DEFINING A PERSON UNDER THE FOURTEENTH AMENDMENT:

A CONSTITUTIONALLY AND SCIENTIFICALLY BASED ANALYSIS

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I. A BRIEF HISTORICAL REVIEW OF CASE LAW AND CURRENT POLICY

This article endeavors to properly understand and implement the Fourteenth Amendment's use and meaning of the word person as it relates to the unborn. It begins by providing a brief historical review of case law and current policy, and then proceeds to answer the following two questions: 1) Who should qualify as a 'person' having the intrinsic worth and value necessary for Fourteenth Amendment protection? and 2) When do the unborn have intrinsic worth and equal value to those born? To address the first question, part one of the article employs a two-prong substantive-due-process analysis. This analysis (A) examines the fundamental rights and liberties that are "objectively [and] deeply rooted in this nation's history and tradition" with respect to the "life" referred to in the Fourteenth Amendment [hereinafter Fourteenth Amendment person], and (B) carefully describes an asserted fundamental liberty interest – life – in order that a Fourteenth Amendment person might be defined.[1] To answer the second question, part two of this article addresses viability as it relates to a Fourteenth Amendment person then demonstrates through science and technology, that the development of man's knowledge has progressed to a point capable of defining when life begins. This knowledge is then used as a basis for equating the born with the unborn. Part three summarizes the article and concludes with a bill proposal intended to adjust current policy accordingly.

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[1] Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (examining the asserted right to physician assisted suicide, the Court described and applied these two primary features of our established method of substantive due-process analysis).

II. A BRIEF HISTORICAL REVIEW OF CASE LAW AND CURRENT POLICY

The Fourteenth Amendment of the Constitution states,

> 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[2]

For all its intricacies, this amendment most noticeably accords substantial rights to persons. These rights include citizenship, due process, and equal protection. To avoid arbitrary enforcement of these rights, it is necessary to agree upon a definition of the word person.

Looking first to the principal author of the Fourteenth Amendment, Congressman John A. Bingham of Ohio, said "the only question to be asked of the creature claiming [Fourteenth Amendment] protection is this: 'Is he a man?'"[3] Yet, surprisingly, this question went unanswered in the landmark case *Roe v. Wade* that served to exclude an entire segment of the population from the protection of the Fourteenth Amendment.[4] In *Roe*, the Supreme Court declared itself unable to answer the question of when the life of a human being begins.[5] Specifically, the Court stated, "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[6] "As a result of its self-professed inability to decide when the life of a human being begins, the Supreme Court rendered its 1973 abortion decision without considering whether unborn children are living human beings."[7] Implicit in this decision is the finding that unborn children are not protected as persons under the Fourteenth Amendment.[8] In a Senate committee report accompanying the Human Life Bill of 1981, Senator East drew this conclusion in his analysis of *Roe*:

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2 U.S. CONST. amend. XIV, § 1.

3 THE RECONSTRUCTION AMENDMENTS' DEBATES 274 (Alfred Avins ed., 1974) (containing debates and proceedings from a special session of the senate).

4 *See* Roe v. Wade, 410 U.S. 113, 159 (1973) (declaring a right to abortion a Constitutionally protected right based on a trimester framework).

5 *Id.*

6 *Id.*

7 SENATE COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON THE HUMAN LIFE BILL (Comm. Print 1981) (hereinafter HUMAN LIFE REPORT) (quoting Mr. East's submission from the Subcommittee of Separation of Powers, containing a report together with additional minority views to accompany the Human life Bill S.158 prior to the hearings).

8 *See* HUMAN LIFE REPORT, *supra* note 7, at 4.

> The Court devoted very little analysis to its holding that the word "person" in the Fourteenth Amendment does not include the unborn. Justice Blackmun noted first that of the other uses of the word "person" in the Constitution - such as the qualifications for the office of President and the clause requiring the extradition of fugitives from justice - "nearly all" seem to apply only postnatally, and "[n]one indicates, with any assurance, that it has any possible pre-natal application."[9]

In response to this point, Professor John Hart Ely suggests that, "[the Court] might have added that most of [these] provisions were plainly drafted with *adults* in mind. . . ."[10] Despite this obvious oversight, Justice Blackmun blithely went on to note, "[T]hroughout the major portion of the nineteenth century, prevailing legal abortion practices were far freer than they are today. . . ."[11]

Of course, this statement glaringly ignores, that:

> [t]he relatively permissive attitude toward abortion . . . that prevailed in the early nineteenth century was overwhelmingly rejected by the very legislatures that ratified the Fourteenth Amendment. [Indeed i]t was these same legislatures which adopted strict anti-abortion laws. . . . Although Justice Blackmun mentioned these political and scientific developments in an earlier portion of his opinion, he did not discuss their relevance to an understanding of the consensus at the time of the adoption of the Fourteenth Amendment on whether the word "person" includes the unborn.[12]

This exclusion of the unborn from the Fourteenth Amendment definition of person was sadly predictable and, as an aside, can be traced back to the overwhelming media victory of the famous "Scopes Monkey Trial" of 1927.[13] This trial, held in Dayton, Tennessee, was deemed, at the time, the most important trial in American history.[14] In it, John Scopes, was on trial for teaching evolution, contrary to Tennessee law.[15]

The legal result of the trial was that Scopes pled guilty even before cross-examination and the conviction was later overturned on a technicality. The sociological result was that evolutionary dogma was

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9 HUMAN LIFE REPORT, *supra* note 7, at 5 n.5.

10 John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 925-26 (1973).

11 Roe v. Wade, 410 U.S. 113, 181 (1973).

12 HUMAN LIFE REPORT, *supra* note 7, at 5 n.5 (internal citations omitted).

13 *See* Scopes v. State, 289 S.W. 363 (Tenn. 1927) (reversing the judgment of the trial court holding John Thomas Scopes, a high-school teacher guilty of violating chapter 27 of the Acts of 1925 (The Tennessee Anti-Evolution Act) which prohibited the teaching of evolution in public schools).

14 John D. Morris, *Did The Evolutionists Present A Good Case At The* Scopes *Trial,* Institute For Creation Research, *at* http://www.icr.org/pubs/btg-b/btg-080b.htm (last visited Nov. 1, 2001).

15 *Scopes,* 289 S.W. at 363.

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transformed into fact in the public mind with a profound and lasting affect on the treatment and value of individual human life. For if human life is the accidental result of a random life-and-death process based on genetic mutation and natural selection, then indeed life has no inherent value. It has only the value assigned by the evolved and surviving society. Today, the link between Darwinian thinking and the value of individual human life is most clearly demonstrated by the current definition of a person under the Fourteenth Amendment, which continues to exclude the unborn.

The mindset that excludes the unborn from the Fourteenth Amendment definition of a person has been heavily reinforced in the last twenty-five years by advances in reproductive technology.[16] Specifically, these advances have resulted in policy that minimizes the status of all human embryos.[17] The current policy originated in the Tennessee Supreme Court case of *Davis v. Davis*.[18] In *Davis*, a dispute regarding the custody of frozen embryos arose between a husband and wife, who after undergoing an in vitro fertilization procedure could no longer agree on the disposition of their frozen embryos.[19] To define the "interest" that the litigants held in the embryos, the Tennessee Supreme Court relied on a report published by the Ethics Committee of the American Fertility Society.[20]

In this report, the Ethics Committee defined an embryo as distinct from a preembryo, based on medical science and legal precedents.[21] According to the report, "[t]he preembryonic stage is considered to last until 14 days after fertilization."[22] Moreover, their consensus concerning the preembryo status is that the preembryo deserves greater respect

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[16] Kelly Hollowell, *Cloning - Exposing Flaws in the Preembryo-Embryo Distinction and Redefining When Life Begins*, 11 REGENT U. L. REV. 319, 329-33 (1998) (describing how current policy related to fetal interests based on recent advances in reproductive technology is flawed in light of the new technology of cloning).

