

A CONSTITUTIONAL VISION

Lincoln Proposal

An Executive Order to Restore Constitutional Rights to All Human Beings

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Introduction

Since 1973, more than 60 million American children have been killed by the violence of abortion. The horror of approximately 2,000 daily killings stems from the United States Supreme Court's constitutional errors in *Roe v. Wade*. The Court promulgated two fundamental errors in *Roe*: first, in its refusal to read the Fourteenth Amendment's guarantees of equal protection and due process to extend to preborn persons; and second, in its erroneous conclusion that "the right to privacy extends to abortion." Fortunately, as scholars ranging from Professor Robert P. George to Professor Mark Tushnet have observed, the judiciary is not the sole interpreter of the Constitution. Rather, the legislature and executive share in this responsibility. Since *Planned Parenthood v. Casey*, the judicial and legislative branches, as well as the states, have engaged in a kind of trench warfare over the logic and scope of *Roe*'s secondary error. The Lincoln Proposal offers a bold vision to repair our constitutional order by turning the executive's attention to the task of correcting *Roe*'s first and foundational error.

Thankfully, the Constitution and laws of the United States vest the President with "[t]he executive power" to take decisive and conclusive action within the domain of the executive branch, including its subsidiary departments and agencies. Article II, Section 1 of the Constitution requires the President to swear to "preserve, protect, and defend the Constitution of the United States." Joseph Story, the famed Supreme Court justice, observed that the oath entails that constitutional officers are "conscientiously bound to abstain from all acts inconsistent with" the



Constitution, and that such officers must "decide each for himself, whether, consistently with the Constitution, the act can be done." Additionally, Article II, Section 3 directs the President to "take Care that the Laws be faithfully executed." This provision imposes a twofold duty: first, an independent responsibility to interpret the Constitution and the laws of the United States, and then second, to faithfully execute them. The President's interpretive role is implicit in and antecedent to the power of execution.

Relying on his constitutionally prescribed oath and his Take Care Clause interpretive authority, the President should fulfill his duty to faithfully execute the guarantees of the Fourteenth Amendment to the Constitution by issuing an Executive Order recognizing preborn persons as constitutional "persons" entitled to the fundamental human rights of due process and equal protection of the laws safeguarded in that Amendment. Such an order would express the full meaning of the Fourteenth Amendment's guarantee of the right to life and would be supported by the historic practice of great American presidents.

The Fourteenth Amendment's Recognition of Preborn Personhood

The Fourteenth Amendment was ratified in 1868, after the Civil War, to ensure that no human being would be denied fundamental rights guaranteed by the Constitution. Notably, Section 1 of the Amendment utilizes two terms, “citizens” and “persons”, which are distinct concepts and impart distinctive rights. The Amendment begins by guaranteeing that “All *persons born* or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” Thus, according to the Amendment’s terms, only born or naturalized persons subject to the jurisdiction of the United States may be citizens, and no state “shall abridge the privileges or immunities of citizens of the United States....” However, the Amendment goes on to provide more expansive protections for “persons” than those “privileges or immunities” that citizens enjoy (e.g., the right to vote), and it does not restrict those protections to “persons born.” It refers simply to “persons”, and provides that no state may “deprive any person of life, liberty, or property, without due process of law” or deny any person “the equal protection of the laws.” Science, across the fields of embryology, physiology, and genetics, instructs unequivocally that the preborn are members of the human species from the moment of conception, or from that instant which Dr. Maureen Condic of the U.S. National Science Board precisely describes as the moment of “sperm-egg fusion,” and thus the preborn are “persons” as that term is applied to every member of the human family.

This understanding is consistent with dictionaries of common and legal usage at the time of the Fourteenth Amendment’s adoption, which treated the word “person” as interchangeable with “human being” or “man.” The 1864 edition of Noah Webster’s *Dictionary of the English Language* defined the term person as relating “especially [to] a living human being; a man, woman, or child.” Alexander Burrill’s *New Law Dictionary and Glossary* defined “person” as “A human being, considered as the subject of rights, as distinguished from a thing.”



