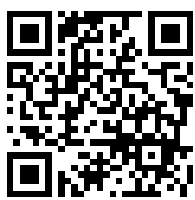

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THE HUMAN LIFE BILL—S. 158 . . .

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

TO THE

COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE

[U.S. Congress]

MADE BY ITS

SUBCOMMITTEE ON SEPARATION OF POWERS

DECEMBER ——

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1st Session

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THE HUMAN LIFE BILL—S. 158

DECEMBER ——

Mr. EAST, from the Subcommittee on Separation of Powers, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 158]

The Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, to which was referred the bill, S. 158, to recognize that the life of each human being begins at conception and to enforce the fourteenth amendment by extending its protection to the life of every human being, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

I. AMENDMENT IN THE NATURE OF A SUBSTITUTE

Strike out the enacting clause and all after the enacting clause and substitute in lieu thereof the following:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 42 of the United States Code shall be amended at the end thereof by adding the following new chapter:

CHAPTER 101

SECTION 1. (a) The Congress finds that the life of each human being begins at conception.

(b) The Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings.

SEC. 2. Upon the basis of these findings, and in the exercise of the powers of Congress, including its power under section 5 of the fourteenth amendment to the

Constitution of the United States, the Congress hereby recognizes that for the purpose of enforcing the obligation of the States under the fourteenth amendment not to deprive persons of life without due process of law, each human life exists from conception, without regard to race, sex, age, health, defect, or condition of dependency, and for this purpose "person" includes all human beings.

SEC. 3. Congress further recognizes that each State has a compelling interest, independent of the status of unborn children under the fourteenth amendment, in protecting the lives of those within the State's jurisdiction whom the State rationally regards as human beings.

SEC. 4. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions: *Provided,* That nothing in this section shall deprive the Supreme Court of the United States of the authority to render appropriate relief in any case.

SEC. 5. Any party may appeal to the Supreme Court of the United States from an interlocutory or final judgment, decree, or order of any court of the United States regarding the enforcement of this Act, or of any State law or municipal ordinance that protects the rights of human beings between conception and birth, or which adjudicates the constitutionality of this Act, or of any such law or ordinance. The Supreme Court shall advance on its docket and expedite the disposition of any such appeal.

SEC. 6. If any provision of this Act or the application thereof to any person or circumstance is judicially determined to be invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected by such determination.

II. PURPOSE OF THE PROPOSED ACT

The purpose of S. 158 is first, to recognize the biological fact that the life of each human being begins at conception; second, to affirm that every human life has intrinsic worth and equal value regardless of its stage or condition; and third, to enforce the fourteenth amendment by ensuring that its protection of life extends to all human beings.

III. NEED FOR THIS LEGISLATION

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." [1]

Today there is a strong concern among many citizens that government is not fulfilling its duty to protect the lives of all human beings. Since 1973 abortion has been available on demand nationwide,[2] resulting in more than one and one-half million abortions per year. Yet this abrupt and fundamental shift in policy occurred without any prior inquiry by any branch of the federal government to determine whether the unborn children being aborted are

[1] Speech to the Republican Citizens of Washington County, Maryland (March 31, 1809) *reprinted in* J. BARTLETT, FAMILIAR QUOTATIONS 472-73 (14th ed. 1968).

[2] The state of the law allowing abortion on demand is explained at pp. 5-6, infra.

living human beings. Nor has any branch of the federal government forthrightly faced the question whether our law should continue to affirm the sanctity of human life—the intrinsic worth and equal value of all human life—or whether our law should now reject the sanctity of life in favor of some competing ethic. Only by determining whether unborn children are human beings, and deciding whether our law should and does accord intrinsic worth and equal value to their lives, can our government rationally address the issue of abortion.

A government can exercise its duty to protect human life only if some branch of that government can determine what human life is. It can afford no protection to an individual without first ascertaining whether that individual falls within a protected class. The principal author of the fourteenth amendment, Congressman John A. Bingham of Ohio, recognized this truism when he stated that, in order to decide whether an individual is protected under the law of our land, "the only question to be asked of the creature claiming its protection is this: Is he a man?" [3] Since the fourteenth amendment expressly confers on Congress the power to enforce the protections of that amendment, including the protection of life, it is appropriate for Congress as well as the Supreme Court to ask whether a particular class of individuals are human beings.

Some branch of government, as a practical matter, *must* have power to answer this basic question. Otherwise, the government would be unable to fulfill its duty to protect each individual that *is* a human being. When the individual under consideration is an unborn human child, the basic question becomes, "When does the life of each human being begin?" Only by examining this question can the government determine whether unborn children are living human beings. Only after addressing this issue can a government intelligently decide whether to accord equal value to the lives of unborn children and whether to protect their lives under the law.

In its hearings on S. 158, the Subcommittee has exhaustively addressed all questions relevant to the protection of lives of unborn children under the fourteenth amendment. Through these hearings we have also come to recognize that the fundamental question concerning the life and humanity of the unborn is twofold. Not only must government answer the biological, factual question of when the life of each human being begins; it must also address the question whether to accord intrinsic worth and equal value to all human life, whether before or after birth.

These two questions are separate and distinct. The question of when the life of a human being begins—when an individual member of the human species comes into existence—is answered by scientific, factual evidence. Science, however, is not relevant to the second question; science cannot tell us what value to give to each human life. This second question can be answered only in light of the ethical and legal values held by our citizens and expressed by the framers of our Constitution.

The two congressional findings contained in section 1 of S. 158 correspond to these two distinct questions. The congressional finding in section 1(a) of the bill addresses the first question and rests on a factual, scientific determination. The congressional finding in section 1(b) of the bill reflects the conclusion of the Subcommittee

[3] CONG. GLOBE, 40th Cong., 1st Sess. 542 (1867).

that the fourteenth amendment answers the second question by affirming the intrinsic worth and equal value of all human lives.

Much confusion has arisen in the Subcommittee's hearings and in public debate over S. 158 because of the failure to distinguish between the two basic questions. Those, on the one hand, who claim that scientific evidence can resolve the abortion issue ignore the significance of the second question. They fail to see that even if unborn children are human beings, government must decide whether their lives are of such value that they should be protected under the law. Those, on the other hand, who deny that science has any relevance to the abortion issue generally focus only on the second question and refuse to acknowledge the possibility of answering the first. They ignore the role science plays in informing us that a particular individual is a member of the human species, a separate individual whose life we must decide either to value or not.[4]

The Subcommittee has taken pains to separate its consideration of the two questions. In this report we shall often refer to the "scientific question" and the "value question" as a convenient shorthand. We have analyzed the testimony of various witnesses and sources of public record as they relate to each question separately. And we report separately our conclusions on each question.

We emphasize that both questions must be answered by some branch of government before the abortion issue can be fully and rationally resolved. The need for Congress to investigate both questions stems partly from the self-professed institutional limitations of our federal judiciary. The Supreme Court, in its 1973 abortion decision, declared itself unable to resolve when the life of a human being 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." *Roe* v. *Wade,* 410 U.S. 113, 159 (1973). The Court went on to explain that a "wide divergence of thinking" exists on the "sensitive and difficult" question of when a human life begins, *id.* at 160; hence, the judiciary is not competent to resolve the question.

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. And because the Court did not consider whether unborn children are living human beings, it was able to avoid an explicit decision on whether our law accords intrinsic worth and equal value to the life of every human being regardless of stage or condition. The Court thus declined to address either of the crucial questions relevant to protecting unborn children under the law: the Court addressed neither the scientific question nor the value question. The Court's entire 1973 opinion concerning the power of states to protect unborn children—including the Court's

[4] For instance, the medical and scientific witnesses who testified against S. 158 universally argued that the question when human life begins is a "moral, religious or philosophical" question rather than a scientific one. In context, it is clear that they were interpreting the question, "Is it a human being?" not as an inquiry about whether a certain being is an individual member of the human species, but as a value question concerning what rights ought to be given to such a creature. *See* pp. 10–15, *infra.* Similarly, the doctors who responded to a questionnaire sent by Senator Baucus tended to regard "human being" as a semantic construct presupposing a conclusion that the being in question is entitled to certain rights, rather than as a designation for all individual members of the human species.

ruling on personhood of the unborn—must be read in light of this failure to resolve the two fundamental questions concerning the existence and value of unborn human life.

That a judicial decision addressing neither of these fundamental questions has led to a national policy of abortion on demand throughout the term of pregnancy is a great anomaly in our constitutional system. It is important to examine the judicial reasoning that led to this result. The Court held that "the right of personal privacy includes the abortion decision," but added that "this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154. Because it did not resolve whether unborn children are human beings, the Court could not make an informed decision on whether abortions implicate the interest and duty of the states to protect living human beings. Still, without purporting to know whether unborn children are living human beings, the Court stated by fiat that they are not protected as persons under the fourteenth amendment.[5]

Then the Court created judge-made rules governing abortions. 410 U.S. at 163–65. During the first three months of an unborn child's life, the states may do nothing to regulate or prohibit the aborting of the child. In the next three months of the unborn child's life, the states may regulate only the manner in which the child is aborted; but abortion remains available on demand. In the final three months before the child is born, the states may prohibit abortions except when necessary to preserve the "life or health of the mother." *Id.* at 165.

The apparently restrictive standard for the third trimester has in fact proved no different from the standard of abortion on demand expressly allowed during the first six months of the unborn child's life. The exception for maternal health has been so broad in practice as to swallow the rule. The Supreme Court has defined "health" in this context to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Doe* v. *Bolton,* 410 U.S. 179, 192 (1973). Since there is nothing to stop an abortionist from certifying that a third-trimester abortion is beneficial to the health of the mother—in this broad sense—the Supreme Court's decision has in fact made abortion available on demand throughout the pre-natal life of the child, from conception to birth.

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[5] 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." 410 U.S. at 157. As Professor John Hart Ely has pointed out, the Court might have added that most of these provisions were "plainly drafted with *adults* in mind, but I suppose that wouldn't have helped." Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade,* 82 YALE L. J. 920, 925–26. (1973). Justice Blackmun also noted that "throughout the major portion of the nineteenth century prevailing legal abortion practices were far freer than they are today...." 410 U.S. at 158. This statement seems not to reflect an awareness that the relatively permissive attitude toward abortion prior to quickening that prevailed in the *early* nineteenth century was overwhelmingly rejected by the very legislatures that ratified the fourteenth amendment. It was these same legislatures which adopted strict anti-abortion laws. These laws in turn resulted from the consensus in the medical profession, based on recent scientific discoveries, that the unborn child was a human being from the moment of conception. *See* pp. 10, 24–25, *infra.* Although Justice Blackmun mentioned these political and scientific developments in an earlier portion of his opinion, 410 U.S. at 138–142, 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.

Statistics such as those of the District of Columbia showing that more children are aborted than are born alive demonstrate the availability of abortion on demand.[6] The news media have reported some of the shocking results of abortion on demand during the third trimester, including the purposeful killing of babies who survive an abortion procedure. *See* Jeffries & Edmonds, "Abortion: The Dreaded Complication," *Philadelphia Inquirer,* Aug. 2, 1981, Today Magazine, at 14. Whether the Supreme Court intended such an extreme result is not clear.[7]

Roe v. *Wade* has been widely criticized by constitutional scholars; it is frequently cited as the most extreme example of a case in which the Supreme Court substituted its own judgment for the judgments of elected legislatures. *See, e.g.,* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 Fordham L. Rev. 807 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment,* 63 Calif. L. Rev. 1250 (1975); Ely, *supra* note 5. While some critics assailed the decision on the ground that unborn children are human beings who ought to be protected by law, the majority of the constitutional scholars who attacked *Roe* made it clear that they personally favored permissive abortion laws, but objected to the Court's decision on the ground that under our Constitution legislatures rather than the federal courts have the power to make abortion policy. In the words of Professor Ely, *Roe* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." Ely, *supra* note 5, at 947.

Not the least of the problems with *Roe* v. *Wade* was that it did not adequately explain either the constitutional or factual bases for its holdings or their precise scope. For instance, it has been suggested that the court's holding that the states may not protect unborn children rests not on the Court's uncertainty about when life begins, but on the Court's endorsement of a rule of constitutional law to the effect that the class of "fourteenth amendment persons" does not necessarily include all human beings. *See The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary,* 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings on S. 158*] (May 21 transcript at 94-95) (testimony of Professor William Van Alstyne). *See also* note 5, *supra.* Under this analysis, even if there were a universal consensus to the effect that unborn children are human beings, they would have no constitutional rights and could not be protected by law. If this was actually the holding of *Roe* v. *Wade,* then the possibility that new classes of human beings will be held not to be "fourteenth amendment persons" gives the decision profound and disturbing implications beyond the abortion context.

A congressional determination that unborn children are human beings and that their lives have intrinsic worth and equal value will encourage the Court to reexamine the results and the reason-

[6] At hearings before another Subcommittee of the Senate Committee on the Judiciary, Dr. Irwin M. Cushner, who testified against restrictions on abortion, stated that no more than two percent of induced abortions are performed "for clinically identifiable reasons," and that no more than one percent are performed to save the life of the mother or for any other purpose related to physical health. Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, October 14, 1981.

[7] Chief Justice Burger, for example, stated in a separate opinion that the Court was not endorsing a constitutional right to abortion on demand. *Doe* v. *Bolton,* 410 U.S. 179, 208 (1973) (Burger, C.J., concurring).

ing of *Roe* v. *Wade*. In *Roe* the Court expressed a desire to decide the abortion issue "consistent with the relative weights of the respective interests involved . . . ." 410 U.S. at 165. The Court's view of the relative weight of the interests of the unborn child was necessarily influenced by the Court's professed inability to determine whether the unborn child was a living human being. It is difficult to believe that the Court would again balance the respective interests in such a way as to allow abortion on demand, if the Court were to recognize that one interest involved was the life of a human being.

IV. THE SCIENTIFIC QUESTION: WHEN DOES A HUMAN LIFE BEGIN

During the course of eight days of hearings, fifty-seven witnesses testified on S. 158 before the Subcommittee. Of these witnesses, twenty-two, including world-renowned geneticists, biologists, and practicing physicians, addressed the medical and biological questions raised by the bill. Eleven testified in support of the bill and eleven in opposition.

The testimony of these witnesses and the voluminous submissions received by the Subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete. Until the early nineteenth century science had not advanced sufficiently to be able to know that conception is the beginning of a human life; but today the facts are beyond dispute.

Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being—of a being that is alive and is a member of the human species. There is overwhelming agreement on this point in countless medical, biological, and scientific writings. Extensive quotation from such writings would be unnecessarily redundant except for the strenuous efforts by some parties to deny or obscure this basic fact. The following are only a limited sample from the scientific literature:

> *Zygote.* This cell results from fertilization of an oocyte by a sperm and is *the beginning of a human being.*
>
> * * * * * * *
>
> *Development begins at fertilization,* when a sperm unites with an oocyte to form a *zygote* (from the Greek *zygotus,* meaning "yoked together"). Each of us started life as a cell called a zygote.