[17] *Id.*

[18] Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992) (relying predominantly on a report published by the American Fertility Society in 1990 to define and distinguish an embryo from a preembryo; this distinction then served as the basis for defining the "interest" the litigants held in the frozen preembryos).

[19] *Id.* at 589.

[20] *Id.* at 596.

[21] *Ethical Considerations of the New Reproductive Technologies – Ethics Committee of the American Fertility Society*, FERTILITY & STERILITY, June 1990, at 31S-36S [hereinafter Ethics Report]. Note, the American Fertility Society became the American Society of Reproductive Medicine in 1994. The American Fertility Society joined by nineteen other national organizations allied in *Davis* as amici curiae to have the Court respond to the issue of when human life begins and whether frozen embryos comprising 4-8 cell entities have a legal right to be born. *Davis*, 842 S.W.2d at 594.

[22] *Id.* at vii.

than that accorded to mere human tissue because of its potential to become a person, "but not the respect accorded to actual persons."[23]

The *Davis* court agreed with the Committee Report, holding that preembryos are not, "strictly speaking either persons or property" but occupy an interim category that entitles them to special respect because of their potential for life.[24] As a result of this decision, our understanding of natural, as well as non-coital reproduction now includes a preembryo-embryo distinction and a policy that has been defined by the medical community and sanctioned by the courts.[25] This distinction and policy will likely apply to all new techniques for non-coital reproduction including the currently controversial prospect of human cloning.[26] Moreover, it is plain to see how this decision, as all progeny of *Roe*, work to further solidify the exclusion of the unborn from the rights and privileges accorded to all other persons under the Fourteenth Amendment. If an adjustment in policy is to be made, it must, therefore, begin with an examination of those who do qualify as persons under the Fourteenth Amendment.

III. WHO QUALIFIES AS A PERSON HAVING THE INTRINSIC WORTH AND VALUE NECESSARY FOR FOURTEENTH AMENDMENT PROTECTION?

Who qualifies as a person having the intrinsic worth and value necessary for Fourteenth Amendment protection? To answer this question, we turn to substantive due process analysis of the Fourteenth Amendment affirming that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[27]

> [The] established method of substantive-due process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, [and] "deeply rooted in this Nation's history and tradition" . . . . Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[28]

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[23] *Id.* at 34S-35S.

[24] Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

[25] *See id.* at 588; *see also* Kass v. Kass, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997) (following *Davis*, court held that the informed consent document and uncontested divorce instrument governed the disposition of frozen embryos); JB v. MB, No. FM-04-95-97, slip op. (N.J. Super. Ct. Law Div. 1998) (citing *Davis*, the judge ordered the destruction of seven embryos in dispute amid a divorce proceeding).

[26] Katheryn D. Katz, *The Cloned Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L.J. SCI. & TECH. 1, 24-27 (1997) (addressing legal questions of human cloning intended to produce a child).

[27] U.S. CONST. amend. XIV, § 1.

[28] Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations omitted).

Thus, this article will first examine the fundamental rights and liberties that are "objectively and deeply rooted in this nation's history and tradition" with respect to life and a Fourteenth Amendment person. Then, this part of the article will provide a careful description of the asserted fundamental liberty interest – life – in order that a Fourteenth Amendment person might be defined.

A. Fundamental Rights and Liberties Objectively and Deeply Rooted in this Nation's History and Tradition

To examine the fundamental rights and liberties, which are "objectively and deeply rooted in this Nation's history and tradition"[29] with respect to life as framed by the Fourteenth Amendment due process clause, the Declaration of Independence operates as a good starting point for our analysis.

> The Declaration of Independence is more than a propaganda instrument or legal brief . . . in fact it is fundamental to a proper understanding of the Constitution . . . abundant support for this proposition can be found in the leading writings and debates of the Founding Era. Indeed, it would hardly be an exaggeration to say that the most fundamental pronouncements made in connection with the framing and ratification of the Constitution are restatements of the principles articulated in the second sentence of the Declaration of Independence.[30]

"The fact is that the Declaration is the best possible condensation of natural law[, which consists of] common law doctrines as they were developed and expounded in England and America for hundreds of years prior to the American Revolution."[31] Moreover, if the Declaration is viewed as a concise summation of natural law principles, then the Declaration's second sentence is "a sentence that might fairly be said to represent the philosophical infrastructure of the Constitution."[32] The second sentence of the Declaration of Independence specifically states that, "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."[33] It is clear that the Declaration of Independence expressly

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[29] *Id.*

[30] Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence,* 100 YALE L.J. 169, 170-71, 186-87 (1990) (footnotes omitted).

[31] Clarence E. Manion, *The Natural Law Philosophy of Founding Fathers, in* 1 NAT. L. INST. PROC. 3, 16 (Alfred L. Scanlan ed., 1949) (providing a collection of lectures delivered at the First Natural Law Institute which convened at the College of Law of the University of Notre Dame for the purpose of considering the natural law).

[32] Harry V. Jaffa, *Slaying the Dragon of Bad Originalism: Jaffa Answers Cooper,* 1995 PUB. INT. L. REV. 209, 218 n.20.

[33] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

affirms the fundamental right and sanctity of human life encapsulated by the substantive due process clause of the Fourteenth Amendment.

In the same way the Declaration of Independence embodies the natural law, the natural law embodies those rights that "existed in every society whether they arose from a social compact or from divine right."[34] It is not surprising then, that the natural law served as a philosophical base upon which seventeenth and eighteenth century political theory was built.[35] This philosophical base taught "that certain natural rights prevailed for all men and that a governmental body could not limit or impair these rights."[36]

A reasonable and valid question is how these laws are applied and passed on to become "deeply rooted in this Nation's history and tradition."[37] The answer is through the common law, which by definition

> comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.[38]

Therefore, it is through the existence and exercise of the common law that fundamental rights and liberties are mechanically passed on.[39] This process and policy of standing by history and tradition is, in turn, embodied by the doctrine of *stare decisis*.

Justice Scalia describes the importance of *stare decisis* to the common law as follows:

> [A]n absolute prerequisite to common-law lawmaking is the doctrine of *stare decisis* - that is, the principle that a decision made in one case will be followed in the next. Quite obviously, without such a principle common-law courts would not be making any "law"; they would just be resolving the particular dispute before them. It is the requirement that future courts adhere to the principle underlying a judicial decision which causes that decision to be a legal rule. (There is no such requirement in the civil-law system, where it is the text of the law rather than any prior judicial interpretation of that text which is authoritative. Prior judicial opinions are consulted for their persuasive effect, much as academic commentary would be; but they are not *binding*.)
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> Within such a precedent-bound common-law system, it is critical for the lawyer, or the judge, to establish whether the case at hand falls within a principle that has already been decided.

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34 JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW, § 11.1 at 331 (3d ed. 1988).

35 *Id.*

36 *Id.*

37 Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

38 BLACK'S LAW DICTIONARY 250-51 (5th ed. 1979).

39 *Id.*

. . . .
. . . [T]hus the common-law tradition is passed on.[40]

Coming full circle then, it is out of this common-law tradition and the doctrine of *stare decisis* that those fundamental rights and liberties, which are "objectively and deeply rooted in this Nation's history and tradition,"[41] are identified.