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Likewise, for the treatise writer William Blackstone, there was no distinction between *biological* human life and *legal* personhood. No dictionary of the era referenced birth or the status of being born in its definition of “person,” “man,” or “human being.”

Moreover, the English common-law tradition—which the United States inherited and developed after its independence—consistently treated abortion as the wrongful killing of a human being. Abortion was prohibited as soon as life in the womb could be detected, such as by “quickening”. This was not a statement that human life is not present until that point, but rather a rule of evidentiary proof, intended to protect the alleged perpetrator of abortion by foreclosing an accusation of abortion before pregnancy could be proven. By the time the Fourteenth Amendment was ratified in 1868, the states widely recognized unborn children as “persons”. Twenty-three states of the 37 states at the time, and six territories, referred to the preborn human being as a “child” in their anti-abortion statutes. Twenty-eight listed abortion among statutory “offenses against the person” or a functionally equivalent classification. In a particularly striking example, the same Ohio legislature that ratified the Fourteenth Amendment in January 1867 passed legislation criminalizing abortion at all stages three months later in April. The committee that reviewed the bill, which was composed of several Senators who had voted for ratification of the amendment, declared in their report that abortion “at any stage of existence” is “child-murder.”

From another perspective, the story of our Constitution—and the Fourteenth Amendment in particular—has been the story of extending the protection of fundamental legal rights to more and more classes of persons, including African Americans, women, Native Americans, resident and nonresident aliens, the developmentally disabled, and illegitimate children. In every case, the affirmation of constitutional guarantees for these classes of persons was based on their mere status as human beings within the Constitution’s juridical reach. Even when the parameters of equal protection and due process are tailored to their subjects, such as the more circumscribed rights held by children and non-citizen aliens, the core of those guarantees are recognized in some way for all members of the human family within the borders of the United States—except for our youngest members.

“The child in the womb,” observed Professor Charles Rice in his 1971 Americans United for Life amicus brief in *Roe*, “is a person within the meaning of the Equal Protection Clause of the Fourteenth Amendment.” Although the Court at that time was bent on ignoring this basic reality, it has since accepted the logic and precedent of equal protection for successive classes of persons.

An Executive Order recognizing the constitutional rights of the preborn would therefore rest on a firm legal basis.

The President's Independent Duty to Interpret the Constitution



In *Roe*, the Supreme Court discovered a constitutional “right” to abortion that exists nowhere in the text, after concluding that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” In so doing, the Court purported to overturn laws protecting human life in all fifty states, and nullified the will of an American democratic majority that recognized preborn human children as worthy of legal protection.

The Supreme Court has not revisited that conclusion in subsequent abortion cases. How then could the President issue an Executive Order contrary to the interpretation of the Supreme Court? Actually, such a move would be supported by strong precedents. Several of America’s greatest presidents—including Thomas Jefferson, Andrew Jackson, and Abraham Lincoln—have relied on the Presidential Oath Clause and the Take Care Clause to assert the Executive’s independent duty to interpret and execute the Constitution within the President’s constitutionally vested domain of authority, even in the face of contrary judicial decisions.

Despite several judicial decisions upholding the constitutionality of the Alien and Sedition Acts, President Jefferson exercised his own constitutional judgement to “affirm that [sedition] act to be no law, because in opposition to the constitution; and I shall treat it as a nullity, wherever it comes in the way of my functions.” Jefferson wrote that treating federal “judges as the ultimate arbiters of all constitutional questions” to be “a very dangerous doctrine

indeed, and one which would place us under the despotism of an oligarchy.” Instead, Jefferson believed “each of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard to what the others may have decided for themselves under a similar question.”

President Jackson adopted the same posture in his veto of the Second National Bank in 1832. He argued that the Supreme Court “ought not to control the co-ordinate authorities of this Government.” Instead, “Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.” Rather than blindly deferring to every pronouncement of Congress or the Supreme Court, Jackson thought that the Executive, when discharging his constitutionally vested responsibilities, should only grant “such influence as the force of their reasoning may deserve.”



