Bioethics: What Would the Founders Say?

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In the last few years, all of you have probably heard the acronym WWJD, which stands for What Would Jesus Do. So far as I can tell, this is a way for Christians, or even left-liberal Jeffersonian deists who admire the social justice message of Christianity, to remind themselves that they ought to live in imitation of the Word made flesh. Modern lives, facing modern choices, still seek guidance from ancient sources. And so, we get clever variations on the motto, such as What Would Jesus Buy or What Would Jesus Drive. The last one, by the way, is especially effective as a bumper sticker, when plastered on a hybrid vehicle as a reproof to the drivers of environmentally-incorrect SUVS.

A few years ago, the political pundit and historian Richard Brookhiser had the inspired idea to write a book titled "What Would the Founders Do?"—in which he speculated about what various founders would conclude about various contemporary questions, from welfare policy to foreign policy. Although I haven't read the book, it strikes me as a salutary exercise, both fun and potentially enlightening. WWtFD is not a bad starting place for American moral reflection—maybe not as elevated as WWJD, but not negligible either. In this talk I inquire into whether the Founders are of any help to us today in thinking about the dilemmas of bioethics. My focus will especially be on the Constitution, since that document embodies the lasting, and still binding, legacy of the Founders. I will, however, recur to some other documents as well.

When I happened to mention the topic of my talk to a man well-versed in both bioethics and the American Founding, he suggested that I respond to the question

posed—the question of the relation between bioethics and the Constitution—as Justice Scalia might. For those of you who are not Supreme Court watchers, Justice Scalia is famous for his scathing dissents in which he chastises his fellow judges for sounding off on any and all subjects without any constitutional warrant for doing so. If I take my cue from Justice Scalia (and my less than encouraging friend), then the most straightforward answer I could give would be that we can't know how to think about bioethics and the Constitution since there is nothing there to think about. The Constitution is silent on such matters, whether it be the most dramatic, but still unrealized, biotech possibilities like human cloning or increasingly routine options like in vitro fertilization, embryo screening, and biomedical interventions to alter mood or enhance performance. Even Ben Franklin, the greatest scientist among the Founders, could not have imagined these new possibilities.

The silence of the Constitution is neither a fault in the Constitution, nor a cause for distress. When the Constitution is silent, it simply means that the matter is one for the current generation to address. We will, of course, do so through the political structures established by the Constitution. Accordingly, the silence of the Constitution might best be understood as an invitation to practice self-government as the Founders understood it.

So, the Constitution, by its silence, instructs us to meet the public policy challenge of biotechnology through the political branches of our government. Our Constitution lodges final authority not with the experts or the scientists, but with the people and the people's representatives. The decisions to be made about cloning, stem cell research, and other biotech possibilities are properly political decisions. To decide well, voters and elected representatives will need both scientific literacy and powers of moral reasoning.

In thinking about the potential of democratic self-governance it's always good to think not only about the Founders, but Aristotle as well. (Indeed, any inquiry is improved by at least a mention of Aristotle.) In the *Politics*, Aristotle defends a regime in which the multitude has a share in the highest offices: the offices of deliberation and judgment. The heart of his defense is an argument on behalf of educated layman. There can be individuals who, while they "do not possess the art" (or science) in question, nonetheless "have some knowledge of its works."[1] What we want is to become educated laymen in Aristotle's sense. We don't need each and every citizen to become a geneticist or a bioethicist, but we do need citizens outfitted with the modest competence of the nonprofessional.

In 2001, President Bush formed the President's Council on Bioethics to help focus the attention of citizens on the crucial questions and inform public debate and reflection. The Council's mission is "to undertake fundamental inquiry into the human and moral significance" of biomedical developments and "to explore specific ethical and policy questions related to these developments." The council has so far issued six reports.[2] All of them are free for the asking at www.bioethics.gov. The reports offer detailed and clear explanations of the science at issue, along with equally careful and clear presentations of the various moral arguments made on all sides. They are invaluable guides to the full panoply of argument and counter-argument on some of the most controversial issues of our day.

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[1] Aristotle, *The Politics*, trans. Carnes Lord (The University of Chicago Press, 1984), Book 3, Chapter 11, 1282a15-20.

[2] The first on human cloning; the second on the whole panoply of so-called "enhancement" technologies; the third on the current state of stem cell research; the fourth on the current state of assisted reproduction, the fifth, on alternative sources of human pluripotent stem cells, and the sixth, on ethical caregiving in an aging society. The Council has also published a bioethics reader called *Being Human*. This is a wonderful collection of readings from poets, novelists, and essayists that help deepen our understanding of what it means to be human and thereby enable us to confront the challenge of being human in a technological age.

