PLAYING GOD: WHY THE THIRTEENTH AMENDMENT PROTECTS HUMAN EMBRYOS FROM STEM CELL RESEARCH

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Speak up for those who cannot speak for themselves

I. INTRODUCTION

It has been almost forty years since the Roe v. Wade decision, and questions concerning the legal rights of the unborn still remain at the forefront of political debate in this country. The focus of this debate centers on the determination of when legal rights attach to human beings. In Roe v. Wade, Justice Blackmun held that the unborn are not considered “persons” under the terms of the Fourteenth Amendment. The United States Supreme Court has shown great reluctance in analyzing when human life begins, but historically, the grant of legal rights to human beings has not been solely based on humanity. Fundamentally, an unborn child should not have to be granted

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1. Proverbs 31:8 (emphasizing the need for natural persons to represent and fight for rights belonging to certain forms of life that cannot voice their own struggles).

2. Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy included a woman’s decision whether or not to terminate her pregnancy).


5. Id. at 159 (“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.”).

legal personhood to be called a “human being” because independent from legal personhood, humanity grants all humans certain constitutional rights. The difference between these two concepts lies in the objective and subjective natures of their existence.7 The right of legal personhood is “defined by law” and its meaning changes as society develops, but the term “human being” is biological and static; therefore, these distinct terms are not interchangeable and should be analyzed separately.8 This comment focuses on the question of the humanity of In-Vitro Fertilization (IVF) embryos9 and the consequential constitutional protections available to them based on their biological nature as humans and not their legal personality.

The issues analyzed in Roe v. Wade only scratched the surface of the issues surrounding the legal rights of the unborn, and many issues that we face today were not even contemplated in the 1973 decision.10 In the past decade alone, the last two Presidents of the United States have fueled this national debate through Executive Orders regulating the legality of human embryonic stem cell research. President George W. Bush, through a 2001 national address11 and a 2007 Executive Order,12 prevented the Secretary of Health and Human Services from creating human embryos “for research purposes or destroying, discarding, or subjecting to harm a human embryo or fetus.”13 As recent as 2009, President Obama issued an Executive Order that expanded the extent to which the United States federal government could fund and perform human embryonic stem cell research.

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8. Id.
9. Referred to as “embryos” in the remainder of this article.
10. McDonald, supra note 7, at 1360-61 (establishing that the ethical issues we face today concerning the unborn not only include Assisted Reproductive Technology, but also Embryonic Stem-Cell Research and Cloning).
11. President George W. Bush, Remarks at National Address at The Bush Ranch on Stem Cell Research (August 9, 2001) (transcript available at http://usgovinfo.about.com/blwhrelease16.htm.) (President Bush announced, “federal funding would be made available for human embryo stem cell research, but only for research on certain existing human embryo stem cell lines, ‘where the life and death decision has already been made.’”).
12. Exec. Order No. 13435, 3 C.F.R. 34591-34593 (2007) (President Bush directed the testing of stem cells to be consistent with certain principles that included: “human embryos and fetuses, as living members of the human species, are not raw materials to be exploited or commodities to be bought and sold”).
13. Id.
research. President Obama’s 2009 Executive Order revoked both Bush’s 2001 address and 2007 Executive Order, and gave the National Institute of Health (NIH) the power to implement guidelines that permit human embryonic stem cell research under certain conditions. The National Institute of Health implemented specific parameters allowing “human embryonic stem cells [to] be used in research using NIH funds, if the cells were derived from human embryos that were created for reproductive purposes, were no longer needed for this purpose, were donated for research purposes, and for which [certain enumerated] documentation . . . can be assured.” These guidelines provided an outlet for couples who received In-Vitro Fertilization treatments and were left with unused embryos.

Subsequently in 2009, a frozen embryo, Mary Scott Doe, brought suit in the United States District Court of Maryland, individually and on behalf of other frozen embryos against the President of the United States. The petitioners claimed, “President Obama’s Executive Order . . . which removes some of the prior limitations on federally-funded human embryo stem cell research, violates the frozen embryos’s constitutional rights to due process, equal protection, and freedom from involuntary servitude under the Fifth, Fourteenth, and Thirteenth Amendments.” The District Court held that the plaintiffs lacked standing as persons to bring a constitutional claim. The Fourth Circuit Court of Appeals affirmed this decision, and ultimately, the United States Supreme Court denied certiorari in 2011.

*Doe v. Obama* hinges on the peculiarity of human existence

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15. *Id.*
17. *Id.* at 32,174.
19. *Id.* at 436. The full list of defendants include: “Charles E. Johnson, in his official capacity as Acting Secretary of the Department of Health, and Raynard S. Kingston, in his official capacity as Acting Director of the National Institutes of Health (“NIH”) (collectively referred to as the “Government”).
20. *Id.* at 437.
21. *Id.* at 441.
and the consequential burden that scientific technology places on United States politics, adding fire to the debate over the constitutional rights of the unborn. This comment focuses on the applicability of the Thirteenth Amendment raised in Doe v. Obama, and the issue of whether the Thirteenth Amendment protects human embryos against stem cell research through its Enforcement Clause. Commentators argue that Roe v. Wade and its progeny cannot continue to provide a sweeping precedent in disputes involving the unborn, and as In-Vitro Fertilization increases the amount of embryos in this country, the federal government must step forward and re-analyze the legal rights of the unborn. Although the personhood debate continues to divide this country, this Comment proposes that Congress recognize the humanity of IVF embryos without adding fuel to the debate. Following the trend started by the Tennessee Supreme Court in Davis v. Davis, this proposal follows the premise that the protection of certain fundamental rights is available to human embryos not through personhood, but through their humanity.

A reading of the express language in the Thirteenth Amendment provides that the protections against slavery and involuntary servitude are not restricted to persons alone. This


25. See Lisa S. Roy, Roe and the New Frontier, 27 Harv. J.L. & Pub. Pol’y 339, 344 (2003). “No Supreme Court Justice has affirmed the correctness of Roe’s personhood analysis as an original matter or applied it outside the bounds of abortion doctrine,” but courts still inadequately apply Roe in outside areas of the law that the Supreme Court did not intend. See also Webster v. Reprod. Health Servs., 492 U.S. 490, 538 (1989). In his dissent, Justice Blackmun expresses that “the plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with Roe explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman’s right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State.” Id. (Blackmun, dissenting).


28. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (creating a novel legal status giving special respect to human embryos because of their potential for life).
broad protection gives an opportunity for viable human embryos to have Thirteenth Amendment protections.\footnote{Brief of Petitioner-Appellants at 26 Doe v. Obama, 631 F.3d 157 (4th Cir. 2010) (No. 10-1104).} The framers’ intent behind the Thirteenth Amendment was to ensure the illegality and unconstitutionality of slavery and involuntary servitude for all human beings.\footnote{BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART I 69 (1970). “Justice and Humanity, self-respect and decency, all demand that the lingering infamy shall be obliterated from the page it blackens.” (During the Senate debate for the Thirteenth Amendment, Representative Henry Wilson discussed the still-existing Slave Acts that must be abolished through an Amendment to the Constitution to protect all humanity.)} Consequentially, the framers reiterated the importance of the fundamental rights recognized in the Declaration of Independence: “life, liberty, and the pursuit of happiness.”\footnote{THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).}

This comment argues that the Thirteenth Amendment protects human embryos from involuntary servitude, and the donation of human embryos to the National Institute of Health for stem cell research violates the Thirteenth Amendment. Additionally, the United States Congress should legislatively protect human embryos by recognizing their humanity and granting them the inalienable Thirteenth Amendment protections. Part I of this Comment provides an overview of In-Vitro Fertilization, embryonic stem-cell research, federal abortion law, and state laws that relate to the issues of current legal rights for human embryos. In Part II, the controversies surrounding human conception are discussed by addressing the various theories that scholars contend amounts to conception. In Part III, this Comment analyzes the reasons why the Thirteenth Amendment was drafted and ratified, gives an overview of case law and legislation that has come about through the Thirteenth Amendment, and finally, argues why involuntary servitude includes stem cell research. In Part IV, this Comment proposes the inclusion of stem-cell research as a method of involuntary servitude, so that Congress, through legislation, can expressly protect human embryos.

II. BACKGROUND

Analyzing the science behind the creation and destruction of human embryos, and subsequently discussing the current methods used by states in analyzing human embryos provides a
necessary background to arguing that embryos are human beings with Thirteenth Amendment protections.

A. In-Vitro Fertilization (IVF)

Currently in the United States, there are over 440 clinics that provide couples with assisted reproductive technology to treat infertility. In particular, women use these nation-wide clinics to achieve pregnancy through a process called In-Vitro Fertilization. In-Vitro Fertilization involves “ovulation induction, egg retrieval, fertilization, and embryo transfer.” Embryonic stem cell research performed by the NIH depends on the availability of an excess amount of embryos that are not used for implantation in In Vitro Fertilization. These excess embryos are available when the number of embryos chosen for implantation is less than the total amount of embryos fertilized.

First, the number of eggs retrieved from a woman depends upon her age and accessibility of the eggs, but “on the average, [eight] to [fifteen eggs] are retrieved per patient.” This high number of eggs creates the most favorable opportunity for a patient to become pregnant because the higher number of eggs, the greater the probability of fertilization. Secondly, once the eggs are retrieved, fertilized with sperm, and chosen for implantation, the patient may have “excess embryos of sufficient quality.” Patients can choose from a number of outlets for what to do with the remaining embryos, but, “cryopreservation of excess embryos [has] become the norm.” Cryopreservation involves the procedure of freezing and preserving the embryos in

34. See note 45.
36. Id.
37. Id.
38. Clemmens, supra note 33, at 97.
liquid nitrogen. In the United States, the occurrence of successful implantation and birth of children from embryos that are frozen for up to ten years and longer is not unthinkable. Also, cryopreservation allows other patients, who did not have successful IVF treatments, to potentially adopt another patient’s embryos. Currently in the United States, the estimated amount of cryopreserved human embryos is 500,000. Cryopreservation is not the only option for patients who choose IVF treatment. Certain states allow patients to discard their embryos after IVF is complete or, with consent, they may donate their embryos to research. Particularly, the National Institute of Health accepts donation of these embryos for stem cell research.

**B. Embryonic Stem Cell Research**

The 2009 NIH Guidelines on Embryonic Stem Cell Research, drafted in response to President Obama’s 2009 Executive Order, provided the mechanisms and procedure for IVF patients to donate their unused embryos to stem cell research. Participants must understand the procedure and consequences of embryonic stem cell research before giving informed consent to donate embryos. Critical to giving informed consent is understanding that IVF patients will not be compensated for their donation, and that the donation will subsequently cause the embryos to be destroyed in the research process.

Embryonic stem cell research begins with the derivation process—a process that requires the killing of human embryos.
Derivation requires scientists to remove the inner cell mass of the human embryo, and this is a mandatory procedure because the inner cell mass contains the embryonic stem cells. Embryonic stem cells are the prime target of this research, and scientists must remove the inner cell mass in order to manipulate the stem cells in various conditions. Embryonic stem cells are “undifferentiated cells . . . that are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers.”

Once scientists derive the embryonic stem cells, the scientists culture the cells under conditions that will allow the cells to divide for months, possibly years. This scientific feat allows researchers to control and monitor the way the stem cells differentiate. They can also generate specific types of cells, such as heart muscle cells, blood cells, and nerve cells. Researchers can then use these specific cultured cells to examine possible treatments for diseases, injuries, and disorders that occur in the human body. However, this scientific research process begins with the destruction of already existing human life.

C. Relevance of Abortion Law

Abortion law is highly relevant to a discussion of the humanity of embryos. This section provides an overview of Supreme Court decisions on this issue. In the 1973 Roe v. Wade decision, the Supreme Court held that a woman’s choice to terminate her pregnancy was included in the fundamental right to privacy. The Court acknowledged, however, that the right protecting the pregnant woman’s interests could not exist in a vacuum, but must be balanced against the state’s interest in safeguarding health and medical standards and in protecting

50. Id. at 12.
52. Id.
54. Id.
56. Id.
potential human life."\textsuperscript{58} This balancing test depends on the stage of the unborn fetus’s development and hence its viability.\textsuperscript{59} In \textit{Roe}, the state of Texas asserted that life began at conception in the womb.\textsuperscript{60} Therefore, Texas had a compelling interest from the moment life began to protect the unborn child apart from the Fourteenth Amendment.\textsuperscript{61} In his opinion, Justice Blackmun refused to answer the question on when human life begins, but stated that a woman’s right to privacy may be limited by a compelling state interest.\textsuperscript{62} Nevertheless, the Supreme Court concluded that the facts in \textit{Roe} did not present a case in which to justify the limitation on a woman’s right to privacy.\textsuperscript{63} Once Justice Blackmun denied Texas this overarching compelling interest to protect the life of the unborn, he was persuaded to rule, “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”\textsuperscript{64,65} Though he ruled out legal personhood, Justice Blackmun acknowledged that the viability of fetuses at a certain stage in the pregnancy outweighs the mother’s interest to privacy.\textsuperscript{66} Additionally, the United States Supreme Court in \textit{Roe} did not affirmatively rule when human life begins.\textsuperscript{67}

Similarly, in \textit{Webster v. Reproductive Health Services},\textsuperscript{68} Missouri passed a law stating that human life began at conception, thus prohibiting any government-employed doctor from aborting a viable fetus.\textsuperscript{69} In 1989, the Supreme Court upheld

\textsuperscript{59} \textit{Roe v. Wade}, 410 U.S. 113, 163 (1973) (“With respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester. . . . With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.”).
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.} at 162-63.
\textsuperscript{63} \textit{Id.} at 164.
\textsuperscript{64} Justice Blackmun defined the unborn to mean a “human being from the time of conception until it is born alive.” \textit{Id.} at 159 n.55.
\textsuperscript{65} \textit{Id.} at 158.
\textsuperscript{66} \textit{Roe}, 410 U.S. at 155.
\textsuperscript{67} \textit{Id.} at 159 (“We need not resolve the difficult question of when life begins.”).
\textsuperscript{68} 492 U.S. 490 (1989).
\textsuperscript{69} \textit{Id.} at 501.
Missouri’s restrictions that prohibit government employees from assisting in non-therapeutic abortions, and also restricted the use of public facilities to perform non-therapeutic abortions.  
Importantly, the Supreme Court used the “viability” framework created in *Roe v. Wade* to uphold part of Missouri’s statute that required doctors to test for viability at after twenty weeks of pregnancy because it furthered “the State’s interest in protecting potential human life.”