The President's Independent Duty to Interpret the Constitution



Perhaps the most famous example of all is Lincoln's response to the Supreme Court's decision in *Dred Scott v. Sandford*. As a Senate candidate, Lincoln acknowledged the Court's decision as binding upon the parties, but denied the opinion possessed precedential effect. Once elected President, Lincoln reaffirmed his commitment to resisting *Dred Scott* in his First Inaugural Address, warning that "if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court ... the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

Lincoln's attorney general quickly drafted a lengthy legal opinion arguing that "the president and the judiciary are co-ordinate departments of government, and the one not subordinate to the other."

Thus, the Executive must be able "to act out its own granted powers, without any ordained or legal superior possessing the power to revise and reverse its action." The Lincoln administration then put its theory into practice, disregarding *Dred Scott*'s central argument against black citizenship and issuing passports and patents to black Americans, acts within his purview as the Chief Executive. Lincoln also exercised his authority over the federal territories and the District of Columbia by signing bills that abolished slavery in those jurisdictions despite *Dred Scott*'s assertion that the territories were constitutionally required to permit slavery. Most famously, Lincoln's Emancipation Proclamation, issued on January 1, 1863 in the midst of the Civil War, declared "that all persons held as slaves" within the warring Southern states "are, and hence-forward shall be free." That act, based upon the president's authority as Commander in Chief of the Union forces, permitted freed African-Americans to enter the army; and by the end of the war, nearly 200,000 had fought for their freedom.

These great American presidents provide an example for the President to follow. The President may exercise his independent constitutional authority to interpret the Fourteenth Amendment's safeguards of due process and equal protection to extend to all human beings, born and not yet born, irrespective of the Supreme Court's position in *Roe*.

A Human Life Executive Order



The groundwork to extend the examples of Jefferson, Jackson, and Lincoln has already been laid. With respect to abortion, President Ronald Reagan recognized the responsibility of the coordinate branches to protect prenatal personhood, encouraging Congress to pass legislation “to protect the life of each person before birth” despite the Supreme Court’s determination in *Roe*.

In 1988, President Reagan issued a proclamation recognizing that “[t]he unalienable right to life is found not only in the Declaration of Independence but also in the Constitution that every President is sworn to preserve, protect, and defend. Both the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life without due process of law.” Reagan therefore undertook to “proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death.” Invoking his solemn constitutional duty, President Reagan promised to “take care that the Constitution and laws of the United States are faithfully executed for the protection of America’s unborn children.”

An Executive Order from the President could give legal effect to the proclamation first announced by President Reagan over three decades ago. Such an order would constitute a binding and authoritative interpretation of the Constitution within the executive branch, including its constitutive departments and agencies. The President could direct the departments and agencies to examine their regulations and programs to ensure they align with the



President’s Executive Order, and to initiate rulemaking or issue guidance bringing those regulations and programs into compliance with the President’s interpretation as necessary. To provide a few concrete examples of how the Executive Order could be implemented, the President could direct and empower:

