MARYLAND "EMBRYO ADOPTION": RELIGIOUS ENTANGLEMENT IN THE MARYLAND STEM CELL RESEARCH ACT OF 2006

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INTRODUCTION

On May 24, 2005, President George W. Bush publically endorsed "embryo adoption" as a "life-affirming alternative" to either donating unused embryos from *in vitro* fertilization (IVF) to research or destroying them.[1] President Bush consistently opposed embryonic stem cell research throughout his tenure, often framing his position on the issue as pro-life.[2] In 2001, he restricted the use of federal funds for embryonic stem cell research to stem cell lines that were in existence before August 9, 2001.[3] Shortly thereafter, President Bush signed into law a bill that provided one million dollars per year in grants to the Department of Health and Human Services to increase public awareness of embryo adoption programs.[4]

The 2001 Bush policy severely limited the availability of stem cells for federally funded research.[5] In response, Maryland enacted the Maryland Stem Cell Research Act of 2006 (MSCRA)[6] to promote and fund ethical stem cell research within the state.[7] The MSCRA is the only Maryland law governing the disposition of unused reproductive material, including

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[1] President George W. Bush, Remarks on Embryo Adoption and Ethical Stem Cell Research (May 24, 2005) (transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050524-12.html).

[2] *See* Jaime E. Conde, *Embryo Donation: The Government Adopts a Cause*, 13 WM. & MARY J. WOMEN & L. 273, 275 (2006) (describing President Bush's reliance on "'culture of life' rhetoric to promote 'embryo adoptions' as the only alternative to dispose of cryopreserved (frozen) human embryos").

[3] NAT'L INST. OF HEALTH, NIH HUMAN EMBRYONIC STEM CELL REGISTRY UNDER FORMER PRESIDENT BUSH (2009), *available at* http://stemcells.nih.gov/staticresources/research/registry/PDFs/FormerRegistry.pdf. President Bush placed additional restrictions on the embryonic stem cells available for research, mandating that the stem cells must come from an embryo—originally created for reproductive purposes—that is no longer needed for reproduction; that the progenitors provide informed consent for the embryos to be used in research; and that the progenitors receive no financial inducement for donating the embryo for research purposes. *Id.* Only seventy-eight stem cell lines met the criteria of the Bush policy. JUDITH A. JOHNSON & ERIN D. WILLIAMS, CONG. RESEARCH SERV., RL33540, STEM CELL RESEARCH: FEDERAL RESEARCH FUNDING AND OVERSIGHT 1 (2007).

[4] S. REP. NO. 107-84, at 244 (2002) (describing specific appropriations authorized by Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, Pub. L. No. 107-116 (2002)).

[5] *See* JOHNSON & WILLIAMS, *supra* note 3, at 1 (describing the limited availability of stem cell lines).

[6] Maryland Stem Cell Research Act of 2006, MD. CODE ANN., ECON. DEV. §§ 10-429-444 (LexisNexis 2008) [hereinafter MSCRA].

[7] MD. CODE ANN., ECON. DEV. § 10-434(b) (LexisNexis 2008).

embryos.[8] Part of the MSCRA specifically addresses what happens to unused material from infertility treatments, and requires licensed IVF practitioners to make their patients aware of various disposition options for their unused material, including the options to donate the unused embryos for stem cell research, fertility treatment, or "adoption."[9]

Although some scholars use the terms *embryo donation* and *embryo adoption* interchangeably,[10] the two terms are fundamentally different.[11] The term *embryo adoption* is emotionally charged, and confers personhood status on an embryo.[12] Many of the moral arguments that assert personhood status on embryos are overtly religious, or at least have religious undertones.[13] Use of the religiously motivated term *embryo adoption* in the MSCRA confers personhood status on embryos in Maryland. However, it is impermissible for a state to endorse a particular religion under the Establishment Clause of the First Amendment to the United States Constitution.[14] Because the reference to *embryo adoption* in the MSCRA confers personhood status on embryos in Maryland, it violates the First Amendment and is contrary to Maryland law and public policy.[15] To remedy this issue, the Maryland legislature should purge any reference to *embryo adoption* in state law.[16]

This article first examines the history of sex, reproduction, and morality in American law, including the development of the "personhood" concept within the reproductive rights framework.[17] Next, it provides a general overview of the development of Assisted Reproductive Technology (ART), how American law has adapted to these expanding procreative technologies, and the chilling effect that conveying a personhood status onto embryos would have on the ART industry – hindering the development of modern American families.[18] The article then explores the differences between *embryo donation* and *embryo adoption* and establishes the concept of *embryo adoption* as a religious, and primarily Christian, moral construct.[19] Finally, this article argues that the use of the term *embryo adoption* in the MSCRA violates the Establishment Clause

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[8] *See* MD. CODE ANN., ECON. DEV. § 10-438(a)(2)(i)-(iv) (LexisNexis 2008) (listing the options for disposition of unused reproductive materials); *compare* Melissa Boatman, Comment, *Bringing Up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes After Divorce*, 37 U. BALT. L. REV. 285, 286 (2008) (noting there is no Maryland law specifically governing the disposition of embryos in divorce proceedings).

[9] MD. CODE ANN., ECON. DEV. § 10-438(a)(2)(i)-(iv) (LexisNexis 2008).

[10] Conde, *supra* note 2, at 280.

[11] *See infra* Part III.A.

[12] *See* Conde, *supra* note 2, at 283 (asserting that the term *embryo adoption* is legally imprecise because it implies that the embryo will actually be adopted).

[13] *See, e.g.*, Elizabeth E. Swire Falker, *The Disposition of Cryopreserved Embryos: Why Embryo Adoption Is An Inapposite Model for Application to Third-Party Assisted Reproduction*, 35 WM. MITCHELL L. REV. 489, 490 (2009) (describing religious text that declares frozen embryos to be "human beings that should be afforded all rights and protections accordant therewith").

[14] U.S. CONST. amend. I; *see generally*, Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (holding that a Pennsylvania program in which the state reimbursed teachers at nonpublic religious schools for teachers' salaries and instructional materials in secular subjects violated the Establishment Clause of the First Amendment to the United States Constitution due to "excessive entanglement between government and religion").

[15] *See infra* Part V.

[16] *See infra* Part V.

[17] *See infra* Part I.

[18] *See infra* Part II.

[19] *See infra* Part III.

of the First Amendment to the United States Constitution, and therefore Section 10-438(a)(2)(iv) should be stricken from the Maryland Economic Development Code.[20]

I. THE PERSONHOOD DEBATES: A NEW-AGE APPROACH TO RESTRICTING REPRODUCTIVE RIGHTS IN AMERICA

> "One of the most fundamental Conservative views is that of being pro-life. Believing that every life has value and worth. That's scientific because you know that, biologically, life begins at conception. That's irrefutable from a biological standpoint. You can argue the theology of it. You can argue the philosophy of it. You can't argue the biology of the beginning of life."
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> — Mike Huckabee, Former Governor of Arkansas[21]

Despite Governor Huckabee's beliefs and assertions, the legal concept of personhood is not equivalent to biological life.[22] In fact, the law often creates fictitious legal persons to achieve desired policy outcomes,[23] such as granting corporations personhood status for the purposes of free speech,[24] but not for the purpose of the Fifth Amendment right against self-incrimination.[25] To address the question of whether or not an embryo is entitled to legal protections under the law, one must first understand the underlying political, social, and legal arguments interwoven with the status of an embryo.

First, this section will assess early American views of abortion and contraception, which clearly denied personhood status to fetuses.[26] Next, the social underpinnings behind abortion criminalization and contraceptive access in the United States during the nineteenth and twentieth centuries will be discussed.[27] Third, this section will explore the quick expansion of reproductive rights during the mid to late twentieth century, including the re-legalization of abortion and contraceptive access.[28] Finally, this section will analyze the introduction of fetal and embryonic

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[20] *See infra* Part IV.

[21] *The Daily Show with Jon Stewart* (Comedy Central television broadcast Nov. 12, 2012, 00:48), *available at* http://www.thedailyshow.com/watch/mon-november-12-2012/exclusive---mike-huckabee-extended-interview-pt--2.

[22] *See, e.g.*, SUSAN L. CROCKIN ET AL., ADOPTION AND REPRODUCTIVE TECHNOLOGY LAW IN MASSACHUSETTS § 11.2 (2000) ("It is patently clear that if non-viable fetuses are not accorded personhood under Massachusetts or U.S. constitutional law, embryos are similarly not entitled to recognition as persons."); CARSON STRONG, ETHICS IN REPRODUCTIVE AND PERINATAL MEDICINE: A NEW FRAMEWORK 53–54 (1997) (distinguishing between the normative and descriptive sense of person, an element of which is life).

[23] *See* LOUIS M. GUENIN, THE MORALITY OF EMBRYO USE 11 (2008) (describing the use of the word *person* in various legal and philosophical contexts).

[24] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343 (2010) (noting that "[t]he Court as thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons'").

[25] Braswell v. United States, 487 U.S. 99, 119 (1988) (holding a corporation could not resist a subpoena for corporate documents by invoking the Fifth Amendment right against self-incrimination).

[26] *See infra* Part I.A.

[27] *See infra* Part I.B.

[28] *See infra* Part I.C.

personhood into contemporary reproductive rights debates, and its implications.[29]

A. Quickening and "the Trade": Early American Views of Reproduction and the Law

Early American jurisprudence differentiated between the existence of a biologically living fetus, with the potential for personhood, and the personhood of a fully developed child.[30] In *State v. Cooper*, the New Jersey Supreme Court clearly distinguished at common law between the "condition of the child before and after the mother is quick"—holding that "[*i*]*n contemplation of law* life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it."[31] Quickening is when a pregnant woman first becomes aware of fetal movement, and generally occurs between the twelfth and the sixteenth weeks of pregnancy.[32] Willful abortion of a fetus before quickening was legal in early America, although the practice was generally covert.[33] Many historians agree that abortion, usually completed by ingesting abortifacient herbs—colloquially called "the trade"—was relatively common.[34]

Although willful abortion was illegal after the quickening stage, the law did not equate abortion to murder, and rarely resulted in any crime being charged.[35] Early American law did not view an unborn fetus as a full legal person.[36] For any infanticide conviction before the mid-1900s,

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[29] *See infra* Part I.D.

[30] *See* State v. Cooper, 22 N.J.L. 52, 54 (N.J. 1849) ("In regard to offences against the person of the child, a distinction is well settled between its condition before and after its birth. Thus, it is not murder to kill a child before it be born, even though it be killed in the very process of delivery.")

[31] *Id.* at 54 (emphasis in original).

[32] Andre E. Hellegers, *Fetal Development*, 31 THEOLOGICAL STUDIES 7–8 (1970). However, during a woman's first pregnancy, she may not recognize the movements as quickening until as late as 20 weeks, and in exceptional circumstances the woman feels no movements throughout the entire pregnancy.

[33] *See* Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 THE WM. & MARY Q. 19, 23 (1991). The death of Sarah Grosvenor in 1742, a young woman from a respected family in a small Connecticut village, resulted from a failed abortion. *Id.* at 19. The Grosvenor case, one of the only documented cases involving an abortion by surgical instruments in the time period, is unique for several reasons. *Id* at 19-20. First, it took over two years for the case to be tried despite rumors that Sarah Grosvenor's death was caused by a failed abortion – which she was likely pressured into having by her former lover and a rural physician. *Id.* at 21. Second, the case was likely heard because of Sarah Grosvenor's death, not the abortion itself. *Id.* at 20. Third, even though there were other common and socially acceptable ways to deal with an illegitimate child at the time and despite evidence that he had coerced her to have an abortion, her lover was cleared of any wrongdoing. *Id*. at 19, 22. Fourth, the only conviction reached in the case was for the physician, who was sentenced to twenty-nine lashes and two hours of public humiliation in the town gallows. *Id*. at 21. The physician was never punished, however, as he escaped custody and fled to Rhode Island. *Id.* Finally, it was incredibly rare for a physician to be tried for an abortion-related crime, with no record of such crime in Britain or the colonies before 1745. *Id.* at 20 n.3.

