough state amendments pass, growing support to pass a national amendment to reiterate the inalienable right to life may prevail.⁴⁰

Id.; see also Jed Rubenfeld, *On the Legal Status of the Proposition that Life Begins at Conception*, 43 STAN. L. REV. 599, 599 n.1 (1991).

35. This author asserts that it is very important to emphasize that such an amendment would not create a right to life, but merely reiterate a pre-existing inalienable right thwarted by misinterpretation. Legal positivism and inalienable rights are mutually exclusive. Indeed, if rights like life and liberty are truly inalienable, one cannot create such rights through legal positivism. If these rights are inalienable, it does not matter whether society ignored their existence. By nature, an inalienable right pre-exists any attempt to create or define that right through legislation or the amendment process. Recognizing an inalienable right that has been ignored is different than attempting to create a right through legal positivism.

36. In *Roe v. Wade*, 410 U.S. 113, 156-57 (1973), Justice Blackmun referenced the Fourteenth Amendment regarding abortion and noted that if the unborn child has due process rights, then the “appellant’s case, of course, collapses.”

37. See *Federal Human Personhood Amendment*, AMERICAN LIFE LEAGUE, [http://www.all.org/upload/2010/03/08/FHPA\(final\).pdf](http://www.all.org/upload/2010/03/08/FHPA(final).pdf) (last visited Feb. 23, 2012); S.B. 335 (Ala. 2010); S.B. 2795 (Miss. 2007); Constitutional Initiative 26 (Miss. 2010); Constitutional Initiative 100 (Mont. 2008); S.B. 406, 61st Leg. (Mont. 2009); Constitutional Initiative 102 (Mont. 2010); H.R. 3213, 116th Leg. (S.C. 2006); H.R. 3526, 118th Leg. (S.C. 2010); Referendum 6 (S.D. 2006); Initiative Measure 11 (S.D. 2008).

38. See referenda and legislation cited *supra* note 37.

39. Memorandum from Liberty Counsel 10 (2009), available at http://lc.org/media/9980/attachments/memo_ms_personhood.pdf.

40. Personhood USA advocates that it “intend[s] to build the support of at least two thirds of the states in an effort to reaffirm personhood within the U.S. Constitution.” *About Us*, PERSONHOOD USA, <http://www.personhoodusa.com/about> (last visited Feb. 3, 2012).

The attempt to protect this right through the avenue of state constitutions is currently relevant and useful. In fact, it is also recognized by United States Supreme Court Justice William Brennan,⁴¹ who is considered to be one of the more liberal Justices in history.⁴² Indeed, Justice Brennan's "judicial works . . . clearly convey a definite political stance. The stance is that of a true political liberal."⁴³ Justice Brennan subscribes to the view of an evolving Constitution.⁴⁴ He makes an important admission, however, by claiming that individual state constitutions are providing more protection to individuals through the provisions of the states' Bill of Rights than the United States Constitution.⁴⁵ Defining *person* to include the unborn, elderly, and infirm is consistent with the current trend of the sovereign attempting to amend state constitutions.⁴⁶ In another article, Justice Brennan proposed that the Florida courts remind the electorate "that when their state court's decisions rest only on state constitutional grounds, citizens have the power 'to amend state law to insure rational law enforcement.'"⁴⁷ One could argue that this places an affirmative duty on the sovereign to amend state law to ensure the legal recognition of inalienable rights previously thwarted by misinterpretation.

Additionally, former New Jersey Supreme Court Justice Stewart Pollock reiterated the dual sovereignty existing in the United States as a basis for justifying state action to expand personal rights in state constitutions.⁴⁸ He stated that "[a]lthough federal courts may interpret a state constitution, the final word on the meaning of that constitution is for the court of last resort in that state," and if a "state court of last resort predicates a decision on an independent state ground, the United States Supreme Court, as a general rule, will not review that decision."⁴⁹ The states have the final word on interpretation of their state constitutions and the determination of the

41. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

42. Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 VA. L. REV. 1261, 1263 (1991).

43. *Id.*

44. *Id.*

45. Brennan, *supra* note 41.

46. *See* Referendum 6 (S.D. 2006).

47. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).

48. Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983).

49. *Id.*

terms contained in them. Such a conclusion, mixed with an abrogation of an inalienable right, delineates a duty for the sovereign to amend the state constitution to prevent repeated denial of a fundamental, inalienable right. History has shown that when the sovereign is silent about the abrogation of an inalienable right, other fundamental rights suffer the same fate.⁵⁰

Such was the case in Mississippi, when silence about the abrogation of the inalienable right to life nearly caused another fundamental right, the right to vote, to be infringed upon by organizations like Planned Parenthood and the ACLU, who attempted to prevent the public from voting on a Personhood initiative.⁵¹ Indeed, both Justice Brennan and Justice Pollock recognized the importance of state constitutions as sources to identify fundamental rights,⁵² and the recent case in Mississippi is proof that when one inalienable right suffers, more are vulnerable to attack.⁵³ The Mississippi State Constitution contains a provision whereby its citizens can propose a constitutional amendment by an initiative and referendum process for the purpose of placing it on the ballot for a public vote.⁵⁴ Nevertheless, because of Mississippi's unfortunate, racially-discriminatory history, the Mississippi Constitution also contains an amendment to prevent this initiative process from being used "[f]or the proposal, modification or repeal of any portion of the Bill of Rights of [the] Constitution."⁵⁵

The initiative and referendum process is not the only way to amend the Mississippi Constitution.⁵⁶ In fact, the Mississippi Code defines the term "person" elsewhere.⁵⁷ Nevertheless, the initiative and referendum process is

50. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 923, 945-46 (2000) (rejecting the right to prohibit admittedly gruesome and dangerous medical procedures like late-term abortion); *Buck v. Bell*, 274 U.S. 200, 205 (1927) (rejecting the right to be free from arbitrary sterilization); *Dred Scott v. Sandford*, 60 U.S. 393, 403-04 (1856) (rejecting the right for African-Americans to be recognized as constitutional citizens).

51. *Hughes v. Hosemann*, No. 251-10-546 (Cir. Ct. 1st Jud. Dist. Hinds Cnty., Miss. Oct. 26, 2010) (denying motion for judgment on the pleadings).

52. See Brennan, *supra* note 47, at 550; Pollock, *supra* note 48, at 709.

53. See *Hughes v. Hosemann*, No. 251-10-546 (Cir. Ct. 1st Jud. Dist. Hinds Cnty., Miss. Oct. 26, 2010).

54. MISS. CONST. art. XV, § 273, cl. 3.

55. *Id.* at cl. 5(a).

56. MISS. CODE ANN. § 23-17-1. This section of the Mississippi Code defines how electors may initiate proposed amendments to the Mississippi Constitution and provides yet another way for the sovereign to change the constitutional covenant between the people. *Id.*

57. *Id.* § 23-17-47(b).

a way the sovereign can use one fundamental right—voting—to directly affect and protect another fundamental and inalienable right—the right to exist. Although several states can amend state constitutions by the initiative and referendum process,⁵⁸ this Comment uses Mississippi as a guide for a current case study on the process.⁵⁹

In *Kean v. Clark*, the District Court for the Southern District of Mississippi recognized the ballot initiative process in Mississippi.⁶⁰ This case, regarding the adoption and background of ballot initiatives, provides a foundation for understanding the ballot initiative process.⁶¹ To this day, Mississippi continues to preserve the sovereign's right to amend its State constitution through ballot initiatives.⁶² Despite the fact that the enumerated right to the ballot initiative process encompasses the fundamental right to vote, the ACLU and Planned Parenthood sought to deny Mississippi citizens the right to vote on a Personhood ballot initiative.⁶³ This infringement of one fundamental right—namely the right to vote—may act as a dangerous catalyst to the proverbial “domino effect” that could lead to the infringement of all fundamental rights.