In summary, the fundamental right at issue is the right to life as framed by the Fourteenth Amendment due process clause: "No state shall deprive any person of life, liberty or property without due process of law."[42] Substantive-due-process examination roots this right to life in the Declaration of Independence, which is foundational to the Constitution itself and regards life as an unalienable right. Because the Declaration of Independence is an embodiment of natural law, this right to life is further rooted in principles of antiquity that arise from social compact or divine right, which cannot be limited by government.[43] This fundamental right to life, as with all fundamental rights, is then passed on through history by the common law doctrine of *stare decisis*, which inherently identifies the fundamental rights and liberties "objectively and deeply rooted in this Nation's history and tradition."[44]

The next question is how the fundamental right to life relates to a Fourteenth Amendment person. By turning to the doctrine of *stare decisis*, one finds a litany of cases that address this question by defining those who qualify as persons under the Fourteenth Amendment. Of course, any single case examined in isolation will necessarily define Fourteenth Amendment persons narrowly. Taken as a whole, however, these cases provide a very broad definition.

For example, in *Levy v. Louisiana*, the Court found that "illegitimate children are not 'nonpersons.'[45] They are humans, alive, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[46] In *Plyler v. Doe*, the Supreme Court held that illegal aliens are also persons: "[w]hatever [one's] status is under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."[47] In *Cruzan v.*

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[40] ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW, 5, 7-9 (Guttman ed., 1997) (an essay on the common-law courts and civil-law system).

[41] *Glucksberg*, 521 U.S. at 720-21.

[42] U.S. CONST. amend. XIV, § 1.

[43] *See supra* note 30, 32, 33, 35 and accompanying text.

[44] *Glucksberg*, 521 U.S. at 720-21.

[45] Levy v. Louisiana, 391 U.S. 68, 70 (1968) (holding that denial to illegitimate children of right to recover for wrongful death of their mother constituted invidious discrimination).

[46] *Id.*

[47] Plyler v. Doe, 457 U.S 202, 202 (1982) (holding that illegal aliens can claim the benefit of the equal protection clause in obtaining an elementary education).

Director, Missouri Department of Health, the Supreme Court held that the gravely ill and chronically incompetent are not nonpersons.[48] The Court stated that it was "patently unconstitutional" to premise a decision on the finding that "chronically incompetent persons have no constitutionally cognizable interests at all, and so are not persons within the meaning of the Constitution."[49] In *Youngberg v. Romeo*, the Supreme Court held that mental retardation resulting in commitment to a state institution does not deprive one of substantive liberty interests accorded persons under the Fourteenth Amendment.[50] And finally, it is a well established law that, "conviction of a crime does not render one a nonperson."[51] In other words, individuals found guilty of criminal offenses, and subsequently imprisoned, do not become nonpersons under the Fourteenth Amendment.[52]

From these cases, we can conclude that a person as defined by the Fourteenth Amendment includes all living beings regardless of legitimacy, legality, mental capacity or confinement. Indeed, any suggestion that some human beings can be nonpersons under the law simply echoes the 1857 holding of *Dred Scott v. Sandford*, "a decision the Fourteenth Amendment was specifically intended to reverse."[53] Since *Dred Scott* was the last known case until *Roe v. Wade* to specifically exclude some human beings from the definition of persons entitled to the rights and privileges granted under the Constitution generally, it warrants a closer examination.

In *Dred Scott*, the plaintiff brought an action "to assert the title of himself and his family to freedom" under the Constitution.[54] The Court asked and answered the questions at issue as follows:

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[48] Cruzan v. Missouri Dept. of Health, 497 U.S. 261, 286-87 (1990) (holding that where parents and co-guardians sought a court order directing withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties, clear and convincing evidence was required of the patient's desire to cease hydration and nutrition).

[49] *Id.* at 286-87.

[50] Youngberg v. Romeo, 457 U.S. 307 (1982) (holding that an involuntarily committed mentally ill individual had constitutionally protected liberty interests under the due process clause of the Fourteenth Amendment).

[51] Wolff v. McDonnell, 418 U.S. 539, 594 (1974) (upholding the civil rights of inmates regarding administrative procedures and practices).

[52] Brewer v. Williams, 430 U.S. 387, 405-06 (1977) (holding that the right to counsel of a state prisoner convicted of murder had been violated, resulting in treatment of the individual as a nonperson); Ohio Adult Parole Auth.v. Woodard, 523 U.S. 272, 277-78 (1998) (holding that a state prisoner under sentence of death cannot be deprived due process protection).

[53] HUMAN LIFE REPORT, *supra* note 7, at 24.

[54] Scott v. Sandford, 60 U.S. 393, 400 (1857) (holding the Missouri Compromise, which declared certain territories free, invalid for exceeding Congressional power in its attempt to interfere with a slave owner's vested rights in owning slaves).

> Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?
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> . . . .
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> . . . [In other words] the question before us is, whether the class of persons described . . . compose a portion of this people, and are constituent members of this sovereignty? We think they are not . . . .
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> . . . [F]or more than a century before [the negro has] been regarded as beings of an inferior order, and altogether unfit . . . they had no rights which the white man was bound to respect . . . the negro might justly and lawfully be reduced to slavery . . . bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made . . . .[55]

Not surprisingly, it has been suggested that, "*Dred Scott* must go down as the Court's first disastrous attempt to settle a major national policy issue, without significant grounds in the Constitution for its intervention."[56] Perhaps the most galling aspect of the decision is the dicta defending the correctness of their opinion.[57] The dicta provides proof that sometimes even very large numbers of individuals, some revered, respected and holding the most powerful positions in the land, are just wrong. Even though it is suggested that this Court was "acting on what they believed to be not only a fair, but a clear reading of the Constitution," there is no doubt that they "paved the way to a constitutional equivalent of hell."[58] In the final analysis, members of the African race were regarded not as persons entitled to Constitutional protection until the introduction of the Fourteenth Amendment into the Constitution some eleven years and one bloody Civil War later.[59]

In any event, review of these historical cases, taken as a whole, should reveal something shared or held in common: a minimal identifying standard or least common denominator among persons seeking and accorded the protections of the Fourteenth Amendment. Identifying the least common denominator should then equate to the definition of the Fourteenth Amendment person that should equally and evenly apply to all "persons." Starting with the obvious, it is clear from

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55 *Id.* at 403-07.

56 CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE MADE LAW 70 (1994).

57 *See* Scott, 60 U.S. at 407-08.

58 WOLFE, *supra* note 56, at 70.

59 *Id.*

these cases that Fourteenth Amendment protection is not dependent on legitimacy, legality, mental capacity or confinement. Since the Civil War Amendments, neither is protection dependent on status, health, race, color, or religion.[60]

For all the complexities revealed by careful study of these cases, only two noticeable denominators emerge. In each and every case, those accorded Fourteenth Amendment protection were 1) biologically alive and 2) genetically human. In light of this observation, one can determine that the Fourteenth Amendment definition of a person minimally requires an individual be biologically alive and genetically human. This definition of a Fourteenth Amendment person then relates back to the fundamental right to life established by the substantive due process clause so that anyone meeting these requirements should not be deprived of life without due process of law.

B. A "Careful Description" Of The Asserted Fundamental Liberty Interest

In part two of the established method of substantive-due-process analysis a "careful description" of the fundamental liberty interest is required.[61] This "careful description" might be interpreted as determining "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[62] For example, in *Michael H. v. Gerald D.*, regarding the rights of the natural father of a child adulterously conceived, Justice Scalia, writing for the majority, articulated his common law theory for evaluating fundamental right claims and providing a "careful description" of the fundamental liberty interest.

> [U]sing historical traditions specifically relating to the rights of an adulterous natural father, [is preferred over] inquiring more generally "whether parenthood is an interest that historically has received our attention and protection." There seems to us no basis for the contention that this methodology is "nove[l]."[63]

The critical inquiry, therefore, lies in determining and applying the historical traditions specifically related to the fundamental right claims. Therefore, which historical tradition is examined is wholly determinative. The danger is that too broad a generality will inevitably result in imprecise guidance in deciding the case at hand and would

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[60] *See supra* notes 45-53 and accompanying text.