So, Aristotle's defense of democracy is an argument for entrusting decisions to educated layman rather than experts. At one point, Aristotle makes an even more radically democratic argument for the qualities of judgment that develop on the basis of experience rather than education. In certain cases at least, Aristotle argues that it is the users of a science or art (which is to say its beneficiaries) who are the appropriate judges. Take the art of cooking: it is the diners, not the cook, whose verdict on the meal matters, and that is so regardless of whether the diners have educated palettes or not. In the same way, it is the citizens not the scientists who must determine what items to select from the biotech banquet, and what items to decline or even ban. I must admit that this is not an altogether reassuring metaphor. Most of us behave badly at smorgasbords. We overindulge, and the art of cooking is complicit in our overindulgence because it caters to our tastes more often than it contributes to our health. For this reason, Socrates suggested that cooking is not a true art, but a form of flattery and demagoguery.

We know that the art of medicine too (while it has a much stronger claim to being a true art) can nonetheless have a flattering side. In place of its traditional end of health, medicine can substitute new and more expansive ends that appeal to us because they flatter our vanity. Think of television shows like *The Swan or Extreme Make-Over* in which ordinary Americans—with bulbous noses and wrinkles on their brows, with weak chins or chins that double over, with small breasts and thighs that bulge—seek to feel better about themselves through cosmetic surgery. These shows make the not-too-subtle claim that liposuction will bring you love, a nose job will get you that promotion, and more fundamentally, that the transfiguration of your body will make your soul happy. So far, we have no psychotropic drug to induce wisdom and no gene for prudence or

moderation that can be spliced into our DNA. It seems that we will have to summon what virtues of character we have of our own to meet the delights and temptations of the biotech banquet. Much will depend on whether Americans, as citizens and as consumers, can negotiate the distance that separates the "extreme make-over" phenomenon from the spirit of deliberative inquiry expressed in the Council's reports.

Although I began by suggesting that one must be cautious in trying to glean public policy from the Constitution, I can't resist the urge to find some phrases to interpret, some hook on which to hang my exegetical shingle. My endeavor can be distinguished, I hope, from that of those activist justices of whom Scalia is so rightly critical. Whereas they have created new rights by judicial fiat, my own approach is directed only toward furthering our political deliberations as citizens. My judgments, unlike the Court's, are entirely non-binding.

There are four constitutional passages I would like to draw to your attention as having some application to bioethics: the Preamble, particularly the aim to "secure the Blessings of Liberty to ourselves and our Posterity"; Article I, section 8, granting Congress the power "to promote the Progress of Science and useful Arts"; Article I, section 9, prohibiting titles of nobility; and the 13th Amendment, forbidding slavery and involuntary servitude.

Let's start with the noble purposes of the Preamble. It's clear that the drafters of the Constitution understood themselves as founders; they acted not simply for themselves, but for their posterity. But what does it mean to secure the blessings of liberty for later generations?

There is a fascinating exchange between Thomas Jefferson and James Madison on the topic of intergenerational rights and obligations that may help us think about this question and about its contemporary relevance to such possibilities as human cloning, the genetic engineering of "designer babies," and the already existing practice of both prenatal and pre-implantation genetic screening, which can be used for the purpose of avoiding giving birth to children with certain genetic disorders or children of the "wrong" sex.

In 1789, Jefferson wrote a letter to Madison, raising the theoretical question "whether one generation of men has a right to bind another." To answer the question, Jefferson assumes that generations are like individuals, by nature free and equal. He asserts that "[e]ach generation is as independent of the one preceding, as that was of all which had gone before."[3] Jefferson was particularly interested in what this generational independence meant for the obligation of debts. He concluded that "no generation can contract debts greater than may be paid during the course of its own existence." It is wrong to saddle your posterity with the consequences of your own selfish profligacy or foolish mismanagement. Using the mortality tables of the day, Jefferson calculated a generation at 19 years. Determined to grant no authority to the dead hand of the past, even if that hand was wise and just, Jefferson goes on to argue that law (including the fundamental law of the Constitution) carries no obligation beyond the term of a generation. As he says, "[e]very constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right."

[3] Thomas Jefferson to Samuel Kercheval, 12 July 1816 in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson (Penguin, 1975), 560.