58. States that do so by constitutional initiative are Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts (indirect, which means the initiatives are submitted to the legislature for action), Michigan, Mississippi (indirect), Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. States that do so by statutory initiative are Alaska, Arizona, Arkansas, California, Colorado, Idaho, Maine (indirect), Massachusetts (indirect), Michigan (indirect), Missouri, Montana, Nebraska, Nevada (indirect), North Dakota, Ohio (indirect), Oklahoma, Oregon, South Dakota, Utah (direct and indirect), Washington (direct and indirect), and Wyoming. See *Initiative and Referendum in the 21st Century: Final Report and Recommendations of the NCSL I&R Task Force*, NATIONAL CONFERENCE OF STATE LEGISLATURES 1, 63, available at <http://www.ncsl.org/default.aspx?tabid=18231>.

59. Constitutional Initiative 26 (Miss. 2010).

60. *Kean v. Clark*, 56 F. Supp. 2d 719, 734 (S.D. Miss. 1999).

61. *Id.* at 722.

62. *Constitutional Initiative in Mississippi A Citizen's Guide*, SECRETARY OF STATE, <http://www.sos.ms.gov/links/elections/home/tab2/InitiativeGuide.pdf> (Jan. 14, 2009) (noting that Mississippi citizens can propose changes to the State constitution through the initiative process).

63. Complaint, *Hughes v. Hosemann*, No. 251-10-546 (Cir. Ct. 1st Jud. Dist. Hinds Cnty., Miss. July 6, 2010); see also *Hughes v. Hosemann*, 68 So. 3d 1260, 1266 (Miss. 2011) (dismissing Planned Parenthood and the ACLU's complaint, stating “[w]e render judgment, finally dismissing plaintiffs' complaint and this action without prejudice”).

III. PROBLEM

A. *The Problem of Incorrectly Defining Personhood Persists*

Defining personhood incorrectly leads to horrific and disastrous results.⁶⁴ Supreme Court decisions that incorrectly define personhood have historically resulted in blatant racism,⁶⁵ attempted eugenics,⁶⁶ and infanticide.⁶⁷ American Supreme Court jurisprudence dating from as far back as 1856 to as recent as 2007 contains many examples of incorrect conclusions later overturned or discredited.

1. The *Dred Scott* decision promoted racism, inequality, and incorrectly defined “person.”

In the infamous *Dred Scott v. Sanford*, the United States Supreme Court held that African-American persons, “not only slaves, but free persons of color” were not citizens.⁶⁸ The Court discussed in detail the importance of defining “person” within the context of the Constitution.⁶⁹ The issue was “whether the class of persons described . . . compose a portion of this people, and are constituent members of this sovereignty.”⁷⁰ The Court concluded that

they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that

64. See *Buck v. Bell*, 274 U.S. 200, 207 (1927); see also Joseph F. Fletcher, *Four Indicators of Humanhood—The Enquiry Matures*, in *ON MORAL MEDICINE: THEOLOGICAL PERSPECTIVES IN MEDICAL ETHICS* 376-80 (Stephen E. Lammers & Allen Verhey eds., Wm. B. Erdmans Publ’g Co. 2d ed. 1998) (1987); Michael Tooley, *Abortion and Infanticide*, 2 *PHIL. & PUB. AFF.* 37-65 (1972).

65. See *Dred Scott v. Sanford*, 60 U.S. 393, 403-04 (1856).

66. See *Buck*, 24 U.S. at 207-08 (stating as a justification for human sterilization that “[t]hree generations of imbeciles are enough”).

67. See *Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000).

68. *Dred Scott*, 60 U.S. at 587.

69. *Id.* at 404-05.

70. *Id.* at 404.

time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race[.]⁷¹

The Court stated that even when African-American slaves became emancipated, they “remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”⁷² When one group of elites determines the definition of personhood incorrectly, monstrous results of slavery, racism, and genetic favoritism are plausible results.

2. The *Buck v. Bell* decision promotes genetic favoritism and incorrectly defines *person*.

Genetic favoritism and eugenics are most notably associated with Nazi Germany, but they also found a home in the Commonwealth of Virginia as was demonstrated by the decision of *Buck v. Bell*.⁷³ In *Buck v. Bell*, Carrie Buck was raped by her landlord’s nephew.⁷⁴ To cover up the shameful, premarital pregnancy, her guardians placed her in a colony for the feeble-minded.⁷⁵ Virginia considered Ms. Buck a “feeble-minded white woman” and placed her in the “State Colony for Epileptics and Feeble Minded.”⁷⁶ Because the Court assumed she was “the daughter of a feeble-minded mother” and also “the mother of an illegitimate feeble-minded child,” the Court concluded that she could be sterilized without consent because she was considered “the probable potential parent of socially inadequate offspring.”⁷⁷ Although the Court did not specifically state that Ms. Buck was not a “person” under the Fourteenth Amendment, the Court did claim that Virginia’s interest in sterilizing her was somehow justified.⁷⁸ The Court reasoned that the alleged process she went through somehow satisfied Fourteenth Amendment concerns, thereby treating her as less than a person with due process rights.⁷⁹

71. *Id.* at 404-05.

72. *Id.* at 405.

73. *Buck v. Bell*, 274 U.S. 200 (1927).

74. *Carrie Buck Revisited*, UNIV. OF VA. HEALTH SYSTEM CLAUDE MOORE HEALTH SCIENCES LIBRARY, <http://www.hsl.virginia.edu/historical/eugenics/5-epilogue.cfm> (last visited Mar. 18, 2012).

75. *Id.*

76. *Buck*, 274 U.S. at 205.

77. *Id.* at 205, 207.

78. *Id.* at 205.

79. *Id.*

In *Buck v. Bell*, the Court permitted the sterilization of some men and women that the Court defined as “manifestly unfit.”⁸⁰ The Court upheld the statute stating that certain types of men or women are somehow “defective persons” and seen as a menace to humanity.⁸¹ Furthermore, the Court concluded that preventing “socially inadequate offspring” was a legitimate state interest and thereby upheld the selective sexual sterilization of Carrie Buck.⁸² Refusing to recognize Carrie Buck as a person led the Court to a shocking conclusion: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.”⁸³ Such legal conclusions are devoid of liberty and adhere more closely with the ideology of Nazi Germany than with what should exist in American legal jurisprudence.

To assist in preventing the horrendous, arbitrary, and capricious constitutional interpretations reflected in *Buck* and *Dred Scott*, one must define the terms *person*, *persons*, or *personhood* to include all stages of biological development and not merely those humans considered by *some* to be genetically beneficial or socially adequate. It is disingenuous to claim that our system upholds the supreme law of the land in its command to “secure the Blessings of Liberty to ourselves and our Posterity” when the nation’s courts selectively and arbitrarily decide certain individuals’ blessings are not worth protecting.⁸⁴

3. The *Stenberg v. Carhart* decision permits infanticide and fails to correctly define *person*.

United States Supreme Court Justice Antonin Scalia referenced the Preamble to the Constitution, specifically the protection of ourselves and our posterity,⁸⁵ when he dissented in *Stenberg v. Carhart* regarding the right to perform a late-term abortion.⁸⁶ Because there are individuals who advocate the acceptability of late-term abortions, who ignore the reality of

80. *Id.* at 205, 207.