[34] *Id.* at 19. Although abortion before quickening was legal, it was rarely referred to in correspondence or other forms of writing at the time. *Id.* When it was referred to, it was mentioned briefly and using euphemisms. *Id.* at 19, 24. The high religiosity of 18th century New England, in which fornication was considered a sin, likely explains why even legal abortions were performed quietly. *Id.* at 23.

[35] Katha Pollitt, *Abortion in American History*, THE ATLANTIC (May 1997), *available at* http://www.theatlantic.com/past/docs/issues/97may/abortion.htm.

[36] *See, e.g.*, State v. Cooper, 22 N.J.L. at 54.

the child had to be born alive.[37] A child being born alive was traditionally determined as a child that had "independent circulation" and was able to breathe without assistance outside of the womb.[38] The distinction between a fetus born alive or dead, for the purposes of infanticide, indicates that early American criminal law did not view an unborn fetus as a full legal person. Interestingly, the subsequent period of criminalization of abortion and contraception was not fueled by the concept of fetal personhood.[39] Rather, it was fueled by racism, sexism, and a growing social disdain for immoral or lewd behavior.[40]

B. The Comstock Era: A Century of Sexual Oppression and Reproductive Control in American Law

During the late 1800s, American attitudes surrounding reproduction—specifically abortion and contraception—shifted drastically from the quiet condemnation and ultimate acquiescence in early America to moral outrage, ultimately leading to a criminalization of abortion and contraception that lasted approximately one hundred years.[41] Anthony Comstock, a highly religious Christian who believed that even the mere availability of contraceptives promoted lewd and promiscuous behavior, spearheaded this shift.[42] Several states at the time criminalized abortion, as well as the sale or distribution of contraceptives.[43] Comstock ardently advocated and lobbied against the proliferation of "obscene" materials from the 1870s until his death in 1915,[44] and the commonly named Comstock Law of 1873—a federal law restricting the mailing of "indecent" materials such as information about contraceptives and instruments or substances that would prevent or end a pregnancy—was passed as a result of his lobbying efforts.[45]

Although there was a fierce fight against abortion and contraceptives at this time, the motivation against these reproductive freedoms focused on the general concept of morality, specifically Christian morality, and not the philosophical concept of the personhood of a fetus or potential child.[46] While the growing Evangelical population of the time crusaded against the

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[37] *See* WAYNE R. LAFAVE, CRIMINAL LAW 767-68 (5th ed. 2010).

[38] *Id.* at 768.

[39] *See* Pollitt, *supra* note 35. Physicians, who sought greater professional legitimacy over midwives and homeopathic healers, largely fueled the anti-abortion campaign of the nineteenth century. *Id.* Some scholars have also attributed the anti-abortion attitudes of the nineteenth century to anti-feminism sentiments and nationalistic and racial biases against Catholics and non-white immigrants. *Id.*

[40] *Id.*

[41] *See* Roy Lucas*, New Historical Insights on the Curious Case of* Baird v. Eisenstadt*,* 9 ROGER WILLIAMS U. L. REV. 9, 9-10, 14-15 (2003) (analyzing the history of American law surrounding contraceptives, abortion, and obscenity between the Comstock era and the Supreme Court case *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

[42] *See generally* Helen Lefkowitz Horowitz, *Victoria Woodhull, Anthony Comstock, and Conflict over Sex in the United States in the 1870s*, 87 J. OF AM. HIST. 403 (2000) (describing Anthony Comstock's personal background and religious underpinnings, as well as his rise to prominence in lobbying against obscene materials).

[43] *See* Lucas, *supra* note 41, at 10 (noting that both Massachusetts and Connecticut had such laws).

[44] Horowitz, *supra* note 42, at 431–34.

[45] *Id*. at 433; An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use (Comstock Law), ch. 258, § 2, 17 Stat. 599 (1873).

[46] *See* Joan C. Callahan, *Electing and Preventing Birth: Introduction*, *in* REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 256 (Joan C. Callahan ed., 1995) (describing the general pro-natalist views of the Comstock era, both from a secular and religious stance). Interestingly, this era corresponded with the Catholic Church's first adoption of the idea that life begins at conception. *See infra* Part I.D.2.

"immoral" behavior seen in popular culture, such as blatant prostitution in large cities and public advertisement of abortionists,[47] a number of secular thinkers of the era advocated against abortion because limiting the number of births would contribute to a "physically and morally weak" lifestyle.[48] At its core, the Comstock era fought against "immoral" behavior.[49] The issue of fetal personhood was absent from the argument; instead, the restrictive policies focused on controlling promiscuous sexual activity and preserving the societal goal of female chastity before marriage.[50]

A key motivation behind many laws that restricted reproduction was a resistance to the growing women's rights movement.[51] State Comstock-like obscenity laws—which often criminalized contraceptives and abortion—sought to control women's bodies and were created with the underlying philosophy that a woman's role in society was almost exclusively as a procreator and caretaker.[52] One scholar from the Comstock era noted that obscenity laws were relatively unheard of before the mid-1800s and that obscenity laws were likely enacted because "all our ladies read now."[53] Meanwhile, women in the late 1800s sought greater social equality through the women's suffrage movement, which was later further realized during the resulting women's rights movement that advocated for greater reproductive freedoms.[54] The future scientific development of hormonal birth control and other novel contraceptives was largely incidental to the societal shift in views surrounding sexuality.[55] The cultural disputes of the time were largely due to the changing roles of women from solely mothers and procreators to more comparable roles in the workforce. [56]

Another motivation behind Comstock-era restrictions on abortion and contraception was

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[47] Horowitz, *supra* note 42, at 408.

[48] Callahan, *supra* note 46, at 256.

[49] *See* Horowitz, *supra* note 42, at 409-10.

[50] *See* CAROL MASON, KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS 9 (2002) (explaining that prior to 1975 anti-abortion activists distinguished abortion from the murder of a full human life); Horowitz, *supra* note 42, at 429-30, 433-34.

[51] Pollitt, *supra* note 35.

[52] *See generally* Martha J. Bailey, *"Momma's Got the Pill": How Anthony Comstock and Griswold v. Connecticut Shaped U.S. Childbearing*, 100 AM. ECON. REV. 98, 104–07 (describing the scope of Comstock-era state obscenity laws, including the criminalization of the sale of contraceptives and abortion); Holly J. McCammon, *"Out of the Parlors and into the Streets": The Changing Tactical Repertoire of the U.S. Women's Suffrage Movements*, 81 SOC. FORCES 787, 790, 800 (2003) (describing the change in women's societal roles including the shift in focus away from women's reproductive capacity).

[53] Henry H. Foster, Jr., *The "Comstock Load"—Obscenity and the Law*, 48 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 245, 247 (1957) (quoting a 1788 conversation in which Dr. Johnson said, "The habit [of reading] was only then being acquired by women! The diversion spread, and books came to be read by the family, often aloud. What had been inoffensive to males had to be cleaned up for mixed company!").

[54] *See generally,* McCammon, *supra* note 52, at 788-89 (describing women in the suffrage movement as moving "out of the parlors and into the streets" as a way of "redefin[ing] themselves as men's equals in the public sphere); C.E. Joffe et al., *Uneasy Allies: Pro-Choice Physicians, Feminist Health Activists and the Struggle for Abortion Rights*, 26 SOC. OF HEALTH & ILLNESS 775, 785 (2004) (detailing the second wave feminist movement in the 20th century that advocated for greater reproductive freedoms).

[55] *See* Nancy Schrom Dye, *The History of the Relationship Between Women's Health and Technology, in* Women & New Reproductive Technologies: Medical, Psychosocial, Legal, and Ethical Dilemmas 12 (Judith Rodin & Aila Collins ed. 1991).

[56] *See, e.g.,* McCammon, *supra* note 52, at 800 (describing the suffrage movement as combatting the idea of "separate spheres" for men and women).

the race-motivated fear that white, native-born Protestants were being out-populated.[57] In the early 1900s, there was a concern of Anglo-Saxon white "race suicide" due to declining birth rates.[58] In response, President Theodore Roosevelt spearheaded a pro-natalist campaign to encourage middle and upper class white Protestant women to reproduce, calling it their civic duty.[59] The racist motivations behind some of the pro-natalist policies in the United States at the time coincided with the American eugenics movement and fit comfortably within its framework by encouraging the birth of children with "desirable" traits while discouraging the birth of children with "undesirable" traits.[60] Despite the generally pro-natalist policies of the era, the same time period brought about the most severe anti-natalist policies designed to prevent the birth of "undesirable" children, including the sterilization of the mentally handicapped and habitual criminals and restrictions against interracial marriage.[61]

Toward the end of the Comstock era, however, certain individuals became increasingly disillusioned with the criminalization of contraception and abortion.[62] By the mid-1900s physicians—who had been some of the most ardent non-religious supporters of abortion criminalization—began expressing discomfort over unclear laws and the growing problem of unsafe, illegal abortions.[63] The civil rights and women's rights movements of the mid-1900s brought radical changes to how Americans viewed sex and reproduction, as well as a number of landmark cases that greatly expanded reproductive freedom in the United States after the Comstock era.[64]

Unlike current cultural disputes over reproductive rights, where some convey a personhood status to embryos or fetuses to justify restricting access to abortion or

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[57] Pollitt, *supra* note 35.

[58] Marcia A. Ellison, *Authoritative Knowledge and Single Women's Unintentional Pregnancies, Abortions, Adoption, and Single Motherhood: Social Stigma and Structural Violence,* 17 MED. ANTHRO. Q. 322, 325 (2003).

[59] *Id.*

[60] *See* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 3 (1996).

> The most passionate of American eugenicists…wished to develop a taxonomy of human traits and to categorize individuals as 'healthy' or 'unhealthy,' and 'normal' or 'abnormal,' within their classification scheme. Working under the presumption that most, if not all, human traits are transmitted genetically, the eugenicists encouraged educated, resourceful, and self-sufficient citizens to mate and produce 'wellborn' eugenic children. In contrast, the dysgenic were discouraged from reproducing. Harry Laughlin called dysgenic groups 'socially inadequate' and defined them to include: the feebleminded, the insane, the criminalistic, the epileptic, the inebriated or the drug addicted, the diseased—regardless of etiology, the blind, the deaf, the deformed, and dependents (an extraordinarily expansive term that embraced orphans, 'ne'er-do-wells,' tramps, the homeless, and paupers).

Id. (citations omitted).

[61] *Id.* at 1-2.

[62] *See, e.g.*, C.E. Joffe et al., *Uneasy Allies: Pro-Choice Physicians, Feminist Health Activists and the Struggle for Abortion Rights*, 26 SOC. OF HEALTH & ILLNESS 775, 778 (2004) (describing the physician response to criminalized abortion under the Comstock era).