By the application of this radical, state of nature reasoning to the generations of man, Jefferson seeks to make each generation assume greater responsibility for itself and itself alone. To remain within its proper bounds, each generation must rule itself, but not its posterity. Future generations should be left free to shape their destinies. One glimpses in Jefferson's ruminations the democratic dream of escaping history. With his call for a constitutional convention every 19 years, he envisions the institutionalization of permanent revolution, with its promise of a fresh start in every age. Indeed, every day will present democratic citizens with the need to reconsider, redraft, or reinstate laws that have expired. This is a perpetual springtime of self-government.

Madison's reply is interesting.[4] Remember that we often accord Madison the title "Father of the Constitution." The suggestion of a constitutional convention every 19 years could not be well-received by a man who knew first-hand the extraordinary difficulty of constituting a government. In very respectful and friendly fashion, Madison says he doubts whether Jefferson's idea "can be received in the extent to which your reasonings carry it," pointing out that the doctrine is "not *in all respects*, compatible with the course of human affairs." In the matter of debts for instance, Madison argues that

> Debts may be incurred with a direct view to the interest of the unborn as well as of the living: Such are debts for repelling a conquest, the evils of which descend through many generations. Debts may even be incurred principally for the benefit of posterity: Such perhaps is the debt incurred by the United States. In these instances the debts might not be dischargeable within the term of 19 years.
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> There seems then [says Madison] to be some foundation in the nature of things; in the relation which one generation bears to another, for the *descent* of obligations from one to another. Equity may require it. Mutual good may be promoted by it.

In place of Jefferson's view of generational independence, Madison argues for generational linkage. As a result, he believes it is permissible to extend one's will into the

[4] James Madison to Thomas Jefferson, 4 February 1790.

future—collectively via a lasting Constitution and individually via a last will and testament. He acknowledges the binding character of those wills on the inheritors. There can be an obligation of obedience in the beneficiaries. Moreover, Madison hopes that the Constitution will come to be supported not just out of a sense of duty, but by the people's time-drenched veneration of it. Veneration, on his view, is a wholesome public prejudice. Despite his reservations about Jefferson's idea, both in principle and in practice, Madison concludes with praise for it and a wish that it might be "always kept in view as a salutary restraint on living generations from unjust and unnecessary burdens on their successors." Like Jefferson, Madison wants to ensure that the entailments of the present on the future remain within reasonable bounds.

The biotech revolution raises the stakes of the debate between Jefferson and Madison. The question of the binding of generations is no longer just about financial impositions or the duration and obligation of law, but about control of the human genome. Decisions made by one generation (say to attempt germline manipulation or to pursue human cloning) might transform what it means to be human for the next generation. Already, there are those who call themselves transhumanists and who welcome the idea that human evolution could become self-conscious and self-directed, to such an extent that man as we know him would be transformed and transcended.

If we choose a post-human future for our posterity will we have secured to them the blessings of liberty; or will we have sentenced them to being animate instruments of our own vastly enhanced wills? It simply isn't sufficient to talk in the abstract about the expansion of human power and choice brought by these new discoveries—for it may be that the expansion of someone's power and choice entails the lessening of someone

else's. What would the reproductive liberty of parents to select a child's genetic endowment, with a view to his being more in line with their hopes and expectations, do to the child's ability to find his own life and be his own man? At the extreme we might wonder whether you can be your own man if you have, in effect, been manufactured by others to satisfy their desires. The temptation to tyranny that is ever-present in parental aspirations for their children is greatly augmented by these new technologies.

Even some of the less radical methods of increasing parental power which are already in use, such as genetic screening and behavior-modifying drugs, threaten a profound recasting of human relations, both in the family and in society at large. Take the growing practice of choosing the sex of a child. There are three methods available at present. The most common is prenatal diagnosis (often by means of a sonogram) followed by abortion if the fetus is not of the desired sex. If the parents are instead using in vitro fertilization, the diagnosis can be made before implantation, in which case only those embryos of the desired sex are transferred to the mother's womb. The third and newest method, sperm sorting, takes place before fertilization. By separating the X-bearing sperm from the Y-bearing sperm, and then conceiving via either artificial insemination or in vitro fertilization, parents could guarantee the sex of their child. Eventually, it might be possible to produce a sex-selecting spermicide that would enable parents to determine the sex of their child via normal intercourse, without the invasive procedures of the existing methods.

The advent of sex selection, despite its current reliance on abortion, IVF, or artificial insemination, has significantly altered the male/female ratio in many nations (although not in the United States). The natural sex ratio at birth is around 105 boys to

100 girls. The ratio in India and China is now 117 to 100, in Cuba 118 to 100 and in Azerbaijan and Armenia 120 to 100.[5] The preference for male offspring is deeply ingrained in many traditional societies. However, the newfound ability of such societies to carry out their preferences is, in the long run, not good for anyone concerned. When the natural sex ratio is skewed, serious disruptions follow. It doesn't require much imagination to foresee the sort of social disorders that are spawned when one/sixth of the adult male population is excluded from marriage.