81. *Id.* at 205-07.

82. *Id.* at 207.

83. *Id.*

84. U.S. CONST. pmbll.

85. *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

86. *Id.*

its brutality, and who fail to correctly define the term *person*, a brief description of the procedure is necessary to illuminate its horrific nature.

The procedure is called “Dilation and Extraction,” otherwise known as D&X, and it is a version of a procedure generally known as “Dilation and Evacuation,” or D&E.⁸⁷ In this procedure, the abortionist “uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities” so that the entire baby, except the head, is outside of the mother’s womb.⁸⁸ The baby’s head “lodges at the internal cervical *Usually* there is not enough dilation for [the head] to pass through.”⁸⁹ While the baby is faced belly down, the abortionist “slides the fingers of the left hand along the back of the [baby] and ‘hooks’ the shoulders . . . with the index and ring fingers (palm down).”⁹⁰ While the abortionist “relies on cervical entrapment of the head, along with a firm grip,” the abortionist “takes a pair of blunt curved Metzenbaum scissors in the right hand” and slides the scissors “along the spine and under his middle finger until he feels it contact the base of the skull.”⁹¹ The abortionist then “forces the [blunt curved Metzenbaum scissors] into the base of the skull [H]e [then] spreads the scissors to enlarge the opening.”⁹² A nurse present during one of these procedures described her observation:

The baby’s little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.⁹³

After the abortionist pries the baby’s skull open, he then sticks “a high-powered suction tube into the opening, and suck[s] the baby’s brains out.”⁹⁴ The Court later held in *Gonzales v. Carhart* that this procedure was not medically necessary.⁹⁵ The only difference between this brutal procedure

87. *Id.* at 924, 927 (majority opinion).

88. *Id.* at 987-88. (Kennedy, J., dissenting).

89. *Id.* at 988 (emphasis added) (alteration in original).

90. *Id.*

91. *Id.*

92. *Id.* (alteration in original).

93. *Gonzales v. Carhart*, 550 U.S. 124, 138-39 (2007).

94. *Id.* (alteration in original).

95. *Id.* at 164.

and infanticide is a handful of seconds and a few inches of birthing progression.⁹⁶ In fact, both the *Stenberg* and *Gonzales* decisions quote a statute that refers to the unborn baby as a *child* three times in the same sentence.⁹⁷ Regardless of one's personal beliefs, the ability for the Supreme Court—or any other judicial, executive, or legislative body—to select who is included in the definition of *person* for the purposes of constitutional protection is too great a power to be haphazardly wielded. If the line is not drawn at the beginning of the existence of human life,⁹⁸ then it will be arbitrarily drawn elsewhere.

4. Modern interpretations of personhood.

Modern interpretations of personhood persist in the attempt to define person to exclude the underprivileged and the defenseless. Three modern writers provide an overview of current interpretations of personhood. Joseph Fletcher⁹⁹ gave a modern interpretation of personhood stating that

96. BALLENTINE'S LAW DICTIONARY (2010) (defining infanticide as “[t]he killing of a young child shortly after its birth”).

97. *Stenberg*, 530 U.S. at 922; *Gonzales*, 550 U.S. at 151.

98. 42 AM. JUR. 2D *Infants* § 3 (2011).

[B]iologically speaking, the life of a human being begins at the moment of conception in the mother's womb, and as a general rule of construction in law, a legal personality is imputed to an unborn child for all purposes which are beneficial to the infant after his or her birth. Under this view, viability does not affect the legal existence of the unborn, and it would be a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development.

Id.; see also David Polin, *Proof of Identification of Substance by Instrumental Analysis*, 54 AM. JUR. *Proof of Facts* 3d 381, § 19 (originally published in 1999) (“Human genetic information is encoded in deoxyribonucleic acid (DNA) and is contained in the 23 pairs of chromosomes found in all body cells that contain nuclei.”); Lee M. Silver & Susan Remis Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 HARV. J.L. & TECH. 593, 618 (1998).

[A] mother deposits just a single copy of DNA for each of the 23 human chromosomes. A second set of 23 DNA molecules is deposited in this same egg by the genetic father. The information present in each of these 46 DNA molecules is then copied over time into 100 million million (100,000,000,000,000) *new* sets of DNA molecules that are placed into each new cell formed during fetal and child development. Each of these new DNA molecules is built from raw materials that are recovered from the food that the mother, and then the child, consumes.

Id.

99. Joseph Fletcher was a professor and former Episcopal theologian who taught at the University of Virginia and Harvard Divinity Schools. He was named Humanist of the Year in

there are four indicators of humanhood.¹⁰⁰ One indicator is that “life is a value to be preserved only insofar as it contains some potentiality for human relationships.”¹⁰¹ Depending on how the court defines the phrase, “potentiality for human relationships”—or what constitutes a human relationship for that matter—this definition of personhood could prove even more disastrous than the depravity revealed in *Buck*. Fletcher also cites Michael Tooley,¹⁰² who illustrates yet another example of how defining personhood incorrectly can have disastrous effects.¹⁰³ Michael Tooley wrote an article in 1972 about defining when a human being deserves a right to life and, thus, when he or she becomes a person. He stated that

[t]he basic issue to be discussed, then, is what properties a thing must possess in order to have a serious right to life. My approach will be to set out and defend a basic moral principle specifying a condition an organism must satisfy if it is to have a serious right to life. It will be seen that this condition is not satisfied by human fetuses and infants, and thus that they do not have a right to life. So unless there are other substantial objections to abortion and infanticide, one is forced to conclude that these practices are morally acceptable ones. In contrast, it may turn out that our treatment of adult members of other species – cats, dogs, polar bears – is morally indefensible. For it is quite possible that such animals do possess properties that endow them with a right to life.¹⁰⁴

1974 by the American Humanist Association. *Joseph Fletcher*, NNDB, <http://www.nndb.com/people/580/000169073/> (last visited Feb. 10, 2012).

100. Fletcher, *supra* note 64, at 80.

101. *Id.* at 377 (citing R. A. McCormick, *To Save or Let Die: The Dilemma of Modern Medicine*, 229 JAMA 172-76 (July 8, 1974)).

102. *Id.* Michael Tooley is a professor of Philosophy at the University of Colorado-Boulder, and his research is primarily in Metaphysics and Epistemology, Moral Philosophy, Ethics, and Philosophy of Religion. *Michael Tooley*, UNIV. OF COLO. AT BOULDER, http://www.colorado.edu/philosophy/fac_tooley.shtml (last visited Feb. 10, 2012).

103. Michael Tooley, *Abortion and Infanticide*, 2 PHIL. PUB. AFF. 37, 37 (1972). One disastrous effect is concluding that infanticide is a morally acceptable practice. “[U]nless there are other substantial objections to abortion and infanticide, one is forced to conclude that these practices are morally acceptable ones.” *Id.*

104. *Id.*

Tooley came to the conclusion that a cat or a dog might be found to have a right to live over a human being in utero.¹⁰⁵ Another prolific writer, Ben Rich,¹⁰⁶ attempted to define *person* as one who has the “capacity for conscious experience.”¹⁰⁷ Perhaps these authors would have no moral objection to the analysis and outcomes of *Dred Scott*, *Buck*, and *Stenberg*. Such preposterous results continue to surface when the importance of defining the term *person* is not understood.