[61] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted).

[62] Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (rejecting the claim of a natural father to have a parental relationship with the child born of an adulterous relationship).

[63] *Id.* (citations omitted).

allow the "judges to dictate rather than discern the society's views."[64] This is illustrated by Justice Scalia's continuing opinion.

> We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-a-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general - perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.
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> . . . The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference - or at least to announce, as Justice Brennan, declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted - is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion, which disapproves this footnote, *both* appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all. [65]

In the debate over the right to life, then, what is the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified? Is the relevant tradition, as the Supreme Court held in 1973, that a woman's right to privacy is a "fundamental" right under the Fourteenth Amendment?[66] Or is it, as the Supreme Court held in 1992, that a "reliance" interest bolsters a woman's right to privacy?[67] This reliance interest is premised on "the ability of women to participate equally in the economic and social life of the Nation . . . [because of] their ability to control their reproductive lives."[68] Or is it, as the majority in *Roe* maintains, that there does not

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64 *Id.*

65 *Id.* (emphasis added and citations omitted).

66 Roe v. Wade, 410 U.S. 113 (1973).

67 Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) (declining to overrule *Roe* explicitly, the Court did, however, overturn abortion's status as a fundamental right and the trimester framework holding that the State may restrict abortion so long as they do not place undue burdens on the woman's right to choose).

68 *Id.*

exist "a long-standing tradition of laws [in our nation proscribing] abortion[?]"[69] It is none of these.

Remembering that "if arbitrary decision making is to be avoided[, one must] adopt the most specific tradition as the point of reference."[70] Therefore, the most specific level at which a relevant tradition regarding human value can be identified lies in the sanctity and preservation of life which itself informs the Fourteenth Amendment definition of person. The relevant tradition is not privacy or reliance as they relate to an independent, fully matured, pregnant woman. This is given for the following four reasons.

First, consider the opinion articulated in the now vindicated dissent of Justice White in *Thornburgh v. American College of Obstetricians* as overruled by *Casey v. Planned Parenthood*.[71] A "pregnant woman cannot be isolated in her privacy . . . [because] the termination of a pregnancy typically involves the destruction of another [life]."[72]

> Even if . . . [the] cases [upon which the *Roe* decision was based] . . . could be properly grounded in rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition," the issues in the cases cited differ from those at stake where abortion is concerned. As the Court appropriately recognized in *Roe v. Wade,* "[t]he pregnant woman cannot be isolated in her privacy," 410 U.S., at 159, [93 S. Ct., at 730]; the termination of a pregnancy typically involves the destruction of another entity: the fetus. However one answers the metaphysical or theological question whether the fetus is a "human being" or the legal question whether it is a "person" as that term is used in the Constitution, *one must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species* homo sapiens *and distinguishes an individual member of that species from all others, and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being.* Given that the continued existence and development - that is to say, the *life* - of such an entity are so directly at stake in the woman's decision whether or not to terminate her pregnancy, that decision must be recognized as *sui generis*, different in kind from the others that the Court has

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[69] Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (rejecting the claim of a natural father to have a parental relationship with the child born of an adulterous relationship).

[70] *Id.*

[71] Thornburgh v. Amer. Coll. of Obstetricians, 476 U.S. 747, 792 (1986) (striking down informed consent provisions related to abortion) (citations omitted); *see also Casey*, 505 U.S. at 882 (holding that informed consent provisions of Pennsylvania's abortion statute do not impose an undue burden on a woman's right to choose to terminate her pregnancy overruling *Thornburgh v. Amer. Coll. of Obstetricians*).

[72] *Thornburgh*, 476 U.S. at 760 (White, J., dissenting).

protected under the rubric of personal or family privacy and autonomy.[73]

Second, there is no general right of privacy dwelling within the text of the Constitution, nor has it been explained how one evolves as a result of the specifically enumerated rights of privacy that serve collectively to support the penumbra theory.[74] This theory arose in 1965, when the Court struck down a Connecticut state statute that banned contraceptive use.[75] The Court found that several guarantees of the Bill of Rights protect privacy interests that exist in the relationship between partners in a traditional marriage.[76] The majority opinion, authored by Justice Douglas, declined to make explicit use of the substantive due process doctrine.[77] Instead, the opinion found that several of the Bill of rights, including the 1st, 3rd, 4th, 5th and 9th amendment guarantees, protect privacy interest and create a "penumbra" or "zone" of privacy.[78]

Because Douglas's opinion failed to describe how the Connecticut statute violated this penumbra of privacy, his jump from the specific aspects of privacy described by the aforementioned amendments to a general right of privacy remains suspect. As a result, one of the primary criticisms regarding the "penumbra" theory is its logic. It could be argued that "[w]hen the Constitution sought to protect private rights it specified them; [the fact] that it explicitly protects some elements of privacy, but not others, suggests that it did not mean to protect those not mentioned."[79] Additionally, the United States is founded upon the notion of limited government with specifically enumerated powers.[80]

Third, in 1973 the court proceeded to stretch the penumbra theory of *Griswold* to cover an even broader definition of privacy in *Roe*.[81] In 1973, the Court held that a woman's right to privacy is a "fundamental" right under the Fourteenth Amendment.[82] Therefore, the legislature has only a "limited right to regulate – and may not completely proscribe – abortions."[83] The difficulty is that the Supreme Court fails to tell us what

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[73] *Id.* at 791-92 (emphasis added).

[74] Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing a "penumbra" around the Bill of Rights that is broad enough to include a right to privacy in reproduction decisions between married couples).

[75] *Id.* at 479.

[76] *Id.* at 484-86.

[77] *Id.* at 481-82.

[78] *Id.*

[79] Louis Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410, 1422 (1974) (addressing the accommodation of a public good to private right by the Justices of the Supreme Court).

[80] *Id.*

[81] Roe v. Wade, 410 U.S. 113, 152 (1973).

[82] *Id.* at 154.

[83] *Id.* at 166.

exactly is included within privacy or when privacy is a fundamental interest versus an ordinary one.[84]

The fourth reason why the relevant tradition is not privacy or reliance relates to the misuse of the doctrine of *stare decisis*. In 1992, *Casey* bolstered *Roe's* "central holding" by adding a "reliance" interest in upholding a woman's right to privacy.[85] The plurality opinion stated that where a constitutional decision has not proven 'unworkable' and where overturning it would damage reliance interests, *stare decisis* dictated that the decision not be overturned and that

> [p]eople have organized intimate relationships and made choices . . . in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[86]

In his dissenting opinion, Justice Rehnquist attacks the majority's reliance on the doctrine of *stare decisis*.[87] *Stare decisis* means "[t]o abide by, or adhere to, decided cases."[88] In the *Casey* holding, however, the majority so revised the *Roe* decision, it was argued *stare decisis* was not actually applied.[89] Perhaps more importantly, Rehnquist did not believe *stare decisis* should be applied. Justice Rehnquist thought that time had simply proven the *Roe* decision to be wrong.[90] In his opinion, the Court should have overruled *Roe* just as it had overruled *Plessy v. Ferguson* (the decision legitimizing "separate but equal" treatment of blacks) in *Brown v. Board of Education*.[91]

Finally, in contradistinction to the ever-elusive definition of "privacy" and the illusory application of *stare decisis*, in *Casey*, there are reasons to find that the relevant tradition is the sanctity and protection of life by defining the word person. The Fourteenth Amendment of the Constitution expressly states that, "[no State shall] deprive any *person* of life . . . without due process of law."[92] While it is conceded as Justice Blackmun states in *Roe* that the Constitution does not define "person" it is strikingly clear that the Founders did not supply definitions for the

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84 Henkin, *supra* note 79, at 1427 (addressing the accommodation of a public good to private right by the Justices of the Supreme Court).