K. Moore, *The Developing Human* 1, 12 (2d ed. 1977).

> In this first pairing, the spermatozoon has contributed its 23 chromosomes, and the oocyte has contributed its 23 chromosomes, thus re-establishing the necessary total of 46 chromosomes. The result is the conception of a unique individual, unlike any that has been born before and unlike any that will ever be born again.

M. Krieger, *The Human Reproductive System* 88 (1969).

> [A]ll organisms, however large and complex they may be when full grown, begin life as but a single cell.

> This is true of the human being, for instance, who begins life as a fertilized ovum . . . .

I. Asimov, *The Genetic Code* 20 (1962).

> It is the penetration of the ovum by a spermatozoon and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of *fertilization* and marks the initiation of the life of a new individual.

B. Patten, *Human Embryology* 43 (3d ed. 1968).

> The formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or *zygote,* which definitely marks the beginning of new individual.

L. Arey, *Developmental Anatomy* 55 (7th ed. 1974).

> A human being originates in the union of two *gametes,* the ovum and the spermatozoon.

J. Roberts, *An Introduction to Medical Genetics* 1 (3d ed. 1963).

> Bisexual reproduction is characteristic of all vertebrates, and *gametogenesis* (the production of *germ cells*) is its first phase. The next phase, the beginning of the development of a new individual, is the fusion of two germ cells (*gametes*) of different nature; one, the *spermatozoon* from the male parent; the other, the *ovum* from the female parent. The result of this fusion is the formation of the first cell of the new individual, the *zygote.*

W. Hamilton & H. Mossman, *Human Embryology* 14 (4th. ed 1972).

> The zygote thus formed [by the moving together of two sets of chromosomes] represents the beginning of a new life.

J. Greenhill & E. Friedman, *Biological Principles and Modern Practice of Obstetrics* 23 (1974).

> The zygote is the starting cell of the new organism

S. Luria, *Thirty-Six Lectures in Biology* 146 (1975).

> A new individual is initiated by the union of two gametes—a male gamete, or *spermatozoon,* and a female gamete, or *mature ovum.*

J. Brash, *Human Embryology* 2 (1956).

> Fertilization is significant in that new life is created, but specifically the cardinal features of fertilization are that (1) the diploid number of chromosomes [46] is reconstituted and (2) the sex of the conceptus is designated chromosomally.

J. Thomas, *Introduction to Human Embryology* 52 (1968).

> A new individual is inaugurated in a single cell (zygote) that results from the union of a male gamete (spermatozoön) with a female gamete (ovum or egg).

T. Torrey, *Morphogenesis of the Vertebrates* 47 (3d ed. 1971).

> The fertilized egg cell—or zygote—contains nuclear material from both parents. It marks the beginning of the life of a new human being and is a useful focal point for presenting all the diverse aspects of organic reproduction.

G. Simpson & W. Beck, *Life: An Introduction to Biology* 139 (2d ed. 1965).

Many witnesses who appeared before the Subcommittee reaffirmed the scientific consensus on this point. Dr. Jerome Lejeune of the Université René Descartes in Paris, discoverer of the chromosomal disease which causes mongolism, testified that, "[l]ife has a very, very long history, but each individual has a very neat beginning—the moment of its conception."[8] *Hearings on S. 158* (April 23 transcript at 18).

Similarly, Dr. Watson Bowes, Professor of Obstetrics and Gynecology at the University of Colorado School of Medicine, stated, "If we are talking, then, about the biological beginning of a human life or lives, as distinct from other human lives, the answer is most assuredly that it is at the time of conception—that is to say, the time at which a human ovum is fertilized by a human sperm." *Id.* at 61. Dr. Bowes ended his prepared statement as follows: "In conclusion, the beginning of a human life from a biological point of view is at the time of conception. This straightforward biological fact should not be distorted to serve sociological, political, or economic goals." *Id.* at 65.

Dr. Hymie Gordon, Professor of Medical Genetics and physician at the Mayo Clinic, affirmed this consensus and recognized the distinction between the scientific question and the value question:

> I think we can now also say that the question of the beginning of life—when life begins—is no longer a question for theological or philosophical dispute. It is an established scientific fact. Theologians and philosophers may go on to debate the meaning of life or the purpose of life, but it is an established fact that all life, including human life, begins at the moment of conception.

Id. at 31-32.

Dr. Gordon further observed:

> I have never ever seen in my own scientific reading, long before I became concerned with issues of life of this nature, that anyone has ever argued that life did not begin at the moment of conception and that it was a human conception if it resulted from the fertilization of the human egg by a human sperm. As far as I know, these have never been argued against.

Id. at 52.

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[8] Various possible biological nuances on this fact do not detract from the scientific facts relevant to this subcommittee's findings. One witness testified that cases in which twins arise from a single embryo suggest that the individual has not yet been "stably constituted" until the point when twinning occurs. Hearings on S. 158 (May 20 transcript at 19) (testimony of Dr. Clifford Grobstein). But even in such exceptional cases of "homozygous" twins, there is a being in existence from conception who is alive and human. That we can describe the formation of twins merely emphasizes that even at the earliest stages after conception we can have scientific knowledge of the existence of distinct, individual human beings.

The same witness also described the experimental process of the fusion of nonhuman embryos. *Id.* But such experiments have never been successfully performed on human beings, and even in other species, such as mice, fusion cannot be performed except within minutes of conception. Hearings on S. 158 (April 23 transcript at 22) (testimony of Dr. Lejeune).

Dr. Micheline Matthews-Roth, a principal research associate in the Department of Medicine at the Harvard Medical School, after reviewing the scientific literature on the question of when the life of a human being begins, concluded her statement with these words:

> So, therefore, it is scientifically correct to say that an individual human life begins at conception, when egg and sperm join to form the zygote, and that this developing human always is a member of our species in all stages of its life.

Id. at 41-42.

The scientific consensus on the biological fact of the beginning of each human life has existed ever since the medical and scientific communities became aware of the process of conception in the mid-ninteenth century. In 1859 a committee of the American Medical Association unanimously reported its objection to the widespread unscientific belief "that the foetus is not alive till after the period of quickening." The committee unanimously recommended a resolution for the Association to protect against all abortions as an "unwarrantable destruction of human life," except when performed to preserve the life of the mother. 12 American Medical Association, *The Transactions of the American Medical Association* 75-78 (1859). The committee emphasized that the true nature of abortion was not a "simple offense against public morality and decency," nor an "attempt upon the life of the mother" but rather the destruction of her child. The committee therefore called upon the Association to recommend to governors and legislators of the states that they protect human life, by law, from the time of conception. During the second half of the nineteenth century, following the formation of a consensus in the medical and scientific community on the beginning of each human life, the overwhelming majority of the states came to protect the lives of unborn children from the time of conception rather than the time of quickening. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 Fordham L. Rev. 807, 827-33 (1973).

Until recent years, no serious challenge was made to the straightforward scientific fact that the life of a human being begins at conception. As recently as 1963, Planned Parenthood Federation of America, now a strong proponent of legalized abortion in Congress and before this subcommittee, published a pamphlet entitled *Plan Your Children for Health and Happiness,* which acknowledged: "An abortion requires an operation. It kills the life of a baby after it has begun."

The biological consensus that conception marks the begining of the life of a human being has recently been confirmed by the process of creating a new human life outside the mother: the "test-tube baby." *See Hearings on S. 158* (April 23 transcript at 22-23) (testimony of Dr. Lejeune).

It may at first seem difficult to reconcile the existence of such a broad consensus with the testimony of some witnesses opposing S. 158 before this subcommittee who emphatically denied that it is possible to determine when a human life begins. If the facts are so

clear, it is crucial to understand how, for example, one noted professor of genetics from Yale University School of Medicine could say that he knows of no scientific evidence that shows when actual human life exists.[9]

Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in the existence of the two distinct questions identified above, the scientific question and the value question. We must consider not only whether unborn children are human beings but also whether to accord their lives intrinsic worth and value equal to those of other human beings. The two questions are separate and distinct. It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn child has intrinsic worth and equal value with other human beings.

Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are "human beings," insofar as the term is used to mean living beings of the human species.

Instead, these witnesses invoked their value preferences to redefine the term "human being." The customary meaning of "human being" is an individual being who is human, *i.e.,* of the human species. This usage is that of the medical and scientific writers quoted above and of all the medical textbooks to which the Subcommittee has been referred; of Doctors Lejeune, Gordon, and Matthews-Roth, who testified before the Subcommittee; of the American Medical Association in 1859; and of Planned Parenthood in 1963. In this sense a "human being" is something that can be identified by science. Whether a living being is human is thus, in the words of Dr. Lejeune, a matter of "plain experimental evidence." *Hearings on S. 158* (April 23 transcript at 25). Disregarding the customary scientific definition of human being, some witnesses sought to make "human being" and "humanness" into undefined concepts that vary according to one's values. They took the view that each person may define as "human" only those beings whose lives that person wants to value. Because they did not wish to accord intrinsic worth to the lives of unborn children, they refused to call them "human beings," regardless of the scientific evidence.

This technique of argument has been openly advocated by one commentator who writes that "[w]hether the fetus is or is not a human being is a matter of definition, not fact; and we can define any way we wish." Hardin, *Abortion—or Compulsory Pregnancy?* 30 J. of Marriage & the Family 246, 250 (1968). This line of argument does not refute the consensus answer to the scientific question; instead it evades the scientific question by focusing solely on the value question. By adopting this line of argument, some witnesses appearing before the Subcommittee, notably Dr. Rosenberg, were able to testify that they knew of no scientific evidence showing

[9] Hearings on S. 158 (April 24 transcript at 24) (testimony of Dr. Leon Rosenberg).

when actual human life exists. That he was speaking only to the value question is evident from his explanation that "science, per se, doesn't deal with the complex quality called 'humanness' any more than it does with such equally complex concepts as love, faith, or trust." *Hearings on S. 158* (April 24 transcript at 25).

A careful examination reveals the true nature of this line of argument. By redefining "human being" according to one's value preferences, one never has to admit believing that some human lives are unworthy of protection. Conveniently one can bury the value judgment that some human lives are not worth protecting beneath the statement that they are not human beings at all. An editorial in the journal of the California Medical Association has explained why this line of argument appeals to those who reject the traditional ethic of the sanctity of human life, which accords intrinsic worth and equal value to all human lives:

> Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices.

A New Ethic for Medicine and Society, 113 California Medicine 67, 68 (1970).

The Subcommittee rejects as misleading semantic efforts to manipulate the English language and to redefine "human being" according to particular value preferences; instead we adhere to the customary meaning of "human being" as including every living member of the human species. S. 158 embodies the Subcommittee's finding, in accordance with the overwhelming consensus of scientific authority, that the life of a human being begins at conception. Our analysis of the leading works on embryology and fetal development indicates that witnesses who disputed that the life of a human being begins at conception reflect not scientific judgment, but rather the value preference of certain members of the scientific community[10] against protecting the life of unborn human beings.[11]

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[10] A recent survey by a disinterested insurance company found that the two groups in society most favorable toward abortion were the scientific and medical community and the legal profession. While 65 percent of the general public believe that abortion is immoral, only 25 percent of doctors and other scientists and only 25 percent of lawyers express such a belief. THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE 80s 219 (1981).

[11] Practical realities sometimes make it impossible for pro-abortion doctors to evade the fact that unborn children are living human beings. The *Philadelphia Inquirer,* in its Today magazine section on Sunday, August 2, 1981, ran a cover story by Liz Jeffries and Rick Edmonds entitled "Abortion: The Dreaded Complication." The "complication" described in the article, and so dreaded by abortionist doctors, is that some babies will survive an abortion procedure and be born alive. The article describes one instance in which a live two and one-half pound baby boy survived an abortion procedure: "Dismayed, the second nurse . . . . deposited it . . . on the stainless steel drainboard of a sink in the maternity unit's Dirty Utility Room—a large closet where bedpans are emptied and dirty linens stored. . . . '[The patient's physician] told me to leave it where it was,' the head nurse testified later, 'just to watch it for a few minutes, that it would probably die in a few minutes.' " *Id.* at 14.

The Subcommittee is appalled that some in the medical profession show such disdain for the value of a human life. But such tragic events do make it impossible to ignore that the unborn

If the United States government is to give reasonable consideration to the abortion issue it must start from the fact that unborn children are human beings. The hearings before this subcommittee show that this fact is not seriously in doubt; it is questioned only by means of efforts to redefine "human being" in a purely subjective manner. No governmental body that approaches the abortion question with honesty can accept semantic gymnastics that obscure the real issue. Accordingly, we turn next to the real issue in dispute, whether to accord intrinsic worth and equal value to all human lives regardless of stage or condition.

V. THE VALUE QUESTION: SHOULD WE VALUE ALL HUMAN LIVES EQUALLY?

The answer to the scientific question casts the value question in clear relief. Unborn children are human beings. But should our nation value all human lives equally? Scientific evidence is not relevant to this question. The answer is a matter of ethical judgement.

Deeply engrained in American society and American constitutional history is the ethic of the sanctity of innocent human life. The sanctity-of-life ethic recognizes each human life as having intrinsic worth simply by virtue of its being human. If, as a society, we reject this ethic, we must inevitably adopt some other standard for deciding which human lives are of value and are worthy of protection. Because the standards some use to make such decisions turn on various qualities by which they define which lives are worthy of protection, the alternative to the sanctity-of-life ethic is often termed the "quality-of-life ethic." A sharp division exists today between those who affirm the sanctity-of-life ethic and those who reject it in favor of the quality-of-life ethic. The Supreme Court has never purported to decide which ethic our Constitution mandates for valuing the lives of human beings before birth. Nevertheless, deciding which ethic should apply is fundamental to resolving the abortion issue under the Constitution.

A few proponents of abortion have conceded that the real issue at stake is the intrinsic value of human life. The California Medical Association journal California Medicine, for exampe, has recognized the relationship between the rejection of the sanctity-of-life ethic and the advocacy of abortion:

> In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right, and even necessary.

A New Ethic for Medicine and Society, 113 California Medicine 67, 68 (1970). Similarly, some witnesses who appeared before the Subcommittee to oppose S. 158 tacitly rejected the sanctity of human life. For example, one witness stated that "[a]t some point as the amazing chain of events that results in a fertilized egg becoming a human being unfolds, we acquire the basis for those attributes that make us humans, but precisely when I cannot say." *Hearings on S.*

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children being aborted today are human beings. Other medical realities further confirm this fact. For example, babies within their mothers' wombs can now be treated to alleviate various disorders. The doctors treating them do not try to redefine them as non-human. When doctors or scientists deny in selected contexts that unborn children are human beings, their statements should be recognized as evasions of facts by those for whom the facts are inconvenient.

158 (May 20 transcript at 24) (testimony of Dr. James Neel). By this view, only after a developing member of the human race has acquired certain attributes or qualities is he or she accorded value as a "human being."