This Comment suggests that, at least originally, there was no need to enumerate a fundamental right “to exist”—or the right to life for every human being from the beginning of biological development until natural death—because it was implicit within the language of the Constitution. Merely recognizing a pre-existing right in any document is much different from creating a new right through legal positivism. Some legal theorists claim that the Constitution’s Preamble secures a right to life for our posterity.¹⁰⁸ Focusing solely on the Preamble of the Constitution, one must recognize the existence of “two classes of people, i.e., ‘ourselves’ and ‘our Posterity.’ . . . ‘Posterity,’ it is suggested, is difficult to define except in terms of yet-to-be-born people.”¹⁰⁹ Prominent members of the Constitutional Convention used the term *posterity* when drafting the Virginia Declaration of Rights and “proclaimed in its Preamble that the rights declared in the purview of the instrument do pertain to them (i.e., ‘the good people of Virginia’) and their posterity, as the basis and foundation of government.”¹¹⁰ Moreover, the Virginia Declaration is very specific in securing a right to life for the unborn:

[A]ll men are by nature equally free and independent, and have certain rights, of which, when they enter into a state of society,

105. *Id.*

106. Ben A. Rich is the U.C. Davis School of Medicine Alumni Association Endowed Chair of Bioethics, and he has written profusely on the bioethics of patient autonomy and end of life care for the elderly. *Professor Ben Rich assumes bioethics endowed chair*, UC DAVIS HEALTH SYSTEM, http://www.ucdmc.ucdavis.edu/welcome/features/20070530_benrich/index.html (last visited Feb. 10, 2012).

107. Ben A. Rich, *Postmodern Personhood: A Matter of Consciousness*, 11 *BIOETHICS* 206, 206 (1997).

108. Eric M. Axler, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People’s Unenumerated Rights*, 24 *SETON HALL LEGIS. J.* 431, 435-37 (2000); Marcin, *supra* note 15, at 273, 275-76.

109. Marcin, *supra* note 15, at 275.

110. *Id.* at 276-77.

*they cannot by any compact deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*¹¹¹

As noted above, Justice Scalia referenced the Preamble when analyzing the legality of the live-birth abortion procedure.¹¹² In another example of the terrible results produced by failing to define the term *person* correctly, Justice Scalia refuted the constitutionality of late-term abortions. He stated that

[t]he notion that the Constitution of the United States, designed, among other things, “to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,” prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.¹¹³

Nevertheless, despite this overwhelming history and Supreme Court dicta supporting a definition of posterity as a protection of the right to life, the Supreme Court has failed to recognize the validity and plain language of the Preamble as a source of inalienable rights.¹¹⁴ When viewed alongside the numerous founding documents referencing an inalienable right to life, such as in the Declaration of Independence and various other provisions of the Constitution, the Preamble substantiates the conclusion that the life and liberty of our posterity must be protected.

111. *Id.* at 277.

112. *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J. dissenting).

113. *Id.*

114. Axler, *supra* note 108, at 437, 440. Commenting on this very subject, the author wrote the following:

Despite abundant commentary regarding the utility of the Preamble as a means of securing and interpreting rights, the Preamble alone, according to the United States Supreme Court case, *Jacobson v. Commonwealth of Massachusetts*, is an insufficient source of such rights.

....

. . . [T]he *Jacobson* decision, although handed down ninety-five years ago, remains conclusive on the issue.

Id. (citation omitted).

IV. THE SOLUTION OF RECOGNIZING INALIENABLE RIGHTS BY
ENUMERATION: AN ANALYSIS OF HISTORICAL RECORDS AND CASE
PRECEDENT

Much is at stake with correctly understanding the Constitution as a covenant.¹¹⁵ Future generations must understand the importance of adhering to the Constitution as a sacred covenant,¹¹⁶ and the Posterity referenced in the Constitution's Preamble is indicative of this importance.¹¹⁷ Great care must be taken when asserting fundamental rights or liberty interests.¹¹⁸ In light of precedent upholding the right of the

115. "Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 901 (1992).

116. *Id.*

117. U.S. CONST. pmb1.

118. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046 (2010) (considering a Second Amendment right).

Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.

Id.; see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (considering a right to die) (internal citations and quotation marks omitted).

By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Id.; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

[T]he District Court . . . then reasoned, based on decisions of this Court affirming the undeniable importance of education, that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand. We are unable to agree that this case, which in significant aspects is *sui generis*, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect-classification nor the fundamental-interest analysis persuasive.

Id.

unborn to have standing to sue,¹¹⁹ acknowledging the right to life of the unborn, the elderly, or the infirm as protected by the Due Process Clause is not precluded by *stare decisis*.¹²⁰ Moreover, proposals for state personhood amendments are rapidly increasing.¹²¹ When the historic and textual evidence that the Constitution preserves rights for future generations is compared to recent constitutional interpretation diminishing those

119. See *Greater Southeast Cmty. Hosp. v. Williams*, 482 A.2d 394, 398 (D.C. 1984) (holding that “having *determined that a viable fetus is a person under the common law*, it follows that injury to the fetus resulting in death is actionable under our wrongful death and survival statutes”) (emphasis added); *Farley v. Sartin*, 466 S.E.2d 522, 535 (W. Va. 1995).

[A] nonviable unborn child who is tortiously injured but, nevertheless, is born alive may maintain a cause of action. In addition, if death ensues as a result of a tortiously inflicted injury to a nonviable unborn child, the personal representative of the deceased may maintain an action pursuant to our wrongful death statute).

Id.; *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 n.11 (D.D.C. 1946) (citations omitted).

By the eighth week the embryo or foetus, as we now call it, is an unmistakable human being, even though it is still only three-quarters of an inch long Indeed, the Chinese have long recognized that when a man is born he is already nine months old. Each of their babies is given at birth a full year’s credit on the reckoning of its age.

Id.

120. See generally John Edward Davidson, *Tomorrow’s Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing Upon Future Generations*, 28 COLUM. J. ENVTL. L. 185 (2003) (arguing for “posterity standing”); see also Zimmerman, *supra* note 15, at 88.

121. H. JT. RES. 3, 84th Leg. (Iowa 2011).

With respect to the fundamental and inalienable rights of all persons guaranteed in this constitution, the word “person” applies to all human beings, irrespective of age, health, function, physical or mental dependency, or method of reproduction, whether in vivo or in vitro, from the beginning of their biological development, including the single-cell human embryo.

Id. A South Carolina bill states:

(A) The right to life for each born and preborn human being vests at fertilization.

(B) The rights guaranteed by Article I, Section 3 of the Constitution of this State, that no person shall be deprived of life without due process of law, nor shall any person be denied the equal protection of the laws, vest at fertilization for each born and preborn human person.

S.B. 616, 119th Leg. (S.C. 2011); see also S.R. 71, 25th Leg. (Haw. 2010) (stating, in part, “that every person, from the beginning of biological development including fertilization, is provided all the rights and protections as a human being”).

rights,¹²² the need for federal and state constitutional amendments reiterating those rights is demonstrated.

A. *The Pre-Constitutional Recognition of a Right to Life*

To accurately ascertain the right to life bestowed on all persons before and after the Constitution, it is necessary to examine important historical documents that reference the right, namely, the Bible, the Declaration of Independence,¹²³ and the Constitution.¹²⁴

These foundational, historical documents, and the founding fathers responsible for creating the latter two, demonstrate the way society viewed the right to life during the years immediately preceding the ratification of the Constitution.

