nobyl Unit 4 was used for wpons production. These protests, hcever, steer clear of the fact that the doned power plant—and many more st operating in the Soviet Union—aredesigned to double as bomb factoriesAnd along with this capability comthe design flaws that make the BMKs so dangerous.

Incidentally, the Sovietsnave since announced a piecemeal pla to adjust their RBMKs to eliminate th possibility of an identical accident ccurring in the future. To date, there isno evidence that they have done so. In fct, Energy Secretary John Herrington told a Senate subcommittee lasNovember that two of the other RBKs at the Chernobyl site had most prably been restarted without the complon of the promised upgrades. In ancase, the proposed corrections are ere bandaids that provide neither aduate containment, an adequate stem for quickly shutting down the eactor, nor a complete solution to he RBMKs predisposition to getting ot of control. Western experts have offerd technical help through the IAEA, bt they and their international organization are being kept informed only to the extent that they can serve Soviet purposes. Because the Soviets won't abide snooping on their weapons production system, they have steadfastly refused Western experts more than superficial tours of their nuclear plants.

Unfortunately, the technical and philosophical differences between the U.S. and Soviet nuclear power programs—including the fact that weapons and power production are kept separate in the United States—have not piqued the interest of the American press, which has thus missed the chief lesson of the disaster: our nuclear plants are safer by several orders of magnitude than Chernobyl Unit 4.

The unwillingness of the media to discuss positive void coefficients of reactivity, for example, is representative of the new status of nuclear power as a political issue. For liberals—especially those opposed to all things nuclear and friendly toward the Soviets—Chernobyl created cognitive dissonance and was quickly forgotten.

And some politicians, like New York's Governor Cuomo and Representative Ed Markey of Massachusetts, rediscovered nuclear power as an issue for alarming that growing part of the electorate that is not so much skeptical about energy sources as merely without a clue. Because of the mysterious similarities discovered by the likes of Cuomo and Markey between Chernobyl and the U.S. nuclear power program, further delays were engineered in the opening of new nuclear plants at Shoreham, Long Island; Seabrook, New Hampshire; and North Perry, Ohio. While these plants sit idle at the expense of both utility shareholders and ratepayers, existing nuclear plants are cleanly and safely powering the same regions where the new nukes have been declared taboo. Savvy politicians can thus take advantage of a temporary surplus in electric capacity, mortgage the future of regional economies, and fully exploit the fact that a large part of the public doesn't know where their electricity comes from in the first place.

Setbacks for a few U.S. plants, however, may not be as significant as the anti-nuclear groundswell that has followed the disaster in Europe. Plans to add more nuclear capacity have been stopped in the Netherlands and Finland; Sweden has voted for a rapid phase-out, and the West German program is suddenly under attack.

For now, nuclear power in the United States remains in deep trouble because of problems in the licensing system, and in the public's misperception of the dangers. We would face a disaster very different from the one at Chernobyl if these obstacles should impede our ability toward the end of the century to further develop what can be our safest, cleanest, and cheapest source of energy. Chernobyl should remind us that we have invested billions of dollars and some of the country's most conscientious technical talent for the enviable option of safe nuclear power. And it should remind us that the Soviets are recklessly lurching toward self-sufficiency in energy—with us or without us. □

Lewis E. Lehrman

THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIFE

One leads unmistakably from the other.

If it might be said that Araham Lincoln, the circuit court ligator, was the framer of the posCivil War Constitution, then it may so be said that President Lincoln ws his own John Marshall. For in anyexegesis of Lincoln's rhetoric one discvers not the temperament of a lawyer bt the jurisprudence of a lawgiver. Nr need one accept all of Lincoln, the aologist and evangelist of the Declaratin of Independence, to declare certai truths indispensable to the triumphf the idea of the American RepublicIndeed, if the Lincoln of the great ebates and the Gettysburg Address di not exist, I would want to invent hin, if only to reappropriate for moden conservatives, once and for all, th first principles of the American Founding—the Declaration of Independence. For it is no exaggeration to say that the future of the world now depends upon the future of American conservatism—and, therefore, upon the true principles of the American Republic we would conserve. And these we can know only from a right reading of the American Constitution.

Today, in the great debate over the authentic Constitution, inaugurated by Attorney General Ed Meese, conservatives are faced with several unresolved but fundamental issues: Are the legal positivists and legal realists, heirs of Justice Oliver Wendell Holmes and Justice Charles Evans Hughes, right when they declare the American Constitution to be essentially what Supreme Court Justices or elected legislators say it to be—their rulings and statutes thus unappealable—even if such "law" plainly violates not only the organic law of the nation but also the law written in our hearts? Moreover, is it true, as historicists, relativists, and nihilists argue, that original intent—the actual meaning of the framers—is undiscoverable in the history of the Constitution, or even by a deep reading of the document itself? And, further, are strict text-based considerations now irrelevant, as "non-interpretivists" imply, when finding and applying the fundamental law of the land?