Advocates of a quality-of-life ethic vary in the qualities they choose as a standard for which human lives to value. The common element of every "quality of life" view, however, is a denial of the intrinsic worth of all human life, along with an attempt to define what qualities must be present in a human being before its life is to be valued. Although the scientific witnesses who adopted the quality-of-life ethic did not state explicitly the theoretical basis for this ethic, it has been the subject of frequent commentary in modern literature on medical ethics. A review of this literature helps in examining this alternative to the sanctity-of-life ethic.

A clear, straightforward statement of the quality-of-life ethic is found in an article by religion professor George H. Ball, *What Happens at Conception?* Christianity and Crisis 274 (Oct. 19, 1981). Professor Ball asserts that "mere biological membership in the species *homo sapiens* does not make one a human being." *Id.* at 286. The quality that Professor Ball requires before he will recognize a being as human is "consciousness of self." He summarizes his quality-of-life standard with these words: "Until a living being can take conscious management of life and its direction, it remains an animal." *Id.*

Professor Ball shows more willingness than many others to follow his theory to its logical conclusion: "Thus, shocking as it may seem, a newly born infant is not a human being." *Id.*

Candidly, Professor Ball articulates what so many other advocates of a quality-of-life ethic leave to inference. He rejects the customary biological definition of the term "human being." Individuals such as the newborn, who are human beings by any ordinary usage of language, are not human beings in his lexicon. Instead, "human beings" are only those whose lives have a certain quality, a quality which he specifies to be "consciousness of self." Professor Ball does not deny the biological facts of human life; he denies that all human lives have intrinsic worth and equal value.

In another instructive example, Professors Raymond S. Duff and A. G. M. Campbell of the Yale Medical School make clear the opposition between the sanctity-of-life ethic and the quality-of-life ethic. The professors describe the death of certain handicapped infants by starvation, or other deliberate forms of denial of normal care, as a "management option." Duff & Campbell, *Moral and Ethical Dilemmas in the Special-Care Nursery,* 289 New Eng. J. of Med. 890 (1973). Laws against killing such handicapped infants by inattention, they conclude, "should be changed." *Id.* at 894. The quality-of-life ethic is superior to the sanctity-of-life ethic:

> Recently, both lay and professional persons have expressed increasing concern about the quality of life for these severely impaired survivors and their families. Many pediatricians and others are distressed with the long-term results of pressing on and on to save life at all costs and in all circumstances. Eliot Slater stated, "If this is one of the consequences of the sanctity-of-life ethic, perhaps our formulation of the principle should be revised."

Id. at 890 (footnotes omitted).

Professors Duff and Campbell also expressed a willingness to redefine especially unfortunate newborn human beings as not human beings at all. According to them, "Such very defective individuals were considered to have little or no hope of achieving meaningful 'humanhood.' For example, they have little or no capacity to love or be loved." *Id.* at 892 (footnote omitted).

This subcommittee rejects the notion that our definition of human being should depend on who is loved or unloved, wanted or unwanted. Though human suffering often accompanies many unfortunate cases of mental and physical handicap, it cannot be allowed to obscure the fact that such unfortunate individuals are indeed human beings. Attempts to redefine "human being" in such cases merely obscure the ethical and moral issues that underlie any public abortion policy.

Our constitutional history leaves no doubt which ethic is written into our fundamental law. The Declaration of Independence expressly affirms the sanctity of human life:

> 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.

The proponents of the fourteenth amendment argued for the amendment on the basis of these principles. Congressman John A. Bingham of Ohio, who drafted the first section of the fourteenth amendment, stated after the adoption of the Joint Resolution of Congress proposing this amendment:

> Before that great law [of the United States,] the only question to be asked of the creature claiming its protection is this: Is he a man? Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867).

Similarly, Abraham Lincoln emphasized the importance of holding to the concept of the sanctity of human life and of never denying the inalienable value of every human being.

> I should like to know if taking this old Declaration of Independence, which declares that all men are equal upon principle and making exceptions to it where will it stop. If one man says it does not mean a negro, why not another say it does not mean some other man? If that declaration is not the truth, let us get the Statute book, in which we find it and tear it out! . . . let us stick to it then . . . let us stand firmly by it then.

Speech during the Lincoln-Douglas senatorial compaign (July 10, 1858), *reprinted in* 2 *The Collected Works of Abraham Lincoln* 484, 500–01 (R. Basler ed. 1953) (footnote omitted).

As the framers planned it, all human beings were to fall within the ambit of the amendment's protection. Congressman Bingham spoke of the rights guaranteed by the amendment as applying to "any human being." *Cong. Globe,* 39th Cong., 1st Sess. 1089 (1866). Bingham also said the amendment would protect the rights of "common humanity." *Cong. Globe,* 40th cong., 2d Sess. 514 (1868).

Senator Jacob M. Howard of Michigan, who sponsored the amendment in the Senate, regarded it as applicable to any member of the human "race." *Cong. Globe,* 39th Cong., 1st Sess. 2766 (1866). Echoing the familiar phrases of the Declaration, these men sought to give added legal protection to rights that the founders of our republic had declared fundamental, paramount among which is the right to life. The fourteenth amendment stands upon the principle that all human life has intrinsic worth and equal value. To sacrifice the sanctity-of-life ethic is thus to abrogate the fourteenth amendment.

The Supreme Court itself has strongly implied support for the sanctity-of-life ethic, by holding that "person" must include all living human beings:

> We start from the premise that illegitimate children are not "nonpersons." They are humans, live, and have their being.

Levy v. *Louisiana,* 391 U.S. 68, 70 (1968). In its 1973 abortion decision, the Supreme Court did not consider whether unborn children fit within this definition of "person." Because it found itself unable to resolve the question of when human life begins, the Court did not face this question. If, in a case arising as a result of S. 158, the Supreme Court should accept this subcommittee's finding that unborn children are living human beings, the Court would then be squarely presented with the question whether the *Levy* definition of human personhood applies equally to the unborn.

Supreme Court justices have strongly affirmed the principle of the sanctity of human life in cases arising in the context of capital punishment. Justice Brennan refers to our society as "a society that . . . strongly affirms the sanctity of life . . . ." *Furman* v. *Georgia,* 408 U.S. 238, 286 (1972) (Brennan, J., concurring). This ethic accords supreme value to the life of each human being simply by virtue of its humanity. "The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings." *Id.* at 270. Such punishment, he observes, "may reflect the attitude that the person punished is not entitled to recognition as a fellow human being." *Id.* at 273.

The sanctity-of-life ethic affirmed in these statements, we believe, is a concept at least as important in the context of abortion as in the context of capital punishment. The Subcommittee does not express any view on whether, under our Constitution, a convicted criminal may be punished by forfeiting his life. We merely observe that the sanctity-of-life ethic demands the utmost respect for the value of innocent lives.

It is true, of course, that the Justices did not make similar observations in the 1973 abortion decision. Once again, it is crucial to note, however, that they also professed not to know whether the unborn were living human beings. Views of Supreme Court Justices can certainly change as the Justices acquire a deeper understanding of the facts on which constitutional rules must operate. For instance, the Court itself has said that the interpretation of the eighth amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States,* 217 U.S. 349, 378 (1910). In like fashion, the fourteenth amendment's protection of life can certainly acquire meaning as scientific facts concerning the beginning of

human life enlighten public opinion and as Congress affirms the principle of the sanctity of life.

It is instructive to note that the highest court of West Germany accorded constitutional protection to unborn children precisely because the court affirmed the principle of the sanctity of human life. The "Basic Law," or the Bonn constitution, of West Germany guarantees the "right to life." The court explained this guarantee as a reaction against the Nazi regime's idea of "Destruction of Life Unworthy to Live" and as an "affirmation of the fundamental value of human life . . . ." Therefore, the court concluded:

> The development process thus begun is a continuous one which manifests no sharp caesuras and does not permit any precise delimitation of the various developmental stages of the human life. It does not end with birth either; the phenomena of consciousness specific to human personality, for instance, do not appear until some time after birth. Therefore the protection of Article 2, paragraph 2, sentence 1, of the Basic Law may not be limited either to the "completed" human being after birth nor to the independently viable *nasciturus.* The right to life is guaranteed to everyone who "lives;" no distinction can be made between individual stages of the developing life before birth or between prenatal and postnatal life.
>
> c) In countering the objection that "everyone" in common parlance and in legal terminology generally denotes a "completed" human person, [and] that, therefore, a purely verbal interpretation militates against the inclusion of the prenatal life in the range of efficacy of Article 2, paragraph 2, sentence 1, of the Basic Law, it must be emphasized that in any event the sense and purpose of this constitutional provision require that the protection of life be also extended to the developing life. The safeguarding of human existence against transgressions of the State would be incomplete if it did not also comprise the preliminary phase of the "completed life," the prenatal life.

Decision of February 25, 1975, [1975] 39 BVerfGE 1.

The West German court recognized the dangers that can follow when a society rejects the idea that all human lives have intrinsic worth. If American law comes to reject the principle of the sanctity of human life, there will be no secure protection for the lives of those, born or unborn, who are weakest and most vulnerable. Some judges have already expressed a belief that the life of a physically or mentally handicapped individual is of less value than the life of other persons. Even before *Roe* v. *Wade* a federal judge found that the state interest is "virtually nil" in protecting the life of an unborn child who is "likely to be born a mental or physical cripple." *Abele* v. *Markle,* 342 F. Supp. 800, 804 (D. Conn. 1972). To kill such a child before birth, the judge believed, would be a "therapeutic" measure. *Id.* Similarly, another federal judge has belittled the value of the life of any unborn child who is "defective" or "intensely unwanted by its future parents." *Doe* v. *Scott,* 321 F. Supp. 1385, 1391 (N.D. Ill. 1971).

Fortunately, federal courts have not carried such reasoning to its logical conclusion. So far they have not ruled that newborn babies

who are physically or mentally handicapped and unwanted by their parents are somehow less than human. A Nobel Prize-winning scientist and proponent of the quality-of-life ethic, however, has made just such a suggestion:

> If a child were not declared alive until three days after birth, then all parents could be allowed the choice . . . . The doctor could allow the child to die if the parents so chose and save a lot of misery and suffering.

Interview with James. D. Watson, *Children from the Laboratory,* 1 Prism 12, 13 (1973).

Because it affirms the Constitution, the Subcommittee cannot accept any legal rule that would allow judges, scientists, or medical professors to decide that some human lives are not worth living. We must instead affirm the intrinsic worth of *all* human life. We find that the fourteenth amendment embodies the sanctity of human life and that today the government must affirm this ethic by recognizing the "personhood" of all human beings. Earlier we found, based upon scientific examination, that the life of each human being begins at conception. Now, basing our decision not upon science but upon the values embodied in our Constitution, we affirm the sanctity of all human life. Science can tell us whether a being is alive and a member of the human species. It cannot tell us whether to accord value to that being. The government of any society that accords intrinsic worth to all human life must make *both* a factual determination recognizing the existence of all human beings *and* a value decision affirming the worth of human life.

VI. LEGAL EFFECT OF S. 158

The provisions of section two of S. 158 follow necessarily from the findings of S. 158 and of this subcommittee: first, that unborn children are human beings, and, second, that the lives of all human beings have intrinsic worth and equal value. The sanctity-of-life ethic embodied in the fourteenth amendment requires that all human beings be recognized as persons for purposes of the protection of life secured by the fourteenth amendment. The ethic embodied in this amendment does not allow government to deny the value of any human life on grounds of race, sex, age, health, defect, or condition of dependency. Unborn children, because they are human beings, must therefore be persons entitled to the fourteenth amendment's protection of life. Section two of S. 158 enforces the amendment's protection of life by guaranteeing that that protection applies to all human beings, including unborn children.

The first effect of S. 158 is to require the Supreme Court to reconsider its holding in *Roe* v. *Wade* that unborn children are not persons entitled to protection of their lives under the fourteenth amendment. With the findings of S. 158, the Court faces a fundamentally different issue than it faced in *Roe* v. *Wade.* In that case it addressed the personhood issue without purporting to know whether unborn children are human beings and without considering whether all human lives are to be accorded intrinsic worth and equal value under our Constitution. Now, the findings of S. 158 would appear to bring the question of the personhood of unborn children within the holding of *Levy* v. *Louisiana,* in which the

Court stated that individuals who are "humans, live, and have their being" cannot be "nonpersons." 391 U.S. 68, 70 (1968). Upon review of S. 158, it will be for the Supreme Court to resolve the inconsistency between *Levy* and *Roe* and to make the ultimate constitutional decision whether unborn children are persons entitled to protection of the fourteenth amendment right to life.

The second legal effect of S. 158 will be to require the Supreme Court to reconsider its 1973 holding that found the right of privacy to include abortion and that permitted abortion on demand throughout the term of pregnancy. In *Roe* v. *Wade*, the court observed that any decision of the abortion issue must be "consistent with the relative weights of the respective interests involved . . . ." 410 U.S. at 165. The findings of S. 158 pose a question concerning the respective interests involved in abortion, but that question is fundamentally different from the question the Court addressed in *Roe* v. *Wade*. The Court never considered whether the interest in having an abortion outweighs the interest in the life of a human being whose life is accorded intrinsic worth. The congressional findings in S. 158 will require the Court to reexamine whether the respective interests involved in an abortion can justify a judicial policy of abortion on demand. In *Roe* v. *Wade* the Court already stated:

> If the suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.

410 U.S. at 156–57.

If the Supreme Court follows this reasoning, upon enactment of S. 158 into law, states will be able to protect unborn children by laws similar to those widely enforced before the Supreme Court struck down anti-abortion laws in 1973. S. 158 also expresses the incontrovertible principle of constitutional law that states have authority to protect the lives of those they rationally regard as human beings. Whatever the scope of the right to privacy may be, it cannot include a right to kill a human being.

The third legal effect of S. 158 is that no state will be able to deprive an unborn child of life without due process of law. Under Supreme Court precedent, states could thus perform or fund abortions only when necessary to protect compelling state interests. Protection of the life of the mother would surely be interpreted as one such compelling state interest. *See Roe* v. *Wade*, 410 U.S. at 173 (Rehnquist, J., dissenting). Other difficult cases will be resolved by the courts on a case-by-case basis. It seems apparent, however, that in light of S. 158 no state could fund or perform abortions on demand.

What S. 158 will not do is also important to recognize. First, S. 158 establishes no criminal penalties; the passage of S. 158 will not make abortion a crime.

Second, while S. 158 will prevent states from funding or performing abortions on demand, it will not automatically prevent the performance of abortions by private means. The fourteenth amendment only provides that no *state* shall deprive any person of life without due process of law. *See Martinez* v. *California*, 444 U.S. 277, 284 (1980). The amendment does not directly affect private action; therefore S. 158 will not directly affect the performance of

abortions by private clinics. A state's failure to act to protect unborn children against privately performed abortions, moreover, would not likely be deemed state action. *See Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974); *Reitman* v. *Mulkey,* 387 U.S. 369, 381 (1967) (equal protection clause applies to private action only when the state has acted affirmatively to "encourage and involve the State in private discrimination"); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 721-22 (1961) ("private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it").