1. Before the Constitution

a. The Bible

One of the most commonly used historical references in American legal writing is the Holy Bible.¹²⁵ Several biblical references identify the need to hold human life in the highest regard. For instance, the Bible states that God created man and woman “in his own image”¹²⁶ and commands them to “be fruitful and multiply.”¹²⁷ The Bible refers to a Holy God as the One who knits together humankind in the womb and even the One who saw the unformed body *before* development.¹²⁸ When speaking about the prophet

122. *Roe v. Wade*, 410 U.S. 113, 156-58 (1973) (establishing constitutional right to abortion); *see also* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (confirming *Roe*); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declaring partial-birth abortion ban unconstitutional). *But see* *Gonzales v. Carhart*, 550 U.S. 124 (2007) (finding partial-birth ban constitutional).

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

124. U.S. CONST. pmbl.

125. *See* *Fields v. Brown*, 503 F.3d 755, 776-83 (9th Cir. 2007) (determining that a juror’s notes regarding Bible verses supporting or opposing capital punishment did not have a “substantial and injurious effect or influence in determining the jury’s verdict”); *People v. Roybal*, 966 P.2d 521, 544-45 (Cal. 1998) (determining that a prosecutor’s discussion of biblical authority did not require reversal); *People v. Wash*, 861 P.2d 1107, 1134-36 (Cal. 1993) (noting that when the prosecutor referenced the Bible, the court did “not find the prosecutor’s remarks here to be prejudicial”).

126. *Genesis* 1:27 (King James).

127. *Genesis* 1:27-28.

128. *Psalms* 139:13-16.

Jeremiah, the Bible says that even before God formed Jeremiah in the womb, He knew Jeremiah and appointed him as a prophet.¹²⁹

b. Blackstone, Montesquieu, and Bracton

Founding Western legal theorists relied heavily on the Bible. For example, Sir William Blackstone in his famous *Commentaries on the Laws of England*, which played a primary role in Western legal thought, described God's law as immutable.¹³⁰ Moreover, Blackstone claimed that any law contrary to God's law was not valid.¹³¹ Another important historical legal theorist was Lord Henry De Bracton.¹³² Lord Bracton was appointed to the advisory council of Henry III of England, was known as the "Father of the Common Law," and is credited with developing the idea of criminal intent.¹³³ Additionally, Bracton was considered the "last great ecclesiastical jurist."¹³⁴ He wrote his treatise *On the Law of England*, which linked the development of justice from Greece and Rome to English jurisprudence.¹³⁵ As an ecclesiastical jurist, Bracton considered Scripture indispensable to the foundation of law.

129. *Jeremiah* 1:5.

130. SIR WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAW OF ENGLAND 27 (W.E. Dean, 1832) (stating that the laws laid down by God are "the eternal immutable laws of good and evil . . .").

131. *Id.* ("This law of nature dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this . . .").

132. Walter A. Bordenn, MD, *A History of Justice: Origins of Law and Psychiatry*, 24 AM. ACAD. OF PSYCHIATRY AND THE LAW 12-14 (Apr. 1999).

133. Michael Edmond O'Neil, *Stalking the Mark of Cain*, 25 Harv. J.L. & Pub. Pol'y 31, 40 (2001).

Henry Bracton, fittingly a cleric as well as a judge, served as the American Law Institute of his day in producing a treatise that became both an immensely influential argument for what the law should be as well as a restatement of what it was at the time in which he wrote. With respect to *mens rea*, Bracton argued, "[i]t is will and purpose which mark *maleficia*" and "a crime is not committed unless the intention to injure exists." This focus on intent as a necessary predicate for establishing criminal liability carries over from Bracton's time to the present day.

Id. (citation omitted).

134. Walter A. Bordenn, *A history of justice: origins of law and psychiatry*, 24 AAPL NEWSLETTER 12 (Apr. 1999).

135. O'Neil, *supra* note 133.

American leaders most frequently consulted the author Baron Charles Secondat de Montesquieu during the formation of the Constitution (1760-1805).¹³⁶ History credits Montesquieu with the important concept of separation of powers.¹³⁷ When speaking of the relationship that the Christian Bible and religion should have with government, Montesquieu said that “[t]he Christian Religion, which ordains that men should love each other, would without doubt have every nation blest with the best civil, the best political laws; because these, next to this religion, are the greatest good that men can give and receive.”¹³⁸ Like Montesquieu, many Founding Fathers relied heavily on Scripture.¹³⁹

Sir William Blackstone was the second most consulted authority during the Founding Fathers’ Era.¹⁴⁰ Blackstone’s *Commentaries* was the primary legal treatise in the United States.¹⁴¹ James Madison stated: “I very cheerfully express my approbation of the proposed edition of Blackstone’s *Commentaries*.”¹⁴² United States Supreme Court Justice James Iredell, appointed by George Washington, said that “[f]or near thirty years it [Blackstone’s *Commentaries*] has been the manual of almost every student of law in the United States, and its uncommon excellence has also introduced it into the libraries, and often to the favorite reading of private gentleman.”¹⁴³

Blackstone, Montesquieu, Lord Bracton, and the Bible were instrumental in the development of Western legal thought and the founding documents of America. To correctly ascertain the right to life bestowed on all persons before and after the Constitution, it is necessary to examine important historical documents that reference this right. In particular, Blackstone was also quoted in the founding document of America—the Declaration of Independence.¹⁴⁴

136. BARTON, *supra* note 10, at 214.

137. *Id.* at 214-15.

138. *Id.* at 214.

139. *Id.* at 226.

140. *Id.* at 216.

141. *Id.* at 217 (noting that Blackstone’s “*Commentaries* became the major foundation for the American system of jurisprudence”).

142. *Id.* at 216.

143. *Id.* at 217.

144. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (“the separate and equal station to which the Laws of Nature and of Nature’s God entitle them . . .”).

c. The Declaration of Independence

The text of the Declaration seems clear.¹⁴⁵ The phrase “to secure these rights, governments are instituted” outlines the purpose of instituting a government: to secure inalienable rights, among which is the right to life.¹⁴⁶ The importance of this central purpose cannot be stressed enough. When people argue about the definition of life, they are in essence arguing about the purpose of government. Regardless of what ideological side one claims, the need to define the right to life and the persons to whom that right extends is paramount. To explain the purpose of mentioning life in the Declaration, one must look at both who created the document and the sources referenced in the document. The reference to the Laws of Nature and of Nature’s God includes Common Law and Blackstone’s expression of it.

The laws of nature are observable laws in nature; the Law of Nature’s God is the written word, the Bible.¹⁴⁷ Indeed, the two primary sources of Natural Law are the laws of nature and the Laws of Nature’s God. Samuel Adams said, “In the supposed state of nature, all men are equally bound by the laws of nature, or to speak more properly, the laws of the Creator.”¹⁴⁸ John Quincy Adams opined that “the laws of nature and of nature’s God . . . of course presupposes the existence of a God, the moral ruler of the universe, and a rule of right and wrong, of just and unjust, binding upon

145. *Id.* at paras. 1-2.

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the *Laws of Nature and of Nature’s God* entitle them 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*. That *to secure these rights, Governments are instituted among Men*

Id. (emphasis added).

146. *Id.*

147. BARTON, *supra* note 10, at 216-17.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being And consequently, as man depends absolutely upon his Maker for every thing, it is necessary that he should in all points conform to his Maker’s will. This will of his Maker is called the law of nature

Id.

148. *Id.* at 230.

man, preceding all institutions of human society and of government.”¹⁴⁹ Natural Law legal theorists Montesquieu, Blackstone, and Locke heavily influenced the Founders. References to the authority of the Bible and Christianity as the bases for Common Law are sprinkled throughout judicial opinions.¹⁵⁰ As Justice Story remarked, “There never has been a period of history in which the Common Law did not recognize Christianity as lying at its foundation.”¹⁵¹ The Common Law is intertwined with American history and jurisprudence.