Or, on the other hand, are Jefferson, Madison, Washington, Adams, and Lincoln right when, affirming the Declaration and "the laws of nature and of nature's God," they "hold these truths to be self-evident, that all men are created equal"; and further that all men "are endowed by their Creator" with the inalienable right to life, and to liberty? And did the founders imply correctly that any law or judicial ruling which violates *these inalienable human rights* is, by its nature, unenforceable, indeed unconstitutional since, according to the Declaration of Independence—the congressional act which united the Colonies and legitimated independence—it is primarily "to secure these [inalienable human] rights" that "governments are instituted among men"; further, that governments hold only "just powers derived from the consent of the governed"; and finally, "that whenever any form of government becomes destructive of these ends [namely, the inalienable right to life and to liberty] it is the right of the people to alter or abolish it, and to institute new government . . ."? Indeed, even *the people* are here constrained in the Declaration of 1776 to consent only to a government of *just* powers and laws. In their absence, the

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people—dedicated to the proposition that all men are created equal and endowed by their Creator with inalienable rights—should institute new government.

These are the first principles of the American regime laid down by the founders at the birth of the republic on July 4, 1776; for not only Thomas Jefferson, but also James Madison, the father of the Constitution, held the Declaration to be, in their words, "the fundamental act of union." That is to say, the Declaration is part of the organic law by which to interpret American constitutional principles and to discover the original intent of the framers. The implications of this fact are too often ignored by constitutional scholars who focus narrowly on the positive law of the great charter of 1787 and its subsequent amendments. Nevertheless, no one can deny that the Declaration was, and is, placed first in the *United States Code of Laws* (1940)—even ahead of the Constitution—and described therein as "organic law." (See the position of the Declaration in *The Public Statutes at Large of the United States of America* 1-3, 1854; the *Federal and State Constitutions . . . and Other Organic Laws of the United States*, 1877; the *Revised Statutes of the United States* 3-6, 1878; the *United States Code* XIX-XXII, 1940.)

Thus Lincoln was clear and correct when, in 1863, he said "four score and seven years ago"—that is, on July 4, 1776—"our Fathers brought forth a new nation. . . ." (He did not say three score and 14 years ago—or 1789.) When Lincoln emphatically called himself a conservative, it was the first principles of the Declaration, our "ancient faith," which he sought to conserve, or rather restore in the Constitution of the United States. Accordingly, if it may now be said that the Fourteenth Amendment indirectly incorporated certain of the Bill of Rights, so too must it be affirmed that the first American Congresses, the original intent of the founders, and, moreover, the U.S. Code of Laws certainly incorporated the Declaration of Independence into the Constitution of the United States. Only, therefore, in light of the organic link between these two documents might American conservatives fully illuminate the great constitutional and moral debates of the present moment.

When Lincoln emphatically called himself a conservative, it was the first principles of the Declaration, our "ancient faith," which he sought to conserve.

Adapting Lincoln's words from his patient struggle for the inalienable right to liberty in the 1850s, we may now say that the "durable" moral issue of *our* age is the struggle for the inalienable right to life of the child-in-the-womb—and thus the right to life of all future generations. These are the penultimate stakes in the current controversy over how, once again, to interpret the inalienable human rights of the American founding. For the stakes could never be otherwise under a government characterized by "just powers." Whether we resolve it immediately or not, the issue of abortion is now joined. And, like the unresolved issue six score years ago—i.e., of the positive right of property of the white man in a black slave, or, on the contrary, the inalienable right to liberty of the black man—this current issue, too, shall be resolved, either for the positive right to abortion of the "foetus" (a chattel); or, on the contrary, for the inalienable right to life of the child-about-to-be-born (a person). Only prudential and practical wisdom, combined with compelling circumstance and necessity, could have delayed the resolution of both historic issues in the true American Republic.

The enduring question is: Shall the actual meaning of the Constitution—the original intent of the founders, as revealed in the document itself and illuminated by its history—prevail in all applications by the Supreme Court? Is this intent, the true meaning of the framers, too imprecise—thus unknowable—justifying the now trendy conclusion that the law can only be what Supreme Court Justices and legislators say it is? Surely it is correctly supposed under the American Constitution that all persons cannot be endowed both with the liberty to hold slaves and with the inalienable right to liberty; indeed, all persons cannot be endowed both with the liberty to take innocent life by abortion and with the inalienable right to life. Or is it now to be suggested that the law is only what the "sovereign" people vote it to be—no matter if judges, legislators, and the people decide and vote, say, for the permanent chattel right to dispose of property in the black man ("popular sovereignty"); or for the chattel right to dispose of property in the child-about-to-be-born (popular "pro-choice").