[63] *Id.*

[64] *See* HELEN LEFKOWITZ HOROWITZ, REREADING SEX 443-44 (2002) (discussing the changing views of sex in the twentieth century, after the Comstock era); Pollitt, *supra* note 35 (noting the role civil liberties advocates played in promoting reproductive freedom and discussing several reproductive freedom cases).

contraceptives,[65] the Comstock era objections to contraceptives and abortion were rooted in a larger culture war intended to encourage certain members of society to reproduce while simultaneously limiting the reproduction of other members of society.[66] However, toward the end of the Comstock era, social acceptance of restricting the procreation of certain groups waned.[67] In 1942, the Supreme Court established marriage and procreation as "fundamental" rights while simultaneously holding that a state law restricting the procreation of habitual criminals, as applied, was unconstitutional.[68] While *Skinner* began the shift toward greater reproductive freedom, decriminalization of contraceptives and abortion would not happen for more than twenty years.[69]

C. Embracing the Sexual Revolution: Expunging Comstock Policies and Expanding Reproductive Rights from Griswold to Roe

The 1960s were a tumultuous time in the United States, and included the civil rights movement, the Women's Liberation Movement, and a general sexual revolution in American culture.[70] Corresponding with the changing societal views of sex, a number of states either repealed or stopped enforcing their Comstock-era laws restricting access to contraceptives.[71] This practice made it difficult for reproductive rights advocates to strike down several of these laws, such as a Connecticut law prohibiting the sale of contraceptives to married couples.[72] In 1962, Planned Parenthood failed in its attempt to have the Connecticut law declared unconstitutional in *Poe v. Ullman*, on the grounds that since the law was unenforced, the physician plaintiff was not coerced into denying married couples contraceptives.[73] In a strongly worded dissent, Justice Douglas advocated for striking down the Connecticut law on First Amendment grounds as an impermissible restriction of speech between a physician and patient.[74] Alternatively, Justice Harlan argued that the Connecticut law should be struck down as a violation of personal privacy and liberty as granted through Fourteenth Amendment substantive due process rights.[75]

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[65] *See infra* Part I.D.

[66] Lombardo *supra* note 60, at 1-4.

[67] *See, e.g.*, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (holding Oklahoma's Habitual Criminal Sterilization Act, as applied, constituted invidious discrimination in violation of the Fourteenth Amendment).

[68] *Id.* at 541.

[69] LAW STUDENTS FOR REPRODUCTIVE JUSTICE, CONSTITUTIONAL LAW PRIMER 1 (2009) *available at* http://lsrj.org/documents/resources/LSRJ_Con_Law_Primer_2d_ed.pdf [hereinafter LSRJ PRIMER].

[70] *See generally* David M. Heer & Amyra Grossbard-Shechtman, *The Impact of the Female Marriage Squeeze and the Contraceptive Revolution on Sex Roles and the Women's Liberation Movement in the United States, 1960 to 1975,* 43 J. MARRIAGE & FAMILY 49, 49–50 (1981) (describing the sexual revolution's impact on American women); SARA EVANS, PERSONAL POLITICS 83-87 (1980) (describing how the women's rights movement was intertwined with the civil rights movement).

[71] Bailey, *supra* note 52, at 106 (noting the repeal of Comstock-era restrictions on contraceptive distribution by seven states prior to *Griswold*); Gretchen Ritter, *Women's Citizenship and the Problem of Legal Personhood in the United States in the 1960s and 1970s,* 13 TEX. J. WOMEN & L. 1, 17 (2003) (noting "the provisions of the more restrictive [contraception] laws were often unenforced").

[72] Ritter, *supra* note 71, at 17-18.

[73] Poe v. Ullman, 367 U.S. 500, 508 (1962).

[74] *Id.* at 513–14 (Douglas, J., dissenting).

[75] *Id.* at 539 (Harlan, J., dissenting); *see also* Ritter, *supra* note 71, at 18 (describing the far reaching impact

After the initial failure to strike down Connecticut's anti-contraception law, Planned Parenthood successfully challenged it in the landmark 1965 case *Griswold v. Connecticut*.[76] The *Griswold* Court, shying away from Justice Harlan's position in *Poe,* established a constitutional right to privacy through a "[First Amendment] penumbra where privacy is protected from government intrusion"[77] The *Griswold* ruling protected only the right of married couples to secure contraceptives, but the Court's articulation of a constitutional right to privacy is the foundation of modern reproductive rights jurisprudence in the United States.[78]

As a practical matter, the *Griswold* ruling was unsurprising within its greater social context.[79] After the New Deal, the federal government had grown exponentially and there was general concern of governmental over-reach into more private matters protected by individual freedoms of contract and property.[80] The marriage contract—firmly rooted in American common law—created an ideal protection against such governmental intrusion.[81] Even in the Comstock era, sexual relations between married couples were protected, making enforcement of obscenity laws aimed at preventing "illicit" sexual acts nearly impossible.[82] This made the 1972 case *Eisenstadt v. Baird*[83] rather remarkable, as it weakened the assumption that non-marital sex was illicit sex[84] by shifting the assumption of a constitutional right to privacy in issues of sexuality and reproduction from its foundation in the establishment of marriage to an individual right.[85]

American views of sexuality were changing in the 1960s, with sex outside of a marital relationship becoming more common and more widely accepted.[86] Additionally, the period's exponential population growth—the Baby Boom—led a number of health officials to support the proliferation of contraceptives not as a women's health measure, but as a means of combatting the public health threat of overpopulation.[87] Contemporaneous with Americans' changing views of sex was the medical development and introduction of oral contraceptives for women, known

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of Justice Harlan's dissent in *Poe*).

[76] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[77] *Id.* at 483.

[78] *See* LSRJ PRIMER, *supra* note 69, at 1.

[79] *See* Christy Scott, Review Essay, *Constitutional Moments and Crockpot Revolutions*, 25 CONN. L. REV. 967, 971 (1993) (describing one scholar's assertion that *Griswold v. Connecticut* was unsurprising at the time as a protection against growing governmental action and regulation in social welfare matters).

[80] *Id.* at 971-72.

[81] *Id.* at 972; *see generally* Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 L. & CONTEMP. PROBS. 272 (1966) (describing the underlying philosophical reasoning behind the marital zone of privacy established in *Griswold*).

[82] Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L. J. 756, 778 (2006) (observing that marriage protected a couple's sexual acts from legal scrutiny).

[83] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[84] Dubler, *supra* note 82, at 808.

[85] Ritter, *supra* note 71, at 22–23.

[86] *See* Heer & Grossbard-Shechtman, *supra* note 70, at 50. ("Traditionally, the legal norm in American society was that sexual intercourse should be confined to persons legally married to each other. The so-called sexual revolution in the United States represented an increasing divergence of actual conduct from that stipulated by the norm, particularly for never-married women.").

[87] *See* Beth Bailey, *Prescribing the Pill: Politics, Culture, and the Sexual Revolution in America's Heartland*, 30 J. OF SOC. HIST. 827, 830 (1997) (describing the endorsement of population control in the 1960s as a public health issue).

colloquially as "the Pill."[88] Women, married or single, could only gain access to the Pill through a physician's prescription, which often made it difficult for unmarried women to access.[89] By the mid-1970s, however, the Pill was one of the most common forms of contraception for young, unmarried women.[90] The social popularity of the pill, and the pro-population control views of the period, made William Baird's challenge to a Massachusetts law banning contraceptives for unmarried persons a logical next step for reproductive rights advocates.[91]

The Massachusetts law in question, which prohibited the distribution of contraceptives to unmarried persons,[92] was a remainder from the Comstock era and no longer accorded with modern American views on sexuality, morality, and the role of government.[93] Invoking the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court struck down the Massachusetts law, holding the state did not have an adequate justification to treat married and unmarried persons differently for purposes of accessing contraceptives.[94] By relying on the equal protection argument, the *Eisenstadt* Court sidestepped the underlying social issue of whether a state could or should restrict access to contraceptives.[95] In striking down the Massachusetts law, however, the Supreme Court shifted the concept of privacy away from an inherent element of the marital institution[96] to an individual right of "*reproductive* privacy."[97]

Asserting greater reproductive freedoms based on the privacy protections in *Griswold* and *Eisenstadt*, reproductive rights advocates began challenging statutes criminalizing abortion.[98] Several cases prior to *Roe v. Wade*[99] argued that anti-abortion laws violated this privacy right, with varying levels of success.[100] Interestingly, the court in *Abele v. Markle* noted that "changed

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[88] *Id.* at 827 (arguing that the 1960s sexual revolution developed separately from the introduction of oral contraceptives since physicians at the time rarely prescribed oral contraceptives for unmarried women)*; see generally* LAURA BRIGGS, REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO, 129–41 (2002) (describing the scientific development of hormonal oral contraceptives in the twentieth century).

[89] Bailey, *supra* note 87, at 827.

[90] *See* Melvin Zelnik & John F. Kantner, *Sexual and Contraceptive Experience of Young Unmarried Women in the United States, 1976 and 1971*, 9 FAM. PLAN. PERSP. 55, 63 (1977) (providing quantified data showing that a majority of 15-19 year-old never-married women—who had ever used some form of contraception—had used the Pill).

[91] *See* Jackie Gardina, *The Tipping Point: Legal Epidemics, Constitutional Doctrine, and the Defense of Marriage Act*, 34 VT. L. REV. 291, 298 (2009) (noting the argument that unmarried and married persons should be afforded the same reproductive rights under the Equal Protection Clause of the Fourteenth Amendment).

[92] *Eisenstadt*, 405 U.S. at 440-42.

[93] *See* Gardina, *supra* note 91, at 297–98.

[94] *Eisenstadt*, 405 U.S. at 454–55.

[95] LSRJ PRIMER, *supra* note 69, at 1-2.

[96] Ritter, *supra* note 71, at 22–23.

[97] Marc Stein, *The Supreme Court's Sexual Counter-Revolution*, OAH MAG. OF HIST. 21, 22 (Mar. 2006) (emphasis in original).

[98] LSRJ PRIMER, *supra* note 69, at 2.

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

[100] *See, e.g.*, Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969) (agreeing to convene a judicial panel to assess the constitutionality of New York's anti-abortion law); Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), *vacated as moot*, 410 U.S. 951 (1973) (striking down a Connecticut law criminalizing abortion); Sasaki v. Kentucky, 485 S.W.2d 897 (Ky. 1972) (upholding a Kentucky law that criminalized abortion and finding that the legislature is best suited to determine if abortion falls into the zone of privacy established by *Griswold*); Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (finding that the state had a legitimate interest "superior to the claimed right of a pregnant woman" in ensuring the "fetal organism an opportunity to survive").

moral standards" and "advances in medical science since 1860 [that] have made abortion in the early stages of pregnancy no more dangerous than childbirth" greatly weakened the state's interest in criminalizing all abortions in an attempt to reduce "promiscuous sexual relationships" or protect women's health.[101] This changing view of sexuality and morality, and the growing acceptance of a liberty right to privacy, set the foundation for the landmark case in reproductive rights: *Roe v. Wade*.[102]

In *Roe*, the Supreme Court of the United States struck down a Texas law that criminalized all abortions except in instances where the mother's life was at risk.[103] The *Roe* Court held that the constitutional right to privacy, developed in *Griswold* and *Eisenstadt*, encompasses a "woman's decision whether or not to terminate her pregnancy," whether the right "be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people."[104] This right, however, is not unlimited and must be balanced with the state's interest in preserving the life of unborn fetuses.[105]

Importantly, the court in *Roe* denied any personhood status to the "unborn".[106] In trying to establish a framework for balancing a pregnant woman's privacy interest against the state's interest in preserving the life of an unborn fetus, the Court adopted a trimester schema.[107] The Court's finding that a woman has an absolute right to an abortion in the first trimester,[108] up to thirteen weeks gestation,[109] is still more restrictive than pre-Comstock laws that permitted abortion prior to quickening.[110] After the first trimester, *Roe* permits states to restrict access to abortion to protect the woman's health, and only allows for state preservation of the "life" of the fetus if the fetus would be viable outside the womb.[111]

Roe's trimester framework, which essentially prohibited the states from protecting the life interest of an unborn fetus until the third trimester, was short-lived.[112] After *Roe*, American views on sexuality, morality, and the family once again began to shift.[113] With the rise of the Religious Right in American politics, and rapid medical and technological advancements, the

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[101] *Abele*, 342 F. Supp. at 802-03 n.10.