The Declaration recognizes a pre-existing inalienable right to life,¹⁵² albeit forgotten in today’s jurisprudence. Principles, such as the inalienable right to life, were meant to establish the foundation on which the Constitution was to operate.¹⁵³ Therefore, protecting the inalienable right to life through the constitutional covenant is essential to effect its intended operation.

2. The Constitution

The Constitution references the right to life four times, although not as explicitly as it is stated in the Declaration.¹⁵⁴ The Constitution references the Declaration of Independence when it states “in the Year of our Lord one thousand seven hundred and Eighty seven” and “of the Independence of the United States of America the Twelfth.”¹⁵⁵ Moreover, not only do several of the Founding Fathers date their government acts from the Declaration

149. *Id.*

150. *See, e.g.*, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824).

151. William Graves, *Evolution, the Supreme Court, and the Destruction of Constitutional Jurisprudence*, 13 REGENT U. L. REV. 513, 535 n.157 (2001).

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

153. BARTON, *supra* note 10, at 250

[T]he virtue which had been infused into the Constitution of the United States . . . was no other than the concretion of those abstract principles which had been first proclaimed in the Declaration of Independence. . . . This was the platform upon which the Constitution of the United States had been erected. Its virtues, its republican character, consisted in its conformity to the principles proclaimed in the Declaration of Independence and as its administration . . . was to depend upon the . . . virtue, or in other words, of those principles proclaimed in the Declaration of Independence and embodied in the Constitution of the United States.

Id. (quoting John Quincy Adams in his oration, “The Jubilee of the Constitution”).

154. U.S. CONST. amend. V (twice); amend XIV, § 1.

155. U.S. CONST. art. VII.

rather than the Constitution,¹⁵⁶ but several enabling acts granted by Congress for various states do also.¹⁵⁷ All this is to say that correctly interpreting the Constitution requires one to read the Constitution in

156. BARTON, *supra* note 10, at 248-49 (emphasis added).

Given under my hand and the seal of the United States, in the city of New York, the 14th day of August, A.D. 1790, and *in the fifteenth year of the Sovereignty and Independence of the United States*. By the President: GEORGE WASHINGTON

In testimony whereof I have caused the seal of the United States to be affixed to these presents, and signed the same with my hand. Done at Philadelphia, the 22nd day of July, A.D. 1797, and *of the Independence of the United States* the twenty-second. By the President: JOHN ADAMS

In testimony whereof I have caused the seal of the United States to be hereunto affixed, and signed the same with my hand. Done at the city of Washington, the 16th day of July, A.D. 1803, and *in the twenty-eighth year of the Independence of the United States*. By the President: THOMAS JEFFERSON

Given under my hand and the seal of the United States at the city of Washington, the 9th day of August, A.D. 1809, and *of the Independence of the said United States* the thirty-fourth. By the President: JAMES MADISON

Given under my hand, at the city of Washington, this 28th day of April, A.D. 1818, and *of the Independence of the United States* the forty-second. By the President: JAMES MONROE

Given under my hand, at the city of Washington, this 17th day of March, A.D. 1827, and *the fifty-first year of the Independence of the United States*. By the President: JOHN QUINCY ADAMS

Given under my hand, at the city of Washington, this 11th day of May, A.D. 1829, and *the fifty-third of the Independence of the United States*. By the President: ANDREW JACKSON.

Id.

157. *Id.* at 249.

[T]he constitution, when formed, shall be republican, and not repugnant to the Constitution of the United States and *the principles of the Declaration of Independence*. COLORADO

[T]he constitution, when formed, shall be republican, and not repugnant to the Constitution of the United States and *the principles of the Declaration of Independence*. NEVADA

The Constitution, when formed, shall be republican, and not repugnant to the Constitution of the United States and *the principles of the Declaration of Independence*. NEBRASKA

The constitution shall be republican in form. . .[sic] and shall not be repugnant to the Constitution of the United States and *the principles of the Declaration of Independence*. OKLAHOMA

Id. (emphasis added).

conjunction with the Declaration to fully understand the principles and rights contained therein, especially the inalienable right to life.

Defining the term *person* or *persons* in the Constitution is a modern debate and is the focus of this Comment. Nevertheless, even the first Supreme Court Chief Justice considered the rights and protections of the Constitution to pertain to “[e]very member of the State” and not just constitutional persons.¹⁵⁸ Daniel Webster also placed a focus on the importance of upholding the Constitution as a responsibility of our unborn “posterity.”¹⁵⁹ The need to clearly define and enumerate the pre-existing right to life for all persons at any stage of biological development until natural death is now more apparent than ever in America. Americans should heed the 1803 warning of reverend Matthias Burnet:

Finally, ye . . . whose high prerogative it is, to . . . invest with office and authority, or to withhold them, and in whose power it is to save or destroy your country, consider well the important trust . . . which God . . . [has] put into your hands. To God and *posterity* you are accountable for them Let not *your children* have reason to curse you for giving up those rights, and prostrating those institutions which our fathers delivered to you¹⁶⁰

158. 1 JOHN JAY, THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, JAY’S CHARGE TO THE GRAND JURY OF ULSTER COUNTY 1 (G. P. Putnam’s Sons 1890) (1763-1781) (“Every member of the State ought diligently to read and to study the constitution of his country By knowing their rights, they will sooner perceive when they are violated, and be the better prepared to defend and assert them.”) (emphasis omitted).

159. 13 DANIEL WEBSTER, THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 492-93 (Little, Brown, & Co. 1903) (1852).

[I]f we and our *posterity* reject religious instruction and authority, violate the rules of eternal justice, trifle with the injunctions of morality, and *recklessly destroy the political constitution* which holds us together, no man can tell how sudden a catastrophe may overwhelm us that shall bury all our glory in profound obscurity.

Id. (emphasis added).

160. Matthias Burnet, Pastor of the First Church in Norwalk, An Election Sermon (May 12, 1803) in DAVID BARTON, ORIGINAL INTENT THE COURTS, THE CONSTITUTION, & RELIGION 350 (4th ed. 2005) (emphasis added).

B. *Constitutional Interpretations that Diminish Inalienable Rights*

Facially, the Constitution and the Declaration uphold the inalienable right to life, liberty, and the pursuit of happiness. The Supreme Court, however, has eroded and diminished all three of these inalienable rights by failing to recognize the Constitution as a covenant among the people and by failing to consider the Declaration's principles. Additionally, the series of Supreme Court decisions on the subject of abortion are almost incomprehensible in application due to the different standards posited and varying outcomes, and they leave one at a loss for a consistent approach to dealing with unborn personhood.¹⁶¹ For instance, *H.L. v. Matheson*¹⁶²