But if judicial supremacy, or majority rule, or "popular sovereignty" leads to an extra-constitutional decision, an unnatural outcome, can there be no further appeal under the last best hope—the authentic Constitution of the United States? This question shall not finally be answered in the law schools, for in the struggle between the moral and natural law (the Declaration of Independence) and legal positivism (adventitious, judge-made law), Americans will soon have to choose in coming presidential and congressional elections. And there is no more important choice before us as a people. For, as a nation founded under God, ours is a house which, divided against itself, cannot stand. So, it should come as no surprise that we the people shall again have to answer the question put so poignantly by Abraham Lincoln to his fellow Americans and to Senator Stephen Douglas in the great debates of 1858 and later in 1860 at Cooper Union: When the issues of life and liberty are at stake, can it ever be right to do wrong?

In deciding what is to be done to resolve the issue of abortion, conservatives must never forget the compelling case for Lincoln's conservatism, grounded as it was in the Declaration of Independence, the organic law of the American founding. Lincoln was, in fact, one of the most persuasive advocates of what the great legal historian, Edward S. Corwin, called the "higher law" principles of the American Constitution. This ancient doctrine suggested that the founding principles of the American regime, according to which the positive law of the Constitution ought to be interpreted, were first and best codified in the natural right doctrine of the Declaration of Independence. In this sense Lincoln was neither a radical nor a conservative. Instead he argued for *restoration* of the original principle of the American Republic—equality of all persons before the law—a principle to be carried out gradually and prudentially in due deference to countervailing circumstance and necessity. Such was Lincoln's principled and prudential policy toward slavery. But today it must be said that Lincoln's view of the self-evident truths of the Declaration is a minority position—among liberals *and* conservatives—confronting as it does a prevailing consensus of relativism in the courts, the legislature, and the law schools. The elite consensus may best be summed up in the words of my friend, Benno Schmidt, former dean of Columbia Law School and now president of Yale, who in discussing this issue with me said, "American constitutional law is positive law, and the Declaration of Independence should have no standing in constitutional interpretation whatsoever."

Ironically, contemporary legal theory, both conservative and liberal, tends to decide constitutional intent by reference to authorities substantially *outside* the four corners of the full text of the Constitution itself. In the one case, as with Attorney General Ed Meese (see his Dickinson College speech of 1985), one is carefully directed to find in the Declaration of Independence an *extrinsic* authority by which to determine the original intent of the framers of the Constitution; in the other case, as with Justice Harry Blackmun (see his opinion in *Roe* v. *Wade*), one is circuitously directed to discover an extrinsic authority for con-

stitutional interpretation n the supervening extra-textual opion of Supreme Court Justices themlves.

But while the Supreme Courmajority today has all but ignored i there is another authoritative way to scover original intent, as Christophe Wolfe reminds us in his important boc, *The Rise of Modern Judicial Revie*, Basic Books, 1985). That way we cannd in the work of Chief Justice Joh Marshall, whose preeminent authoy has been claimed not only by traditnalists who hold that the Suprem Court Justice must always find th actual meaning of the law in the original intent of the framers, but also by*udi*cial supremacists who hold that te judge must and should legislate himelf. But let us read, in *Osborne* v. *ank of*

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United States, the words of Chf Justice Marshall himself: "Judici power is never exercised for the purose of giving effect . . . to the will of the judge; always for the purpos of giving effect to the will of the law"—law made by the legislator who daws his authority directly from the peole. And further, he declares, "we [judge] must never forget that it is a Constitution we are expounding," not the legislative opinions of judges. But in *Mrbury* v. *Madison*, Marshall states: "I is emphatically the province and dur of the judicial department to say whathe law is."

Yet in *McCullough* v. *Maryand* he emphasizes that "where the la is not prohibitive" [i.e., where the lw does not clearly prohibit a legislativaction], for judges "to undertake . . . tonquire into the degree of [the law's] ncessity would be to pass the line whichircumscribes the judicial departmerand to tread on legislative ground." Te Chief Justice clearly held that theudicial department *is* circumscribed;nd it *is* limited by legislative (or constittional) intent. Moreover, Marshall's lgal reasoning and opinions show hw and why, according to commonly ccepted rules of judicial interpretaton, the original intent of the framer of the Constitution can best be dscovered "intrinsically." That is to sa, Justice Marshall used a substantially *in*ternal analysis of the actual documt itself to find in its text the framers' ntent—carefully applying rational ules of legal construction which depnd primarily upon the plain meanirg of the words, the full context of the words, the relations of the words in the different parts of the Constitution, he subject matter with which the words of the law deal, and the obvious spirit or cause which gave rise to the law itself.