[102] LSRJ PRIMER, *supra* note 69, at 5 (warning that *Roe v. Wade* must be seen in the context of the changing social fabric, particularly views on women's rights and the Court's recognition of liberty interests in other realms).

[103] *Roe*, 410 U.S. at 164.

[104] *Id.* at 153.

[105] *Id.* at 159 ("[I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly").

[106] *Id.* at 162.

[107] *Id.* at 162–64.

[108] *Id.* at 163.

[109] *Fetal Development: First Trimester*, AM. PREGNANCY ASSOC. (Jan. 2013), www.americanpregnancy.org/duringpregnancy/fetaldevelopment1.htm.

[110] *See supra* Part.I.A (describing quickening as occurring between the twelfth and sixteenth weeks of pregnancy).

[111] *Roe*, 410 U.S. at 163–64.

[112] *See* LSRJ PRIMER, *supra* note 69, at 19 (detailing the effects of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), a Supreme Court case that restructured the abortion rights framework without overturning *Roe*).

[113] *See* Lisa Duggan, *From Instincts to Politics: Writing the History of Sexuality in the U.S.*, 27 J. OF SEX RES. 95, 99-102 (1990) (describing the "moral panic" of the 1980s surrounding sexuality and other social issues).

stage was set for many fierce social battles.[114]

D. Post-Revolution Social Backlash: Assisted Reproductive Technology, Personhood, and Neo-Conservatism in Post-Roe Politics

Post-*Roe*, America experienced a political "backlash" to the sexual revolution via the creation of the "New Right."[115] The neo-conservative New Right movement was categorized into three sub-movements during the early 1980s: economic conservatives, social conservatives, and religious conservatives.[116] The social and religious conservatives, vocally opposed abortion and some even opposed the proliferation of contraceptives.[117] The rise of the "New Right" in the 1980s, which has remained a powerful force through the beginning of the twenty-first century, was primarily a reaction against the changing definition of family in the United States.[118] This threat to the "traditional" family, in which a man and woman were married with only marital offspring, underpinned the social and political battles of the next three decades.[119]

In framing social issues like abortion as "baby-killing", and bringing the Pro-Life movement into political predominance, the New Right changed the conversation surrounding abortion and reproductive freedom.[120] This section will look at the rise of personhood in modern American politics regarding reproductive issues.[121] First, the section will explore the limitations placed on reproductive rights after *Roe* and the rise of the Religious Right.[122] Second, this section will discuss the struggles of the Religious Right's anti-abortion and anti-contraception campaigns, which are founded on the religious concept of "personhood".[123] Finally, this section will describe the hindrance "personhood" places on scientific development—specifically, stem cell research.[124]

1. Losing Ground in the Reproductive Rights Battle: The Rise of Neo-Conservatism and Strengthening of the Right to Life Movement in the United States

The Right to Life movement began during the sexual revolution of the 1960s, but did not gain prominence until after *Roe*.[125] *Roe* altered the discourse surrounding abortion from a

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[114] *See* Dennis R. Hoover & Kevin R. den Dulk, *Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada*, 25 INT'L POL. SCI. REV. 9, 9–10 (2004) (describing the reemergence of socially conservative Christians as vocal players in the American culture wars, and noting the general tendency of Americans to be "exceptionally litigious").

[115] *See* Pamela Johnston Conover, *The Mobilization of the New Right: A Test of Various Explanations,* 36 POL. RES. Q. 632, 632 (1983) (describing the social backlash of the time and the creation of the "New Right").

[116] *Id.*

[117] *See id.* (describing Right to Life and Stop E.R.A. [the Equal Rights Amendment] as single-issue interest groups that formed part of the New Right, and opposed abortion and other feminist policies that threatened to change traditional family structures and dynamics).

[118] *See id.* at 645–46.

[119] *See infra* Part I.D.1–3.

[120] *See infra* Part I.D.1

[121] *See infra* Part I.D.1–3.

[122] *See infra* Part I.D.1.

[123] *See infra* Part I.D.2.

[124] *See infra* Part I.D.3.

[125] *See generally* Keith Cassidy, *Interpreting the Pro-Life Movement: Recurrent Themes and Recent Trends*,

discussion about population control and eugenics to a rights-based justification for preserving the right of women to seek elective abortions in the United States.[126] After *Roe*, anti-abortion activists fought political "edge" issues, such as prohibitions on the use of federal funds for abortions, with a good deal of success.[127] These "edge" issues slowly curtailed the broad-stroke rights established in *Roe*.[128]

One of the biggest accomplishments of post-*Roe* anti-abortion activists was the passage of the Hyde Amendment in 1977.[129] The Hyde Amendment is a federal law prohibiting the use of federal funds for any elective abortion, which by default prohibits Medicaid and other public health plans from covering abortion services unless there is a threat to the pregnant woman's life.[130] The Supreme Court upheld the constitutionality of the Hyde Amendment in the 1980 case *Harris v. McRae*.[131] *McRae* established abortion as a negative right in American law—the government has a duty not to prohibit access to abortion in certain circumstances, but it does not have an affirmative duty to assist a person in obtaining an abortion.[132] Establishing abortion, as well as other reproductive rights, as a negative right was a critical blow to the reproductive rights movement, providing anti-abortion activists ample room to curb the scope of abortion and other reproductive rights.[133]

Ironically, the case that solidified the constitutional right to an abortion, *Planned Parenthood v. Casey*,[134] also provided anti-abortion activists with a framework for greatly limiting abortion rights.[135] In *Casey*, the Court did away with both the strict scrutiny standard and the trimester framework from *Roe*, instead creating the "undue burden" standard[136] and opening the door for modern state and federal laws restricting access to abortion.[137] After *Casey*, a state could restrict and regulate abortions and abortion services as long as those restrictions did not

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in LIFE AND LEARNING IX 1, 10 (1999), *available at* http://www.uffl.org/vol%209/cassidy9.pdf (noting that the anti-abortion movement grew during the 1960s and that arguments over the "nature and value of human life" have been a "major" element of American discourse since *Roe*).

[126] *See* Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 L. & HIST. REV. 281, 283–86, 321–23 (2009) (arguing that the decision in *Roe* changed the composition of interest groups that supported and opposed abortion rights in the United States).

[127] *See* David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 842–43 (1999) (describing the early successes and failures of the anti-abortion movement post *Roe*).

[128] *See* GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS 1 (Apr. 1, 2014), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

[129] *See* Jeannie I. Rosoff, *The Hyde Amendment and the Future*, 12 FAM. PLAN. PERSP. 172, 172 (1980) (describing the passage and impact of the Hyde Amendment).

[130] *See id.*

[131] 448 U.S. 297 (1980).

[132] *See* Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750, 754-55 (2001) (defining negative rights and asserting that *McRae* established a negative constitutional right).

[133] *See* LSRJ PRIMER, *supra* note 69, at 12-13.

[134] 505 U.S. 833 (1992).

[135] David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1646 (1996) (describing the impact of *Casey* as encouraging states to pass "reasonable" abortion restrictions).

[136] *Casey*, 505 U.S. at 870, 876 (1992).

[137] LSRJ PRIMER, *supra* note 69, at 18.

create an "undue burden" or "substantial obstacle" to a woman's access to services.[138] However, the *Casey* Court preserved a woman's right to abort a fetus before it became viable outside the womb.[139] This ruling opened the doors for states to develop the targeted regulation of abortion provider (TRAP) laws that would become the fodder of modern reproductive rights debates.[140] Currently, the majority of states have at least one TRAP law,[141] and three states have been so successful in restricting access that there is only one abortion provider remaining in each state.[142]

The "pro-life" movement has accomplished a lot since *Roe,* as demonstrated by the near extinction of abortion providers in some states.[143] Adopting pro-life policies has become a litmus test for modern conservative politicians, with radical pro-life policies becoming the norm of modern conservative politics.[144] An increasing number of extreme social policies have been accepted in American politics since the early 1990s.[145] The 2012 election, however, brought many of these extreme positions to light and started yet another national reaction against the radicalization of reproductive politics.[146] Underlying some of these extreme views—particularly those of the radical Religious Right—is the definition of when life begins and the concept of

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[138] *Id.* at 18-19.

[139] *Casey*, 505 U.S. at 877.

[140] *See* Barry Yeoman*, The Quiet War on Abortion*, MOTHER JONES (Sept./Oct. 2001), *available at* http://www.motherjones.com/politics/2001/09/quiet-war-abortion (describing how *Casey* set the foundation for future TRAP laws in the United States).

[141] *See* GUTTMACHER INSTITUTE, *supra* note 128 (providing a chart of all abortion restrictive state laws in place as of Apr. 1, 2014).

[142] Dawn Johnsen, *"Trap"ing Roe in Indiana and A Common-Ground Alternative*, 118 YALE L.J. 1356, 1387 (2009) (observing that Mississippi, North Dakota, and South Dakota have successfully used TRAP laws to close all but one abortion provider in each state).

[143] *See id.*

[144] *See* John Seery, *Moral Perfectionism and Abortion Politics*, 33 POLITY 345, 346, 349 (2001) (describing the use of abortion politics, particularly pro-life stances, as a political litmus test on moral values for social conservatives and the Religious Right).

[145] *See* Sal Gentile, *As Furor Over Reproductive Rights Grows Louder, Number of States that are 'Hostile' to Abortion Doubles, Study Finds*, THE DAILY NEED, PBS (Mar. 19, 2012, 12:05 PM), http://www.pbs.org/wnet/need-to-know/the-daily-need/as-furor-over-reproductive-rights-grows-louder-number-of-states-that-are-hostile-to-abortion-doubles-study-finds/13371/ (describing a recent Guttmacher Institute study that found a drastic increase in state anti-abortion legislation and hostility between 2000 and 2012).