Consequently, abortions will become illegal in the wake of S. 158 only if state legislatures choose to make them illegal. It is incorrect to state that S. 158 will make abortion "murder." S. 158 will not make abortion murder because it does not even make abortion a crime. Further, states are not likely to make abortion murder, since before 1973 all state anti-abortion laws established abortion either as a lesser degree of homicide or as a crime against the person designated only as "abortion," with leser penalties. This subcommittee regrets that the widespread journalistic use of the term "murder" in connection with S. 158 has engendered unwarranted emotionalism on this topic; such reports reflect a misunderstanding of this bill.

The third thing S. 158 will not do is allow states to outlaw any forms of contraception. S. 158 allows states to protect unborn children only after they have come into existence at conception. Contraceptives, by definition, prevent conception. They do not terminate the life of any living human being. Furthermore, drugs and devices that do act to perform abortions after conception will not be prohibited following enactment of S. 158 unless states so legislate.

Fourth, S. 158 will not require state lesislatures to categorize abortion as murder. State legislatures will have descretion, within limits of reason, to set penalties for abortion as for any other crime. They may consider mitigating circumstances for the crime of abortion, just as for any other degree of homicide or any other crime. States, furthermore, may make exceptions from an abortion statute where there is a compelling state interest for doing so. Such an interest would certainly exist in a case where an abortion was necessary to save the life of the mother, assuming that in such cases all practicable means are taken to preserve the life of the child. Here, as before, other difficult cases will have to be resolved by the courts on a case-by-case basis.

VII. CONSTITUTIONALITY OF S. 158

Congress has constitutional power to enact S. 158 despite the holding of *Roe* v. *Wade* that unborn children are not persons and there is a right to abort them. The findings of S. 158 that unborn children are human beings as a matter of biological fact and that the sanctity-of-life ethic is central to our Constitution create a fundamentally different question of constitutional law than the Supreme Court faced in *Roe* v. *Wade.* The factual question whether unborn children are human beings is central to deciding whether their lives are protected by a constitutional amendment that is intended to protect all human beings. The value decision of wheth-

er to accord intrinsic worth and equal value to all human life is also central to the enforcement of the fourteenth amendment's protection of life. The Supreme Court's *Roe* v. *Wade* opinion found the judiciary unable to address the first question, whether unborn children are human beings. It did not therefore address the question whether the lives of unborn human beings are to be accorded intrinsic worth and equal value along with other human lives. When the Supreme Court faces these two congressional determinations in the course of reviewing the constitutionality of S. 158, it will therefore face a constitutional question far different from that decided in *Roe* v. *Wade.*

Congress has the authority and, indeed, the duty to address questions of fact and value that are central to the interpretation and enforcement of constitutional provisions. The task of interpreting the Constitution in the context of specific cases is ultimately for the Supreme Court. But when the Supreme Court has professed an inability to address underlying questions that are fundamental to the interpretation of a constitutional provision, Congress is entirely justified in expressing its view on such questions, subject to Supreme Court review. Those who argue that Congress cannot address the questions of when a human life begins and what value to accord human life and unborn children are in effect arguing that no branch of the federal government can address these questions. Such an argument would mean that, even if unborn children are human beings, even if the Constitution accords intrinsic worth and equal value to all human lives, nevertheless no branch of government could recognize such facts and protect unborn children. Such a result would be absurd. Government cannot be powerless to recognize facts and make value decisions essential to the enforcement of a right so fundamental as the right to life.

The purpose of this legislation is not to impair the Supreme Court's power to review the consitutionality of legislation, but to exercise the authority of Congress to disagree with the result of an earlier Supreme Court decision based on an investigation of facts and on a decision concerning values that the Supreme Court has declined to address. The Supreme Court retains full power to review the constitutionality of S. 158, and the Subcommittee believes that the bill *should* be reviewed by the Supreme Court. A primary purpose of S. 158 is precisely to produce a new consideration by the Supreme Court of its abortion decision in light of both the biological facts concerning unborn human life and the principle that all human life is of intrinsic worth and equal value. If the Supreme Court finds the determinations of Congress to be persuasive, it will change its constitutional decision as to the availability of abortion on demand. If the Supreme Court finds Congress's determinations unsubstantiated and unpersuasive, it can refuse to follow them. In either case, the Supreme Court will have an opportunity to interpret S. 158 in light of the Constitution.

Some critics of S. 158 argue that even if *Roe* v. *Wade* was wrongly decided and ought to be overruled, S. 158 is unconstitutional because Congress must act in conformity with Supreme Court decisions until the Court itself chooses to overrule them. This criticism rests on a profound misapprehension of the doctrine of judicial review espoused in *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 (1803). Under *Marbury,* the Supreme Court, presented

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with a proper case, must rule in accordance with its own interpretation of the Constitution rather than with a contrary congressional interpretation, because the Justices have taken an oath to uphold the Constitution. As Chief Justice Marshall stated in *Marbury,* automatic judicial deference to a legislative interpretation of the Constitution would constitute an implicit violation of the Justices' oath of office; the Justices would thereby "close their eyes on the constitution, and see only the law." 5 U.S (Cranch) at 178. It does not follow, however, that once the Court has interpreted a provision of the Constitution members of Congress must automatically defer to the judicial interpretation. Indeed, members of Congress take the same oath that the Justices take to uphold the Constitution. Confronted with a proposed law that is consistent with his own honest construction of the Constitution and with his view of sound policy, but that conflicts with what he regards as an erroneous Supreme Court decision, a member of Congress has at least the right and perhaps the duty to vote for the bill. To do otherwise would be to close his eyes on the Constitution and see only the case. Through its power to issue judgments that are binding on the parties to litigation, the Supreme Court will as a practical matter generally have the final word in any dispute over constitutional interpretation. But this does not preclude the possibility of a responsible dialogue between Congress and the Court.

As an attempt to influence the Supreme Court to change a constitutional decision, S. 158 calls to mind Abraham Lincoln's approach to the Supreme Court's *Dred Scott* decision of 1857. President Lincoln observed in his first inaugural address that for any erroneous Supreme Court decision there is "the chance that it may be over-ruled, and never become a precedent for other cases . . . ."[12]

Throughout his vigorous campaign against the *Dred Scott* decision, Abraham Lincoln emphasized an approach that would influence the Supreme Court to reverse its decision:

> We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.[13]

In taking this position, Lincoln acknowledged the role of the Supreme Court in reviewing the constitutionality of legislation:

> I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court . . . [and that such decisions] are also entitled to very high respect and consideration, in all paralel [*sic*] cases, by all other departments of the government.[14]

To influence the Supreme Court without denying its proper role within our constitutional structure, Lincoln argued that the *Dred Scott* decision should be opposed as a

> Political rule which shall be binding . . . on the members of Congress or the President to favor no measure that

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[12] First Inaugural Address (March 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (R. Basler ed. 1953).

[13] Speech during the Lincoln-Douglas senatorial campaign (October 13, 1858), *reprinted in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (R. Basler ed. 1953).

[14] First Inaugural Address (March 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (R. Basler ed. 1953).

> does not actually concur with the principles of that decision.[15]

Rather, he advocated:

> If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should.[16]

When Congress votes for a measure contrary to a Supreme Court decision which congressmen feel is erroneously decided, the Supreme Court upon review of that statutory measure will have an opportunity to reverse its earlier decision.

Commentators have sought to define the proper limits of this approach by Congress toward decisions it considers erroneous. The distinguished scholar of constitutional law at Columbia University, Herbert Wechsler, has commented on Lincoln's idea of pursuing the "chance" that an erroneous ruling "may be over-ruled" by the Supreme Court. Wechsler states: "When that chance has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation?" Wechsler, *The Courts and the Constitution,* 65 Colum. L. Rev. 1001, 1008 (1965). S. 158 is not inconsistent with this view of the limits on Congress' role. The Supreme Court has yet to reexamine its abortion decision of 1973, and certainly it has never reexamined it in light of the biological facts concerning the humanity of unborn children and the importance of the principle of the sanctity of human life. The Court deserves a chance to reconsider its decision before Congress and the states proceed to enact a constitutional amendment reversing *Roe* v. *Wade.*

If the Supreme Court considers Congress's finding in S. 158 that unborn children are human beings, and if the Court considers the principle that all human lives are of intrinsic worth and equal value, then the Court should uphold S. 158 and change its earlier decision that legal abortion on demand is required by the Constitution. Both the explicit wording and plain intent of the fourteenth amendment and the Supreme Court's decisions concerning Congress's power to enforce the fourteenth amendment support S. 158. The framers of the fourteenth amendment, as shown at page 16, *supra*, intended it to be universal in its application and to apply to "any human being." *Cong. Globe,* 39th Cong., 1st Sess. 1089 (1866) (remarks of Congressman Bingham). The fourteenth amendment does not qualify the term "person" or limit protection to a certain class or race or type of human being. It speaks in absolutes and declares unequivocally that no state shall deny *any* person *life,* liberty or property without due process of law. In the hearings held by the Subcommittee, no legislative history whatsoever was cited by any of the witnesses to indicate that the framers of the four-

[15] Speech during the Lincoln-Douglas senatorial campaign (October 13, 1858), *reprinted in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (R. Basler ed. 1953).

[16] Speech during the Lincoln-Douglas senatorial campaign (July 10, 1858), *reprinted in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 495 (R. Basler ed. 1953). Lincoln's view was consistent with that of Andrew Jackson in his message of 1832 vetoing the Act to recharter the Bank of the United States: "The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve." 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1145 (J. Richardson ed. 1897).

teenth amendment intended the term "person" to be a restrictive term including fewer than all human beings. Any suggestion that some human beings can be "nonpersons" under the law simply echoes the holding of *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857) a decision the fourteenth amendment was intended to reverse.

It is true, of course, that Congress did not debate the question of abortion during its consideration of the fourteenth amendment. Some of the witnesses who appeared before the Subcommittee to testify against S. 158 indicated that this absence of debate was dispositive regarding the intent of the framers. It is no less true, however, that the architects of our fourteenth amendment liberties did not address the right of privacy, or whether the due process clause prohibited the states from outlawing abortion, pornography, prayer in the public schools, searches and seizures of illicit drugs in the glove compartments of automobiles, and countless other activities that the courts have held to be under the aegis of the fourteenth amendment. As Justice Marshall observed, this is a Constitution we are construing, a document which lays down general principles that are applicable to human affairs in every stage of our historical development:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument but from the language. . . . . we must never forget, that it is *a constitution* we are expounding.

McCulloch v. *Maryland* 17 U.S. (4 Wheat.) 316, 407 (1819).

To interpret the word "person" in its narrowest sense, and to insist that it does not encompass prenatal life because the authors of the fourteenth amendment neglected to debate the issue of abortion (which the states were then regulating to the apparent satisfaction of the framers of the amendment) makes no more sense than to argue that infants or senior citizens are not "persons" within the meaning of the amendment because the framers never discussed infanticide or euthanasia. Although the principal immediate motive of the framers was to protect the rights of ex-slaves, the fourteenth amendment, courts have long recognized, protects the right of other classes of human beings.

At the time Congress was debating the fourteenth amendment and the states were ratifying the amendment, it was widely known that the life of a human being begins at conception. During the period from 1848 to 1876 almost all the states changed the common law standard, which had protected the unborn child only from the point of quickening, the time the mother first perceived the movement of the child. The new statutes "explicitly accepted the . . .

assertions" of leaders of the American Medical Association that "interruption of gestation at any point *in* a pregnancy should be a crime . . . ." J. Mohr, *Abortion in America* 200 (1978). *See Hearings on S. 158* (June 10 transcript at 84–85) (testimony of Professor Joseph Witherspoon); *Hearings on S. 158* (June 1 transcript at 108–10) (testimony of Professor Victor Rosenblum). In the mid-nineteenth century, doctors had learned that the unborn child was a distinct living being even prior to quickening. Statutes protecting the unborn child from the moment of conception resulted from the American Medical Association's campaign for strict anti-abortion laws, a campaign undertaken in response to advances in the knowledge of embryology. The AMA successfully sought to persuade states to protect every unborn child because abortion was the "unwarrantable destruction of human life." 12 American Medical Association, *The Transactions of the American Medical Association* 75, 78 (1859). As Professor Rosenblum pointed out in his testimony before the Subcommittee:

> Since the 14th Amendment with its broad protection of the lives of all persons was ratified by State legislatures while these very same legislatures, persuaded by newly-discovered scientific and medical evidence, were extending the protection of the criminal law to encompass *all* the unborn from the time of conception or fertilization, it is a fair assumption that the unborn were not excluded from those "persons" covered by the Amendment.

Hearings on S. 158 (June 1 transcript at 111) (emphasis and quotation marks added to conform to written statement).

To understand the views of the framers of the fourteenth amendment with regard to the personhood of unborn children we must not confine our search to a survey of the criminal laws. These legislators were children of their culture, of thousands of years of a Judaeo-Christian civilization in which protection of human life had been "an almost absolute value in history." Noonan, "An Almost Absolute Value in History," in *The Morality of Abortion* 1 (J. Noonan ed. 1970).

Ancient civilizations differed in their views on the value of human life and, consequently, on their views of abortion. The oath of Hippocrates, which we trace to ancient Greece, and which, until recently, set the standard for the medical profession, affirms the value of all human life. It required physicians entering the practice of medicine to swear that they "will not give to a woman an abortive remedy." [17]

On the other hand, the Romans, with some exceptions,[18] not only allowed abortion but practiced it extensively. A reason is that

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[17] L. Edelstein, THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION" 3 (1943).

[18] The second-century Greco-Roman gynecologist Soranus noted that the physicians of his day were divided into two camps. One party followed Hippocrates whom Soranus quotes as saying, " 'I will give to no one an abortive.' " This party believed that "it is the specific task of medicine to guard and preserve what has been engendered by nature." The other party, among whom Soranus included himself, allowed abortion but only under certain limited conditions:

"The other party prescribes abortives, but with discrimination, that is, they do not prescribe them when a person wishes to destroy the embryo because of adultery or out of consideration for youthful beauty; but only to prevent subsequent danger in parturition if the uterus is small and not capable of accommodating the complete development, or if the uterus at its orifice has knobby swellings and fissures, or if some similar difficulty is involved."

SORANUS GYNECOLOGY. 1.60 at p. 63 (O. Temkin trans. 1956). These limitations on abortion were more honored in theory than in practice and Soranus had to warn his ideal midwife that

the Roman government imposed a narrow definition of citizenship and permitted a general disregard for the value of human life in non-citizens. The result was widespread practice of slavery, infanticide, killing for sport, torture and other forms of barbarity, along with abortion.

The principle of the intrinsic value of human life entered the Western world as the new Judeo-Christian ethic clashed with this Roman and pagan view which awarded rights only to select individuals.[19]

Significantly, the earliest Christian writing outside the New Testament, the *Didache* (*Teaching of the Twelve Apostles*), clearly prohibits abortion and infanticide, stating that, "You shall not slay the child by abortions. You shall not kill what is generated" and this teaching accords with that of other leading Christians of the time.[20]

The triumph of this Judeo-Christian sanctity-of-life ethic established in Western civilization a principle of protecting all individuals, not merely a select category of persons defined arbitrarily by the state. When nineteenth-century American legislators passed laws protecting unborn children from the moment of conception they acted from the same recognition of this principle that had led them to ratify the fourteenth amendment. At any rate, no statute that enforces the fourteenth amendment would violate the Constitution merely by defending the sanctity of life. That principle undergirds the amendment and a defense of it is a defense of the Constitution.