85 *See* Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992).

86 *Id.*

87 *Id.* at 944.

88 BLACK'S LAW DICTIONARY, *supra* note 38, at 1261.

89 *Casey*, 505 U.S. at 954.

90 *Id.* at 952.

91 Brown v. Bd. of Educ., 349 U.S. 294 (1955) (rejecting the separate-but-equal doctrine formulated in Plessy v. Ferguson, 163 U.S. 537 (1896) in which a Louisiana law called for separate-but-equal accommodations for white and black railroad passengers and pronouncing official segregation to be a violation of equal protection).

92 U.S. CONST. amend. XIV, § 1 (emphasis added).

term "person" in any other part of the Constitution.[93] Therefore, the Supreme Court should apply to the words their plain meaning and give content to interests, which are within the scope of particular constitutional provisions. In other words, "if the words of the document are clear, then the judges are bound and can do no more than apply them: 'If, indeed, such be the mandate of the Constitution, we have only to obey. . . .'"[94] Furthermore, the Declaration of Independence, a document foundational to the Constitution, expressly affirms the fundamental right and sanctity of human life. The second sentence of the Declaration of Independence states that, "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."[95] Moreover, the definition of person, using a least common denominator analysis of case law defining those who qualify as persons under the Fourteenth Amendment, reveals two minimal requirements. Persons must be biologically alive and genetically human. No other standard should apply to the unborn.

In summary, the best approach to providing a "careful description" of the fundamental liberty interest in the context of the substantive-due-process analysis is to determine the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.[96] It is argued for the following reasons that the relevant tradition is not privacy or reliance as they relate to an independent fully matured pregnant woman.

First, "[t]he pregnant woman cannot be isolated in her privacy;" the termination of a pregnancy typically involves the destruction of another entity - the fetus.[97] Second, there is no general right of privacy dwelling within the text of Constitution nor has it been explained how one evolves as a result of the specifically enumerated rights of privacy that serve collectively to support the penumbra theory. Third, in an ever-broadening definition of privacy, the Supreme Court fails to tell us what exactly is included within privacy or when privacy is a fundamental interest versus an ordinary one.[98] Fourth, in *Casey*, the majority so revised the *Roe* decision it was argued by Justice Rehnquist that *stare decisis* was not actually applied.[99]

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93 Roe v. Wade, 410 U.S. 113, 157 (1973).

94 WOLFE, *supra* note 56, at 43 (citing McCulloch v. Maryland, 17 U.S. 316, 408 (1819)).

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

96 Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989).

97 Thornburgh v. Amer. Coll. of Obstetricians, 476 U.S. 747, 794 (1986) (White, J., dissenting) (striking down informed consent provisions related to abortion).

98 Henkin, *supra* note 79, at 1427.

99 *Casey*, 505 U.S. at 954.

By contrast, this article concludes that the relevant tradition is protecting the fundamental right to life. This is based on the plain reading of the Fourteenth Amendment, the sanctity of human life affirmed in the Declaration of Independence, and a least common denominator analysis of case law defining those who qualify as persons under the Fourteenth Amendment.

Next this article examines how abortion law affects the definition of a Fourteenth Amendment person, specifically the issue of viability and the difficult question of when life begins. These two issues are critical to shaping the Fourteenth Amendment use and meaning of the word person.

IV. WHEN DO THE UNBORN HAVE INTRINSIC WORTH AND EQUAL VALUE TO THOSE BORN?

A. Viability And A Fourteenth Amendment Person

Viability is "[a] term used to denote the power a new-born child possesses of continuing independent existence. [It is that] stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."[100] Viability is a term that hit its greatest popularity in 1992 in the landmark case *Planned Parenthood v. Casey*.[101] In *Casey*, the Court's opinion confirmed that the State retained the power to restrict abortion after fetal viability.[102] However, if the law contains exceptions for pregnancies endangering the woman's life or health; "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[103] Viability is challenged however on at least two fronts when it comes to the deprivation of Fourteenth Amendment protection. First, with the progress of technology, the time frame of viability is changing.

> In 1973, viability before 28 weeks was considered unusual. The [fourteenth] edition of L. Hellman & J. Pritchard, Williams Obstetrics (1971), on which the Court relied in *Roe* for its understanding of viability, stated, that "attainment of a fetal weight of 1,000 g or a fetal age of approximately 28 weeks' gestation is . . . widely used as the criterion of viability." However, recent studies have demonstrated increasingly earlier fetal viability. It is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future. Indeed, the Court has explicitly

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[100] BLACK'S LAW DICTIONARY, *supra* note 38, at 1404 (stating "[t]he constitutionality of this statutory definition (V.A.M.S. (Mo.), § 188.015) was upheld in Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d 788.").

[101] Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992).

[102] *Id.* at 846.

[103] *Id.* at 879.

> acknowledged that *Roe* left the point of viability flexible for anticipated advancements in medical skill." [Colautti]. "[We] recognized in *Roe* that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term." [Danforth].[104]

Directly on point, a pro-life news source recently reported a child was prematurely born on October 2, 2000 to Tammy Herring in Heidelberg Germany. His name is Joseph Herring and he was born an astounding 3.5 months early. He was born at twenty-three weeks, that is five weeks earlier than the accepted age of viability in *Roe*. Joseph was only twelve inches long and just over one pound. Nonetheless, neonatal specialists have helped Joseph overcome complications and he is reportedly doing well and developing normally.[105]

Fortunately, Justice Blackmun stated in *Roe*, that decisions regarding fundamental rights would continue to be decided "as logic and science [compel]."[106] Perhaps, even more compelling is the statement made by Justice Blackmun in his majority opinion in *Roe* that,

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, [*at this point in the development of man's knowledge*] is not in a position to speculate as to the answer.[107]

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[104] City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 457-58 (1983) (O'Connor, J., dissenting) (citations omitted) (quoting Colautti v. Franklin, 439 U.S. 379, 387 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976)).

[105] Pro-life Infonet, Comments on Miracle Baby, *at* http://www.prolifeinfo.org/news082.html (last visited Oct. 10, 2001) (citing *Born 3 1/2 Months Early, Miracle Child Battles for Life,* STARS AND STRIPES, Jan. 25, 2001). The Pro-Life Infonet is a daily compilation of pro-life news and information, sponsored by Women and Children First, http:www.womenandchildrenfirst.org.

[106] Webster v. Reprod. Health Serv., 492 U.S. 490, 554 (1989) (Blackmun, J., dissenting); *see also* City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983) (O'Connor, J., dissenting) (recognizing that, "the State's compelling interest in maternal health changes as medical technology changes. . . ."). *Id.* at 454. Additionally, O'Connor notes that,

> [T]he lines drawn in [the Roe] decision have now been "blurred" because of what the Court accepts as technological advancements . . . .
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> . . . .
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> Just as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother.

Id. at 455-58 (quoting Colautti v. Franklin, 439 U.S. 379, 387 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976)).

[107] Roe v. Wade, 410 U.S. 113, 159 (1973) (emphasis added).