Subsequently in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the United States Supreme Court retained the essential holding in *Roe v. Wade*, and the Court divided the holding into three fundamental parts:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Although the Court admitted that opposition to *Roe* had increased since 1973, the Court gave a lengthy analysis of *stare decisis* and concluded that *Roe* did not have to be overruled. The Court did agree to expand the restrictions placed on the performance of abortions because continuing medical advances had increased the viability of the unborn.  

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70. *Id.* at 511.
71. *Id.* at 493.
73. *Id.* at 846.
74. *Id.* at 855-60.
75. *Id.* at 878 (the Court analyzing "the State’s profound interest in potential life" and employing the undue burden test, designed to invalidate any state law that places a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” This undue burden test was complemented with allowable State measures that regulate and restrict abortions to protect potential life).
Casey did recognize the state’s increasing interest to protect potential life, the Court in Casey or in future cases did not discuss the question of fetal personhood, or the more fundamental question of when human life begins.\textsuperscript{76}

The United States Supreme Court decisions of Roe v. Wade and its progeny should be limited to the circumstances that the cases addressed. These decisions essentially created a balancing test in abortion disputes between interests of the mother of the unborn and an individual state’s interests in protecting the unborn.\textsuperscript{77} This balancing of interests between a mother and an unborn child are not at issue in this comment because human embryos “exist outside of [a woman’s] body . . . and do not implicate a woman’s interest in her ‘bodily integrity.’”\textsuperscript{78} Currently, IVF patients and their partners do have the ultimate control and interest in the existence of their excess embryos,\textsuperscript{79} but if embryos are deemed human beings, then the Thirteenth Amendment’s protections for embryos will outweigh any personal interests of the patient.\textsuperscript{80} Secondly, the Court made its conclusions on the basis that the unborn did not have legal personhood and stressed, “humanity of the embryo had no relevance to the conclusion that Fourteenth Amendment rights do not extend to fetuses.”\textsuperscript{81} Because the Court focused its decision on the basis of legal personhood and not on the basis of humanity, Roe v. Wade would be inapplicable if embryos can be legislatively recognized as human life. If embryos are seen as human beings, then the Thirteenth Amendment grants protections to them without the threshold requirement of legal personhood.\textsuperscript{82}

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\item \textsuperscript{77} McDonald, supra note 7, at 1370.
\item \textsuperscript{78} McDonald, supra note 7, at 1370; See Kass v. Kass, 91 N.Y.2d 554, 563 (1998) (recognizing that the implications of Roe v. Wade concerning a “woman’s right of privacy or bodily integrity in the area of reproductive choice” does not apply in embryo disposition cases).
\item \textsuperscript{79} See Kass, 91 N.Y.2d at 563.
\item \textsuperscript{80} BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART I 53 (McGraw Hill Text ed. 1970). “[Every human] has the right to live, and live in a state of freedom.” (Representative Ingersoll in the Congressional Debate of the Thirteenth Amendment proclaims the natural right to life for all human beings.).
\item \textsuperscript{81} Roe v. Wade, 410 U.S. 113, 159 (1973).
\item \textsuperscript{82} See McDonald, supra note 7, 1381 (noting that the requirement of being a “post-natal” human being may not be necessary for the unborn to have certain fundamental rights).
\end{itemize}
next section, a comparison of state legislation shows the lack of protections and rights granted to human embryos and consequentially the allowance of stem cell research.

**D. State Statutes Concerning Human Embryos**

In a study completed in 2005, only twenty-nine states had their own laws determining the use, protocol, and distribution of human embryos. The issues of disposal, cryopreservation, adoption, and donation to research are relevant to a state’s determination of the embryo’s legal status. Out of the state legislatures that address these issues, only the Louisiana legislature grants human embryos the legal status of “juridical persons.” The status of juridical persons disallows any individual ownership, sale, donation, or disposal of human embryos after the conclusion of IVF. Also, Louisiana is the only state that specifically addresses the prohibition of stem cell research using IVF embryos. If a couple does not want to cryopreserve unused embryos from IVF for their own future implantation, the only available option for the couple is “adoptive implantation.” In this situation, the couple renounces their parental rights, and subsequently another couple may adopt the cryopreserved embryo. Louisiana does not allow the creation, transfer, or usage of human embryos in any way other than through the process of IVF. These restrictions placed on stem cell research and general usage of human embryos are contrary to the laws and regulations of such states as New Jersey, New York and California.

In 2004, New Jersey became the first state to “appropriate

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88. *Id.* See also Noonan, supra note 84, at 489.

funds specifically for . . . embryonic stem cell research.” Similar to the 2009 Executive Order by President Obama that allows for embryonic stem cell research, New Jersey passed an Act that allowed patients, who received IVF treatments, the choice to donate their unused embryos to stem cell research with written consent. Subsequently, both California and New York passed laws to fund embryonic stem cell research. California, similar to New Jersey, requires the patient’s consent to donate their unused embryos for stem cell research and restricts the sale of embryos for research. In contrast, New York state law does not require a patient’s informed consent when donating unused embryos. Additionally, a patient may be compensated for the donation of eggs used for embryonic stem cell research. Other states that allow embryonic stem cell research include: Connecticut, Illinois, Iowa, Maryland, and Massachusetts. In states such as New Jersey, Massachusetts, Connecticut, and California, if a patient does not wish to donate their unused embryos to stem cell research, the patient may cryopreserve their embryos, donate them to another person, or destroy their embryos. Without concrete federal legislation, these inconsistencies in individual state embryonic law will continue to increase and the vulnerable legal rights of human embryos will continue to be undermined.

E. Relevant State Supreme Court Decisions

The first state supreme court to hear a case concerning the legal status of human embryos was Tennessee in Davis v. Davis. In 1992, the Tennessee Supreme Court analyzed whether cryopreserved human embryos were persons or property under state or federal law pertaining to a divorce dispute. The issue litigated in this case was a question of custody and disposal of the

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93. Stem Cell Research, supra note 86.
94. Id.
96. Stem Cell Research, supra note 86.
97. Noonan, supra note 84, at 490.
98. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); See Noonan, supra note 84, at 492.
99. Davis, 842 S.W.2d at 589, 594.
embryos. The *Davis v. Davis* court analyzed federal law consistent with *Roe v. Wade* in ruling that human embryos are not persons by law. However, the court did not hinge its decision on this precedent.

The court analyzed three possible legal dispositions that human embryos could hold: (1) persons, (2) property, or (3) “special respect” category. The court ruled that cryopreserved human embryos were neither persons nor property, but “occupied an interim category that entitled them to special respect because of their potential for human life.” The decision was based on a report by the American Fertility Society, which analyzed the sensitive nature of human embryos based on the fact that they are composed of living cells. The report concluded that “special respect is necessary to protect the welfare of potential offspring . . . [and] creates obligations not to hurt or injure the offspring who might be born after transfer [by research or intervention with a preembryo].” Although the Tennessee court’s analysis focused on the potential for human life, its recognition and approval of this “special respect” category showed judicial awareness of the fact that human embryos are not property even though they lack legal personhood, and that they deserve protections against harm because of their humanity.