The constitutionality of S. 158 is further supported by Supreme Court opinions concerning the power of Congress to enforce the fourteenth amendment. Not only the majority opinions, but also minority opinions taking a more restrictive view of this congressional power, support the constitutionality of S. 158. Supreme

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"she must not be greedy for money, lest she give an abortive wickedly for payment." *Id.* 1.4 at p. 7.

[19] See Lactantius, *The Divine Institutes* 6.20 in 49 THE FATHERS OF THE CHURCH 450-55 (M. McDonald trans. 1964) for a typical early Christian critique of the inhumanity of Roman values. Lactantius enumerates the ways in which the Romans degrade humanity. Beginning first with the Roman games he declares:

"For, although a man be condemned deservedly, whoever reckons it a pleasure for him to be strangled in his sight defiles his own conscience, just as surely as if he were a spectator and participant of a murder which is performed secretly. They call these games, however, in which human blood is spilled. So far has humanity departed from men that, when they kill the very life of men, they think that they are playing, but they are more harmful than all those whose blood they use for their pleasure."

Id. at 451. After concluding his discussion of the public killing that characterized the games, Lactantius then turns to the Romans' brutal attitudes towards infants, attitudes that promoted infanticide and abortion:

"It is always wrong to kill a man whom God has intended to be a sacrosanct creature. Let no one, then, think that it is to be conceded even, that newly born children may be done away with, an especially great impiety! God breaths souls into them for life, not for death. Yet men, lest they stain their hands with that which is a crime, deny light not given by them to souls still fresh and simple. Does someone think that they will be sparing of a stranger's blood who are not of their own? These are without any question criminal and unjust."

Id. at 452.

Some Romans sought to assuage their consciences by not actually killing an unwanted infant, leaving it out to die by exposure instead. They rationalized that if the gods wished to save the infant they would then do so just as they saved Oedipus in the myth. Lactantius castigates this practice as more cruel, if possible, than simple murder:

"What of those whom a false piety forces to expose? Are they able to be judged innocent who cast their own members as prey for dogs and kill whatever is in them more cruelly than if they had strangled it?"

Id. at 452-53.

[20] DIDACHE 2.2. In the first few centuries after Jesus, the Christian writers who mentioned abortion opposed it. Included in their number were Clement of Alexandria, Tertullian, Cyprian, John Chrysostom, Jerome, and Augustine. *See* NOONAN, *supra*, at 11-18.

Court decisions recognize broad power in Congress under section 5 of the fourteenth amendment to "enforce, by appropriate legislation, the provisions of this article." The Court has upheld the power of Congress to make findings relevant to the enforcement of fourteenth and fifteenth amendment rights, and to enforce those amendments consistent with such findings. *See South Carolina* v. *Katzenbach,* 383 U.S. 301, 333-34 (1966). Even when Congress has made no relevant findings, the Court has upheld the power of Congress to expand the substantive scope of a fourteenth amendment right beyond the Court's previous interpretation. *Katzenbach* v. *Morgan,* 384 U.S. 641, 648-49 (1966). In *Katzenbach* v. *Morgan* the court found broad authority in Congress to interpret the provisions of the fourteenth amendment independent of the interpretations of the judicial branch, whenever Congress acts to "expand" fourteenth amendment rights. *Id.* at 648-49.

As it faces the problem of abortion, Congress has before it a uniquely appropriate occasion for exercising this power to find facts and make judgments relevant to the interpretation of fourteenth amendment rights. The Supreme Court's professed inability to address and resolve the question whether unborn children are human beings has left a gap in the knowledge necessary for the federal government to enforce the fourteenth amendment right to life. The congressional findings in S. 158 concerning the facts and value of human life in unborn children can now fill this gap and allow a thoroughly informed decision by both the legislative and the judicial branches concerning the power of states to protect unborn children.[21]

Former Solicitor General Robert Bork testified before the Subcommittee that S. 158 was consistent with the *Katzenbach* v. *Morgan* decision but that *Katzenbach* was wrongly decided. *Hearings on S. 158* (June 1 transcript at 10-11). Even if one takes a narrower view than that of the *Katzenbach* v. *Morgan* opinion of Congress's power to enforce the fourteenth amendment, S. 158 is still constitutional. Justice Harlan dissented from *Katzenbach* v. *Morgan* and outlined a narrow enforcement power for Congress. But even the terms of Justice Harlan's theory allow a role for Congress in cases such as S. 158:

> To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect.

384 U.S. at 668 (Harlan, J., dissenting). S. 158 sets forth "legislative facts" relevant to the issue of abortion in its determination that unborn children are human beings. If the Supreme Court defers to this finding, as Justice Harlan would seem to suggest it should, the Court will have to find that the fourteenth amendment protects the lives of unborn children unless the Court denies that their lives have intrinsic worth and equal value. Another matter the Court should take into consideration is the finding of S. 158 concerning the importance of the sanctity of human life and the protection

[21] For a discussion of Supreme Court respect for congressional judgments on matters of "value" rather than "fact," *see* footnote 22, *infra.*

afforded all human life by the fourteenth amendment.[22] Both these findings of S. 158, considered in tandem, will require a re-evaluation of the Supreme Court's *Roe* v. *Wade* decision.

Such an exercise of Congress's enforcement power accords with former Solicitor General Bork's view that

> the justices may be persuaded to a different view of a subject by the informed opinion of the legislature. At the very least, a deliberate judgment by Congress on constitutional matters is a powerful brief laid before the Court. A constitutional role of even such limited dimensions is not to be despised.

R. Bork, *Constitutionality of the President's Busing Proposals,* 5-6 (American Enterprise Institute 1972). Here Bork expresses substantially the same view as Abraham Lincoln's, that Congress can affirm a principle at odds with a prior Supreme Court decision that is contrary to the Constitution, and so perhaps influence the Court to overrule that decision. Members of Congress have a duty to cast their votes according to their own honest view of the Constitution. If that view is at odds with a Supreme Court decision, it is appropriate to give the Court the opportunity to conform its decision to the Constitution. S. 158 does not seek to evade judicial review; it invites judicial review. The purpose of S. 158 will be best fulfilled if the Supreme Court considers on its merits each statement of fact and value made in the bill, and then tenders a constitutional judgment accordingly.

It is crucial to note, therefore, that the constitutionality of S. 158 does *not* depend on one's view of *Katzenbach* v. *Morgan* and the scope of Congress's power to enforce the fourteenth amendment. The Subcommittee does not take the position that Congress has a plenary power under the enforcement clause of the fourteenth amendment to create new rights or refashion the substantive content of constitutional rights. No matter how narrow one believes Congress's power should be, it is not inappropriate for Congress to make factual findings and value decisions on questions fundamental to the interpretation of the fourteenth amendment, when the Supreme Court has declared its own inability to address those questions. Congress's attempt with S. 158 at influencing the Supreme Court to reexamine *Roe* v. *Wade* in light of congressional findings is *the most responsible* means to address an erroneous Supreme Court decision, a means President Lincoln clearly recognized. A constitutional amendment will be necessary only if the Supreme Court in reviewing S. 158, refuses to modify the result imposed by *Roe* v. *Wade.*

Finally, Congress should reject the view that S. 158 would "establish a religion" because it affirms the moral principle of the sanctity of human life. The signers of the Declaration of Independence and the framers of the fourteenth amendment obviously believed

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[22] Professor Archibald Cox, who in his testimony before the subcommittee suggested a narrow reading of Katzenbach in the context of S. 158, earlier suggested a broader reading of the decision: ". . . Congress has power under section 5 of the fourteenth amendment to extend the practical application of the amendment's broad constitutional guarantees upon its own findings of fact, characterizations, and resolution of *questions of proportion and degree.*" Cox, *The Role of Congress in Constitutional Determinations* 40 CINN. L. REV. 199, 238 (1971) (emphasis added). The question of the sanctity of all human life involves more than the compilation of raw data; whether to regard all biological members of the human species as "human beings" would seem to be the sort of characterization, or resolution of a question of proportion and degree, which Cox's earlier view would suggest Congress has the power to make under section 5.

that the sanctity of human life is a principle *embodied* in our governmental order, not a principle in violation of that order. Indeed, the Supreme Court has expressly held that legislation concerning abortion does not violate the establishment clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *Harris* v. *McRae,* 448 U.S. 297, 319 (1980) (quoting *McGowan* v. *Maryland,* 366 U.S. 420, 442 (1961)).

The assertion of some witnesses before the Subcommittee that citizens may not bring their religious beliefs to bear on public policy questions is an affront not only to well-established constitutional principles, but also to the right of religious believers to participate in the political process. *See, e.g., Hearings on S. 158* (June 12 transcript at 42-43, 46-47) (testimony of Rev. William Thompson); *id.* at 56 (testimony of Rabbi Henry Siegman); *id.* at 87-90 (testimony of Rev. Paul Simmons). The Supreme Court has aptly observed:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right.

Walz v. *Tax Commission,* 397 U.S. 664, 670 (1970). When the subject matter of legislation concerns a legitimate sphere of government activity—and protecting human life is the *most* clearly legitimate and basic sphere of government activity—citizens and legislators have a right to advocate such legislation for religious as well as secular motives.

VIII. WITHDRAWAL OF JURISDICTION OF LOWER FEDERAL COURTS

Section 4 of S. 158 withdraws lower federal court jurisdiction to grant declaratory or injunctive relief in certain types of abortion cases. It expressly leaves the jurisdiction of the Supreme Court intact. The intent of this provision is to make state courts the original forum for injunction and declaratory judgment cases concerning abortion, and to ensure that the Supreme Court will have the benefit of the views of the state courts when it exercises its ultimate power of appellate review over decisions of the highest state courts involving questions of federal law.

This allocation of jurisdiction between state and federal courts in abortion cases serves important interests in the federal system. Until 1973 the states had power to determine, at least in the first instance, what protection should be extended to unborn children. Because S. 158 recognizes unborn children as living human persons, the Supreme Court should once again allow states to make legislative determinations to protect unborn children. State action to protect unborn children is likely, however, to encounter legal challenges. In any such challenges, state courts should have the initial opportunity to resolve relevant issues without interference from lower federal court injunctions or declaratory judgments. State courts are best suited to interpret state statutes in a way that carries out the will of the legislature and yet conforms to the requirements of the Constitution.

Reserving such issues to state courts in the first instance will not jeopardize constitutional rights, because, under article VI of the

Constitution (the supremacy clause), state courts are bound by the Constitution just like federal courts.[23] The Supreme Court, moreover, will retain its power of appellate review over questions of constitutional interpretation. Its deliberations should benefit from the opportunity to consider the views of state courts on matters traditionally resolved under state law.

This withdrawal of lower federal court jurisdiction is consistent with the Constitution and with Supreme Court precedent. The power of Congress to limit the jurisdiction of lower federal courts has been sustained in every Supreme Court decision in which the issue was presented, and the Court has endorsed this power in the broadest terms. *See, e.g., Palmore v. United States*, 411 U.S. 389, 400-01 (1973) (Congress has the sole power of creating inferior federal courts and of "withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good," quoting *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845).); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 449 (1850) (". . . Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.").

Clear precedent exists for Congressional legislation removing a particular class of controversies from the federal courts. The Norris-La Guardia Act, 29 U.S.C. §§101-115, for example, withdrew from the federal courts jurisdiction to issue injunctions in labor disputes. In *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938), the Supreme Court recognized the constitutionality of the Act. The withdrawal of jurisdiction in S. 158 is equally appropriate as a means to ensure state judicial review of state anti-abortion statutes.

IX. AMENDMENTS ADOPTED BY THE SUBCOMMITTEE ON SEPARATION OF POWERS

Prior to making its favorable recommendation on S.158 the Subcommittee on Separation of Powers amended the bill in several respects in response to suggestions of both supporters and opponents of the bill.

Section 1(a). This section as amended now reflects in clear and concise form the facts summarized at pages 7 to 13 of this report. The words "a significant likelihood" have been deleted because no evidence presented at the Subcommittee's hearings cast any doubt on the biological fact that conception marks the beginning of the life of a human being. Challenges to this finding by witnesses at the hearings were not challenges to the biological facts; they were either (1) attempts to redefine "human being" as including less than every member of the human species, or (2) denials that science can help decide which human beings to accord value to as persons. Both arguments concern the value given to human life, not the fact of the existence of a living human being.

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[23] This analysis assumes that state court systems can provide speedy adjudication of suits for injunctive and declaratory relief, with speedy review by means of interlocutory appeals if necessary. Speedy adjudication is of particular concern in the context of abortions, since an abortion delayed is an abortion denied, and an abortion performed is a human life irrevocably ended. If any states fail to provide such speedy review, it might be held under the reasoning of *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948) that lower federal court jurisdiction was constitutionally required with respect to that particular state. As to other states the jurisdictional limitation would still be valid.

The Subcommittee's decision on questions of value is reflected separately in section 1(b).

The Subcommittee has deleted the words "actual human life" because they are redundant. Once the life of a human being has begun, it constitutes a human life, not a potential human life.

Section 1(a) as revised substitutes the phrase "the life of each human being begins at conception" for the phrase "human life exists from conception" to make clear that the unborn child is an individual human being and not a form of "life" comparable to a sperm cell, an unfertilized ovum or a piece of fingernail tissue. Some witnesses suggested that the original language was ambiguous in this respect. *See e.g., Hearings on S. 158* (May 20 transcript at 18) (testimony of Dr. Clifford Grobstein).

Section 1(b). The Subcommittee amended the original language which had stated that the fourteenth amendment to the Constitution of the United States "was intended to protect all human beings." It now reads simply that the amendment "protects all human beings." Senator Baucus proposed that the language concerning the intent of the framers of the Constitution be omitted entirely, on the ground that the Congressional debates on the fourteenth amendment did not include discussions of abortion. Senator Hatch proposed a substitute amendment in the form of the present language, which the Subcommittee accepted on the ground that it substantially restates the original language. The Constitution protects all those whom its framers intended it to protect, and the purpose of the fourteenth amendment was to eliminate the constitutional regime in which some human beings were legally an inferior class not entitled to the rights enjoyed by other human beings. *See* pp. 16, 23–25, *supra.* Section 1(b) recognizes that under the fourteenth amendment no class of human beings can be regarded as "nonpersons."

Section 2. This section is similar to the third paragraph of section 1 of the original bill. The only changes are as follows:

(1) The Subcommittee has substituted the word "recognizes" for "declares" and "shall be deemed" and "shall include" to make it clear that Congress is not making unborn children into human beings; it is recognizing that they are in fact human beings. Congress is not defining human life, it is recognizing human life. The only matter of definition involved is that S. 158 adopts the customary meaning of "human beings" as including every living member of the human species.