Even in countries, like the U.S. perhaps, where the practice of sex selection will not lead to a gender imbalance, there may be other equally deleterious effects—effects that are less obvious, but more insidious. Natural human procreation operates by the luck of the draw. What happens when parents' gracious acceptance of whatever gift they get is replaced by parental dictation of a child's sexual identity? What happens when the parental attitude shifts from unconditional love and a feeling of having been blessed to a feeling of vindication at having gotten what one ordered? Consumer choice in the economic marketplace of goods and services is all well and good, but is the advent of choice in the reproductive realm so unambiguously good?

Think for a moment of the bizarre and baffling situation to which the practice of in vitro fertilization has led us. Along with the 170,000 miracle babies born in the United States through IVF, the embryos who are the biological brothers and sisters of the IVF successes are stacked up in deep freezes around the country. There are said to be some 400,000 of them and we call them "surplus" or "excess" or "spare" embryos. We have started to regard some embryos not as members of the next generation, but instead as

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[5] *Beyond Therapy: Biotechnology and the Pursuit of Happiness*: *A Report of The President's Council on Bioethics*, 60-61.

"spares" who might as well be put to use as spare parts, disaggregated to yield stem cells for research. And we do this even knowing that each of these embryos was brought into being in the desperate hope for biological offspring. I don't mean to suggest that IVF should be outlawed, only that there are more and less ethical ways of conducting it. It could be done (and in some countries is done) without creating so-called "excess" embryos, although it would be more expensive and less efficient.

To bring this discussion back round to the Constitution let me just note that the Preamble speaks of securing "the blessings of liberty" rather than simply securing liberty. Perhaps there is an acknowledgment in that locution that liberty may have its abuses and profanations, and that what "We the People" want to secure are certain good things that are coincident with liberty. It may be that to secure the blessings of liberty for our posterity we must secure ourselves against the abuses of liberty.

The next clause that offers material for bioethical speculation is what's known as the patent clause. Article I, section 8 grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Of the eighteen paragraphs in section 8, each one specifying a particular power of Congress, this one is unique. All of the other paragraphs simply state what power is being granted, for instance, Congress shall have power "to borrow money," "to coin money," "to declare War," "to establish Post Offices and post Roads." No explanation is offered as to why Congress is granted those particular powers. In the case of the patent clause, however, there is a preamble of sorts, spelling out the reason why Congress is vested with the

power to grant copyrights to authors and patents to inventors. The reason is "to promote the Progress of Science and useful Arts."

We might wonder: why was it necessary to justify patents, but not post offices? Remember that patents began in England as monopoly privileges granted by the Crown to merchants who garnered royal favor. Sort of like how the Olympic Committee proceeds today, naming Gatorade as the official drink of the Olympics. It's not quite the British East India Company, but the idea of a monopolistic concession is the same. I suspect that the drafters of the Constitution wanted to make clear that their reason for securing exclusive rights to authors and inventors was for the limited purpose of promoting scientific progress and not in order to provide a blanket congressional authorization to set up commercial monopolies or allocate economic privileges, as the Crown had routinely done in eras past. Indeed, the Constitutional Convention rejected wording that would have granted Congress the power to charter corporations.[6]

So, if the aim was the encouragement of science, we might wonder why they didn't just leave it at saying "The Congress shall have power to promote the Progress of Science and useful Arts." That wording, too, would have made this clause parallel in structure to the other grants of power. Instead, the Founders specified the sole constitutional means by which the promotion of science could be pursued. Again, what could have been a very far-ranging grant of power became instead a fairly narrow one. Congress's role as a promoter of scientific progress is restricted to this one mode of encouragement. The Constitutional Convention rejected language that would have allowed Congress to found a national university or to award prizes for scientific discoveries. Of course, in the last century, Congress has, without constitutional warrant it

[6] See *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 18 August 1787.

seems, taken to promoting science in other ways, particularly taxpayer-funded research. [It should be remembered that the current controversy over embryonic stem cells relates entirely to federal funding of such research. There are no federal laws whatsoever that either forbid or even regulate embryo-destructive research or research on human cloning.]