Conversely, in 1998, the New York Court of Appeals ruled that cryopreserved embryos are not persons under the law for

100. *Id.* at 589.
101. *Id.* at 595, 597.
102. *Id.* at 596.
103. *Davis*, 842 S.W.2d at 596.
104. *Id.* at 597 (quoting REPORT OF THE ETHICS COMM. OF THE AMERICAN FERTILITY SOCIETY, 53 FERTILITY & STERILITY 6 (1992)).
105. *Id.* at 596.
106. Even though the court recognized the embryo’s “potential for human life,” the court concluded that the couple had a primary interest in the “decision-making authority concerning the disposition of the embryos.” Here, the husband was found to have a fundamental right not to procreate without his consent, so the wife could not solely consent on the use or adoption of the cryopreserved embryos to another couple. *Id.* at 597.
107. *Kass v. Kass*, 91 N.Y.2d 554 (1998) (holding that an individual court cannot force a person to become a parent against their will. In a divorce dispute, the wife wanted to take possession of the embryos, but the couple had a pre-existing written agreement that retrieval could not occur without the consent of both parties. The agreement also stated that if the couple could not agree on the disposition of the embryos, the couple wanted to donate their unused cryopreserved embryos to science).
constitutional purposes; therefore, the donation of cryopreserved embryos for embryonic stem cell research is not unconstitutional. In *Kass v. Kass*, the New York court affirmed the validity of a couple’s agreement giving them authority over the disposition of the cryopreserved embryos. The court’s decision in this opinion corresponds to the movement of certain states statutorily allowing patients of In-Vitro Fertilization to donate their unused cryopreserved embryos to science for stem cell research.

These courts did not analyze Thirteenth Amendment rights in deciding the disposition of human embryos, but the cases illustrate the struggles of state courts in attempting to resolve fundamental questions concerning the status and rights of human embryos. Now, more than two decades later after *Davis*, with an increased awareness of the ethical issues of stem cell research, constitutional amendment rights can be the basis for arguing that human embryos deserve more protection than mere property. The protections under the Thirteenth Amendment can potentially rectify the dispute that exists between the states. Furthermore, the Amendment was created exactly for the purpose of providing protections to all human beings, and Congress can use the Amendment to afford protections to human embryos.

III. CURRENT STATE MOVEMENTS CONCERNING THE UNBORN

In November 2011, Mississippi voters rejected a Pro-Life Initiative that would have amended the Mississippi Constitution to declare that human life begins at fertilization. The main goal of a “Personhood Amendment” is to give the unborn the status of a legal person, granting them the Fourteenth Amendment right to due process, which would not only overrule *Roe v. Wade*, but also limit numerous forms of research and contraceptives.
Since *Roe v. Wade* legalized abortion under the protections of the constitutional right to privacy, if this Mississippi referendum had passed “it was virtually assured of drawing legal challenges” because of the conflicts that exist with the 1973 Supreme Court decision. Also, possible effects of this legislation would have “made birth control, such as the morning-after pill or the intrauterine device, illegal. [The ballot also] would have deterred physicians from performing in vitro fertilization because they would fear criminal charges if an embryo doesn’t survive.”

Similarly, other states such as Florida, Virginia, Georgia, Wisconsin, and Colorado have goals to initiate and pass legislation that would grant legal Personhood to the unborn by declaring life begins at conception. Importantly, these “petition drives are happening across the country,” and individual state efforts are connected to the national organization, “Personhood U.S.A.,” whose main goal is to amend the Constitution to invalidate the *Roe v. Wade* decision.

**IV. HUMAN LIFE BEGINS AT CONCEPTION, BUT WHEN DOES THIS OCCUR?**

To understand why the Thirteenth Amendment grants legal rights to human embryos, the science of conception must be analyzed. Conception defines the start of human life, and because it is not an instantaneous process, numerous theories exist

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115. *Id.*
concerning when the process of conception is complete. The National Institute of Health defines fertilization as “the joining [insemination] of the male gamete (sperm) and the female gamete (egg).” However, it is disputed whether this definition is enough to constitute the recognition of new human life. Scientists perform embryonic stem cell research during the blastocyst stage of embryonic development. For the Thirteenth Amendment to protect human embryos, conception must occur before scientific research has begun because at the moment of conception, an embryo must be considered a human being. Because IVF embryos are fertilized outside the womb, theories of conception that occur after implantation in the womb do not comport with this comment’s argument. Though fertilization marks the beginning of conception, there is no undisputed opinion for when conception is complete, and this comment will explore the commonly accepted theories.

A. Fertilization and Conception as Synonymous Terms

One well-defined theory is that of the Catholic Church. Catholicism articulates that fertilization and conception are synonymous terms; therefore, the unborn represent human life from the moment of fertilization. Significant to this recognition is the individuality of the created embryo. Once fertilization

119. See id. at 202; Glossary, supra note 53.
120. See Christina L. Misner, What if Mary Sue Wanted An Abortion Instead? The effect of Davis v. Davis on Abortion Rights, 3 AM. U.J. GENDER & L. 265, 287 (1995) (Those in opposition to this theory argue that “declaring that life begins at conception is not only a scientifically ‘egregious oversimplification’ . . . scientifically and socially, birth is the landmark event that gives a human its status”). This rationalization only justifies why legal personhood is granted at birth, but does not justify why human life cannot be recognized separately. See Roy, supra note 58, at 375 n.164 (“[D]isagreement exists over whether life is present at fertilization, implantation, three or fourteen days after fertilization, or at some point later in pregnancy.”).
121. James A. Thompson, et al., Embryonic Stem Cell Lines Derived from Human Blastocysts, 282 SCI. 1145 (1998) (stating, “[f]resh or frozen cleavage stage human embryos, produced by In-Vitro fertilization (IVF) for clinical purposes, were donated by individuals . . . were cultured to the blastocyst stage”).
occurs, a haploid egg and a haploid sperm no longer exist and the embryo becomes a “unique genetic individual.” 124 Thus, the Catholic Church believes the moment of fertilization concludes once the sperm has entered into the egg. 125 Also, the Louisiana legislature recognizes that “as soon as the sperm makes contact with the outside of the egg” conception occurs and “legal personhood attaches” to the unborn. 126 These two views are polar opposites of those who believe conception does not occur until implantation in the mother’s womb. 127 There also exists two additional commonly accepted theories, focused on the formation of a human’s diploid genome, that act as happy-mediums for scholars to recognize conception has occurred.

B. Existence of a Diploid Genome

At the core of the creation of human life is the existence of the diploid embryonic genome, 128 and the exact timing of this occurrence causes a split in different theories of conception. After insemination of the egg and sperm, several steps occur to assemble the chromosomes from the individual egg and sperm into a unique diploid form of life. 129 A diploid genome contains forty-six chromosomes that consist of the “essential elements of humanity,” and these elements include the genetic code, which constitutes the entire makeup of a diploid organism. 130 The genetic code is comprised of DNA, and once the genetic code is in place, humans have the complete hereditary information required for their entire existence. 131 The unique DNA gives the human embryo a “distinct identity . . . and [with] predispositions to certain conditions such as heart disease, the embryo is ‘destined
for a specific life.”132 Because of the numerous phases of conception, scholars disagree on whether conception should be complete either when the human-diploid genome is complete in form or in function.