[146] *See, e.g.,* Michael McAuliff, *Richard Mourdock on Abortion: Pregnancy from Rape is 'Something God Intended',* HUFFINGTON POST (Oct. 24, 2012, 9:10 PM), http://www.huffingtonpost.com/2012/10/23/richard-mourdock-abortion_n_2007482.html. Extreme reproductive rights views, such as Senate candidate Richard Mourdock's assertion that all abortion, including instances of rape, should be prohibited since "God intended [pregnancy] to happen", were publicized during the 2012 election. *Id.* Other extreme, and often unscientific, views of reproductive rights were prevalent among conservative candidates in the 2012 election. *Id.* For example, Representative Todd Akin falsely asserted that women cannot be impregnated by "legitimate rape." *Id.* Republican President hopeful Rick Santorum, a former Senator from Pennsylvania, took a strong stance against the availability of contraceptives during his 2012 campaign, arguing that states should be allowed to ban contraceptives. Ann Gerhart, *Birth Control as Election Issue? Why?*, WASH. POST (Feb. 20, 2012), www.washingtonpost.com/national/health-science/birth-control-as-election-issue-why/2012/02/17/gIQASW6kPR_story.html. Most political candidates who expressed their extreme anti-abortion or anti-reproductive rights views lost their election bids in 2012, potentially indicating the beginning of another social shift in American politics away from the current religious extremism of social conservatives. *See Most Candidates Who Made Controversial Abortion Remarks Defeated*, NAT'L PARTNERSHIP FOR WOMEN & FAM. (Nov. 07, 2012), http://www.nationalpartnership.org/site/News2?abbr=daily2_&page=NewsArticle&id=36614.

embryonic "personhood."[147]

2. Personhood: The New Battle Cry of the Radical Religious Right

Personhood, the philosophical determination of when something acquires the status of being a full human person in society, "is not a matter of fact."[148] Instead, many argue that the moral status of person is conferred at some point during gestation, while the legal status of person is conferred after the birth of a child.[149] Philosophers and theologians have debated the existence and importance of personhood for centuries.[150] Religious groups, particularly modern Evangelical Christians and Catholics, use the personhood construct in addressing a number of reproductive issues.[151]

The concept of fetal and embryonic personhood is relatively new to Christian theology,[152] but has now become the cornerstone of the Evangelical Conservatives' opposition to a number of reproductive rights.[153] In the 1960s, at the height of the sexual revolution, contemporary Christian theology of personhood was consistent with the theology of medieval times: that "the soul [was] infused at some time after conception."[154] Thus, no "person" existed until the developing organism had been "infused" with a soul.[155] This view has greatly changed in recent years, particularly in the abortion context.[156]

The first shift in the Christian theological view of personhood to conception occurred in the nineteenth century Catholic Church.[157] In 1875, following the discovery of fertilization of an

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[147] *See* Seery, *supra* note 144, at 351, 354 (describing the moral framework many anti-choice candidates use to oppose abortion, which is almost exclusively based in Christian theology).

[148] Jed Rubenfeld, *On the Legal Status of the Proposition That 'Life Begins at Conception'*, 43 STAN. L. REV. 599, 601 (1991).

[149] *See id.*

[150] *See* DAVID ALBERT JONES, THE SOUL OF THE EMBRYO 220–35 (2004) (describing philosophical and Christian theological views of personhood).

[151] *See* Jonathan Dudley, *My Take: When Evangelicals were Pro-Choice*, CNN (Oct. 30, 2012, 5:54 PM), http://religion.blogs.cnn.com/2012/10/30/my-take-when-evangelicals-were-pro-choice (describing the contradictions between historically held views which were tolerant of abortion and modern beliefs).

[152] *See generally* Gordon Dunstan, *The Moral Status of the Human Embryo: A Tradition Recalled*, 1 J. OF MED. ETHICS 38, 38 (1984) (arguing that claims for embryonic protection from conception were introduced in Western religious traditions at the end of the nineteenth century).

[153] *See* Dudley, *supra* note 151.

[154] JONES, *supra* note 150, at 220 (noting this view was consistent with medieval Christianity's view on the beginning of life).

[155] *See* Valerie Tarico, *Right-wing Christians Didn't Always Hate Women*, SALON (Nov. 17, 2012, 9:00 AM), http://www.salon.com/2012/11/17/right_wing_christians_didnt_always_hate_women (noting that *Christianity Today* published an article in 1968 stating life did not begin until birth, and that the Bible drew a distinction between a fetus and an adult).

[156] *Id.* Interestingly, some biblical literalists adopted the new view that all life is sacred and that the Bible prohibits abortion after the language of the New American Standard Bible was altered to explicitly address the legal and moral status of a fetus. *Id.* The versions of the Bible published prior to 1995 treated the status of a fetus as different from that of a full human being. *Id.*

[157] John A. Balint, *Ethical Issues in Stem Cell Research*, 65 ALB. L. REV. 729, 735 (2002) (describing the evolution of Catholic views of when life begins). Prior to this decree, the Catholic Church believed that life began at "ensoulment," which occurred at approximately 40 days gestation. *Id.*

ova by sperm, Pope Pius IX adopted the modern Catholic view that life begins at conception.[158] Every successive Pope has reaffirmed this view.[159] Other Christian traditions have also adopted the belief that personhood begins at conception, including Missouri Synod Lutherans and some Southern Baptists.[160] Contemporary Christian theologian Francis Beckwith has strongly argued that life begins at conception, and asserts that such a definition is strongly supported by Biblical text.[161] Notably, though, other sects of Christianity and major religions like Judaism do not define life at conception.[162]

Since the 1980s, the Religious Right in American politics has largely adopted the view that personhood begins at conception and has used this reasoning as a justification to oppose abortion, and in some cases, even contraception.[163] This view has been taken to the extreme by some groups, such as the American Right to Life—which condemned 2008 Presidential nominee John McCain for endorsing rape exceptions in anti-abortion measures—who defines personhood at conception and believes that embryos should have full rights as persons.[164] Such views have been behind a number of extreme state legislative initiatives to define life at, or even before, conception.[165] Advancements in medical technologies have additionally led to the transfer of moral outrage from abortion and contraception to certain assisted reproductive technologies, such as *in vitro* fertilization and stem cell research.[166]

3. Scientific Advancement and Moral Outrage: Stem Cell Research

Contemporaneously with the rise of the Religious Right and the shift to a personhood-based opposition to reproductive issues like abortion, significant medical advancements since *Roe* have introduced a number of novel reproductive issues.[167] A major point of contention for the Religious Right has been the acceptance of *in vitro* fertilization and the related issue of embryonic

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158 *Id.*

159 *Id.*

160 Robert L. Maddox & Blaine Bortnick, Webster v. Reproductive Health Services*: Do Legislative Declarations That Life Begins at Conception Violate the Establishment Clause?,* 12 CAMPBELL L. REV. 1, 3 (1989).

161 Margaret D. Kamitsuka, *Feminist Scholarship and Its Relevance for Political Engagement: The Test Case of Abortion in the U.S.*, 1 RELIGION & GEND. 18, 37 (2011).

162 Balint, *supra* note 157, at 736.

163 *See* Ari Armstrong & Diana Hsieh, *The 'Personhood' Movement is Anti-Life: Why it Matters that Rights Begin at Birth, Not Conception*, COAL. FOR SECULAR GOV'T, 3 (2010) (describing the Catholic Church's opposition to contraceptives and noting that evangelical Protestants do not generally oppose contraceptives that work solely to prevent fertilization).

164 *Id*.

165 *See* Emily Wagster Pettus, *Mississippi 'Personhood' Amendment Vote Fails*, HUFFINGTON POST (Nov. 8, 2011, 11:17 PM), http://www.huffingtonpost.com/2011/11/08/mississippi-personhood-amendment_n_1082546.html (detailing the failed 2011 Mississippi state constitutional amendment that would have defined life at fertilization); John Celock, *Arizona Abortion Bill: Legislators Pass Three Bills, Including One that Redefines When Life Begins*, HUFFINGTON POST (Apr. 12, 2012, 4:56 PM), www.huffingtonpost.com/2012/04/10/az-abortion-bills-arizona-gestational-age_n_1415715.html (describing an Arizona state bill that would define gestational age in terms of a woman's last menstrual cycle, which could be as much as two weeks *before* conception).

166 *See infra* Part I.D.3.

167 *See infra* Part II.A.

stem cell research.[168] The crux of the moral outrage in embryonic stem cell research, which many hope will find cures to debilitating diseases such as Parkinson's and ALS,[169] is that the embryo would be destroyed through the research process.[170] Embryonic personhood advocates have made several attempts to stop embryonic stem cell research and federal funding for such research based entirely on the belief that the research destroys lives.[171]

During President George W. Bush's administration, advocates for embryonic personhood found a strong ally.[172] President Bush was a member of the personhood movement of the Religious Right, and helped advance the personhood agenda through his 2005 announcement supporting embryo adoption over donation to embryonic stem cell research.[173] During the late 1990s and early 2000s, the promise of medical cures for previously incurable diseases persuaded many Americans, including some ardent pro-life adherents, to support embryonic stem cell research.[174] President Bush's reframing of the issue, asserting the personhood of unused embryos from *in vitro* fertilization, revitalized the movement against stem cell research. The resulting Bush-era policies greatly restricted funding for embryonic stem cell research, and prompted states like Maryland to create its own solution to the federal limitations on embryonic stem cell research.[175]

The election of Barack Obama in 2008 greatly changed the discourse surrounding embryonic stem cell research and personhood issues as a whole. Only months into office, President Obama rescinded President Bush's executive order restricting funding for embryonic stem cell research.[176] Additionally, the personhood arguments of the Religious Right have fallen outside the mainstream understanding of many Americans; and emerging concepts such as the parental rights of single persons and same-sex couples, as well as the general acceptance of assisted reproductive technology make it highly unlikely that the personhood purity standards of the Right to Life movement will be adopted by mainstream American culture.[177]

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[168] *See* James J. McCartney, *Embryonic Stem Cell Research and Respect for Human Life: Philosophical and Legal Reflections*, 65 ALB. L. REV. 597, 613 n.85, 614 (2002) (describing various ethical arguments related to embryonic stem cell research, including the moral status of the developing embryo).

[169] *See* Sonja Kriks, et al., *Dopamine Neurons Derived from Human ES Cells Efficiently Engraft in Animal Models of Parkinson's Disease,* 480 NATURE 547, 551 (2011) (concluding based on animal studies that continued embryonic stem cell research could lead to a cell based therapy for Parkinson's disease). Advocacy groups for other degenerative diseases, such as Amyotrophic lateral sclerosis, or ALS, also support the use of embryonic stem cell research to find a cure. *See generally* LUCIE BRUIJN, SENIOR VICE PRESIDENT OF RESEARCH AND DEVELOPMENT, ALS ASS'N, A PRIMER ON STEM CELLS, *available at* www.alsa.org/research/about-als-research/primer-on-stem-cells.html.

[170] *See* McCartney, *supra* note 168, at 612-15.

[171] *See* Lisa Shaw Roy, Roe *and the New Frontier*, 27 HARV. J. L. & PUB. POL'Y 339, 368 (2003) (discussing the link between embryo disputes and embryonic stem cell research, including the controversy over federally funded stem cell research); Doe v. Obama, 631 F.3d 157 (4th Cir. 2011), *cert denied*, 131 S. Ct. 2938 (2011) (denying standing to cryogenically preserved embryos in suit brought on the embryos' behalf, alleging a violation of the embryos' constitutional and statutory rights).

[172] *See supra* Introduction.

[173] *See* Janet L. Dolgin, *New Terms for an Old Debate: Embryos, Dying, and the 'Culture Wars',* 6 HOUS. J. HEALTH L. & POL'Y 249, 268 (2006).

[174] *Id.* at 249, 268.

[175] *See supra* Introduction.

[176] Exec. Order No.13,505, 74 Fed. Reg. 10,667 (Mar. 09, 2009).

[177] *See infra* Part II; *see also* Conover, *supra* note 115, at 642.

II. THE "NEW NORMAL" OF AMERICAN FAMILIES: DEVELOPMENT AND ACCEPTANCE OF ASSISTED REPRODUCTIVE TECHNOLOGY AND AMERICAN LAW

Scientific and medical advancements over the past few decades have greatly increased the reproductive options available to American families.[178] There are now numerous options to overcome almost any barrier to reproduction, including the absence of a sexual partner.[179] American laws have slowly adapted to these new American families, but there are still a number of gaps in the legal framework surrounding assisted reproductive technology.[180] This section first provides a brief overview of assisted reproductive technology.[181] It then describes several aspects of American law affected by assisted reproductive technology—specifically, defining the parent-child relationship.[182] Finally, this section analyzes the implications embryonic personhood has on ARTs and the modern American family.[183]

A. A Brief History of Assisted Reproductive Technology Development

Assisted reproductive technology is a general term for non-coital, or third party, reproduction.[184] The first recorded human conception through ART occurred in the late eighteenth century, when Dr. John Hunter helped a husband and wife achieve pregnancy using artificial insemination (AI).[185] It was not until 1884 that donor sperm was used to achieve a pregnancy in the United States.[186] For many decades, AI was the only form of non-coital reproductive technology available. It was not until the 1960s that medical researchers began trying to use other types of ART.[187]

Processes like *in vitro* fertilization were considered a scientific fantasy for a long time.[188]

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[178] *See infra* Part II.A.