This statement clearly indicates that as the development of man's knowledge progresses to a point that is capable of answering the above question, the policy regarding abortion will be reexamined. In other words, advances in neonatal care, the advent of cloning technology and the nearing breakthrough of artificial wombs, should arguably shift the time frame of viability ever closer to the time of conception.[108]

Until the advent of artificial wombs or neonatal care are capable of hosting an embryonic life throughout development, there is still an argument to be made in logic against the use of viability in determining the worth and value of the unborn. That is, viability is a human condition that affects both the born and unborn. Not surprisingly when those born experience a change in their status of viability, they maintain their Fourteenth Amendment protection. For example, even those born are, at times, extremely vulnerable and subject to a hostile environment and sometimes completely dependent on others.[109] This is seen, not only in cases previously cited regarding the mentally and physically incompetent but also in ordinary, healthy individuals. Consider, astronauts maneuvering about the exterior of their spaceship, literally tethered to the spaceship by a lifeline. Likewise, consider submariners in a diving bell suspended by an umbilical-like cord to a mother ship on the surface of the water. Both examples illustrate circumstances in which healthy individuals are entirely dependent on others for all their life sustaining needs.

Similarly we might view an unborn child suspended in the womb of its mother - no less human and no less alive than the astronaut or submariner. The difference is that only the unborn are deprived of their right to life under the protection accorded by the Fourteenth Amendment. It would be ludicrous to suggest an astronaut or submariner is any less a person due to his dependence on an outside system for protection, nutrition, or survival. To require something more of the unborn than we require of the born under similar circumstances related to dependence and/or viability can only result in an arbitrary selection of human qualities and characteristics that convey personhood.[110] This, of course, begs the question of proof that the unborn are biologically alive and genetically human. To address these issues, this article considers our current understanding of reproductive science and a recent advance in genetic technology, specifically, cloning.

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[108] Ronald Chester, *To Be, Be, Be. . . Not Just To Be: Legal and Social Implications of Cloning For Human Reproduction*, 49 FLA. L. REV. 303, 307 n.10 (1997) (discussing recent successes in the gestation and delivery of goats from an artificial womb).

[109] *See supra* notes 45-53 and accompanying text.

[110] Hollowell, *supra* note 16, at 329-33 (describing current policy regarding fetal interests in the light of cloning technology).

B. Cloning Technology - Determining When Life Begins

1. Biologically Alive

In human reproduction, biological information is transferred from the parents to each new child through heredity.[111] "The units of heredity are called genes and the branch of biology concerned with the structure, transmission, and expression of hereditary information is called genetics."[112] The carriers of genetic information are structures called chromosomes, which are contained within the cell nucleus.[113] It is currently understood that,

> Every individual [cell] of a given species contains a characteristic number of chromosomes in most nuclei of the [cell] body. [And that m]ost cells in the body of a normal human being have exactly forty-six chromosomes.
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> . . . .
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> Chromosomes normally exist in pairs [and] there are typically two of each kind in the somatic (body) cells of higher plants and animals. Thus, the forty-six chromosomes in human cells constitute twenty-three different pairs. [114]

Some human cells have only half of the forty-six chromosomes. For example, a gamete, the cell that functions in sexual reproduction, (i.e., the egg and sperm) has only twenty-three chromosomes.[115] In reproduction, the sperm and egg fuse at fertilization. In this instant, each gamete contributes its set of twenty-three chromosomes. When the egg and sperm combine, they form a cell with forty-six chromosomes.[116] "Shortly after fertilization the [embryo] undergoes a series of rapid [divisions], collectively referred to as cleavage."[117] Cleavage begins as the

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[111] CLAUDE A. VILLEE ET AL., BIOLOGY 221 (2d ed. 1989).

[112] *Id.*

[113] *Id.*

[114] VILLEE, *supra* note 111, at 222, 230-31; *see also* BRUCE ALBERTS ET AL., MOLECULAR BIOLOGY OF THE CELL 502-06 (2d ed. 1989).

[115] VILLEE, *supra* note 111, at 231 (describing cells containing half of the forty-six chromosomes contained in most adult cells as haploid).

[116] *Id.* at 1201 (This is only one of the functions of fertilization. Two other functions of fertilization include determination of the sex of the offspring and "stimulation necessary to initiate the reactions in the egg that permit development to take place." *Id.*).

"Fertilization involves four steps. First, the sperm must contact the egg and recognition must occur. Second, the sperm enters the egg. Third, the sperm and egg nuclei fuse. Finally, the egg is activated and development [of the newly formed embryo] begins." *Id.*

[117] *Id.* at 1204.

one cell embryo undergoes division "to form a two-cell embryo."[118] This occurs "about twenty-four hours after fertilization."[119]

At this point, "[e]ach of [these two] cells [divides], bringing the number of cells to four."[120] It takes only about five days for the embryo to divide to the thirty-two cell stage.[121] "Repeated divisions continue as the embryo is pushed along the uterine tube by ciliary action and muscular contraction" until it reaches the uterus.[122] The embryo begins to implant itself into the uterus "[o]n about the seventh day of development."[123] "Implantation is completed by the ninth day of development" and normal gestation continues for approximately nine months until birth.[124]

The question, then, is whether all these complexities of development can produce a definition of the term "biologically alive" that can be applied equally and evenly to all members of the human race. Such a definition requires there to be a characteristic shared or held in common by all those objects the term would define. With this in mind it is noted, that from the first day of conception, cleavage is the process of producing many cells from one cell by repeated mitosis.[125] And mitosis is the division of the cell nucleus resulting in the distribution of a complete set of chromosomes to each daughter cell.[126] Moreover, chromosomes are the carriers of heredity, which uniquely comprise each new child.[127] It is most noteworthy that the process of mitosis is not only ignited at conception but also continues throughout development, birth, adolescence, adulthood, and on into old age.[128] Therefore, it is submitted that the process of mitosis most objectively and comprehensively defines what it means to be "biologically alive."

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118 *Id.*

119 *Id.* at 1216.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* at 1215, 1218.

125 *Id.* at 1204.

126 *Id.* at 223-24.

127 *Id.* at 221.

128 THE WORLD BOOK ENCYCLOPEDIA, C-CH VOL. 3, 332 (1999).

> Like all other living things, cells die. Every minute, about 3 billion cells in your body die. During the same minute, about 3 billion new cells are born by mitosis and replace them. Each day, several billion cells in the body die and are replaced by cell division.. Dead skin cells flake off. Dead cells from internal organs pass out of the body with waste products. . . . [W]hite blood cells live about 13 days; red blood cells live about 120 days; and liver cells live about 18 months. Nerve cells can live about 100 years.

Id.

The next question asks when a genetically human life begins. To answer this question, the article continues in its discussion of early human development.

2. When A Genetically Human Life Begins

Occasionally in early development, the cells of a two-cell embryo separate entirely, with each embryo then developing independently into an adult.[129] In this event, these single-cell embryos will have identical sets of genes. As a result, the individuals formed are exactly alike. In other words, they are genetically identical and most commonly known as identical twins.[130] This process is appropriately called twinning and can be used to explain cloning technology with one very noticeable distinction: cloning circumvents the need for sperm and egg to unite.

In the process of cloning, the twenty-three chromosomes of a recipient egg are removed. Similarly, the DNA or genetic material comprising forty-six chromosomes is removed from a selected adult cell.[131] The forty-six chromosomes of the adult cell are introduced into the now empty (enucleated) egg. Alternatively, the adult cell is fused with the egg to introduce the forty-six chromosomes into it.[132] The egg then contains the forty-six chromosomes of the adult cell, and will use the information encoded in the DNA to create a clone of the donor.

The forty-six chromosomes introduced into the egg are identical to the genetic material contained by all the other adult cells of the donor that contain forty-six chromosomes. The genetic material taken from the donor was originally determined (presumably years earlier) when an egg

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[129] VILLEE, *supra* note 111, at 1216.

[130] *Id.* Alternatively, "[f]raternal twins develop when a woman ovulates two eggs and each is fertilized" to give rise to two embryos, each having its own distinctive genetic makeup. *Id.*

[131] NAT'L BIOETHICS ADVISORY COMM'N, CLONING HUMAN BEINGS, 17 (1997), *available at* http://bioethics.gov/pubs.html (last visited Oct. 10, 2001).