C. Diploid Genome Formation

Roughly twenty-four hours after insemination of the sperm into the egg, syngamy and cleavage occur to create the “zygote.”133 The definition of a zygote is “a cell in diploid state following fertilization or union of haploid male sex cell (e.g. sperm) and haploid female sex cell (e.g. ovum).”134 Syngamy is the “assembly of a diploid genome”135 and occurs through the fusion of the maternal and paternal chromosomes.136 The diploid genome is composed of the forty-six chromosomes necessary for ordinary human life.137 Next cleavage occurs, and cleavage represents the first cell-division of the zygote.138 It is believed that because syngamy and cleavage signify the formation of the diploid genome, this completion “constitutes the point at which conception has occurred.”139 This theory signifies one common view that the formation of, and not the functioning of, the diploid genome concludes conception.

D. Diploid Genome Function

During the processes of syngamy and cleavage, the newly formed diploid genome is not functioning because the zygote is not yet activated.140 Activation of the genome occurs during the eight-cell stage, roughly forty-eight to seventy-two hours after insemination.141 Activation signals this new single organism’s power to control its own functions, and “the embryonic genome begins transcribing DNA into mRNA and translating mRNA into
proteins.” In preparation for implantation, which occurs roughly around day five or six after insemination, the zygote forms the blastocyst with a defined “inner cell mass” composed of embryonic stem cells. The inner cell mass is the prime target for embryonic stem cell research. So, because activation of the genome involves independent development and differentiation of cells, such as the “inner cell mass,” many scholars believe that these physical changes indicate “the beginning of existence as a diploid organism.” The beginning of existence as a “diploid organism” marks the beginning of human life.

These different views portray the range of ideologies that exist among scientists and professional interest groups in this nation. However, this comment does not propose that conception occurs at a particular moment. Rather, it proposes that before an embryo implants in the womb, Thirteenth Amendment rights attach to human embryos. From the moment of insemination, the creation is human, and “it will not articulate itself into some other kind of animal.” Even after a mere twenty-four hours, the embryo already contains its entire DNA that will define and direct the embryo throughout its entire existence. Whether the diploid genome exists in form or function, before the embryo is implanted there is distinct human life. An embryo during the blastocyst stage, with its unique, individual DNA structure, should be recognized as a human being. Human life deserves dignity; therefore, we should respect all human beings and not arbitrarily limit constitutional protections to only those human beings who are granted legal personhood.

142. Peters, supra note 118, at 213; mRNA is messenger ribonucleic acid, the type of RNA that codes for the chemical blueprint for a protein during protein synthesis, BIOLOGY ONLINE, www.biology-online.org/dictionary/Mrna (last visited Dec. 12, 2012).
143. “[A] blastocyst is an embryo that has divided into hundreds of cells and is composed of two parts. The outer sphere of the blastocyst is called the trophoblast. The inner portion of the blastocyst is filled with fluid. Inside the trophoblast, there is a clump of cells called the inner cell mass.” IVF Blastocyst Formation and Blastocyst Transfer, IVF1, http://www.ivf1.com/lab-embryo-culture/ (last visited Feb. 13, 2012).
144. Stem Cells, KIMBALL’S BIOLOGY PAGES, http://users.rcn.com/jkimball.ma.ultranet/BiologyPages/S/Stem_Cells.html (last visited Mar. 1, 2012). Scientists also deem the blastocyst stage as the most effective for In-Vitro Fertilization implantation because it naturally precedes implantation as if the embryo were developing in the womb. IVF Blastocyst Formation and Blastocyst Transfer, supra note 143.
146. McDonald, supra note 7, at 1364.
147. Id. at 1363.
V. THE THIRTEENTH AMENDMENT

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

A. Foundations of the Thirteenth Amendment

Before considering whether human embryos are a proper class for Thirteenth Amendment protections, one must analyze the ideals and law behind the ratification of the Amendment. Famously, Chief Justice Marshall stated: “We must never forget that it is a constitution we are expounding... a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” During the time of its adoption, the Thirteenth Amendment was revolutionary by simply, but forcefully, eradicating African American slavery. As Justice Marshall explained, the drafters intentionally created the constitution in a way that allows the articles and amendments to evolve and be applicable for future generations. The specific and powerful text chosen for the Thirteenth Amendment allows it to remain relevant and practical to today’s society.

Nowhere in the text of the Thirteenth Amendment is the word “person.” By first glance, most rational thinkers would not second guess that the Thirteenth Amendment only applies to legal persons, but the intent of the authors was to create a broader and more encompassing protection of natural rights. Although the original intent for the passage of the Thirteenth Amendment was to abolish African American slavery, the ideals behind the abolition of slavery encompass a more powerful protection of every human being’s right to live freely.

149. McCulloch v. Maryland, 17 U.S. 316, 407, 415 (1819). As technology continues to advance in this nation and the world, questions of life, especially human life, will continue to frustrate the current legal insufficiencies in which the legal realm of this country currently operates. We must be able to interpret and modernize the fundamental legal bases that the framers of this country created with the intent to govern the United States in whatever period and for any relevant circumstance.
150. See U.S. CONST. amend. XIII.
At the time the Thirteenth Amendment was proposed and ratified, African Americans were not considered legal persons under the law.\textsuperscript{151} When the Constitution was drafted and ratified in 1787, “slavery had been the great lacuna in the rule of freedom and equality upon which the Republic had been based – the living lie in the American heritage.”\textsuperscript{152} Even a century after ratification of the Constitution, the country still remained in turmoil over the issues of slavery. The Civil War eventually handled this issue after taking the lives of over 700,000\textsuperscript{153} American soldiers, which still accounts for more deaths than any other American war combined.\textsuperscript{154}

In 1863, President Abraham Lincoln began his brave conquest of eradicating slavery by publicly announcing the Emancipation Proclamation.\textsuperscript{155} Because of questions of legality and enforcement,\textsuperscript{156} supporters of President Lincoln drafted the Thirteenth Amendment to ensure the abolition of African American slavery.\textsuperscript{157} This Amendment was not based on the predisposition that African Americans were legal persons; it was based on the fact that they were humans.\textsuperscript{158} Congress specifically dealt with the issues of legal personhood for African Americans as

\begin{footnotes}
\item[151.] During debates on the formation of the Constitution, the North and South disagreed over whether slaves could be a part of the representation of the South for population purposes. The North argued that “the slave status was property, not person,” and the South claimed, “slaves had both attributes of persons and property.” Further, the “status of the slave as a quasi-person was reflected in the body of statutory language which regulated slavery in the states.” Lebovitz, supra note 6, at 574. Subsequently in Dred Scott, Justice Taney, taking a property approach, concluded that negroes whose ancestors were imported to the United States and sold as slaves could not “become a member of the political community formed and brought into existence by the constitution of the United States.” Dred Scott v. Sandford, 60 U.S. 393, 403 (1856).
\item[152.] SCHWARTZ, supra note 30, at 25 (During the House of Representatives Debate in 1864, James Wilson, a representative of Iowa, recognized that the United States was more familiar “with bills, resolutions, and propositions to amend the Constitution to more firmly establish, extend, and perpetuate slavery the country has been perfectly familiar” than with amendments to end slavery).
\item[154.] C. Vann Woodward, Editor’s Introduction to JAMES M. MCPHERSON’S BATTLE CRY OF FREEDOM, at xix (C. Vann Woodward ed., Oxford Univ. Press 1988).
\item[156.] S. DOC. NO. 108-17, at 1657 (2002).
\item[157.] Id.
\item[158.] See Lebovitz, supra note 6, at 571-72.
\end{footnotes}
a consequence to the belligerent refusal by many states to adhere to the Thirteenth Amendment.\textsuperscript{159} With the ratification of the Fourteenth Amendment, African Americans received the full constitutional rights granted to all legal persons.\textsuperscript{160}