161. See, e.g., *United States v. Vuitch*, 402 U.S. 62, 71 (1971) (“There remains the contention that the word ‘health’ is so imprecise and has so uncertain a meaning that it fails to inform a defendant of the charge against him and therefore the statute offends the Due Process Clause of the Constitution. We hold that it does not.”) (citations omitted). This decision recognized the ambiguous “health” exception, yet upheld the criminal abortion statute. *Id.* at 70-72; see also AMERICANS UNITED FOR LIFE, DEFENDING LIFE 2008: PROVEN STRATEGIES FOR A PRO-LIFE AMERICA 43-48 (Americans United for Life, 2008) (2006) (citing *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Federal Partial-Birth Abortion Ban of 2003, effectively throwing out *Stenberg* and restoring *Casey*-type deference to state legislation, basically rejecting a requirement for an unlimited health exception, and paving the way for states to have more strict “informed consent” laws, recognizing the detrimental effects on women); *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006) (reversing court decision that invalidated New Hampshire’s parental notice law and remanding for future consideration); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking Nebraska’s ban on partial-birth abortion and the partial-birth abortion prohibitions of twenty-nine other states, concluding that statutory terms were unconstitutionally vague, and also invalidating for lack of a “health” exception); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding Montana’s parental notice statute on the “assumption that a judicial-bypass procedure requiring a minor to show that parental notification is not in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that abortion without notification is in her best interests”); *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam) (upholding Montana’s statute restricting performance of abortions to licensed physicians only); *Fargo Women’s Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O’Connor, J., concurring) (insisting that *Casey* invalidates laws that are a substantial obstacle to a woman’s choice to undergo abortion); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (reaffirming the central holding of *Roe v. Wade* that, prior to viability, a woman’s right to abortion cannot be restricted, but a plurality of three justices abandoned the strict scrutiny standard of review applied to fundamental rights for a new “undue burden” standard, and five justices voted to strike down spousal notice requirement); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding federal regulations prohibiting personnel at family planning clinics that receive Title X funds from counseling or referring women regarding abortion); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (invalidating a Minnesota law requiring a two-parent notification without a procedure for judicial bypass, but upholding two-parent notification

that included judicial waiver, and a forty-eight hour waiting period for minors); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (Akron II) (upholding an Ohio statute that required minor to notify one parent or obtain judicial waiver, and rejecting clinic's claim that judicial procedure was burdensome); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (upholding a Missouri statute that prohibited use of public facilities or public personnel to perform abortions and required ultrasound tests to determine viability of unborn child in pregnancies of twenty weeks or more); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (invalidating provisions of a Pennsylvania statute that required informed consent from physicians on fetal development and medical risks of abortion, reporting requirements, requiring a physician to use the method of abortion most likely to preserve the life of a viable unborn child, and requiring attendance of a second physician at post-viability abortions); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (Akron I) (invalidating the informed consent provisions of city ordinance requiring: (1) physicians to give patients information on medical risks of abortion, (2) a twenty-four hour waiting period, (3) that all abortions after the first trimester be performed in a hospital, (4) parental consent for minors seeking abortions with no judicial bypass, and (5) that physicians dispose of fetal remains in a "humane and sanitary manner"); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983) (invalidating a Missouri statute that required second trimester abortions to be performed in a hospital, but upholding requirements that a second physician be in attendance during a post-viability abortion, that a minor obtain parental consent or judicial waiver, and a pathology report be made for each abortion); *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (noting that Virginia's definition of "hospital" included outpatient clinics and holding that its requirement was a reasonable means of furthering the state's compelling interest, but the Court affirmed the conviction of a doctor for unlawfully performing an abortion during the second trimester of pregnancy outside of a licensed hospital); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding a Utah statute requiring a physician to notify a minor's parent before performing abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which restricts federal funding of Medicaid abortions only to cases of life endangerment and rape or incest, reasoning that government could distinguish between abortion and other medical procedures because "no other procedure involves the purposeful termination of potential life"); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (upholding an Illinois statute prohibiting the use of state funds for abortions except where necessary to save the woman's life); *Bellotti v. Baird*, 443 U.S. 622 (1979) (Bellotti II) (invalidating a Massachusetts law that required minors to obtain consent of both parents before obtaining an abortion and requiring states with similar consent requirements to afford minors an alternative opportunity for abortion authorization via judicial bypass); *Colautti v. Franklin*, 439 U.S. 379 (1979) (striking as vague a Pennsylvania statute that required physicians to use abortion technique providing the best opportunity for the child to be born alive in abortions after viability); *Beal v. Doe*, 432 U.S. 438 (1977) (upholding a Pennsylvania statute that restricted the use of Medicaid funds for abortion to those that are "medically necessary"); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding a Connecticut prohibition on the use of public funds for abortions, except those that are "medically necessary"); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding a St. Louis policy against performing abortions in public hospitals); *Bellotti v. Baird*, 428 U.S. 132 (1976) (Bellotti I) (holding that the district court should have abstained from deciding the constitutionality of a Massachusetts parental consent statute until the state

upheld a Utah statute requiring a physician to notify a minor's parent before performing an abortion.¹⁶³ Such parental notifications are on point with much of the previous Supreme Court precedent, but *Bellotti v. Baird*¹⁶⁴ (Bellotti II) invalidated a Massachusetts law requiring a minor to obtain parental consent.¹⁶⁵ In another case, the Court upheld portions of a Missouri statute requiring a second physician to be present during post-viability abortions,¹⁶⁶ but three years later, the Court invalidated a Pennsylvania statute requiring, *inter alia*, the attendance of a second physician during post-viability abortions.¹⁶⁷ Additionally, the Court invalidated a city ordinance that required a twenty-four hour waiting period for a woman who sought an abortion,¹⁶⁸ but in a separate case upheld a

court had interpreted the statute); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (upholding the definition of "viability" under a state statute and a requirement that women sign a consent form prior to abortion but invalidating spousal consent, parental consent for minors, a prohibition on use of saline amniocentesis, and a requirement for those performing abortions to exercise professional skill and care to preserve the life of the unborn child); *Singleton v. Wulff*, 428 U.S. 106 (1976) (holding that physicians may challenge abortion-funding restrictions on behalf of female patients seeking abortions, thereby permitting abortion providers to challenge state laws as plaintiffs in place of individual patients); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (invalidating the application of a Virginia statute that prohibited the advertisement of abortion); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (upholding a Connecticut anti-abortion statute as it applied to non-physicians); *Roe v. Wade*, 410 U.S. 113 (1973) (striking Texas's criminal abortion statute, prohibiting abortion except where necessary to preserve maternal life, and declaring for the first time a "right to privacy" in the Due Process Clause includes the right to abortion); *Doe v. Bolton*, 410 U.S. 179 (1973) (invalidating Georgia's abortion "reform" statute that authorized abortion only where continued pregnancy would endanger a woman's life or health, including mental health, where the unborn child would likely be born with a serious defect or where pregnancy resulted from rape).

162. *Matheson*, 450 U.S. at 412 ("The Utah statute is reasonably calculated to protect minors in appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences."); *see also Ayotte*, 546 U.S. at 323 (reversing the lower court decision invalidating New Hampshire's parental notice law in its entirety and remanding for the lower court to determine whether it could devise a narrower remedy than a permanent injunction).

163. *Id.* at 331.

164. *Bellotti II*, 443 U.S. at 651 ("Although [the statute] satisfies constitutional standards in large part, [it] falls short of them . . .").

165. *Id.*

166. *Planned Parenthood Ass'n of Kansas City, Mo.*, 462 U.S. at 476.

167. *Thornburgh*, 476 U.S. at 747.