Although limited in the ways I have outlined, the patent clause is not inconsiderable. As Abraham Lincoln so vividly described in his "Lecture on Discoveries and Inventions," what the patent clause does is add "the fuel of *interest* to the *fire* of genius." That is a pretty combustible combination—one that has certainly furthered the Promethean achievements of modern science and technology. The underlying assumptions of the patent provision are that scientific advance will redound to the public good and that the public good can be achieved by rewarding private enterprise. The individual gets the patent and the profits from it (for a certain space of time), but in exchange the individual must disclose his discovery to society at large. Rights of intellectual ownership are secured only for those who share the fruits of their intellection—the first meaning of patent is "open to public inspection." The bargain proposed is as follows: If you want us to respect something as yours, you first have to explain to us what it is. Show us how you built it, and then we'll let you build it for us, for a while. Society gets both access to the knowledge and an increased likelihood that the patent holder will market his invention. James Madison discusses the patent clause in Federalist 43 where he declares that in this matter: "The public good fully coincides … with the claims of individuals." Madison's enthusiasm for this provision should not be surprising. The man who spoke so highly of the "policy of supplying, by opposite and

rival interests, the defect of better motives"[7] might be expected to think well of the patent clause's nicely calibrated balancing of "self-interest and common good; monopoly and liberty; the ownership of ideas and the shareability or publicity of speech and thought."[8]

There is, however, another figure in the American pantheon who was notably less sanguine about the harmony of science and society. A careful reading of Abraham Lincoln's "Lecture on Discoveries and Inventions" shows him, I believe, to be worried that the fire of genius, particularly when fueled by self-interest, could get out of hand. (We have seen some of the ways in which scientific ambition can get out of hand in the recent scandal involving both South Korean and American stem cell researchers.) I don't mean to suggest that Lincoln was hostile to technological advance, for he certainly was not. After all, he was himself the holder of a patent for a mechanical device that would lift boats over shoals—he is, by the way, the only American president to have obtained a patent. He was, however, aware that not every invention and discovery is a boon for mankind. Lincoln's reservations about scientific progress are grounded ultimately in his recognition of the morally dubious character of the human quest for mastery.

Lincoln's "Lecture on Discoveries and Inventions" appears to be a celebration of human achievement and inventiveness, particularly American achievement and inventiveness. Lincoln begins by sketching a portrait of Young America. What initially sounds like praise, however, pretty quickly reveals itself as mockery. Lincoln satirizes Young America's hubris and hypocrisy, its greed for land and its habit of self-congratulation. Let me just read you a bit, so you can get the flavor. Remember as you listen that Lincoln's opposition to the Mexican War and "Manifest Destiny" were well-

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[7] Federalist 51.
[8] Leon Kass, *Toward a More Natural Science: Biology and Human Affairs* (Free Press, 1985), 136.

known, and that the catch phrase “Young America” was a rallying cry for the supporters of Stephen A. Douglas, Lincoln’s arch-rival.

> We have all heard of Young America . . . Is he not the inventor and owner of the *present*, . . . He owns a large part of the world, by right of possessing it; and all the rest by right of *wanting* it, and *intending* to have it. As Plato had for the immortality of the soul, so Young America has “a pleasing hope—a fond desire—a longing after” territory. He has a great passion—a perfect rage—for the “*new*” . . . . He is a great friend of humanity; and his desire for land is not selfish, but merely an impulse to extend the area of freedom. He is very anxious to fight for the liberation of enslaved nations and colonies, provided, always, they *have* land, and have *not* any liking for his interference. As to those who have no land, and would be glad of help from any quarter, he considers *they* can afford to wait a few hundred years longer. In knowledge he is particularly rich. He knows all that can possibly be known; inclines to believe in spiritual rappings, and is the unquestioned inventor of “*Manifest Destiny*.” His horror is for all that is old, particularly “Old Fogy”; and if there be any thing old which he can endure, it is only old whiskey and old tobacco.

It should come as no surprise that this talk of Lincoln’s, which he delivered half a dozen times around Illinois in 1859, was not popular. He chastened us in the hour of our pride, and Young America didn’t much care to be chastened. After this opening sketch, Lincoln draws a contrast between Young America and “the first of all fogies, father Adam” who was responsible for “the first of all inventions, . . . *the fig-leaf apron*.” With this biblical reference, Lincoln reminds us that the useful arts began in human sinfulness and pride. Adam and Eve, joint participants in what Lincoln calls “the mother of all ‘Sewing societies,” rejected God’s provision for them. They covered over their newly discovered nakedness. As he goes on to consider speech and writing, Lincoln again reminds us of things we might prefer to forget and points to the need for greater humility. Speech, says Lincoln, does not appear to be “an invention of man, but rather the direct gift of his Creator.” Even writing, which he calls “the great invention of the world” is only possible because of “the wonderful powers of the *eye*” which are not of human

making. Throughout, he stresses the manifold ways in which we, as human beings, are beholden to our natural endowment and the extent to which we, as Americans, are beholden to the advances made by "very old fogies." Along with Adam, Lincoln mentions Moses by name, and alludes to God's employment of writing in the Ten Commandments and the Holy Scriptures.