[179] *See infra* Part II.A.

[180] *See infra* Part II.B.

[181] *See infra* Part II.A.

[182] *See infra* Part II.B.

[183] *See infra* Part II.C.

[184] While the Centers for Disease Control and Prevention define ART as limited to those procedures in which both the sperm and egg are handled, this Article will use a more expansive definition that encompasses all methods of reproduction other than coitus. *See* CENTERS FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY (ART), www.cdc.gov/art (last updated Nov. 2013).

[185] Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1049-50 (2002). Notably, the physician was not present for the insemination; instead, he provided the husband instructions and then left the couple to complete the task. *Id.*

[186] R. SNOWDEN & G.D. MITCHELL, THE ARTIFICIAL FAMILY 13 (1981) (describing the 1909 announcement in the journal *Medical World* that "the first human donor insemination had been performed at Jefferson Medical College, in America, in 1884"). With the advent of genetic testing, donor sperm is often tested for markers of certain genetic disorders that may cause the donor to be excluded from selection. *See* STRONG, *supra* note 22, at 153-54 (describing guidelines that could permit the exclusion of donors with hereditary conditions such as sickle-cell anemia and Tay-Sachs disease).

[187] *See* R. G. Edwards, *IVF and the History of Stem Cells*, 413 NATURE 349, 349 (2001); *see also* Gerardo Vela et al., *Advances and Controversies In Assisted Reproductive Technology,* 76 MT. SINAI J. MED. 506, 507 (2009) (noting that the first reported live birth from IVF occurred in 1978).

[188] Moon H. Kim, *Current Trends in Human IVF and Other Assisted Reproductive Technologies*, 31 YONSEI MED. J. 91, 91 (1990).

IVF begins with the harvest of a mature human egg cell from a woman shortly before she ovulates.[189] The egg is then fertilized with sperm in a petri dish, and the resulting fertilized egg begins to divide.[190] Once the fertilized egg divides, it becomes an embryo that can be transferred to a human uterus for gestation, used for research purposes, or cryogenically preserved for future use.[191]

In 1978, Louise Brown became the first human child conceived through IVF and resulting in a live birth.[192] Shortly thereafter, in 1984, the first birth from a cryogenically frozen embryo occurred.[193] Since then, IVF has become very successful in the United States.[194] These procedures have become so popular that more than one percent of all births per year in the United States are conceived via IVF.[195]

In addition to IVF's popularity, the method has become more refined and effective over the years, with success rates increasing in recent years.[196] Recently, the American Society for Reproductive Medicine (ASRM) published an article indicating that success rates for embryo transfers have become so high that, in certain circumstances, transferring only one embryo is sufficient.[197] Until the late 1990s, when the ASRM revised its practice guidelines, it was a common practice for multiple embryos to be transferred in order to compensate for failed implantation attempts.[198] With the rise of IVF and the improved technology of cryogenically freezing and storing embryos, cryopreservation has become a common practice and the surplus of stored embryos is increasing.[199]

Advances in reproductive medicine, however, come with social and financial costs.[200]

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[189] BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS & FETUSES 200-01 (1992).

[190] *Id.* at 200-01. The term *in vitro* literally means "in glass," referring to the use of a glass petri dish to fertilize the two gametes.

[191] *Id.*

[192] Margie Mietling Eget, Casenote, *The Solomon Decision: A Study of* Davis v. Davis, 42 MERCER L. REV. 1113, 1114 (1991).

[193] *Id.* at 1115.

[194] James P. Toner, *Progress We Can Be Proud Of: U.S. Trends in Assisted Reproduction Over the First Twenty Years*, 78 FERTILITY & STERILITY 943, 948–49 (2002) (noting the success of IVF procedures in the United States from 1985 through 2000).

[195] *What is Assisted Reproductive Technology?*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/art (last updated Feb. 21, 2014).

[196] Toner, *supra* note 194, at 948-49. In the past, multiple embryos were transferred in hopes of increasing the chance for implantation and pregnancy. Am. Soc'y for Reprod. Med., *Elective Single-Embryo Transfer*, 97 FERTILITY & STERILITY 835, 835 (2012). Now that the technology has improved, single-embryo transfer is being advocated for some patients in order to reduce the chance of a multiple pregnancy, which is a higher risk pregnancy. *Id.*

[197] *See* Am. Soc'y for Reprod. Med., *supra* note 196, at 835, 837 (asserting that with the increased success of IVF transfers, for women under the age of 35 with more than one high quality embryo for transfer, a single embryo transfer is appropriate).

[198] *Id.* at 835.

[199] Brandon J. Bankowski et al., *The Social Implications of Embryo Cryopreservation*, 84 FERTILITY & STERILITY 823, 823 (2005).

[200] François Olivennes & René Frydman, *Friendly IVF: The Way of the Future?*, 13 HUMAN REPROD. 1121, 1121–22 (1998) (discussing the cost of IVF).

Couples must decide the fate of unused embryonic material.[201] Nationally, the disposition of unused embryos has sparked social outcries at the rise of IVF and the destruction of unused embryos.[202] Despite social discomfort about the IVF industry, business is booming.[203] Much of this boom comes from the lack of government regulation of the infertility market.[204] Even with a competitive market and some private insurers covering the costs of IVF, treatment remains expensive.[205] In 2009, the average cost of one standard IVF cycle in the United States was $12,513.[206] Cryogenically storing embryos is also an expensive endeavor.[207] Despite its increased use and acceptance as a method of reproduction, IVF remains an expensive choice for couples.[208]

At any given time, as many as twenty percent of American couples experience infertility.[209] While many couples ultimately use ARTs to achieve a pregnancy,[210] it is usually a deeply private experience that involves numerous emotional conflicts and difficult choices.[211] Since reproduction is usually a private experience, the legal implications of using ARTs are rarely considered before the technology is developed and widely implemented.[212]

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[201] *See* Alison Lobron, *The Maybe-Baby Dilemma*, BOSTON GLOBE MAG., Nov. 22, 2009 (describing a couple's struggle in deciding what to do with remaining frozen embryos after they feel their family is complete).

[202] *See* Conde, *supra* note 2, at 283-86 (examining the rhetoric surrounding "snowflake babies" and discussing organizations that view the destruction of any embryos as a destruction of human life and therefore promote the "adoption" of cryogenically preserved embryos).

[203] *See* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 3 (2006) ("In 2004, more than one million Americans underwent some form of fertility treatment, participating in what had become a nearly $3 billon industry.").

[204] *See* Tarun Jain et al., *Trends in Embryo-Transfer Practice and in Outcomes of the Use of Assisted Reproductive Technology in the United States*, 350 NEW ENG. J. MED. 1639, 1640 (2004) (attributing the lack of regulation of the U.S. infertility market to the belief that fertility decisions should remain between a physician and their patient).

[205] Some states, including Maryland, mandate that private insurers cover certain IVF treatments. *See, e.g.*, MD. CODE ANN., INS. § 15–810 (LexisNexis 2011); *see also* Katherine E. Abel, Note, *The Pregnancy Discrimination Act and Insurance Coverage for Infertility Treatment: An Inconceivable Union*, 37 CONN. L. REV. 819, 823 (2005).

[206] Desireé M. McCarthy-Keith et al., *Will Decreasing Assisted Reproduction Technology Costs Improve Utilization and Outcomes Among Minority Women?*, 94 FERTILITY & STERILITY 2587, 2587 (2010).

[207] *See, e.g., Single Cycle IVF Cost Details*, ADVANCED FERTILITY CTR. OF CHI., http://www.advancedfertility.com/ivfprice.htm (last visited Apr. 5, 2014) (showing a cost of $750 for embryos to be cryogenically frozen and stored for one year, with a cost of $600 for each subsequent year).

[208] *See* McCarthy-Keith et al., *supra* note 206, at 2587 (describing the financial barriers to accessing IVF in the United States for low-income and uninsured women).

[209] Steven H. Snyder, *I'm a Divorce Lawyer! So Why Should I Read About ART?*, 34 FAM. ADVOCATE 6, 6 (2011).

[210] *Compare id.* (stating that a "vast number" of infertile persons in the United States choose various medical procedures to treat infertility and "often participat[e] in third-party reproduction"), *with* Arthur L. Greil et al., *Infertility Treatment and Fertility-Specific Distress: A Longitudinal Analysis of a Population-Based Sample of U.S. Women*, 73 SOC. SCI. & MED. 87, 88 (2011) (asserting that fewer than fifty percent of infertile U.S. women participate in medical procedures to treat infertility).

[211] Snyder, *supra* note 209, at 7 (describing the deep sense of privacy some couples feel toward using ARTs, with one couple concealing their use of an egg donor from their friends and family).

[212] *See* Anna Stolley Persky, *Reproductive Technology and the Law,* WASHINGTON LAWYER, Jul./Aug. 2012, at 23–24 (describing the political implications of ARTs, including conflicting state laws).

B. Adapting Existing Laws for Families Achieved through Assisted Reproductive Technology

The law has been very slow to accommodate the changing family dynamics that arise from the use of ARTs.[213] Some ARTs, like AI, fit comfortably within existing parentage laws.[214] Others, like IVF, are much more complicated and often involve novel legal issues.[215] There is no national policy addressing ARTs; instead, the states have been free to draft their own laws regarding ARTs.[216] Despite the lack of legal consistency surrounding ARTs—with some forms of assisted reproduction criminalized in certain jurisdictions[217]—many forms of ARTs have become widely accepted in American culture.[218]

1. The Marital Presumption: Incorporating the use of ARTs into Existing Family and Inheritance Laws

Artificial insemination, when used within a marriage, is the least problematic form of ART to incorporate into the existing legal framework. Under the common law, a child born during a marriage is presumed to be the legal child of the husband and wife.[219] This is a rebuttable presumption that historically could only be overcome with strong evidence that the father was either sterile or not near the wife during the time of conception.[220] Genetic testing provides one means of overcoming the marital presumption.[221] When using AI, however, the husband is only

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[213] *Id.* at 28 (describing the troubles encountered by determining legal parentage under an antiquated understanding of pregnancy and birth, into which many ARTs do not fit).

[214] Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 623–24 (2002) (describing the marital presumption for parentage of a child conceived via artificial insemination).

[215] *See generally* ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 87–92 (1995) (discussing controversies and ethical dilemmas related to IVF).

[216] The assisted reproductive technology market is largely self-regulated. *See* SPAR, *supra* note 203, at 5. Some states, however, have enacted laws directly governing certain aspects of third-party reproduction. *See, e.g.*, LA. REV. STAT. ANN. § 14:101.2 (2013) (prohibiting the implantation of an IVF embryo without the express written consent of both progenitor and recipient); N.H. REV. STAT. ANN. § 168–B:13 (2013) (creating statutory guidelines for proper IVF consent procedures). Disposition of cryogenically preserved embryos in the event of divorce, death or abandonment, however, is rarely addressed in the law. *See, e.g.*, FLA. STAT. § 742.17 (2013) (mandating that couples pursuing IVF enter a written agreement regarding the disposition of embryos related by the union).