(2) The Subcommittee has inserted the word "each" before "human life" to emphasize that the bill deals with individuals, not protoplasm or life in an amorphous sense. See the discussion of this issue in connection with section 1(a) above.

Section 3. This section is new. It states an alternative theory supporting the result the bill seeks to achieve.

Most constitutional scholars agree that *Roe* was wrongly decided, and that the states can prohibit abortion without violating any provision of the Constitution. Sections 1(a) and 1(b) of S. 158 afford states a justification to protect unborn children because the unborn are entitled to the fourteenth amendment right to life. Section 3 provides that even if the Supreme Court rejects Congress's findings in sections 1(a) and 1(b), the states can still legislate concerning abortion because they have authority under the Constitution to

protect human life, a power that the states have exercised throughout our history. The power to protect human beings extends to those individuals whom the state rationally regards as human beings. The hearings before the Subcommittee leave no doubt that it is rational to regard unborn children as human beings.

Section 3 is severable. Thus if the Court were to decide that Congress is constitutionally empowered to find facts with which the Court will inform its own judgments, but is constitutionally forbidden even to express its opinions on questions of law, the Court might "strike down" section 3; but it should still give sections 1 and 2 the full force to which they would otherwise be entitled.

Section 4. This language, similar to that of section 2 of the original bill comprises the limitation on jurisdiction of the lower federal courts to injunctive relief in abortion-related cases. The Subcommittee amended the section to make it clear that nothing in the section is intended to deny jurisdiction to the Supreme Court.

Section 5. This section is similar to one originally proposed in H.R. 3225, the House counterpart to S. 158. It does two things: first, by providing immediate Supreme Court review of lower court decrees, it prevents a situation in which the validity of the bill could be in doubt for years. Second, it makes clear that the bill is not a congressional "challenge" to the Court's authority: S. 158 does not oppose judicial review; rather, it invites immediate judicial review.

ADDITIONAL VIEWS OF SENATOR ORRIN G. HATCH

The Subcommittee on the Separation of Powers and Senator East have made an important contribution to the public debate on abortion with its consideration of S. 158, the proposed Human Life Bill.

It is with great reluctance, however, that I am forced to express serious reservations about the constitutionality of S. 158. Such reluctance comes from the fact that I fully share the frustrations of the bill's proponents with the continuing destruction of unborn human life that has resulted from the appalling Abortion Cases of 1973.

In the decisions of *Roe* v. *Wade* 410 U.S. 113 (1973) and *Doe* v. *Bolton* 410 U.S. 179 (1973) and their progeny, the Supreme Court has created a virtually limitless right of a woman to obtain an abortion, for virtually any reason, during virtually any stage of her pregnancy. In identifying a previously undetected right to abortion in the 14th Amendment and elsewhere in the Constitution, the Supreme Court has created a regime in which abortion is available on demand within this country. In the process of outlining this new "right", the Supreme Court has overturned laws enacted by the elected representatives of the people in all fifty States of the Union.

There is no disagreement between myself and the proponents of S. 158 that the Abortion Cases must be overcome and that legal protection must be restored to unborn human life. I must conclude, however, that *Roe* and *Doe* can only be overturned by an amendment to the Constitution, not by a simple statute such as S. 158. Completely apart from my own doubts about the constitutional propriety of S. 158, I have little reason to believe that the Supreme Court as presently comprised would be likely to uphold the exercise of Congressional authority in this measure. No legislation that is not ultimately sustained by the Court will contribute anything toward saving unborn lives.

I am in basic agreement with Professor Robert Bork, formerly of the Yale Law School, and formerly Solicitor General of the United States, who has posed the issue in the following terms:

> The question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformations.

There is no doubt in my mind that the *Roe* and *Doe* decisions represented "deformations" of the Constitution of a magnitude exceeded only perhaps by the *Dred Scott* decision in 1857, *Scott* v. *Sandford* 60 U.S. 393. In each of these decisions, the Supreme Court significantly reduced the scope of constitutional protections for classes deemed un-worthy of "person"-hood. The constitutional response of this nation to the *Dred Scott* decision—the 14th Amendment—ought to be emulated in the present circumstance.

Regrettably, I, with Professor Bork, view S. 158 as a "further deformation" of the Constitution. S. 158, in my view, rests upon a principle of constitutional law, articulated in the *Katzenbach* v. *Morgan* case, 384 U.S. 641 (1966), that I simply cannot accept. I do not believe that the case would be decided similarly today and, even if it were to be, I cannot in good conscience support legislation that finds its authority in the *Katzenbach* principle.

In *Katzenbach,* the Supreme Court upheld legislation enacted by Congress to limit the use of literacy tests by the State of New York even though the Court itself, in an earlier decision, had determined that such tests were not necessarily violative of the "equal protection" clause of the 14th Amendment. The Court concluded that Congress possessed this authority under the 5th Section of the 14th Amendment which grants to Congress the power to "enforce" the provisions of the Amendment.

In finding this authority in Congress, the Court in effect declared a Congressional power, not merely to *enforce* those rights already identified by the courts, but the power itself to *define* substantive rights under the 14th Amendment. The implications of this doctrine are substantial and in radical violation of traditional principles of American federalism.

Quite simply, the 14th Amendment is a limitation upon the States, while section 5 of the 14th Amendment is a conferral of authority upon the Congress. To enhance that Congressional authority, by transforming it from mere authority to establish remedies for substantive constitutional violations into authority to define what constitute such violations, is to significantly erode the division of powers between the State and national governments.

If Congress can define what constitutes a "person" for purposes of the due process clause of the 14th Amendment and impose that definition upon the States, and obligate the States to abide by that definition, then Congress would equally be empowered to interpret and define other substantive provisions of the 14th Amendment (as well as the other Reconstruction Amendments). As Professor Bork has observed:

> A national legislature empowered to define the meaning of involuntary servitude, privileges and immunities, due process, equal protection, and the right to vote, which includes all qualifications of electors, can void any State legislation on any subject and replace it with a Federal statute.

Professor Van Alstyne of the Duke University School of Law has also noted in this regard:

> If Congress can (a) determine authoritatively what affirmative obligations each State has in respect to the life, liberty, and property of each person, and if Congress can (b) legislate to "enforce" such affirmative obligations as determined by Congress, then indeed the rudiments of federalism are dead, the 10th Amendment is meaningless, and each State becomes but the instrument of a uniform, congressional determined policy of social welfare.

Even in the service of a good cause (and there is no better cause than the pro-life cause), I am not prepared to accord further legiti-

macy to the *Katzenbach* doctrine. I concur with Justice Harlan who observed in his dissent in that case that it could not be sustained,

> except at the sacrifice of fundamentals in the American constitutional system—the separation between the legislative and the judicial function and the boundaries between federal and State political activity.

What makes the case for S. 158 an even more difficult proposition than the statute involved in *Katzenbach* is that S. 158 purports to interpret the Constitution in direct contravention of a previous Supreme Court decision.

While I am in agreement with the view expressed by Professor Charles Alan Wright of the University of Texas Law School—and indeed of many proponents of S. 158—that the argument in support of the constitutionality of the measure "must rest . . . exclusively" on *Katzenbach,* I recognize the efforts of proponents to suggest an alternative basis for argument.

Proponents of this basis argue that even Justice Harlan's dissent in *Katzenbach* is compatible with S. 158 in its recognition of the fact that the Court owes deference to Congressional determinations of "legislative facts". Justice Harlan observed there that:

> To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them and such determinations are, of course, entitled to due respect.

I would respond to the reliance upon Justice Harlan's remarks in the following respects:

First, I would disagree that the "legislative facts" of S. 158 are "relevant" to any judicial determination involved in *Roe* v. *Wade.* I simply do not see the ray of shining light that S. 158 proponents see in *Roe* v. *Wade* in respect of the Court's supposed invitation to Congress to define when life begins. In this respect, perhaps, I view *Roe* as a more undilutedly bad decision than even proponents of S. 158. I do not believe that the Supreme Court was as "undecided" on this issue as do proponents. Professor Lynn Wardle of the Brigham Young University Law School has argued:

> In *Roe* v. *Wade,* the Supreme Court specifically held that the term "person" as used in the 14th Amendment does not include the unborn. The point was made whole and complete in itself. Contrary to the implication of [proponents], that holding was *not* predicated or contingent upon a prior finding that the Court did not know when human life began. In fact, the Court did not address the question of when human life began until after it has separately analyzed and specifically concluded that the unborn are not "persons" protected by the 14th Amendment.

In *Roe* v. *Wade,* the Supreme Court initially determined that the 14th Amendment contained a "right to privacy" which was broad enough to encompass "a woman's decision whether or not to terminate her pregnancy." Finding this to be a "fundamental" right, the Court declared that State laws infringing upon this right could only be sustained if necesssary to uphold a "compelling" state

interest. The first proposed "compelling" interest that it considered was that the unborn were legal "persons" under the 14th Amendment. The Court observed:

> [Appellee] argues that the fetus is a "person" within the language and meaning of the 14th Amendment. In support of this, they outline at length in detail the well known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses for the fetus' right to life would then be guaranteed specifically by the Constitution.

The Court, however, expressly rejected this argument and concluded that unborn life was not entitled to the protections of "person"-hood. This conclusion was reached after analysis of the text of the Constitution, the history of the 14th Amendment, and earlier Federal Court decisons.

I emphatically reject the analysis by the Court in this regard. I believe that it was poorly conceived and wrong. I do not, however, see how we can get around this analysis by suggesting that it did not, in fact, take place. As a legal analysis of the *Roe* decision by Will Caron, General Counsel of the U.S. Catholic Conference, has observed,

> Clearly, the Court's determinations were a product of legal analysis which explicitly and repeatedly rejected the human "personhood" of the unborn as a proper measure of the rights of the mother, the unborn, or the State. . . in the Court's view, the mother's constitutional right necessarily presupposes the absence of 14th Amendment personhood for prenatal life.

The second response to the reliance upon Justice Harlan's dissent as a rationale for S. 158 is that Congress is doing far more in this bill than simply stating Congressional findings of fact and attempting to call these to the attention of the Court. If this is its objective, Congress is always free to pass a sense of the Senate resolution or to file an amicus brief with the Court. What Congress is trying to do here is entirely different. It is attempting to enact a law. It is attempting to enact a law in the face of an absolutely contrary Supreme Court decision. This law would redefine the term "person" in the 14th Amendment; it would not simply apprise the Court of Congress' perspective on biological issues or "when human life begins". Congress is attempting to exercise its constitutional lawmaking authority on the basis of its own "legislative fact" determinations. Congress itself is purporting to act on these determinations; it is not simply raising the flag of "legislative fact" determinations to see whether or not the Court will salute. Congress is attempting to impose upon the States the provisions of S. 158 which to all extents and purposes will be the law of the land, at least until the Court is able to review (and almost certainly reject) this exercise.

Third, I do not agree with the reliance upon the Harlan language because I believe that it misreads Harlan. What is most explicit in his opinion is that Congress cannot make substantive determinations about constitutionally-guaranteed rights. The authority of Congress in this regard is absent. Justice Harlan, I believe, was

clearly discussing "legislative fact finding" in the context of the traditional remedial role of Congress under the 14th Amendment. In his dissent, he stated,

> In passing upon the remedial provisions [of the Act], we reviewed first the voluminous legislative history as well as judicial precedents supporting the basic Congressional finding that the clear commands of the 15th Amendment had been infringed by various State subterfuges. Given the existence of the evil, we held the remedial steps taken by the legislature under the enforcement clause of the 15th Amendment to be a justifiable exercise of congressional initiative. . . To the extent that legislative facts are relevant to a judicial determination, Congress is well equipped to investigate them and such determinations are, of course, entitled to due respect. In *South Carolina* v. *Katzenbach,* such legislative findings were made to show that racial discrimination in voting was actually occurring.

The case discussed by Justice Harlan, *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1965), involved an undisputed exercise by Congress of its remedial authority under the 15th Amendment. It sought to create no new substantive rights or authority.

Finally, I would argue that the rationale in reliance upon the Harlan dissent misconstrues the basic function of Congress. While I would be in total agreement that the Court, as illustrated in the *Roe* case, has itself lost sight of its proper constitutional role, I would repeat Professor Bork's warning that one "deformation" of the Constitution "is not properly cured by further deformations". Even if S. 158 was no more than a Congressional attempt to get the Court to take another look at its 1973 decisions, there would still be no basis for the Congress to "advise" the Supreme Court on the "proper" meaning of the Constitution. The role of the Congress is to legislate. When Congress passes legislation, there ought to be a presumption that such legislation is valid at the outset. This presumption could not obtain under the circumstances of S. 158. Passage of S.158 would mean that there would be in existence two conflicting "laws" derived from the Constitution. These would exist simultaneously, at least until the Court was confronted with a "case or controversy" allowing the matter to be resolved (as it would certainly be in favor of the Court-interpreted law). Such a situation would be highly detrimental to our constitutional system.

Let me conclude by saying that I have given every possible presumption of constitutionality to this legislation. I have reluctantly voted it out of Subcommittee in order to sustain the debate on its provisions. I will continue to maintain an open mind on this proposal. I am favorably disposed to virtually any measure to save the lives of the unborn, even if it is not my first or second or third choice. At this point, however, I cannot state my support for this legislation.

My present views on S. 158 are, if anything, strengthened by its extremely limited scope. Even if I believed the bill to be constitutional and even were it to be sustained by the Court, all that the bill would do, arguably, is to allow individual States to bar publicly funded abortions. As this Report notes,

> while S. 158 will prevent States from funding or performing abortions on demand, it will not prevent the performance of abortion by private means, The 14th Amendment only provides that no State shall deprive any person of life without due process of law.

I am not even sure whether or not it is clear that States would be required to prohibit such "publicly-supported" abortions. All that S. 158 would seem to ensure, given that it is upheld, would be to ensure that there be some element of "due process" prior to an abortion. Given that the mother would retain a "fundamental" right to abortion, I am not clear as to what circumstances would satisfy the "due process" requirement. Given the tendencies of the judiciary in this area, I am not much comforted by this "guarantee".

Despite my disagreement with the Chairman of the Subcommittee on the Separation of Powers, Senator John East, on some aspects of S. 158, let me express my admiration for his willingness to place the issue of abortion as the priority issue on the agenda of his subcommittee. The hearings that he has conducted on this have ensured the development of a strong record by Congress on the tragedy of abortion and they have ensured that the abortion issue continues to be a matter of highest public debate. These are no small achievements. I would strongly concur with the report of the subcommittee in virtually all particulars with the exception of the discussion on the constitutional issues relating to S. 158.

MINORITY VIEWS OF SENATOR MAX BAUCUS

Seldom in this nation's history have the public policy questions surrounding an issue been as complex or controversial as they are with abortion. Abortion has divided Americans for decades. I fully appreciate the depth of feeling on all sides of the abortion question.

While there are many activists in favor of or opposed to S. 158, I believe there also are many more Americans who—like me—are wrestling in the deepest part of their souls with the questions raised by abortion. The issue involves highly intimate and personal decisions. As we discuss the constitutional and legal arguments we should not forget that millions of individual lives are touched by this issue.