> In the Spring of 1997, Scottish Scientist Ian Wilmut of the Roslin Institute announced to an astonished world that he and his team of scientists had successfully cloned a sheep. They named the cloned sheep Dolly. After the news of Dolly's birth was announced, President Clinton banned the use of federal funding for human cloning research and asked the recently appointed National Bioethics Advisory Commission to examine the issue. This provided an opportunity for initiating analysis of the many dimensions of human cloning research. The report produced included careful consideration of the potential risks and benefits related to serious safety concerns, individuality, family integrity, and treating children as objects. The conclusion was a recommendation that the current moratorium continue on the use of Federal funding in support of any attempt to create a child by somatic cell nuclear transfer.

Id. at iii.

[132] *Id.* at 20.

and sperm each donated their original twenty-three chromosomes at the point of conception.

In natural conception, twenty-three chromosomes of the sperm and egg unite to create a single cell containing forty-six chromosomes. Therefore, the moment that forty-six chromosomes are introduced into the enucleated egg is equivalent to the naturally occurring point of conception. In cloning, the life created will be genetically identical to the donor, as though it were an identical twin of the donor.[133]

During development, in both the naturally conceived and the cloned embryos, repeated mitotic divisions of the embryo continue to increase the number of cells until they then begin to specialize and organize into an adult.[134] Specialization during development is called differentiation. Differentiation is a continual process. Specifically, as the cells multiply and divide, groups of cells become gradually committed to particular patterns of gene activity. Differentiation does not mean that cells lose genes during development. In fact, all differentiated adult cells of an individual are genetically identical. They are simply not metabolically identical.[135] This means that different genes are activated to make proteins as required by the individual cell.

For example, the same proteins required by liver cells are not necessarily the same proteins required by hair cells. That is why each cell makes different proteins suited to its needs while the genetic material remains constant in each cell.[136] This explains why genetic material can be taken, theoretically, from any cell and injected into the enucleated egg resulting in a clone of the animal or person from whom the cell was taken.[137] In short, the "magic of mitosis" occurs whenever a complete set of forty-six chromosomes is introduced into an egg, whether by natural conception, in vitro fertilization, or cloning technology.

Differentiation is of particular interest because the Ethics Committee and the *Davis* court use the event as a foundational part of the preembryo-embryo distinction.[138] Specifically, the report and reasoning of the committee explain the preembryo-embryo distinction in terms of differentiation and differentiation is explained in terms of development of an individual, and uterine implantation. The question, then, is whether this preembryo-embryo distinction remains valid in the light of the newest reproductive technology, cloning. To make such a

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[133] I. Wilmut et al., *Viable Offspring Derived from Fetal and Adult Mammalian Cells*, 385 NATURE 810, 810-13 (1997).

[134] VILLEE, *supra* note 111, at 384; *see also* ALBERTS ET AL., *supra* note 104, at 502.

[135] VILLEE, *supra* note 111, at 387.

[136] *Id.*

[137] Wilmut, *supra* note 133, at 810.

[138] Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992); Ethics Report, *supra* note 21, at 32S.

determination, a closer examination of the report by the Ethics Committee of the American Fertility Society is warranted.

The Ethics Committee explains differentiation in terms of development of an individual as correlated with visually recognizable structures of the developing embryo, and described in terms related to twinning.[139] Specifically, the committee reports that, "[w]ith the appearance of the [primitive] streak, as far as is now known, the embryonic disc is committed to forming a single being; beyond this point, twinning is not believed to occur, either naturally or experimentally."[140] Therefore, absent specific visually recognizable structures that indicate an end to the embryo's ability to create a twin, a human embryo is not a person nor is it property. It is a preembryo. There are at least two recognizable flaws in relying on this explanation as a basis for defining the preembryo status.

First, while it is conceded that prior to fourteen days, single embryos have the ability to split or be split to effect development of more than one independent adult, each life so created develops in the same manner as the embryo from which it was split. This is the result of being derived from the same genetic material. This event merely serves to reset the biological clock of the embryo, forcing it to repeat previously experienced divisions. In humans, this event does not prevent the embryo from attaining eventual personhood. At a minimum, the embryo will develop into at least one life. It is questionable, therefore, whether the phenomenal ability of the embryo, under some conditions, to produce more than one life should diminish an embryo's life status. Logic dictates the opposite.

Second, evidence that the embryo is a specific life from the moment of conception is actually offered by cloning technology. In cloning technology, the moment that a complete set of forty-six chromosomes is introduced into an enucleated egg, the embryo is a very specific life, identical to the donor of the genetic material. To illustrate, the success of Dolly and various other cloned animals provides undeniable evidence that the embryo is set on a predetermined pathway of life from the moment the complete set of chromosomes is introduced into the egg. That is precisely the science and logic that explains how the cloned embryo is capable of duplicating the donor.

The individual cells of the cloned embryo early in cleavage follow the same path of development followed by the donor of the genetic material when the donor was only an embryo. In other words, there appear to have been no options for the cloned embryo, as a whole, in its development. Clearly, the path of development is no less random from

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[139] Ethics Report, *supra* note 21, at 32S.

[140] *Id.*

the point of conception to fourteen days than after fourteen days. Therefore, we can infer that there were no options for the initial groups of cells (the preembryo) that came into existence through mitotic cell division in the first few days of life. Recalling that the moment that a complete set of chromosomes is introduced into the egg is equivalent to the point of conception, it is clear that development of the *individual* is encoded in the genetic material itself, and does not require fourteen days to be committed to forming a specific and uniquely individual being.

Additionally, differentiation is explained by the committee report in terms of uterine implantation. The report states that it is the physiologic interaction of the embryo with the mother during implantation that determines the path of differentiation.[141] Clearly, cloning suggests otherwise. Specifically, the cloned embryo develops in the same manner as the donor, despite the absence of the same available womb. Cloned animals, such as Dolly, were not implanted into the womb of the same mother that birthed the donor of the genetic material.[142] Yet, the cloned embryo was an exact genetic duplicate of the donor. Therefore, it is not the physiologic interaction of the embryo with the mother during implantation that determines the path of differentiation. Implantation of the egg in the uterine wall merely provides the nutritive environment necessary for continued growth in relation to the embryo's current stage of life.

With these points in mind, one must recognize that the scientific rationale behind the preembryo-embryo distinction is flawed. Clearly the beginning of each human life occurs when a biologically alive member of the species *homo sapien* is genetically complete. This occurs at the moment of conception.

In summary, cleavage is the process of producing many cells from one cell by repeated mitosis.[143] And mitosis is the division of the cell nucleus resulting in the distribution of a complete set of chromosomes to each daughter cell.[144] Moreover, chromosomes are the carriers of heredity, which uniquely comprise each new child.[145] This entire process is ignited at conception and continues throughout life. Therefore, mitosis defines what it means to be biologically alive. Moreover, the logic and specific evidence provided by successful cloning experiments indicates strongly that both the cloned embryo and the fertilized egg have been set on the path *of* life, not a path destined *for* life, the moment that the complete set of chromosomes exists within the cell. In other words, a

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141 *Id.*

142 Wilmut, *supra* note 133, at 810.

143 VILLEE, *supra* note 111, at 1204.

144 *Id.* at 223-24.