Supporters of the Thirteenth Amendment made it clear during the Congressional debates that slavery was fundamentally at odds with the creation and existence of the democratic American government.\textsuperscript{161} The philosophy behind the foundation of this democratic nation stirred this powerful reasoning. This nation was founded first and foremost to recognize and protect the natural rights humans are given by their Creator,\textsuperscript{162} which justly include the right to life, liberty, and the pursuit of happiness.\textsuperscript{163} The existence of African American slavery restricted these natural rights, and supporters of the Amendment “intended the Thirteenth Amendment to protect the self-evident natural rights to which the Declaration had committed national government.”\textsuperscript{164} More importantly, the enactment of the Thirteenth Amendment allowed for the “principles embodied in the Declaration of Independence and the Bill of Rights [to] be translated into actuality.”\textsuperscript{165} This positive law allowed the fundamental principles of life, liberty, and the pursuit of happiness to exist as more than idealistic principles of natural law.\textsuperscript{166}

B. Life, Liberty, and the Pursuit of Happiness

Thomas Jefferson’s recognition of naturalism in our democratic government captures the essence of human dignity through rights of “self-interest.”\textsuperscript{167} Thirteenth Amendment

\begin{itemize}
  \item \textsuperscript{159}  SCHWARTZ, supra note 30, at 24; S. Doc. No. 108-17, at 1659.
  \item \textsuperscript{160}  Lebovitz, supra note 6, at 565.
  \item \textsuperscript{161}  SCHWARTZ, supra note 30, at 19.
  \item \textsuperscript{162}  \textit{Id.} (emphasizing during the debate the importance of the inscription on the Liberty Bell which states “Proclaim LIBERTY throughout all the Land unto all the inhabitants thereof” (Leviticus 25:10)).
  \item \textsuperscript{163}  \textsc{The Declaration of Independence} para. 2 (U.S. 1776).
  \item \textsuperscript{164}  Alexander Tsesis, \textit{The Thirteenth Amendment Enforcement Authority} 46 (Pittsburgh Sch. of Law Working Paper Series, Paper No. 9, 2005), available at http://law.bepress.com/cgi/viewcontent.cgi?article=1008&context=pittlwps.
  \item \textsuperscript{165}  SCHWARTZ, supra note 30, at 19-20.
  \item \textsuperscript{166}  \textit{See The Declaration of Independence} para. 2 (U.S. 1776). \textit{See also} Tsesis, supra note 164, at 46.
  \item \textsuperscript{167}  \textit{See The Declaration of Independence} para. 2 (U.S. 1776). \textit{See also} SCHWARTZ, supra note 30, at 19.
\end{itemize}
congressional debates defined self-interest as the “right to one’s own life: to survive, to procreate and have familial relations, to keep one’s labor, and to be free from physical abuse by another.”168 Supporters of the Amendment revealed that the protection of self-interest through the Thirteenth Amendment “did not require that the right-holder be a full constitutional person,”169 and because of this broad protection, this particular right of self-interest should automatically protect all human life. The congressional debates of the Amendment make it evident that the right of self-interest was fundamental to human life because “living beings have a possessory interest in their own life, apart from simply being the property of another . . . the right-holder is alive and has a natural concern for its own life.”170 In 1865, the right of self-interest was “extended to Africans, [and the Thirteenth Amendment] undid the rule that ‘race’ could be used to dissect and apportion the constitutional community.”171 Because the Amendment does not restrict its application to race inequalities only, its broad protections give it enormous potential as a weapon to battle future inequalities that may exist in the United States when certain groups try to limit the rights of human beings.

C. Thirteenth Amendment Interpretation

Because the Thirteenth Amendment protects against both spheres of slavery and involuntary servitude, the Supreme Court has used its authority to define and limit the meaning of each section of the Amendment.

1. Slavery

In the Slaughter-House Cases, the Supreme Court resolved the issue of whether or not the Thirteenth Amendment could protect other groups of human beings other than African

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168. Lebovitz, supra note 6, at 564.
169. Id. at 572; See SCHWARTZ, supra note 30, at 35. Iterated in the Preamble to the Constitution is the conviction that these protections are for the “sake of all mankind.” President Thomas Jefferson questioned that if these protections of liberty begin to disappear, then “we have removed [humans’] only firm basis” for believing in the conviction that all humans possess “liberties [that] are a gift from God.” CONG. GLOBE, 38TH CONG., 1ST SESS. 2990 (1864) (Representative Ingersoll during the Thirteenth Amendment Congressional Debates).
170. Lebovitz, supra note 6, at 565.
171. Id. at 566.
Americans. The Court ruled that although “[Negro] slavery alone was in the mind of Congress which proposed the Thirteenth article, it forbids any other kind of slavery, now or hereafter...” A decade later in the Civil Rights Cases and in Hodges v. United States the Supreme Court expressly defined and limited congressional powers under section two of the Thirteenth Amendment. Although initially Congress was thought to have broad powers to enforce this powerful Amendment, the Civil Rights Cases created strict limitations for Congress in the late nineteenth century. The Civil Rights Cases recognized that Congress had the authority to “pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,” but in 1866 this authority only secured a limited, expressed list of protections. In the twentieth century case of Jones v. Alfred H. Mayer Co., the Supreme Court re-questioned the protections arising out of the “badges and incidents” of slavery and held that “surely Congress has the power... to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.” This decision denounced any limitations on the definition of “badges and incidents,” and it gave Congress, under section two of the Amendment, the freedom to account for future instances of slavery.

Although the Thirteenth Amendment was initially thought to be a self-executing Amendment, the authority of the Amendment itself “has been invoked only a few times by the

173. Id. at 71-72 (1878); see also Hodges v. United States, 203 U.S. 1, 16-17 (1906) (reiterating the general applicability rule). The United States Supreme Court has also applied this rule when analyzing peonage, which the Slaughter-House Cases affirmed as included within slavery and involuntary servitude. S. Doc. No. 108-17, at 1661.
176. Id.
179. “All citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.” Id. at 22.
181. Id. at 440-443.
Court to strike down state legislation.” The Court in *Jones v. Alfred H. Mayer Co.* reserved the question of whether the “badges and incidents” of slavery could be protected by the Amendment without the use of congressional legislation through section two. In modern times, section two plays a critical role in shaping legislation to prevent modern forms of slavery, and *Jones v. Alfred H. Mayer Co.* increased the Enforcement Clause’s importance by giving Congress the authority to regulate private action through the enforcement clause of the Amendment.