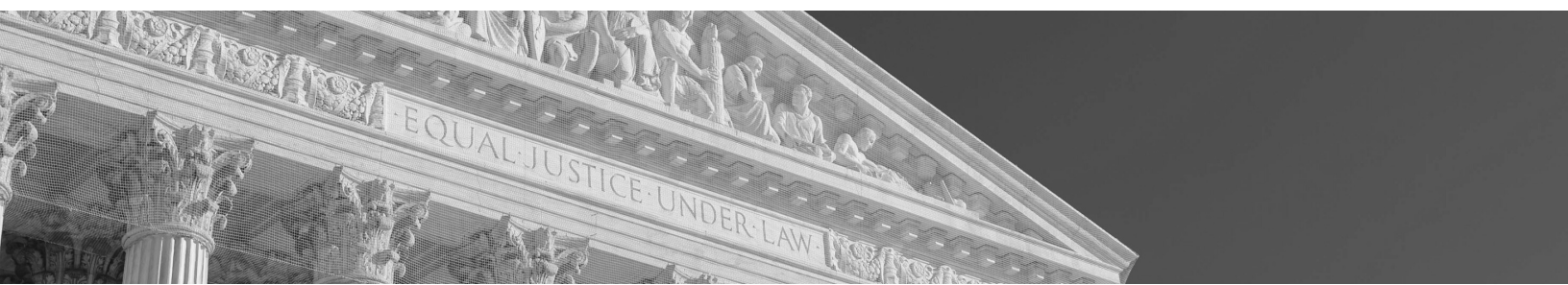
- The Department of Justice and relevant enforcement agencies to oppose judicial injunctions intended to restrict and interfere with the ability of Congressional and state lawmakers to codify protections for human life;
- The Department of Justice and its Civil Rights Division to investigate state or municipal laws or policies that deprive preborn persons of due process of law or the equal protection of the laws;

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- The Department of Commerce and Census Bureau to enumerate children born and not yet born in the decennial census, consistent with Section 2 of the Fourteenth Amendment, which requires apportionment “counting the whole number of persons in each state”;
- The Department of Defense to establish National Safe Havens at all military and recruiting stations for expectant mothers facing abuse or coercion, and for emergency housing, financial, and educational aid for those seeking alternatives to abortion, particularly in jurisdictions hostile to protections for human life;
- The State Department to ensure that preborn children are not denied equal protection in multilateral instruments at the United Nations and other international treaty bodies, either by policy or by subsidization with United States taxpayer funds;
- The Department of Health and Human Services to condition federal healthcare funding to states upon the adoption of specified policies that protect the right to life to the utmost extent possible, and to deny federal funding, including Medicare funding and Title X funding, to organizations that refer or advocate for abortion;
- The Department of Health and Human Services to condition federal healthcare funding on state defunding of abortion businesses and redirecting such funds to life-affirming pregnancy resource centers and direct aid alternatives;
- The Department of Health and Human Services and the National Institutes of Health to deny federal funding for fetal tissue research derived from human abortion;
- The Food and Drug Administration to suspend its approvals of chemical abortifacients such as RU-486 (Mifeprex) and similar generic drugs, and to take affirmative steps to deny the importation of abortifacients from outside the borders of the United States;

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- The Department of Homeland Security and the Immigration and Customs Enforcement (ICE) to prohibit coverage and provision of abortion to individuals in ICE custody; and
- The Department of Education to withhold federal funds from school programs that advocate abortion or the use of abortifacient drugs, and to promote educational programs that accurately teach the biological fact that each human life begins at sperm-egg fusion;

The exercise of prudence in public life calls political leaders to bring about the greatest good possible in a given situation. Americans need not accept an interminable status quo of indifference toward the rights of the child, due either to the timidity of our political elite or to the presumption of our judiciary class. It is a political imperative to lead with both prudence and principle. An Executive Order would be the culmination of earlier presidential actions to guarantee constitutional protections to all human beings, following in the footsteps of President Lincoln in the aftermath of *Dred Scott*. Adopting the logic of Lincoln's approach would likewise be a step away from a false federalism wherein the most basic and fundamental of all rights could continue to be unjustly withheld in hostile jurisdictions. No doubt such an order would be the greatest pro-life accomplishment in decades, introducing the logic of abolition to America's body politic. And indeed, such an order would vindicate that most precious unalienable right named in the Declaration of Independence: the right to life.

Presidents have questioned the Supreme Court's abortion regime, but until *Roe*'s first and foundational error in its misreading of the Fourteenth Amendment is addressed directly, America's abortion culture can never be fully uprooted. The Lincoln Proposal focuses presidential energy not merely on abortion's regulation, but rather on the ultimate goal of abortion's abolition.

The Lincoln Proposal represents the next step toward an American culture capable of overcoming the Supreme Court's jurisprudence of violence and doubt, and moving boldly into an American future uplifting, empowering, and protecting every member of our common family.