145 *Id.* at 221.

genetically human life begins at conception. Indeed, if there is a preembryo, then it likely is the egg and the sperm themselves, not the cloned embryo or the fertilized egg. As a result, this analysis suggests that the human embryo, even at the very earliest stages, should be recognized as protectable life. This requires that it be accorded the rights of a person. Even the committee report recognized, "this position entails an obligation to provide an opportunity for implantation to occur and tends to ban any action before transfer that might harm the embryo or that is not immediately therapeutic."[146]

V. SUMMARY

A. Constitutionally And Scientifically Compatible Definition Of A Fourteenth Amendment Person

To properly understand and implement the Fourteenth Amendment's use and meaning of the word person at least two questions need to be answered: 1) Who qualifies as having the intrinsic worth and value necessary for Fourteenth Amendment protection; and 2) When does an unborn life have the intrinsic worth and equal value to those born?

In part one of this article we used a substantive due process analysis to address the first question. We examined (A) What fundamental rights and liberties are "objectively and deeply rooted in this nation's history and tradition" with respect to life and a Fourteenth Amendment person, and (B) Provided a "careful description" of the asserted fundamental liberty interest – life – in order that a Fourteenth Amendment person might be defined.

In summary of part 1A, the fundamental right at issue is the right to life as framed by the Fourteenth Amendment due process clause: "No state shall deprive any person of life, liberty or property without due process of law."[147] A substantive due process analysis roots this right to life in the Declaration of Independence, which is foundational to the Constitution itself and regards life as an inalienable right. Because the Declaration of Independence is an embodiment of natural law, this right to life is further rooted in principles of antiquity that arise from social compact or divine right, which cannot be limited by government. This fundamental right to life, as with all fundamental rights, is then passed on through history by the common law doctrine of *stare decisis*, which inherently identifies the fundamental rights and liberties "objectively and deeply rooted in this Nation's history and tradition."

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[146] Ethics Report, *supra* note 21, at 32S.

[147] U.S. CONST. amend. XIV, § 1.

Analysis also revealed that, based on the common law doctrine of *stare decisis*, Fourteenth Amendment protection is not dependent on legitimacy, legality, mental capacity or confinement. Neither is protection dependent on status, health, race, color, or religion.[148] In the cases reviewed by a least common denominator analysis, it was determined that the Fourteenth Amendment definition of a person minimally requires an individual be biologically alive and genetically human. This definition of a Fourteenth Amendment person relates back to the fundamental right to life established by the substantive due process clause so that anyone meeting these requirements should not be deprived of life without due process of law. These requirements for the definition of a Fourteenth Amendment person should, therefore, be applied equally and evenly to all members of the human race.

In summary of part 1B, the best approach to providing a "careful description" of the asserted fundamental liberty interest in the context of the substantive due process analysis is to determine the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.[149] It is argued for the following reasons that the relevant tradition is not privacy or reliance as they relate to an independent fully matured pregnant woman.

First, "[t]he pregnant woman cannot be isolated in her privacy," the termination of a pregnancy typically involves the destruction of another entity: the fetus.[150] Second, there is no general right of privacy dwelling within the text of Constitution nor has it been explained how one evolves as a result of the specifically enumerated rights of privacy that serve collectively to support the penumbra theory. Third, in an ever-broadening definition of privacy, the Supreme Court fails to tell us what exactly is included within privacy or when privacy is a fundamental interest versus an ordinary one.[151] Fourth, in *Casey*, the majority so revised the *Roe* decision it was argued by Justice Rehnquist that *stare decisis* was not actually applied.[152]

By contrast, this article concludes the relevant tradition is protecting the asserted right to life. This is based on the plain reading of the Fourteenth Amendment, the sanctity of human life affirmed in the Declaration of Independence and a least common denominator analysis

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[148] *See supra* notes 45-53 and accompanying text.

[149] Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989).

[150] Thornburgh v. Amer. Coll. of Obstetricians, 476 U.S. 747, 794 (1986) (White, J., dissenting) (striking down informed consent provisions related to abortion) (citations omitted).

[151] Louis Henkin, *supra* note 79, at 1427 (addressing the accommodation of a public good to private right by the Supreme Court Justices).

[152] *See supra* notes 85-91 and accompanying text.

of case law defining those who qualify as persons under the Fourteenth Amendment.

Part two answered the second question "When does an unborn life have intrinsic worth and equal value to those born?" by defining the term "biologically alive" and determining when a genetically human life begins. Analysis revealed cleavage as the process of producing many cells from one cell by repeated mitosis and mitosis as the division of the cell nucleus resulting in the distribution of a complete set of chromosomes to each daughter cell.[153] Because this entire process is ignited at conception and continues throughout life, it was determined that mitosis defines what it means to be biologically alive. Cloning technology was then used to determine when a genetically human life begins. Analysis exposed the flawed rationalization supporting the preembryo-embryo distinction and provided irrefutable evidence that each new human life begins at conception. The genetic material contained in both the natural and cloned embryos solely determines the individual path and specific development for the embryo, even from its earliest stages.

On total, the Supreme Court erred in its substantive due process analysis regarding abortion. This article establishes the relevant tradition regarding abortion is the sanctity and protection of life *vis-à-vis* the Constitutional use and meaning of the word person. Moreover, using scientific progress this article also answered the question, left open by the Supreme Court, of when human life begins. Combining results of this analysis, this article provides a scientifically and constitutionally cohesive definition of a Fourteenth Amendment person.

The aim of this article is toward correcting the flaws in past applications of the substantive-due-process analysis that have resulted in our current abortion policy. The conclusions require recognition of all fetuses, embryos, and preembryos as persons under the Fourteenth Amendment deserving protection to the fullest extent of the law regardless of viability. They also warrant the sanctity of life be preserved from conception under any and all conditions, natural or otherwise. A remedy is presented in the form of a Bill Proposal. This Bill is proposed to amend any constitution, state or federal, by incorporating a scientifically and constitutionally cohesive definition of person.

B. A Bill Proposal

The Bill states that: "For Purposes of this Constitution the word person shall include all biologically alive members of the species *homo sapiens*."

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[153] VILLEE, *supra* note 111, at 1204, 1223-24.

The purpose of this Bill is first, to recognize that the life of each member of the species *homo sapiens* begins when the member is biologically alive and genetically human; second, to affirm that every member of the species *homo sapiens* has intrinsic worth and equal value whether born or unborn; and third, to enforce the Fourteenth Amendment by ensuring that its protection of life extends to all living members of the species homosapiens.

An obvious question goes to the authority for such legislation. Although this subject goes beyond the scope of this article, a comment is warranted. It is the author's opinion that the enactment of such legislation could be held remedial. Therefore, authority for such legislation exists under § 5 of the Fourteenth Amendment.[154] Commensurably, the need for such legislation is made clear by the following statement of Senator East regarding the Human Life Bill - S.158 submitted for consideration in 1982.[155]

To protect the lives of human beings is the highest duty of government. Our nation's laws are founded on respect for the life of each and every human being. The Declaration of Independence holds that the right to life is a self-evident, inalienable right of every human being. Embodied in the statement that "all men are created equal" is the idea of the intrinsic worth and equal value of every human life. The author of the Declaration, Thomas Jefferson, explained in later years that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."[156]

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[154] City of Boerne v. Flores, 521 U.S. 507 (1997) (examining the enactment of RFRA, the Supreme Court held that congress does not hold the power to determine the substantive scope of the Constitution, but can remedy state violations of the Constitution through legislation).

[155] HUMAN LIFE REPORT, *supra* note 7, at 2. Mr. East, from the Subcommittee of Powers, submitted a report together with additional and minority views to accompany the Human life Bill S.158 prior to the hearings.

[156] HUMAN LIFE REPORT, *supra* note 7, at 4. (citing a speech to the Republican Citizens of Washington County, Maryland (March 31,1809), *reprinted in* J. BARTLETT, FAMILIAR QUOTATIONS 472-73 (14th ed. 1968)).