2. Peonage and Involuntary Servitude

The ban against involuntary servitude was first upheld in 1911 by the United States Supreme Court in *Bailey v. Alabama*. Questioning the validity of an Alabama statute, the United States Supreme Court held that “[t]he state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.” Subsequently in 1948, “pursuant to its section [two] enforcement powers, Congress enacted a statute by which it abolished peonage and prohibited anyone from holding, arresting, or returning, or causing or aiding in the arresting or returning, of a person to peonage.” Over time, Congress and the Supreme Court have recognized that slavery can take on many forms and thus, including involuntary servitude in the Amendment was meant to cover multiple types of forced labor.

183. Id. at 1659 n.10.
184. Id. at 1661.
185. *Bailey v. Alabama*, 219 U.S. 219, 242 (1911) (holding that the term peonage amounted to indentured or involuntary servitude). The Slaughter-House Cases initially included peonage in the terms of slavery and involuntary servitude. Peonage is defined as a “condition of enforced servitude by which the servitor is compelled to labor against his will in liquidation of some debt or obligation, either real or pretended.” S. Doc. No. 108-17, at 1661.
187. “Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished.” Id. at 227-28.
188. *Bailey*, 219 U.S. at 244.
189. S. Doc. No. 108-17, at 1663.
operating in a similar fashion to African slavery. The Supreme Court analyzed servitude as having “larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery.” The direction given by the Supreme Court allows Congress to enact legislation to statutorily protect human beings from modern forms of involuntary servitude.

3. Coercion

Coercion is defined as “compulsion by physical force or threat of physical force.” Prior to 1968, psychological coercion was the principal method used to prove involuntary servitude. However, the Supreme Court limited the conditions of involuntary servitude and determined that psychological coercion was not prohibited under particular Thirteenth Amendment statutes in United States v. Kozminski. Justice O’Conner held that statutes designed to prohibit “conditions ‘akin to African slavery’” also were designed to prohibit “compulsion through physical coercion.” African American slaves experienced the use of physical force when placed into slavery, and they were forced to live in cruel conditions only to perform work for the benefit of others. Justice O’Conner described slave-like conditions overall as “complete domination over all aspects of the victim’s life.” In this opinion, the Supreme Court limited situations of intentional coercion of a victim’s labor to situations in which: (1) a defendant uses or threatens to use legal or physical means, (2) intentional coercion “into a slavelike condition . . . by other forms of coercion,” or (3) “by rendering the [victim] incapable of rational choice.” Today, physical force remains a fundamental method of coercing a victim into involuntary servitude.

VI. MODERN DAY INVOLUNTARY SERVITUDE

Today, the Thirteenth Amendment is still an active and vital
channel to protect human beings from involuntary servitude, but the form of modern day involuntary servitude does not perfectly resemble African American slavery. Though modern forms of forced labor may not be easy to detect, Congress has the authority to protect human beings from any modern forms of forced labor that threaten human rights under the Thirteenth Amendment’s Enforcement Clause.

A. Human Embryos as a Proper Class

Since the Thirteenth Amendment protects all human beings from involuntary servitude, it is relevant to show what society viewed as human life at the time of ratification in 1863. A survey of medical literature and legislation from the Civil War period reveals that the term human being included the unborn. During this period, pro-life movements in legislation and in medical campaigns increased rapidly. Medical professionals publicly recognized conception as the beginning of human life through books and lectures. In 1844, Dr. Charles Meigs, when expressing his stance on abortion, stated, “by common law [abortion] is [a] felony, and by the law of God murder.” One decade later, Dr. David Humphreys Storer emphasized the importance of humanity by recognizing that “the moment an embryo enters the uterus [as] a microscopic speck, it is the germ of a human being.” Dr. Storer went even further to argue that the destruction of an embryo was as evil as infanticide. The American Medical Association “was a staunch opponent of abortion, which it dubbed ‘unwarrantable destruction of human life.’”

199. MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA 98, 110 (1992) [hereinafter OLASKY, ABORTION RITES]. See also McDonald, supra note 7, at 1376, 1378 (The American Medical Association and many state legislatures expressed opinions that abortion was the killing of human life).


201. McDonald, supra note 7, at 1377.

202. OLASKY, ABORTION RITES, supra note 199, at 110.

203. DAVID HUMPHREYS STORER, AN INTRODUCTORY LECTURE BEFORE THE MEDICAL CLASS OF 1855-56 OF HARVARD UNIVERSITY (1855), reprinted in part in D. Humphreys Storer, Two Frequent Causes of Uterine Diseases, 6 J. GYNECOLOGICAL SOC’Y OF BOS., 194, 199 (1872). See McDonald, supra note 7, at 1377.

204. Id.

Post-Civil War, thirteen states made abortion illegal for the first time, and twenty-one states revised anti-abortion laws that were already in existence.206 By the turn of the century, “virtually every jurisdiction in the United States had laws upon its books that proscribed the practice [of abortion] sharply and declared most abortions to be criminal offenses.”207 Though state legislatures struggled with appropriate sentencing and severity of this type of criminal offense, the main goal was to statutorily recognize that the killing of the unborn was the killing of human life.208 In 1869, the New York legislature wrote a resolution that affirmatively concluded that:

[From the moment of conception, there is a living creature in process of development to full maturity; and whereas, any sufficient interruption to this living process always results in the destruction of life; and whereas, the intentional arrest of this living process, eventuating in the destruction of life (being an act with intention to kill), is consequentially murder.209]

This evidence shows a strong view that the term “human being” in the Civil War era applied to the unborn. Categorizing the unborn as human beings gives them the protections of the Thirteenth Amendment, which was written to protect all human beings, including the unborn.210 Furthermore, arguments against using the Amendment for the unborn are based on the lack of legal personhood not on the lack of “human being” status.211 As discussed previously, the biological term “human being” and “legal personhood” are not synonymous terms, and “the law cannot change the scientific fact that an embryo is a human being.”212 Today, advances in science and medicine continue to enhance the knowledge and understanding of the creation of human life,213 and confirm already established views of mid-nineteenth century laws and science that conception before implantation marks the beginning of human life.