In the final analysis, the issue presented by S. 158 is not the controversy surrounding abortion or *Roe* v. *Wade*. Rather, it is whether the Congress wishes to end run the constitutional amendment process and undermine the central role of the judiciary as the final arbiter for defining the terms of the Constitution. In my view, that is what is at stake—not abortion or *Roe* v. *Wade*.

THE CONSTITUTIONALITY OF S. 158

The abortion decision of 1973 was not the first controversial Supreme Court decision in our nation's history. The framers of the Constitution wisely provided within Article V a mechanism for Congress and the citizenry to respond to such decisions.

Several of the amendments to our Constitution have been direct responses to Supreme Court decisions. The Eleventh Amendment was a response to the Court's holding in *Chisolm* v. *Georgia* which subjected the states to law suits in federal courts. The Fourteenth Amendment was in response to the Court's holding in *Dred Scott* v. *Sanford* that the constitutional term "citizen" did not include Black Americans. The Sixteenth Amendment overturned the Court's interpretation of the constitutional term "direct taxes" in *Pollack* v. *Farmer's Loan and Trust Company*. And the Twenty-sixth Amendment was a response to the Court's holding in *Oregon* v. *Mitchell* that the Congress could not lower the voting age in state elections to 18 years of age.

Since the *Chisolm* case was decided in 1793, this country has had a long and consistent history of responding to constitutional decisions of the Supreme Court. The issue raised by S. 158 is not the correctness or wisdom of *Roe* v. *Wade*, but rather whether we should retain our historic tradition of utilizing Article V to amend the Constitution.

Our nation's most distinguished constitutional scholars who have analyzed S. 158 have come to the conclusion that it is an attempt to overturn a constitutional decision of the Supreme Court by simple statute. Even those who believe that *Roe* v. *Wade* was incorrectly decided, believe that S. 158 is an unconstitutional attempt to alter that decision.

Professor Charles Alan Wright of the University of Texas Law School, stated in a letter to the Separation of Powers Subcommittee:

> I find *Roe* unpersuasive. Nevertheless, *Roe* exists, it has been repeatedly reaffirmed and even extended, and I do not think Congress has authority by statute to overrule a constitutional decision of the Supreme Court. Whatever the arguments might have been if the matter where one of first impression, we have long since accepted the notion that "it is emphatically the province and duty of the Judicial Department to say what the law is," *Marbury* v. *Madison,* that the duty is now more specifically that of "this court," *United States* v. *Nixon,* and that "the federal judiciary is supreme in the exposition of the law of the Constitution . . ." *Cooper* v. *Aaron.*

Professor Phillip Kurland of the University of Chicago Law School wrote in his letter to the Subcommittee:

> The question is not whether the Supreme Court decisions are sound or unsound. The question is what is the meaning of the word "person" in the due process clauses of the Fifth and Fourteenth Amendments. The Supreme Court has decided that a fetus is not a "person" within the meaning of those provisions. If that constitutional determination is to be overruled, it can be done only by the Supreme Court or by constitutional amendment.

Former United States Solicitor General Erwin Griswold wrote the following to the Subcommittee:

> For the Congress to undertake to interfere with that decision, even under Section V of the Fourteenth Amendment, would, in my view, be an inappropriate legislative interference with the judicial power, and thus a violation of the separation of powers, which is one of the two major premises of the United States Constitution—the other being the appropriate division of powers between the states and the federal government.

Former United States Solicitor General Archibald Cox told the Subcommittee:

> Over the years, a few decisions have proved clearly wrong headed, and perhaps *Roe* v. *Wade* is such a case. I, myself, wrote critically of *Roe* v. *Wade* a little while after the decision came down.
>
> But wrong headed decisions can be changed by time and debate or by constitutional amendments. But the very function of the constitution and Court is to put individual liberties beyond the reach of both Congressonal majorities and popular clamor. Any principle which permits Congress, with the approval of the President, to nullify one constitutional right protected by the Constitution, as interpreted by the Court—that principle would sanction the nullification of others, and that is why I say that the principle of S. 158 is exceedingly dangerous, and I can only call it radical.

And finally, former United States Solicitor General Robert Bork told the Subcommittee:

> The question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformation. Only if we are prepared to say that the Court has become intolerable in a fundamentally Democratic society and that there is no prospect whatever for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role. I do not think we are at that stage.

The views of these distinguished constitutional scholars was supported by the common view of former Attorneys General Brownell, Katzenbach, Clark, Richardson, Saxbe, and Civiletti.

The consensus position of the six former Attorneys General of the United States was communicated in a letter to the Subcommittee. They wrote:

> Our views about the correctness of the Supreme Court's 1973 abortion decision vary widely, but all of us are agreed that Congress has no constitutional authority either to overturn that decision by enacting a statute redefining such terms as "person" or "human life," or selectively to restrict the jurisdiction of federal courts so as to prevent them from enforcing that decision fully.
>
> We thus regard S. 158 and H.R. 900 as an attempt to exercise unconstitutional power and a dangerous circumvention of the avenues that the Constitution itself provides for reversing Supreme Court interpretations of the Constitution.

The proponents of S. 158 acknowledge that in most cases judicial independence and the doctrine of separation of powers would require Congress to respond to a constitutional decision of the Supreme Court by constitutional amendment. They argue that *Roe* v. *Wade* is a special case and an exception to this rule because the court in *Roe* v. *Wade* invited Congress to define when human life begins.

The passage of Justice Blackmun's opinion in *Roe* v. *Wade* that they rely on reads as follows:

> 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.

If the hearings on S. 158 held by the Separation of Powers Subcommittee were conclusive on any one point it is that in 1981 there remains no consensus among scientists, philosophers and theologians on the question of when life begins. The candid observation of the Supreme Court in 1973 is as accurate a description of the Subcommittee's record as it was of the record before the Court

in *Roe*. The Subcommittee heard conflicting testimony from each of several disciplines. The testimony of the scientists, physicians, philosophers and theologians who appeared before the subcommittee made it apparent that our society is as divided on the question today as it was eight years ago, and that man's knowledge on the subject has not appreciably increased during the eight year period.

Congress to answer the question of when life begins. The proponents of S. 158 simply feel the Court abdicated its role in not addressing the issue. But that does not alter the status of the Court's constitutional holding in the case. Consititutional experts who are in sharp disagreement on the correctness of *Roe* v. *Wade* agree that the theory behind S. 158 is based on a misreading of *Roe*.

Sarah Weddington, who argued *Roe* v. *Wade* before the Supreme Court, in her statement to the Subcommittee, clearly explained the nature of the holding in *Roe:*

> The Court did not abdicate its role of defining constitutional terms. It said very clearly that in the Fourteenth Amendment, the term person does not—not "should not," nor "might not," nor "pending further information not," but does not refer to the unborn. The Court went on to say that there was no point in its engaging in philosophic or theological speculation on the beginning of life, since there was no consensus among those who concern themselves with such things, and since the constitutional meaning of "person" was already clear without the Court assuming a function which was foreign to it.

In support of this position, Professor Lynn D. Wardle of the Brigham Young University Law School, who is a strong supporter of a human life amendment, commented in his analysis of the constitutionality of S. 158:

> Contrary to the implication of Galebach, that holding (*Roe*) was not predicated or contingent upon a prior finding that the Court did not know when human life began. In fact, the Court did not address the question of when human life began until after it had separately analyzed and specifically concluded that the unborn are not "persons" protected by the Fourteenth Amendment.

And, finally on this point, the General Counsel to the U.S. Catholic Conference, Wilfred Caron, critiqued this point in his legal memorandum on the constitutionality of S. 158:

> In this regard, it should be noted that when the Court acknowledged the judiciary's inability to speculate as to when human life begins, it did so in the context of the state's interest in safeguarding potential life—not in the context of the question of personhood under the Fourteenth Amendment. The Court's candid admission cannot reasonably be regarded as opening the way for what is contemplated by these bills.

The consititutional scholars who examined S. 158 in its original form generally took the position that the only possible argument supporting its constitutionality was that *Katzenbach* v. *Morgan*

empowered Congress to "enforce" the Fourteenth Amendment by expanding the coverage of the due process clause. There is no constitutional doctrine or case law supporting the proposition that Congress has the authority to grant states a compelling interest in any activity that the Supreme Court explicitly stated the states had no interest in.

As the Supreme Court noted in the well known footnote 10 of *Katzenbach* v. *Morgan:*

> Section 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this court." We emphasize that Congress' power under Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

The language of Section 3 of S. 158 cannot be supported under the authority of Congress' power to enforce the Fourteenth Amendment. There is no other Congressional power that can serve as the basis for Congress to overturn constitutional decisions of the Supreme Court.

The consequences of a decision by the Supreme Court to uphold the Congress' power to enact S. 158 would be disastrous for our system of government as we now know it. If Congress can alter the court's ruling on a constitutional term as basic as the interpretation of "person" under the Fourteenth Amendment, then there is virtually no constitutional protection that Congress couldn't dilute or eliminate by simple majority vote.

Additionally, if Congress can find today by statute that life begins at conception, then a future Congress can alter or reverse that result. This approach envisions a system of government where constitutional protections are more transitory or illusory than they are today. The basic terms of the Constitution are left to be determined by the shifting majorities in Congress.

It is for these basic reasons that most of the country's leading scholars and those who have served the nation as the highest ranking legal officers have publicly announced their view that S. 158 is unconstitutional. It is highly unusual to find agreement among six former Attorneys General, three former Solicitors General, and the nation's most distinguished constitutional scholars on such a controversial issue. In my view, the consensus among them provides significant evidence that the question of the constitutionality of S. 158 is not a "close call." Rather, the theory behind the legislation runs counter to principles of judicial independence and the separation of powers that lie at the very heart of our constitutional system. I oppose the bill on that basis.

IMPACT OF S. 158 ON STATE SOVEREIGNTY AND STATE ABORTION AND CONTRACEPTIVE POLICY

There is another aspect of S. 158 that should be considered carefully. That is the impact of S. 158 on the central role of our state governments as basic decision makers in our federal system.

Although S. 158 is touted as returning power to the states, its long term impact will be to set a precedent that will lead to increased federal intervention and an erosion of state authority.

As former Solicitor General Bork stated at the Subcommittee hearings in response to a question from Senator Heflin;

> Senator Heflin, if I may—I think the version of Section V of the Fourteenth Amendment that is being propounded here in support of this bill not only federalizes the question of life, but indeed, federalizes state police powers. Under the equal protection clause and the due process clause together, those are turned over to Congress, and there is no state legislation on any topic that I can think of that cannot be federalized if Congress so chooses.

And, in a letter to Senator Hatch, Professor William Van Alstyne of the Duke University School of Law, further expounded on this aspect of the bill by stating:

> If Congress can (a) determine authoritatively what affirmative obligations each state has in respect to the life, liberty and property of each person, and if Congress can (b) legislate to "enforce" such affirmative obligations as determined by Congress, then indeed the rudiments of federalism are dead, the Tenth Amendment is meaningless, and each state becomes but the instrument of a uniform, Congressional determined policy of social welfare.

More specifically, the hearings on S. 158 have brought to light the fact that with regard to state and local decision making over abortion and contraception questions, the current state latitude over these areas would be substantially restricted.

Today, states are free to make their own policy decisions about what abortions to fund or not to fund. However, the intent of S. 158 is to thwart that current authority. Supporters and opponents of S. 158 who testified before the Subcommittee agreed that without any additional legislation, S. 158 would have the effect of preventing any state from engaging in conduct that interferes with the development of the fertilized egg. In other words, states would not be free to fund abortions or fund hospitals or clinics that performed abortions.

Additionally, under S. 158, states could not fund or support any person or facility involved with the use or distribution of those contraceptives that intefere with the development of the fertilized egg (e.g., IUDs and morning-after pills). State action with regard to currently available contraceptives would be prohibited without any additional legislation.

During the Subcommittee hearings of May 21, 1981, the author of S. 158, Stephen Galebach, clarified these points in the following exchange:

> Senator BAUCUS. Mr. Galebach, I would like to clear up, if we could, your undestanding of how this bill would affect state action. My understanding is that the bill, if it is enacted without any additional state or federal legislation, would prohibit states from funding abortions. Is that your understanding, too?
>
> Mr. GALEBACH. In general, except where states had a justification as compelling as, say, to prevent the death of a mother.

Senator BAUCUS. In those cases, too, would the bill also prohibit states from funding abortion clinics that distribute IUDs and morning-after pills in your view?

Mr. GALEBACH. It could very well.

Senator BAUCUS. That is, without additional legislation, this bill, if it passes, would have the effect of prohibiting the states from funding abortion clinics engaged in the distribution of IUDs and morning-after pills?

Mr. GALEBACH. There might be some tough legal questions that would come up as to whether the state could fund other operations of the clinic, but the state could not fund any device that would terminate a human life after conception.

Senator BAUCUS. Because that would be state action prohibited under the bill?

Mr. GALEBACH. Yes.

State legislatures could no longer make basic abortion funding decisions that they are free to make today. S. 158 precludes states from funding any abortion unless they have a "compelling" state interest. Most experts on both sides of the question agree that such an interest would only exist where the life of the mother was at stake. Therefore, states could no longeer fund abortions in the case of rape or incest if they determined that was appropriate public policy.

Professor Robert Nagel of Cornell, a supporter of S. 158, criticized the bill for its curtailment of state authority at the Subcommittee hearings of June 1:

Senator BAUCUS. Insofar as this bill would prohibit states from funding action, in a sense that is not returning the determination to the state but is establishing a national policy which prevents states from taking certain action. That is, the effect of this bill is not to throw the question of abortion back to the states—generally, it certainly is not—and it sets a national policy insofar as the bill will prevent states from funding abortions. That is correct, is it not?

Mr. NAGEL. In my view, that is an unfortunate aspect of the bill—yes.

Senator BAUCUS. It is an unfortunate aspect? Why is that?

Mr. NAGEL. Because I think it ought to be a matter for states in their own judgment to decide on.

Following that exchange, I wrote Professor Nagel and asked him his analysis of the degree to which state conduct would be limited by S. 158. I asked him whether states would be permitted to fund abortions in the case where the life of the mother was threatened. I also asked him whether a state would be permitted to fund abortions in the case of rape or incest or the detection of serious genetic defects.

By letter of July 2, Professor Nagel responded to my letter as follows:

Although you state that there seems to be agreement that states would be permitted to fund abortions where the

> life of the mother was threatened, I must say that I believe the matter is far from certain . . .
>
> In any event, it seems clear to me that even if a state does not violate due process standards when it encourages the destruction of fetuses in order to save the lives of mothers, it does not follow that a state would be permitted to perform or fund abortions in cases of rape or incest or genetic defect. In such situations, the states' aid, whatever its justification, would amount to the destruction of "persons" (in the statutory sense) and thus violate the statute. There is not general doctrine that a state may encourage the destruction of persons for "compelling" reasons.