168. *City of Akron*, 462 U.S. at 416.

forty-eight hour waiting period for minors.¹⁶⁹ The Court has also upheld part of a Pennsylvania statute requiring a twenty-four hour mandatory reflection period following the receipt of risk information.¹⁷⁰

Moreover, the standard of review the Court applies continues to change with its wavering position. For instance, in *Simopoulos v. Virginia*, the Court held that Virginia's requirements were constitutional as a "reasonable means" of furthering the state's "compelling interest" in protecting the health and safety of women.¹⁷¹ Generally, the Court applies three levels of scrutiny (strict scrutiny, intermediate scrutiny, and a rational basis test).¹⁷² The specifics of each level of scrutiny are outside the purview of this Comment; however, it is unclear whether "reasonable means" and "compelling interest" constitute strict scrutiny, intermediate scrutiny, a rational basis test, or some new hybrid. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, however, the plurality abandoned what had evidently been the standard—strict scrutiny—and applied a new "undue burden" standard of review.¹⁷³ Yet, in a subsequent decision, Justice O'Connor stated in a concurring opinion that the proper *Casey* analysis is whether, "in a large fraction of the cases in which [the law] is relevant, it will operate as a *substantial obstacle* to a woman's choice to undergo an abortion."¹⁷⁴ Whether the current standard is a "substantial obstacle," "undue burden," or a "reasonable means" of furthering a state's "compelling interest" is unknown and determining whether one of these standards is currently applicable is disappointingly unpredictable.

Historically, the Supreme Court has decided cases involving inalienable rights in a way inimical to life, liberty, and the pursuit of happiness.¹⁷⁵ In *Stenberg v. Carhart*, the Court upheld a violation of the right to life of an infant, striking down a ban on partial-birth abortion in which a distinct, individual, human child is born, but the child's head is kept partially in the

169. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

170. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

171. *Simopoulos v. Virginia*, 462 U.S. 506 (1983).

172. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (recognizing "the traditionally expressed levels [of scrutiny] (strict scrutiny, intermediate scrutiny, rational basis)").

173. AMERICANS UNITED FOR LIFE, *supra* note 161, at 47 (citing *Casey*).

174. *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring).

175. See generally *Stenberg v. Carhart*, 530 U.S. 914 (2000) (considering a partial-birth abortion statute); *Buck v. Bell*, 274 U.S. 200 (1927) (considering a forced sterilization and eugenics statute); *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (considering slavery).

vagina for the purpose of shoving scissors into the skull and extracting the infant's brains.¹⁷⁶ Additionally, in *Buck v. Bell*, the Court upheld a violation of liberty against mentally challenged individuals, referring to them as "imbeciles" and justifying their sterilization.¹⁷⁷ Moreover, in *Dred Scott v. Sandford*, African-American persons were denied recognition as *citizens* under the Constitution.¹⁷⁸

To interpret the Constitution without viewing it as a covenant among the people and in light of the Declaration of Independence erodes, confuses, and diminishes a person's inalienable rights. The necessity of understanding the Constitution as the covenant among the people that it was intended to be, and viewing the Constitution through the lens of the Declaration's principles, continues to grow. Thus, perhaps the time has come to enumerate the pre-existing inalienable right to life through a federal constitutional amendment and similar state amendments.

1. Standing to Sue

Case precedent upholds the right of the unborn to have standing to sue,¹⁷⁹ and a personhood amendment vesting due process rights in the unborn is not an unforeseeable conclusion.¹⁸⁰ In *Greater Southeast*

176. See *Stenberg*, 530 U.S. at 914 (discussing dilation and evacuation (D&E) and dilation and extraction (D&X) abortion procedures).

177. *Buck*, 274 U.S. at 207 (stating that "[t]hree generations of imbeciles are enough" as a justification for sterilization).

178. *Dred Scott*, 60 U.S. at 403-05.

179. See *Greater Southeast Cmty. Hosp. v. Williams*, 482 A.2d 394 (D.C. 1984) (holding that "(1) viable fetus is a 'person' under the common law with the right to be free of nonfatal tortious injury, and (2) viable fetus is also a 'person' within meaning of wrongful death and survival statutes and, hence, fatal prenatal injury to otherwise viable fetus is actionable under those statutes"); see also *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. 1995) (holding that "(1) tortious injury suffered by nonviable child en ventre sa mere who subsequently is born alive is compensable and no less meritorious than injury inflicted on viable child who is subsequently born alive, and (2) term 'person' as used in wrongful death statutes encompasses nonviable unborn child, and cause of action for tortious death of such child is permitted"); *Bonbrest v. Kotz*, 65 F. Supp. 138, 143 n.11 (D.D.C. 1946) (stating, in part, that "[b]y the eighth week the embryo or fetus, as we now call it, is an unmistakable human being, even though it is still only three-quarters of an inch long. Indeed, the Chinese have long recognized that when a man is born he is already nine months old. Each of their babies is given at birth a full year's credit on the reckoning of its age.") (citations omitted) (internal quotation marks omitted).

180. See Davidson, *supra* note 120, at 185 (positing the Stewardship Doctrine as a constitutional theory of intergenerational justice); Zimmerman, *supra* note 15, at 88

Community Hospital v. Williams, the Court of Appeals for the District of Columbia held that a viable unborn child is a *person* under the common law and has the right to be free from tortious injury.¹⁸¹ Additionally, the Court found that a viable unborn child is a *person* under the wrongful death statutes, and therefore, prenatal injury was actionable.¹⁸² In *Farley v. Sartin*, the West Virginia Supreme Court of Appeals went further, holding that tortious injury on a nonviable child was no less meritorious than injury on a viable child.¹⁸³ The Court also held that the term *person* in the wrongful death statutes included a nonviable unborn child.¹⁸⁴

The definition of a *person* as applied to unborn children is not foreign to American courts. It is a non sequitur that an unborn child has standing to bring a cause of action for tortious injury, but somehow does not have the inalienable right to live. Indeed, defining an unborn child as a *person* is therefore a foreseeable constitutional protection. Some argue such a protection should at least begin with state constitutional amendments, mainly citing principles of dual federalism. An argument could be made that the current Supreme Court may be returning to such federalist principles. In fact, in 2011, the Supreme Court upheld this idea of federalism when it struck down a criminal statute for violating the Tenth Amendment.¹⁸⁵ Perhaps it is permissible under federal law for states to enact through constitutional amendment a more expansive protection of persons under the state law. If this were to take effect, another issue may arise in finding prosecutors willing to uphold such a law.¹⁸⁶

(discussing whether the unborn child injured by its mother's employer possesses a worker's compensation claim or an action in tort).

181. *Williams*, 482 A.2d at 394.

182. *Id.*

183. *Farley*, 466 S.E.2d at 522.

184. *Id.*

185. *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011).

Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism. That claim need not depend on the vicarious assertion of a State's constitutional interests, even if a State's constitutional interests are also implicated.

Id.

186. For a tragic example of the adversity prosecutors may face when challenging the status quo of *Roe* and its progeny, see PLANNED PARENTHOOD CORRUPTION, *Timeline of Events* <http://plannedparenthoodcorruption.org/timeline/> (last viewed Mar. 3, 2012).

VI. CONCLUSION

Historical records, case precedent, and constitutional federalism demonstrate a need to protect the inalienable right to life through a federal constitutional amendment and similar state amendments. In the case of abortion, a moral evil of great magnitude is committed against two persons—the child and the mother. A personhood amendment is a principled and defensible response to the onslaught of abortion-on-demand that tears apart the lives of women and children. Our founding documents, along with the horrific judicial attempts at defining the term *person*, illustrate that a personhood amendment is both foreseeable and necessary. Such an amendment would reaffirm the Supreme Court’s recent insistence on upholding federalism, and the basic inalienable human right to life for the most susceptible to attack—the defenseless unborn. It is a sad day in America when the most dangerous place for any human is inside a mother’s womb. A Supreme Court decision on a state personhood constitutional amendment could answer the question of whether the Federal Government can dictate state constitutional definitions, and more specifically, whether the Supreme Court is willing to recognize the inalienable right to life from the beginning of biological development until natural death.