206. MOHR, supra note 200, at 200.
207. Id. at vii.
208. OLASKY, ABORTION RITES, supra note 199, at 98.
209. MOHR, supra note 200, at 216.
210. McDonald, supra note 7, at 1376.
211. Id. at 1376 n.141.
212. Id. at 1367.
213. Christiane Nusslein-Volhard, Manipulating the Human Embryo, 139 USA TODAY MAGAZINE 2788 (2011).
B. Embryonic Stem Cell Research

After determining that embryos, as human beings, are capable of receiving Thirteenth Amendment protections, one must analyze embryonic stem cell research as a form of involuntary servitude. This analysis depends upon a study of physical coercion and labor. Although the Supreme Court in Kozminksi limited involuntary servitude to situations where physical coercion is present, Justice O'Conner recognized that “certain classes . . . have ‘special vulnerabilities’ which may be taken into account when determining whether one’s Thirteenth Amendment rights have been abrogated.”214 This assertion allows for a broader application of the Amendment by recognizing a vulnerable class of humans who are susceptible to involuntary servitude with a lesser degree of physical coercion.215 Because of the different levels of intellect that exist in human beings, a lesser degree of physical force or any means of coercion should suffice to recognize a state of involuntary servitude.216 For example, through the enactment of 18 U.S.C. § 1591, Congress recognized the special vulnerabilities of child victims in human trafficking by removing the requirement of physical coercion to punish human trafficking offenses.217 So, an analysis of the necessary means of force should be “considered in assessing whether there has been an abrogation of a [Thirteenth Amendment] right.”218

Because of the special vulnerabilities of the human embryo and the destructive consequence of embryonic stem cell research, the direct act of physical force used in embryonic stem cell research should satisfy the requirement of placing human embryos in a state of involuntary servitude. The act of embryonic stem cell research involves the compelling physical relationship between the scientist and the embryo. The embryo is under the

214. Lebovitz, supra note 6, at 592. See also U.S. v. Kozminski, 487 U.S. 931, 948 (1988) (Justice O’Conner stated “for example, a child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be. Similarly, it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.”).
215. Lebovitz, supra note 6 at 592.
216. Id.
218. Lebovitz, supra note 6, at 592.
complete control of the scientist who forces the embryo to work for the benefit of the community and not for its own benefit, which is forced labor. The scientific procedure of extraction of the inner cell mass requires the use of physical injury by the scientist which subsequently destroys the human life.\footnote{See supra, Part I.D.} Though the human embryo cannot express its will or dissent in the forced labor, the consequence of the procedure is the destruction of the embryo’s human existence. Every human being deserves to live freely without arbitrary constraint, and the destruction of human life is inherently against the will of all human beings.\footnote{International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), ¶ 16, U.N. Doc. A/RES/2201 (Mar. 23, 1976). “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”} Therefore, even though the donor makes an informed decision to consent to the donation of the human embryo to the National Institute of Health, this does not create an escape hatch for the NIH to place human embryos in a state of involuntary servitude. It is well established that “the Western legal tradition prohibits contracts consenting in advance to suffer assaults and other criminal wrongs. They are void as against public policy.”\footnote{U.S. v. King, 840 F.2d 1276, 1283 (6th Cir. 1988) (making it unlawful for parents to consent to placing their children in a state of involuntary servitude).} Therefore, the NIH does not escape civil or criminal liability because of the informed consent given in an agreement by the donor.

Those in opposition to the idea that embryos can be forced into labor argue that embryos make “no conscious decision to perform work,” and the presence of physical force alone does not constitute involuntary servitude.\footnote{Johnathan Grossman, Human Embryos, Patents, and the Thirteenth Amendment, 55 U. KAN. L. REV. 731, 759 (2007).} The progression of Congressional legislation founded upon the Thirteenth Amendment does not support this argument. Tactics and methods used to force victims into modern day slavery, including sex trafficking, involve the constant distribution of drugs, which consequentially eliminate the victim’s ability to rationalize thought and retain awareness and even consciousness.\footnote{U.S. DEP’T OF HEALTH AND HUMAN SERV., SEX TRAFFICKING FACT SHEET (2012), available at http://www.acf.hhs.gov/programs/orri/resource/fact-sheet-sex-trafficking-english.} In many instances, a victim of modern day slavery is unaware of the
work they perform, and Congressional statutes do not expressly limit protections to labor where the victim is aware. Restricting Thirteenth Amendment protections to active labor alone would hinder the ability of Congress to address and prohibit future activities that may place human beings into a state of slavery.

VII. CONGRESSIONAL PROPOSAL

When the court in Davis v. Davis recognized a novel legal status for human embryos, it opened the door for legal enthusiasts to protect the rights of human embryos without labeling them as persons or property. Though the court in Davis only recognized an embryo’s “potential for human life,” the court’s interest in expanding legal protections to human embryos leads to a valid claim for Thirteenth Amendment protection. The Davis philosophy does not paint the entire picture because “potential for human life” can only go so far in recognizing respect for something that is not a living being. Once fertilization occurs through IVF, there is a unique human life with individualized DNA, which marks it as human, even before implantation in the womb.

The United States Congress should recognize the humanity of IVF embryos and grant them the respect and dignity they deserve as human life. Human embryos may be the smallest, most vulnerable forms of human life, but they are a categorical form of human life. Also, as medical advances and scientific research increase the results of successful IVF implantations, it only affirms the importance and ethical reasoning behind the recognition of human embryos as forms of human life. With the authority under section two of the Thirteenth Amendment, Congress has the power to protect human embryos and thereby make it a crime for anyone to place them into a state of involuntary servitude. Because embryonic stem cell research places human embryos in a state of involuntary servitude, Congress has the authority to fine or imprison anyone who


225. See Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (discussing three legal dispositions that human embryos could embrace including: (1) persons; (2) property, and (3) special respect because of their potential for human life).

226. Davis, 842 S.W.2d at 597.

227. Misner, supra note 120 at 291.
authorizes and performs embryonic stem cell research on viable human embryos.

Consequences of this proposal include the issue of unused embryos. Those in opposition may argue that the illegalization of embryonic stem cell research will only increase the amount of cryopreserved embryos in this country, which could potentially lead to the death of the embryo as well. Natural death occurs in all phases of human life, and the possibility of the natural death of an embryo is in no way equivalent to death through involuntary servitude. Although the number of cryopreserved embryos will inevitably increase with the initial realization of a federal ban on embryonic stem cell research, advances in assisted reproductive technology continue to make efficient use of the number of retrieved embryos from IVF and the corresponding number that will be implanted; therefore, making the argument of an exponential frozen population of embryos irrational. Also, with a prohibition on stem cell research, patients choosing IVF should become more conscious of the ratifications from IVF due to the utmost concern for human dignity that comes with creation of embryos through assisted reproductive technology. IVF patients will still have the available options of cryopreservation for future implantation and adoption by other couples. These options not only respect the human dignity of the embryos, but also give patients future opportunities to have more children and possibly give that chance to other couples.

VIII. CONCLUSION

The term person is too constrictive to account for all forms of human life, and the authors of the Thirteenth Amendment intended to capture the essence of the natural rights that humans

228. “Miscarriage is the spontaneous loss of a fetus before the [twentieth] week of pregnancy.” “It is estimated that up to half of all fertilized eggs die and are lost spontaneously.” Definition of miscarriage, MEDLINEPLUS, http://www.nlm.nih.gov/medlineplus/ency/article/001488.htm (last updated Nov. 21, 2010).
possess inherently because of their humanity. If we are to think that the authors of the Thirteenth Amendment did not intend to respect every part of a human's life with dignity, then their sacrifice and energy is wasted on the future generations of this nation. Because of the commonality of assisted reproductive technology in this country, a line needs to be drawn in regards to when and how these embryos can be protected under the Constitution. Congress has this authority, and the prohibition of embryonic stem cell research can mark the first step of many in recognizing humanity and protecting the dignity of all human life.