The final section of the speech takes up modern inventions. The three he singles out are printing, the discovery of America, and the patent laws. These three have vastly accelerated the overall rate of discovery and invention. According to Lincoln, printing in particular expands the field for invention because it awakens in men the thought of "rising to equality." Printing is the emancipation proclamation of the mind. Lincoln suggests that, in breaking the shackles of ignorance and low expectations, printing not only transform minds, but conditions as well. Printing is an invention that furthers political liberty.

In the midst of this appreciative account of printing, Lincoln stops suddenly and injects an attention-arresting, one-sentence digression. Here's the sentence:

> Though not apposite to my present purpose, it is but justice to the fruitfulness of that period, to mention two other important events—the Lutheran Reformation in 1517, and, still earlier, the invention of negroes, or, of the present mode of using them, in 1434.

The date Lincoln gives for "the invention of negroes" is the date when Portuguese explorers first rounded the treacherous Cape Bojador on the western coast of Africa, a feat of navigational expertise and daring that led almost immediately to the start of the African slave trade in 1441. Not all discoveries advance the cause of civilization. The discovery of America in 1492 opened new fields for slavery, and greatly increased the fruitfulness or profitability of the original invention of negroes. Eli Whitney's patent on

the cotton gin similarly enhanced the value of the invention of negroes (to such an extent that there were those who asserted that "by the invention of the cotton-gin it became a necessity in this country that slavery should be perpetual"[9]).

The five modern events mentioned by Lincoln culminate in the American Civil War which the nation was just on the cusp of as Lincoln delivered this speech in February of 1859. The two seminal inventions of modernity presaged the conflict: the invention of printing in 1436 pointed man towards freedom; the invention of negroes in 1434 pointed him towards slavery. The discovery of America in 1492 provided the ground on which both forces—freedom and slavery—eventually converged. The Reformation in 1517 added religious support for the cause of freedom. Patent law in 1624, like the discovery of America, is double-edged, capable of working mischief as well as marvels. I already mentioned the patenting of the cotton gin. Even more significant (especially since Lincoln refers to the 17th century English origin of patent law), was the patent granted by the British Crown to the Royal African Company in 1672, giving the Company exclusive rights to the slave trade—in essence, a patent on negroes, or on the present mode of using them. We might with justice say that Abraham Lincoln's entire public career was devoted to disinventing the negro, or disinventing the present mode of using him. He sought to move the negro from his status as an invention to his rightful status as a human being, entitled to his natural rights of life and liberty.

It turns out that our contemporary dilemmas and debates are not entirely novel. Lincoln anticipates our concerns about the patentability of human life and the uneasiness, among some of us at least, occasioned by the discovery of new modes of using human beings—this time around, though, it is not Africans but embryos. In 1980, the Supreme

[9] Preston Brooks, quoted by Lincoln.

Court ruled that living organisms are patentable. At issue in that ruling were laboratory-engineered oil-eating bacteria. Since then, genetically-altered mammals have become patentable. Although the Patent Board in *Ex Parte Allen* (1987) declared that human beings were off-limits because of the 13th Amendment (forbidding slavery), there are many who doubt that the prohibition will hold, particularly if the issue involves parts of people rather than whole beings. It would certainly be desirable for Congress to act to specify what is not patentable and to codify the boundaries of ownership. In its report entitled *Reproduction and Responsibility*, the President's Council on Bioethics unanimously recommended that Congress "prohibit the issuing of patents on claims directed to or encompassing human embryos or fetuses at any stage of development."

Nonetheless, in the end, patentability is a side issue, since failure to secure a patent does not mean one can't continue research or pursue commercial development. Remember, slavery continued unabated after the Royal African Company's patent lapsed. The real issue is whether certain types of research and certain modes of using human beings will be allowed. Once again, these decisions will be up to us to make, whether through legislation, executive order, or the self-regulation of various governing bodies, from university committees that oversee research involving human subjects to Olympic and sports officials who rule on the acceptability of performance-enhancing interventions.