[217] Surrogacy, where a woman carries a child for another intended couple or individual, has been criminalized in several states. *See, e.g.* D.C. CODE § 16-402 (2013) (prohibiting surrogacy contracts in the District of Columbia and creating a civil penalty up to $10,000 or one year imprisonment, or both); ARIZ. REV. STAT. ANN. § 25-218 (2013) (prohibiting the formation of a surrogacy contract and declaring the surrogate mother the legal mother of any child resulting from such a contract); *but see* Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (holding Arizona statute prohibiting surrogacy was unconstitutional on equal protection grounds).

[218] To provide one example from popular culture, NBC television premiered the sitcom *The New Normal* in 2012, which revolves around a gay couple hiring a surrogate to carry their child. GLAAD, *The New Normal* (last visited February 18, 2014), http://www.glaad.org/thenewnormal. It is one of several television shows that have positively shown the use of ARTs to help create non-traditional families. *Id.*

[219] Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 248 (2006).

[220] *Id.*

[221] *See* Erin V. Podolny, *Are You My Mother?: Removing A Gestational Surrogate's Name from the Birth*

determined to be the legal father of the child if he consented to the insemination.[222] Many jurisdictions require this consent to be in writing, and it is often not presumed.[223]

Even with genetic testing, it can be difficult to overcome the marital presumption of paternity.[224] A genetic father may not have judicial standing to bring a paternity claim if the child has been born into another marriage.[225] In these situations, if the husband accepts the child and holds the child out as his own, it is unlikely that a court will grant the genetic father standing to challenge the marital presumption of paternity.[226]

Regardless of the marital status of the mother that conceives a child using AI, the sperm donor is generally protected against legal fatherhood.[227] Specifically, when sperm is anonymously donated the donor is protected against claims for paternity.[228] When the sperm donor is known, however, the parental status may be less clear under the common law.[229] If a known donor enters into a contract that provides for a lack of parental rights with the intended single mother, he is unlikely to be adjudicated the legal father of any resulting child.[230] The Uniform Parentage Act (UPA) declares, "A donor is not a parent of a child conceived by means of assisted reproduction."[231] Several states have adopted the UPA, but the sections referring to donor materials and AI vary widely.[232]

Certificate in the Name of Equal Protection, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 351, 359 (2008) (explaining that in Maryland, the right to a blood test to challenge the establishment of paternity is the "right of a putative father for relief from potentially false paternity determinations").

[222] Storrow, *supra* note 214, at 623-24; *see also* Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 958 (2009) (noting that, in most jurisdictions, if the husband does not consent to the insemination he will not be held financially responsible for the resultant child).

[223] Storrow, *supra* note 214, at 623-24.

[224] *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that the genetic father of a child born into an intact marriage had no constitutional due process right to establish his paternity of the child).

[225] *Id.* at 120.

[226] *Id.* at 127.

[227] *See, e.g.*, Daryl L. Gordon-Ceresky, Note, *Artificial Insemination: Its Effect on Paternity and Inheritance Rights*, 9 CONN. PROB. L.J. 245, 261–62 (1995) (noting that New Jersey and California do not recognize the parental rights of sperm donors).

[228] *See id.*

[229] *See id.*

[230] *See, e.g.*, Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007) (holding that a known sperm donor was not the legal father of a child, having no financial or legal obligations to the child, because he donated sperm under an agreement that declared him to not be the legal father of the child).

[231] UNIF. PARENTAGE ACT § 702 (2002).

[232] Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 10 (2008) ("Although between nineteen and twenty-one states have attempted to pass legislation based on the UPA, most other states have little, if any, guidance on the rights of persons participating in AI. Further, most of the states adopting some version of the UPA have significantly varying provisions, which makes the act far from 'uniform.'").

2. Establishing Parentage Outside of Marriage: Uncertainty for Single Parents and Same-Sex Couples

Establishing the parentage of a child born outside the institution of marriage is considerably more difficult.[233] Lesbians, and women generally, have fewer barriers to procreation than gay couples or single men as many women likely have the ability to gestate a pregnancy themselves.[234] Men who wish to become parents but who are not in a sexual relationship with a woman are limited to either adopting a child or hiring a surrogate mother.[235] Although the medical technology exists for single individuals and gay couples to procreate, it is often costly and the legal parentage of the resulting children is not firmly established.[236]

A single parent wishing to establish sole legal parentage can encounter several legal obstacles.[237] It is easier for a single woman to establish sole legal parentage of a child than for a man to do so.[238] Single mothers often can avoid an establishment of paternity by not listing a father on the child's birth certificate.[239] This is particularly true when a single woman uses donor sperm to achieve pregnancy.[240] It is far more difficult for a man to gain sole parentage because the gestational mother of a child is often considered the legal mother of that child at birth.[241] Some states allow pre-birth orders to determine the legal parentage of a child born to a gestational surrogate,[242] but only Maryland has considered, and permitted, a child born without a mother

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[233] *See generally* SUSAN L. CROCKIN & HOWARD W. JONES, LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES 211-16 (2010) (discussing legal parentage cases and issues when children are conceived via ARTs).

[234] *See* Mary B. Mahowald, *As If There Were Fetuses Without Women: A Remedial Essay*, *in* REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 199, 217 (Joan C. Callahan ed., 1995) (describing the use of self-insemination by women to become pregnant outside of a sexual relationship with men).

[235] *See* Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 149 (2000) (describing procreative limitations of gays and lesbians); Barbara J. Berg, *Listening to the Voices of the Infertile, in* REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 104, 104 (Joan C. Callahan ed., 1995) (describing how "single or homosexual individuals" rarely discover infertility due to their inherent need to use ARTs to procreate).

[236] *See generally* CROCKIN & JONES, *supra* note 233 (discussing legal parentage cases and issues when children are conceived via ARTs).

[237] Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 60 (2006) (asserting that U.S. public policy supports the establishment of legal motherhood and fatherhood at birth).

[238] At common law, the father of a non-marital child had no rights to prevent the child's adoption. Garrison, *supra* note 233, at 885. The only legal parent of these non-marital children was the mother, who by default was the woman who had given birth to the child. *Id.*

[239] *See* Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641, 655 (2008) (describing the system of voluntary paternity acknowledgement in the United States).

[240] *See* UNIF. PARENTAGE ACT § 702 (2002).

[241] *See, e.g.*, *In re* Roberto, 923 A.2d 115, 131-32 (Md. 2007) (permitting a single father to have the gestational surrogate's name removed from the birth certificate because she was not genetically related and had entered into the surrogacy contract under the agreement that she would have no legal obligation to the child); *see also* Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 619-20 (2003) (observing that birth mothers are generally considered to be the legal mother of the child, and must affirmatively give up those rights).

[242] Mary P. Byrn & Steven H. Snyder, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39

listed on the birth certificate.[243]

Same-sex couples also encounter legal barriers to having both parents listed on a child's birth certificate.[244] In some jurisdictions, a pre-birth order can grant both parents legal parental status at birth—regardless of sexual orientation.[245] In jurisdictions where a pre-birth order is not possible, many same-sex couples must use a second parent adoption proceeding in order for both parents to be recognized as legal parents of the child.[246] In either scenario, though, the couple is left to the mercy of the judge and the judicial system.[247] Until recently, some states prohibited adoption by gay and lesbian couples by statute,[248] and even now some states do not recognize second parent adoption as a means of granting full legal parental rights to same-sex parents.[249]

Despite the barriers same-sex couples and single persons have to building families through ARTs, the practice is generally accepted in popular culture,[250] and has a growing acceptance in American society. With the acceptance of ART families in general society, the establishment of embryonic personhood would have a profound chilling effect on the industry.[251] Recognition of embryonic personhood would also deny many Americans the ability and right to create a family.[252]

FAM. L.Q. 633, 634-35 (2005).

[243] *See* In re *Roberto*, 923 A.2d at 132 (holding that a biological father could remove the surrogate mother's information from the birth certificate).

[244] A same-sex couple must go through the legal system to have both parents listed in the birth certificate. CHRISTINE M. DURKIN & ANGELA M. ORDOÑEZ, NAMING NONMARITAL CHILDREN: BIRTH CERTIFICATES AND NAME CHANGE PETITIONS § 10-3 (2009). Such couples may either have a court adjudicate parentage or complete a second parent adoption of the child. *Id.*

[245] *See, e.g.*, Davis v. Kania, 836 A.2d 480, 484 (Conn. Super. 2003) (recognizing and enforcing a California pre-birth order that declared both members of a gay couple to be the legal parents of a child carried by a gestational surrogate).

[246] Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 205 (2009) (describing the use of second parent adoption by gay and lesbian parents).

[247] *See* Sheryl L. Sultan, *The Right of Homosexuals to Adopt: Changing Legal Interpretations of 'Parent' and 'Family'*, 10 J. SUFFOLK ACAD. L. 45, 77 (1995) (describing the discretion courts have in adoption proceedings, including consideration of a party's sexual orientation). It is likely that this notion is changing, albeit slowly, as more legal protections are afforded to gay, lesbian, bisexual, and transgendered persons. *See* Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 681 (2012) (describing political and legal strides made by the LGBT community for marriage equality, anti-discrimination protection, and expanded access to legal parentage).

[248] *See, e.g.*, FLA. STAT. § 63.042 (2003) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."). This statute was valid until 2010, when the Florida District Court of Appeal found it unconstitutional because there was no rational basis for prohibiting homosexuals from adopting children when state law permitted homosexual couples to care for the same children in foster care. Florida Dept. of Children & Families v. Adoption of X.X.G., 45 So.3d 79 (Fla. Dist. Ct. App. 2010).

[249] *See, e.g.*, MISS. CODE. ANN. § 93-17-3(5) (2012) (denying same sex couples access to a second parent adoption).

[250] *See The New Normal*, *supra* note 218.

[251] *See infra* Part II.C.

[252] *See infra* Part II.C.

C. Establishing Embryonic Personhood Would have a Chilling Effect on the ART Industry and Deny Many Americans the Ability to Create a Family

The heart of the modern ART industry is IVF, which has greatly expanded the procreative options available to infertile persons.[253] Since the development of IVF in the late 1970s, its practice has grown greatly and there has been a great increase in the number of embryos cryogenically stored in the United States.[254] Some estimate that the United States has between 400,000 and 500,000 cryogenically preserved embryos.[255] Despite the fact that these embryos were fertilized outside the womb, coming to existence in a method not dreamed of until the twentieth century, many in the Religious Right believe that these embryos have a personhood status.[256]

Holding an embryo to be a full legal person raises numerous ethical and legal issues.[257] For instance, if an embryo has full personhood, it would be both immoral and criminal to thaw, or 'kill', it.[258] Logically, if an embryo is considered a legal person, the destruction of the embryo in any manner is tantamount to murder.[259] Only one state, Louisiana, has legally imposed a pseudo-personhood status on *in vitro* embryos.[260] Based on the wording of the law, once an *in vitro* embryo is implanted into a uterus it would again lose its personhood status.[261]

Creating a legal personhood status for embryos could have a chilling effect on the IVF industry, as industry workers may become reluctant to perform procedures for fear of civil or criminal liability if the embryos were harmed, accidentally or otherwise.[262] Although IVF would not be *per se* criminal if a legal status of personhood is adopted, the procedure would likely become less effective and more dangerous.[263] For instance, the adoption of legal personhood may

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[253] *See* SPAR, *supra* note 203, at 3 (displaying table showing that, in 2004, revenue from IVF procedures constituted nearly one-third of the American infertility market).