The majority report remains silent on these important questions. The report states that the courts should decide these matters on a case-by-case basis. It is my view that it is irresponsible to pass this bill without the Senate stating its own view on whether this bill is likely to result in the substantial curtailment of state authority over abortion funding. Leaving such matters to the discretion of the courts runs counter to the spirit of those who offer this legislation as an antidote to judicial activism.

Furthermore, when legislating, it is irresponsible to leave basic questions on state authority like these unanswered:

1. Would S. 158 prohibit the states from funding clinics and hospitals that distribute drugs or devices that interfere with the development of the fertilized egg, such as IUDs and morning-after pills?
2. Would the state have a "compelling interest" in funding abortion in the case of rape that would override the fetus' protection as a person under the Fourteenth Amendment?
3. Would the state have a compelling interest in funding abortions in the case of incest?
4. Would the state have a compelling interest in funding an abortion in the case of a detectable genetic disease of the fetus?
5. Would the state have a compelling interest in funding abortions when the life of the mother was at stake?

These are serious questions. The answers to them can profoundly affect state and local decision-making over basic health and safety issues. Those who support such state authority should not take these questions lightly.

S. 158 AND REMOVAL OF LOWER FEDERAL COURT JURISDICTION

Section 4 of S. 158 would remove the jurisdiction of the lower federal courts over certain types of abortion cases. The reason that has been cited by advocates of S. 158 for inclusion of this provision in the bill is that a limitation of the available remedies in federal court will encourage prompt review of the statute in the Supreme Court. A report issued by Senator East's office entitled Questions and Answers on S. 158 offers the following explanation for the provision:

> *Question.* Why should Congress be so concerned to prevent review of the Act by lower federal courts?
>
> Answer. The anti-injunction clause of the bill is designed to prevent lower federal courts from interfering with the

> enforcement of the Act. An example of this problem arose in Judge Dooling's injuction against the Hyde Amendment respecting federal funding of abortion. That injunction remained in effect for approximately two years before the Supreme Court reviewed the case and upheld the legislation. The anti-injunction provision of the bill assures the continued enforcement of the State law outlawing abortion until the Supreme Court has had an opportunity to interpret it.

Section 5 of S. 158, as amended, contains a provision that directly addresses this concern for speedy review by the Supreme Court. It specifically provides for an expedited review of the legislation by the Supreme Court. This addresses the primary concern articulated by those who supported the section of S. 158 which limits lower federal court jurisdiction. In my view, it addresses those concerns in a manner that is less controversial and less threatening to our system of government.

Many questions have been raised about the constitutionality and wisdom of attempts to limit lower federal court jurisdiction. Several leading constitutional scholars have raised serious concerns about the specific provision contained in S. 158.

Professor Charles Alan Wright of the University of Texas Law School observed in his letter to the Subcommittee:

> I think Congress has very sweeping power over the jurisdiction of the inferior courts . . . At the same time, I feel certain that Congress must exercise its power over federal jurisdiction, as it must its other powers, in a fashion consistent with constitutional limitations . . . Under such cases as *Hunter* v. *Erickson* and *United States* v. *Klein,* I do not think Congress has authority to close the federal court door in suits arising under laws that prohibit, limit or regulate abortions, while allowing access to federal court for challenges to statutes that permit, facilitate, or aid in the financing of abortions.

Even if Congress has the power to remove lower federal court jusrisdiction over constitutional matters, it must do so neutrally. It would have to remove lower federal court jurisdiction over all abortion cases. The provision in S. 158 effectively keeps out litigants on one side of the issue and allows in litigants from the other. Challenges to statutes that restrict or prohibit abortions would not be permitted to be brought in the lower federal courts. Attempts to enjoin abortions from occurring, or challenges to statutes that fund abortions, could be brought in the lower federal courts.

This aspect of Section 4 of S. 158 not only raises constitutional questions, but it underscores the true intent of the provision. The provision is designed to restrict the jurisdiction of the lower federal courts so as to prevent them from enforcing certain rights fully. In my view, in such an instance, the Congressional attempt to remove lower federal court jurisdiction is violative of that provision of the Constitution from which the right flows.

Additionally, we ought to consider the public policy implications of attempts to remove constitutional issues from the jurisdiction of

the lower federal courts. My own view is that while the creation of the lower federal courts was initially within the discretion of Congress, the growth of our nation has significantly altered the role of the lower federal courts in our federal system. Certainly, in 1789 the Supreme Court was able to handle its role as the primary vindicator of federal rights.

But the Supreme Court case load has increased dramatically since the birth of our nation, and this has had significant consequences for the lower federal courts. For a litigant who desires to vindicate his federal constitutional rights, access to the lower federal courts is an essential element in giving those rights true meaning. It is my view that we do great damage to our structure of government if we deny the central role of the lower federal courts in modern times.

It is because of these arguments that I think we should use the Congressional power to limit the jurisdiction of the federal courts over constitutional issues quite sparingly. If it is invoked at all, and I personally do not think that it should be, it should only be utilized where no other alternative is available and where it can be shown to have results that are helpful to society.

Because of the expedited Supreme Court review provision now contained in S. 158, I believe that a large portion of the rationale in favor of a section to remove lower federal court jurisdiction has been removed. Furthermore, I believe the section itself is unconstitutional and I oppose it on that basis.

THE INTENT OF THE FOURTEENTH AMENDMENT

There is an implication in the majority report that the Fourteenth Amendment was intended to protect the unborn. While it is clearly appropriate for Congress to state its opinion on whether the Fourteenth Amendment ought to apply to the unborn, that is far different from suggesting that the framers of the Fourteenth Amendment intended for the amendment to apply to the unborn.

Distinguished historians who appeared before the Subcommittee addressed this issue. It is clear from their testimony that during the long debate on the Fourteenth Amendment in the 39th Congress, and during all debates in the states on the ratification of the Fourteenth Amendment, there was never any explicit mention made of the unborn, nor any reference to the issue of abortion. This is undisputed.

In his testimony before the Subcommittee, Professor Carl Degler of Stanford University disputed the thesis propounded by Professor Witherspoon with regard to this finding. Professor Degler stated:

> Professor Witherspoon then links this discussion of the amendments concerned with the protection of life to the laws then being passed in a number of states to limit abortion. He professes to see in these state laws an extension of the concern for the freedom of the former slaves. Yet there is no mention in the discussion in Congress of these laws, nor is there any reference to abortion or to the unborn in the course of the debate on the Fourteenth Amendment.

In his testimony before the Subcommittee, Dr. James Mohr of the University of Maryland at Baltimore stated:

> I am also troubled by the phrase "all human beings." The Fourteenth Amendment does not, in fact, refer to human beings, but rather to "citizens" and "persons." I know of no direct evidence that the framers of the Fourteenth Amendment ever intended that either of these words should apply to the preborn.
>
> None of the leading historians of the Reconstruction Era whom I was able to contact, including several who have done painstaking research both on the drafting and on the ratification of the Fourteenth Amendment, knows of any.
>
> The rights of the preborn were simply not at issue. Moreover, there is compelling evidence that they were never intended to be.

Finally, the Congressional Research Service has issued a report entitled, "Examination of Congressional Intention In The Use Of The Word 'Person' In the Fourteenth Amendment: Abortion Considerations." The report concludes with this analysis:

> A reading of the legislative history of the Fourteenth Amendment does not reveal any references to the unborn. There are no statements in the debates of the 39th Congress indicating that the framers ever considered the unborn in connection with the Amendment's protection . . .
>
> Beyond this examination of the legislative history, one enters the realm of speculation and theorizing concerning what the framers of the Fourteenth Amendment actually intended when they used "person" in the langage of this Amendment.

The record created by the Separation of Powers Subcommittee is very clear on this point. The majority report may express the views of the majority of the Subcommittee on the coverage of the Fourteenth Amendment, but that should be distinguished from the concrete evidence available to the Subcommittee on the intent of the framers of the Amendment.

SCIENTIFIC TESTIMONY ON S. 158

The majority report implies that there was substantial agreement among scientific witnesses on the question of when an individual human life begins. The report attempts to minimize the diversity of views expressed by the scientific witnesses. I would simply suggest that the testimony of the scientific witnesses underscored the real complexity of the issues involved.

Dr. Lewis Thomas, Chancellor of the Memorial Sloan-Kettering Cancer Center and formerly Dean of Yale Medical School told the subcommittee:

> The question as to when human life begins, and whether the very first single cell that comes into existence after fertilization of an ovum represents, in itself, a human life, is not in any real sense a scientific question and cannot be answered by scientists. Whatever the answer, it can nei-

ther be verified nor proven false using today's scientific knowledge.

It is therefore in the domain of metaphysics: it can be argued by philosophers and theologians, but it lies beyond the reach of science.

Such a cell does not differ, in its possession of all the genes needed for coding out a whole human being, from any of the other, somatic cells of the body, nor indeed from any of the billions of human cells now being cultured in research laboratories all around the world. The difference is that the progeny of a fertilized ovum develop systems for differentiation and embryogenesis; we do not yet understand this system. But the fact remains that all human cells contain the same full complement of human DNA.

There are two criteria that I can think of for determining the stage of an embryo's development when the essential characteristic of a human being begins to emerge. One is the start-up of spontaneous electrical activity in the brain; this could be interpreted as the beginning of human life just as we take the cessation of such activity to indicate the end of human life. The second is the appearance of those molecular signals (antigens) at the surfaces of the embryonic cells which are the unequivocal markers of individuality and selfness. There is, in this immunological sense, a stage in embryonic development at which the fetus becomes a specific individual.

This is as far as I can see science making a contribution to the question of the point at which an embryo becomes a human self. It is a limited contribution at best, and tells us nothing about the "personhood" of a single cell.

Dr. Frederick Robbins, President of the Institute of Medicine of the National Academy of Sciences, wrote the following to the Subcommittee:

Even the most elementary understanding of biology suggests that, from the moment of conception, the human zygote is biologically alive in that it is capable of dividing and growing. That there is biological "life" is not in dispute for the fertilized egg or for other cells of human origin. What is at question is at what point the growing mass of cells—that is, the product of conception—takes on the attributes of "personhood." That is, at what point in the sequence of development do we choose to say that the organism is a person, and therefore, of special value? Clearly, the answer to such questions rests not on scientific judgments, but solely on what we choose to define as the qualities and attributes of being a person. Is it the capacity to sustain life on one's own? To think or reason? To feel? Or is it some intangible quality that we cannot quite specify?

In my view, it is social, philosophical, and religious values that provide the guidelines for making such determinations, not science. Science can answer such questions as, for example, when does an embryo's nervous system develop the capacity to sense pain, but science cannot

answer the question of whether that particular developmental attribute therefore makes that organism a person. Science can outline the steps of prenatal brain development, but it is the broader society that evaluates such information and chooses to label one stage of life as "personhood" and another as not.

Dr. James Ebert, President of the Carnegie Institution, stated in this letter to the Subcommittee:

> I do not believe that the statement in Chapter 101, Section 1 can be supported. This Section reads "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement embodies and expresses a dogmatic and dangerously narrow definition of "actual human life", for human life cannot properly be said to begin at any single moment fixed in time.
>
> Indeed, human life is a continuum, proceeding generation after generation. The eggs contained in the ovary of a very young girl ripen and are shed over her reproductive lifetime. These eggs like the other cells of the woman's body are living. The sperm maturing in the human male are no less alive. The union of living egg and living sperm results in a living zygote, no less alive than its parental predecessors, but differing from both of them. But the zygote is but one fleeting morphologic and physiologic entity in the panorama that is human development. When does "personhood begin?" In my opinion, the question cannot be answered scientifically. Some might argue for the moment of conception, others for the moment at which the heart first begins to beat, or the face takes shape, or the brain begins to function. Some physiologic functions do not come into play until after birth; and as Peter Medawar has written "birth is a moveable feast in the calendar of development."

Dr. Robert Ebert, President of the Milbank Memorial Fund and former Dean of Harvard Medical School, wrote the Subcommittee as follows:

> I know of no ". . . current medical and scientific data . . ." that supports the contention ". . . that human life in the sense of an actual human being or legal person begins at conception." Life in the biologic sense does not begin the moment that an ovum is fertilized by a sperm, since both have life prior to that event.
>
> In my view, the question of human personhood is neither a medical nor a scientific question. In one sense it is a philosophical question which can be debated endlessly and has to do with how one defines a person and "self." But in the context of the present legislative proposal, I believe it can best be described as a religious question.

Dr. Clifford Grobstein, Professor of Biological Science and Public Policy Science and former Dean of the School of Medicine at the University of California at San Diego listed for the Subcommittee

what he considered to be the consensus views of science and then concluded:

> The implication of these statements is that at fertilization a new generation in a genetic sense is constituted, but that two weeks later a new and stable biological entity or individual is not yet certainly present. Exactly when such an entity arises is not known for certain in the human species but it is probably not many days later. The development of such an entity, therefore, is gradual and involves a number of transitions and stages. No single moment nor event is known scientifically to mark its initiation, rather it emerges steadily out of the developmental process as an additional characteristic beyond being alive and biologically human.
>
> Returning to the language of *Roe* v. *Wade* and S. 158, it would be scientifically more accurate to say that "human life does not begin with fertilization (conception) but hereditary individuality does. Individuality in the sense of singleness and wholeness, however, cannot be said to be established until more than two weeks after fertilization."

And finally, the National Academy of Sciences forwarded to the Subcommittee the following resolution passed by its membership at its annual meeting on April 24, 1981 concerning the original text of S. 158:

> *Resolution.*—It is the view of the National Academy of Sciences that the statement in Chapter 101, Section 1, of the U.S. Senate Bill S. 158, 1981, cannot stand up to the scrutiny of science. This section reads "the Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in S. 158 that the term "person" shall include "all human life" has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a "person" must remain a matter of moral and religious value.

CONCLUSION

I cannot support S. 158 because I believe it is an attempt to end run the constitutional amendment process. The legislation undermines the central role of the judiciary as it has existed in this country since *Marbury* v. *Madison*. The theory underlying the bill envisions a system of government where constitutional protections are illusory and where the basic protections of the Constitution can be diluted or eliminated by simple majorities of the Congress. In my view, the legislation runs counter to principles of judicial independence and the separation of powers that lie at the very heart of our constitutional system.

Additionally, I am deeply concerned that S. 158 will lead to an erosion of the central role of the states in our federal system. Not only could the theory behind the bill lead to an expanded federal role in almost every area of the law, but S. 158 eliminates a state's

authority to set policy on state funding of abortions and distribution of contraceptives (e.g. IUD's and morning after pills) at state supported hospitals.

Finally, I believe the provision eliminating lower federal court jurisdiction over certain abortion cases is unconstitutional. I personally am opposed to efforts to remove federal court jurisdiction over constitutional cases. However, even if Congress has the power to remove lower federal court jurisdiction over constitutional cases, it must do so in a neutral, even-handed manner. Section 4 of S. 158 effectively closes the federal courthouse to citizens on one side of the issue, while keeping it open to citizens on the other. It, therefore, represents an unconstitutional exercise of Congress' power to control the jursidiction of the lower federal courts.

O