The Constitution does, I would argue, set certain ultimate limits to our experimentation upon ourselves. The 13th Amendment bans slavery and involuntary servitude and Article 1, section 9 contains an absolute prohibition of titles of nobility. Alexander Hamilton said in Federalist #84 that the prohibition of titles of nobility "may

truly be denominated the cornerstone of republican government." Both provisions point to the natural law background of the Constitution and remind us of the self-evident truths of the Declaration of Independence. The principle of the natural equality of the human kind condemns any and all caste systems. It is impermissible to set up one class or category of human beings to rule over another class or category on the basis of their power or privilege.[10]

The American Revolution set itself against artificial aristocracy—what Jefferson called "the tinsel aristocracy" based on the inherited privileges of a master class. The Biotech Revolution raises the specter of a reinstitution of aristocracy. This time, however, it would not be a matter of external tinsel like wealth, skin color, or status, but an aristocracy achieved through the alteration of natural human capacities. We may face the prospect of an artificially-produced "natural" aristocracy. The movie *Gattaca* shows a society divided into the genetically-engineered and perfected class of "valids" versus the natural-born class of "in-valids." It may not be science fiction forever. There have already been suggestions that, in addition to the regular Olympics and the Special Olympics, we institute a "Bio-Olympics," for biologically enhanced athletes.[11] At the other end of the spectrum, consider the repudiation of equality—in the sense of equal

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[10]It is clear enough that the principles of the Declaration condemned the enslavement of Africans. It could be argued that the constitutional provision which prohibited titles of nobility condemned slavery also, even without the more explicit language of the 13th Amendment, inasmuch as a system of race-based, hereditary slavery confers upon white skin a title of nobility. It is the counterpart to the inherited infamy of slavery (which might be analogized to a bill of attainder, another constitutionally banned action). Of course, in America's federal system, slavery drew its breath not from U.S. law but from the laws of the individual states, and it was usually held that the federal government had no right to interfere with slavery in the states where it existed. However, there were some in the antebellum period who argued that the "guarantee clause" (Article 4, section 4), by which the United States guarantees "to every State in this Union a Republican form of Government," authorized the federal government to abolish slavery—indeed, required it to do so. In other words, it was asserted that the guarantee clause in effect incorporates or constitutionalizes the natural rights teaching of the Declaration. Hamilton's gloss on Article 1, section 9 would give support to this reading.

[11] *Beyond Therapy*, 123.

rights to life and respect— involved in prenatal screening for genetic disorders. There are now genetic tests available for more than 900 diseases and conditions. However, our ability to test for disease or increased risk of disease greatly outstrips our ability to treat or cure these diseases. Thus, the increasing availability of genetic information readily lends itself to eugenic uses. The strong implication, sometimes spoken, sometimes unspoken, is that the defective should not be born. How far are we from the day in which invalids become in-valid? It's ironic that in a time when dog breeders no longer routinely drown weak puppies, breeders of human beings are more and more inclined to a ruthless culling of the imperfect.

Finally, there is on the horizon not only the specter of a biologically enhanced aristocracy but a novel form of slavery. A certain subset of the unborn could be transformed into a class of beings who exist as animate instruments of our scientific advancement. We can now create new life not to succeed old life but to serve and sustain old life; the new life is not meant to outlive us but is designed to allow us to live longer and more comfortably. We might one day be able to farm and harvest human embryos to feed our needs—the needs of the sick and dying. To describe this situation as slavery or involuntary servitude depends, of course, on granting that an embryo is a human being, and, as such, encompassed within the "all men are created equal" principle of the Declaration.

We have had contentious debates before in our history about precisely who is included within the Declaration's broad language. Chief Justice Roger Taney, in his opinion in the *Dred Scott* case, claimed that blacks were not included, for the reason that they were, in his words, "regarded as beings of an inferior order . . . and so far inferior,

that they had no rights which the white man was bound to respect." The question for us is: Does the embryo—either cloned or conceived—have any rights that those of us who are "of woman born" must respect? I think yes, but just as in Lincoln's day, there are those with more restrictive definitions of humanity who look upon such an expansion of the human family as absurd.

Yet as Lincoln pointed out, the very slaveholders who sought to deny the human standing of their slaves themselves had trouble believing that slaves had no status other than as property. Their own behavior often gave the lie to their bold pronouncements of exclusion and black inferiority. Among other things, there was the phenomenon of free blacks, many of them free by virtue of the guilty conscience of slaveholders. In many Southern states, moreover, there were laws that upheld the status of slaves as persons, and as such eligible for protection against crimes committed against them. Then there was the social fact that slaveholders disdained the society of slave-dealers, though not the society of other tradesmen. And finally, there were all those mulattos on the plantations. The enslaved sons and daughters of the masters were a powerful and painful testimony to the species similarity of whites and blacks.