That the law, above all, is intended to do justice, whatever the rules of construction, is a first principle of Marshall's jurisprudence which he makes clear in *Marbury* v. *Madison* by asking the fundamental question: "Can it be imagined that the law furnishes to the injured person no remedy?"—no matter how small, helpless, defenseless, or obscure the person. To this question Marshall rejoined: "It is not believed that any person whatever would attempt to maintain such a proposition." Moreover, the fundamental principles of natural justice, suggested Marshall in *Ogden* v. *Saunders*, stemmed from the very principles of "the framers of our constitution" who "were intimately acquainted with . . . the law of nature" because "the language they have used" in their writings and documents, such as the Declaration and the Constitution, "confirms this opinion."

Thus, Marshall found it straightforward if sometimes painstaking to decide faithfully whether a law or act or judicial decision was unconstitutional. He enshrined his reasoning in the *Marbury* decision. Often cited by both judicial supremacists and legal positivists who reject natural law, Marshall in *Marbury* considers "the question, whether an act, repugnant to the Constitution, can become the law of the land. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it." And by what *principles* shall it be decided? To this question Marshall had an unequivocal answer. "That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness, is *the basis* [my emphasis] on which the whole American fabric is erected." And, moreover, "the principles, therefore, so established are deemed fundamental."

But why is Marshall so absolutely sure of "the basis" and "the principles" deemed fundamental to the Constitution—that is, to the "whole American fabric"? Because, in fact, Marshall draws the very words of this part of his opinion almost exactly from the Declaration of Independence itself—from its second paragraph, which reads, "It is the right of the people . . . to institute a new government laying its foundation on such principles . . . as to them shall seem most likely to effect their safety and happiness. . . ." But the phrase *such principles* must also refer to its antecedents, specified in the preceding paragraph of the Declaration, namely, those self-evident truths which hold that all men are created equal and endowed by their Creator with the inalienable right to life and to liberty.

The lawful basis of the American Republic is thus, in fact, found by Chief Justice Marshall in the very same organic law upheld by Abraham Lincoln, the Declaration of Independence. But, echoing Marshall, one must now ask: can it be supposed that the Declaration, the fundamental act of union, which provides the basis for the American people to establish constitutional government—can it truly be supposed that this explicit charter of the inalienable right to life is to be ignored by Supreme Court Justices, legislators, Presidents, and law school professors? May it be reasonably supposed that an expressly stipulated right to life, as set forth in the Declaration and the Constitution, is to be set aside in favor of the conjured right to abortion in *Roe* v. *Wade*, a spurious right born exclusively of judicial supremacy with not a single trace of lawful authority, implicit or explicit, in the actual text or history of the Constitution itself?

Are we finally to suppose that the right to life of the child-about-to-be-born—an inalienable right, the *first* in the sequence of God-given rights warranted in the Declaration of Independence and also enumerated *first* among the basic positive rights to life, liberty, and property stipulated in the Fifth and Fourteenth Amendments of the Constitution—are we, against all reason and American history, to suppose that the right to life as set forth in the American Constitution may be lawfully eviscerated and amended by the Supreme Court of the United States with neither warrant nor amendment directly or indirectly from the American people whatsoever? Is it not a biological necessity, if it were not manifestly plain from the sequence of the actual words in the Declaration *and* in the constitutional amendments themselves, that liberty is made for life, not life for liberty? Is it to be reasonably supposed that the right to liberty is safe if the right to life is not first secured; and, further, is it to be maintained that human life "endowed by the Creator" commences in the second or third trimester and not at the very beginning of the child-in-the-womb?

Given the consequences of *Roe* v. *Wade*, can it thus be concluded that a well-intentioned but overreaching Supreme Court decision brought about a "coup" against the Constitution and the amendment-making authority of the American people? In the full light of the resulting holocaust, are we at last to suppose that legal positivists and judicial supremacists, even some conservative advocates of original intent and strict construction, all of whom cite Marshall, may properly abandon the Declaration of Independence, the lawful source of those inalienable human rights which are now, in the case of *Roe* v. *Wade*, issues of life and death—when not only the Founding Fathers but Chief Justice Marshall and President Lincoln find that certain American "principles . . . are deemed fundamental," because they stem from the Declaration? Surely "it is not believed any person whatever would attempt to maintain such a proposition. . . ." Surely not Mr. Washington, Mr. Jefferson, Mr. Madison, Mr. Marshall, Mr. Lincoln—all of whom maintained for the Declaration. □