We can see some rough parallels today. We have "free embryos," secure in their mothers' wombs, recognized already as beings in their own right, having their sonogram pictures taken and sent out by e-mail to friends and family under the heading "Baby's First Picture." We have laws on the books, both state and federal, protecting pre-natal life against crimes of assault and murder that are committed against persons. The repugnance against the slave-dealers' trade in human flesh is felt today against the abortionists' trade, the underground dealers in human organs and babies, and to a more limited degree,

against those scientists and ideologues (Peter Singer springs to mind) who take a radically reductionist view of human life. Finally, every embryo used for purposes of research is someone's biological relative.

It is certainly the case that our discomfort with embryo research grows as the embryo grows. However, there is also a time during which the new life is so tiny, so seemingly negligible (those blastocysts are brainless, after all), and so hidden from view (stacked up in those petri dishes in those freezers), that it requires a real leap of the imagination to acknowledge human identity. Would it really be wrong to allow a window of 10 to 14 days during which time experimentation is permitted upon these beings of seemingly indeterminate or intermediate status?

In dwelling on the comparison to the debate over slavery, I want mainly to remind us that many Americans were wrong once before to constrict membership in the human family on the basis of their own sentiments and self-interest. That doesn't prove we would be wrong this time around, especially since we have in view the noble purpose of healing the sick, but I think it does suggest the need for extreme caution, especially since our use of the embryo is always fatal to it. Our experimentation is lethal experimentation.

Lest I unintentionally give offense, I want to acknowledge the limits of the analogy between slavery and embryo research. There is no comparison at all in terms of human suffering. I do not want to be misunderstood on this point. Slaves, as fully thinking and feeling beings, suffered intensely. By contrast, early embryos are not pained by the use to which they are put. So if embryo research is wrong, its wrongfulness does not hinge on pain and suffering. In fact, if pain and suffering are our only moral touchstones then the argument is all on the side of those with terrible diseases who look

to embryo research for hope and cure. Pain and suffering, however, are not the only standard by which we measure violations of human dignity. One can wrong even those who are unaware of the wrong being done them. The wrong in embryo-destroying research is in treating human life simply as a thing, an animate possession.

Now of course the claim of those who want to use early embryos for the relief of human suffering is that the early embryo, or more precisely, the blastocyst, is nothing more than a bundle of cells, and very few cells at that, lacking recognizable human form and lacking human capacities of any kind. What respect could it possibly be entitled to? While I understand the objection, it also seems to me that the case for the embryo—the case for the embryo's human standing—has never been easier to make, and that it is science itself, the science of embryology, that best makes the case. It is undeniable that each and every post-natal human being has passed through the identical stages of embryonic and fetal development. We were all blastocysts once. That clump of cells is us at that stage of our life. The embryo is not just potentially a member of the human kind. It is human. From conception (or to use more technical language, from the moment of syngamy), the human zygote has 46 chromosomes and can be distinguished from embryos of other species. It is recognizably one of us—recognizable not to the naked eye, but to the scientifically trained eye. Moreover, the embryo is not like other cells or tissues. In the words of Stanford biologist William Hurlbut, "it possesses an inherent organismal unity and potency that such other cells lack."[12] Because of this "unified organismal principle of growth," nothing external is added to its biological essence over time. Our unique being unfolds continuously from within. Along the way we develop and manifest various capacities, sensory and cognitive, but there isn't one of those capacities

[12] *Human Cloning and Human Dignity*, p. 310.

whose acquisition suddenly makes us human. There are many phases and stages of a human life, but the being — the unique human being — is there from beginning to end, from conception to death. Of course, certain externals need to be present for this human life-in-process to continue its self-directed growth, but that is true of every phase of human life. We are self-directed, but not self-sufficient. Knowledge of our earliest beginnings, and of the dynamic developmental process of the human organism as it matures, can awaken a sense of awe and respect. Knowledge of our origins does not destroy wonder; it deepens it.

In a letter written by Thomas Jefferson just 10 days before his death, he expressed the conviction that it is "the unbounded exercise of reason" and "the general spread of the light of science" that will open men's eyes to the truths of the Declaration.[13] I hope he is right. I hope that the knowledge supplied by the science of embryology will lead us to question the moral legitimacy of embryo-destroying research. If we keep in mind what Madison called "the interests of the unborn," then perhaps we will realize that we are not at liberty to divest our posterity of their right to life, liberty, and the pursuit of happiness.

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[13] Thomas Jefferson to Roger C. Weightman, 24 June 1826, in *Portable Jefferson*, 585.