[254] Jennifer Baker, *A War of Words: How Fundamentalist Rhetoric Threatens Reproductive Autonomy*, 43 U.S.F. L. REV. 671, 685 (2009) (describing the "exploding frozen embryo population").

[255] *Id.*

[256] *See id.* (noting that those in favor of embryo adoption believe that life begins a conception).

[257] John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 444-50 (1990) (describing competing moral frameworks surrounding early stage embryos, particularly the religious view of life beginning at conception).

[258] *Id.* at 444.

[259] Stephanie J. Owen, Note, Davis v. Davis: *Establishing Guidelines for Resolving Disputes Over Frozen Embryos*, 10 J. CONTEMP. HEALTH L. & POL'Y 493, 497-98 (1993) ("The legal ramifications of person status for abortion and IVF are clear: any procedure allowing or causing the destruction of an embryo is an unacceptable violation of the embryo's liberty, and may be considered murder.").

[260] *See* LA. REV. STAT. ANN. § 9:125 (1986) ("An in vitro fertilized human ovum *as a juridical person* is recognized as a separate entity apart from the medical facility or clinic where it is housed or stored.") (emphasis added).

[261] Emilie W. Clemmens, *Creating Human Embryos for Research: A Scientist's Perspective on Managing the Legal and Ethical Issues,* 2 IND. HEALTH L. REV. 95, 101 (2005).

[262] *See RESOLVE's Policy on 'Personhood' Legislation,* RESOLVE (Apr. 2012), http://www.resolve.org/about/personhood-legislation.html. RESOLVE is a national infertility association that opposes Personhood Legislation because such legislation would likely limit the IVF industry. *Id.*

[263] *See* Michelle Goldberg, *Will Mississippi Ban IVF?*, THE DAILY BEAST (Oct. 24, 2011), http://www.thedailybeast.com/articles/2011/10/24/personhood-ballot-initiative-in-mississippi-could-ban-some-ivf-practices.html (interviewing Mississippi IVF physician Dr. Randall Hines about the implication of the Mississippi Personhood Constitutional Amendment proposal on IVF treatments in the state).

prevent practitioners from developing more than one embryo for implantation at a time.[264] Limiting the number of embryos created in each round severely limits the success of IVF, as not all embryos created *in vitro* are viable for uterine transfer.[265] This lack of implantation success will likely increase the total number of IVF cycles completed, thereby increasing the risk of major health complications such as future development of ovarian cancer.[266] Additionally, multiple IVF attempts become cost prohibitive for many and would reduce the overall number of IVF attempts made.[267] The cumulative effect of declaring an embryo a legal person would therefore limit the procreative options available to many Americans who do not otherwise have the capacity to procreate.

The personhood debates currently taking place in the United States have made one thing clear: there is no consensus on the legal or moral status of embryos or fetuses. Lack of consensus makes legislation on these issues "problematical" for many, and necessitates approaching legislation with caution.[268] As noted in a case before the High Court of Australia, "'[t]here are limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims.'"[269] This balance between personal privacy, personal liberty, and religiously motivated moral goals has an even greater protection in American law.[270]

III. PERSON, THING, OR SOMETHING ELSE? WHY THE TERMINOLOGY MATTERS

The underlying contention behind the Religious Right's "pro-life" stance in matters of abortion, contraception, and stem cell research is that full moral and legal personhood begins at conception.[271] As described above, the definition of personhood has great moral and legal implications within the reproductive rights framework.[272] In the decades since the introduction of IVF, scholars have struggled to define the exact moral and legal status of an embryo.[273] Because

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[264] *See id.* (noting that some who favor personhood believe physicians should not develop multiple embryos, as the selection of viable embryos is akin to "looking at the ones you [the physician or parents] want to give life to and destroying the rest").

[265] *See* CHARLES P. KINDREGAN & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 94 (2d ed., 2011) (noting that multiple eggs are fertilized in each round of IVF as not every implantation results in pregnancy). If a patient does not create and store extra embryos or gametes during the IVF cycle, additional rounds may be required if no children result or if more children are wanted. *See id.*

[266] *See* Diane Beeson & Abby Lippman, *Egg Harvesting for Stem Cell Research: Medical Risks and Ethical Problems*, 13 REPROD. BIOMED. ONLINE 573, 574 (2006) (describing the long-term health risks of ovarian stimulation—used to collect ova for IVF procedures—including links to future incidences of ovarian cancer); *see also Developments in the Law: Medical Technology and the Law*, HARV. L. REV. 1519, 1540-41 (1990) (stating the long-term health consequences of the drugs used during IVF are unknown).

[267] *See supra* notes 200-08 and accompanying text.

[268] Mark W. Richardson, *Can the Use of Human Embryos for Research Be Banned or Would that Be Unconstitutional in Australia?*, *in* THE REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY 231, 232 (Jennifer Gunning & Helen Szoke eds., 2003) (describing ethical concerns surrounding embryonic personhood in Australian legislation).

[269] *Id.* at 242–43 (quoting Att'y General ex rel Kerr v. T, 46 A.L.R. 275, 277-78 (1983)).

[270] *See infra* Part III–IV.

[271] *See supra* Parts I.D.2, II.C.

[272] *See supra* Parts I.D.2, II.C.

[273] *See* Barbara Gregoratos, Note, *Tempest in the Laboratory: Medical Research on Spare Embryos from* In

the legal status of embryos is not uniformly defined and varies by jurisdiction,[274] clear terminology is essential in discussing the status of an embryo for the purposes of stem cell research and related issues like abortion.

Under the "pro-life" framework supported by the political Religious Right, all embryos obtain personhood status at the moment of conception.[275] In stark contrast to the pro-life stance is the view that embryos are merely property and do not hold any special status, morally or legally.[276] Somewhere between these two views lies the least controversial embryo status: a balance of property and personhood.[277] This middle status, which treats embryos as a special form of property due to its potentiality for life, has been the foundation of embryo disposition disputes in state courts.[278]

Since few states clearly define an embryo's legal status, determining a state's view on an embryo's status comes from an assessment of the state's statutory and case law addressing embryos. First, this section argues that *embryo donation* confers a property or quasi-property status to embryos while *embryo adoption* confers a personhood status to embryos.[279] Second, this section argues that embryo adoption is a purely religious construct in American politics.[280]

A. Defining the Terms

Many providers use the terms *embryo donation* and *embryo adoption* interchangeably.[281] The terms, however, confer fundamentally different understandings of an embryo's moral and legal status. At their core, both terms convey the same actions between the progenitors[282] and the receivers[283] of an embryo. The progenitors, after either completing their family through IVF or reaching an impasse in using the excess embryos,[284] decide to give their remaining embryos to

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Vitro *Fertilization*, 37 HASTINGS L.J. 977, 987–90 (1986) (describing the legal status of an embryo in different areas of the law).

[274] *See* Clemmens, *supra* note 261, at 100–02 (outlining the varying state laws that apply to embryos, particularly in the realm of stem cell research).

[275] Balint *supra* note 157, at 734-35.

[276] *See* Karin A. Moore, *Embryo Adoption: The Legal and Moral Challenges*, 1 U. ST. THOMAS J. L. & PUB. POL'Y 100, 114 (2007) (describing a consent agreement that described embryos as property to be divided in divorce).

[277] Clemmens, *supra* note 261, at 100.

[278] *Id.*

[279] *See infra* Part III.A.

[280] *See infra* Part III.B.

[281] Conde, *supra* note 2, at 280.

[282] Progenitors of an embryo in this case are the individual(s) that initially *contracted* with a clinic to create the embryo and do not necessarily have a genetic link to the embryo. Traditionally, the progenitors would be a husband and wife who both contributed the gametes that made the embryo in question, but the introduction of donor sperm and egg cells makes this assumption faulty. The progenitors could be a same-sex or heterosexual couple or a single person who has acquired donor gamete(s) through other transactions. *See supra* Part II.A–B.

[283] Here, the receivers of an embryo are the individuals to whom the progenitors gave an embryo.

[284] *See* Lobron, *supra* note 201; *see also, e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003) (holding that the parties' disposition agreement to discard the cryogenically preserved embryos was unenforceable because one party had changed their mind, and that any storage costs would be borne by the party who opposed discarding of the embryos); J.B. v. M.B., 783 A.2d 707 (N.J. 2001) (declining to enforce a contract between the parties to donate the remaining embryos to another couple in the event of divorce); Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (enforcing the

another individual or couple for the purposes of procreation.[285]

The notable difference between the actions taken in embryo donation and embryo adoption is the ease with which the recipients acquire the embryos. Recipients of donated embryos may be required to provide basic demographic information such as marital status and income level to a progenitor deciding who will receive any excess embryos.[286] Recipients of adopted embryos, however, are subjected to the same screening standards as traditional child adoption—including meetings with social workers, background checks, and mandatory parenting education.[287]

In embryo donation, the status of the embryo is consistent with current state laws, most of which view embryos as property with a special status due to its procreative potential.[288] The transfer between progenitor and recipient is governed purely by contract, and often the donors only rely on the basic health and demographic information of the recipients to decide which recipients are given embryos.[289] Based on the agreement between progenitors and recipients, the donation can be done with as much or little communication between them as desired,[290] but usually communication is rare.

Embryo adoption does not involve the same legal process as adopting a child.[291] Legally, the same property and contract laws that govern embryo donation govern the adoption.[292] Practically, though, the organizations that conduct embryo adoptions treat the transaction like a traditional adoption process.[293] These agencies often require that "[p]rospective adoptive parents entering an embryo adoption program [] complete an application, traditional adoption home study,

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agreement between a divorcing couple to donate cryogenically preserved embryos to IVF research); Davis v. Davis, 842 S.W.2d at 588 (holding that each party's interest in the disposition of a cryogenically preserved embryo must be weighed and that "[o]rdinarily, the party wishing to avoid procreation should prevail" in a dispute); Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006) (enforcing a contract drafted before the IVF procedure began, which called for cryogenically preserved embryos to be discarded in the event of divorce).

[285] *See* Lobron, *supra* note 201.

[286] *See* Susan L. Crockin, *Myths About Embryo Donation*, RESOLVE, http://www.resolve.org/national-infertility-awareness-week/myths-about-embryo-donation.html (last visited Apr. 6, 2014) (describing the differences between embryo donation and embryo adoption, and noting that embryo donation may be "fully open" or anonymous and frequently involves fewer restrictions on the recipient).

[287] *See Adopter FAQs*, EMBRYO ADOPTION AWARENESS CENTER, http://www.embryoadoption.org/adopters/adopting_parent_faq.cfm (last visited Apr. 6, 2014) (detailing the requirements of embryo adoption, including background checks, medical checks, and home visits); *Embryo Adoption Education Outline*, NIGHTLIGHT CHRISTIAN ADOPTIONS, http://www.nightlight.org/wp-content/uploads/2012/01/Embryo_Adoption_Education.pdf (last visited Apr. 6, 2014); *Required and Recommended Booklist: Domestic and Embryo Adoptions*, NIGHTLIGHT CHRISTIAN ADOPTIONS, http://www.nightlight.org/wp-content/uploads/2012/01/Embryo_adoption_booklist.pdf (last visited Apr. 6, 2014).

[288] *See* Crockin, *supra* note 286 (comparing state embryo donation guidelines to those for sperm and egg donation).

[289] *See Embryo Donation*, NAT'L EMBRYO DONATION CENTER, http://www.embryodonation.org/index.php?content=donation (last visited Apr. 6, 2014).

[290] *Id.*

[291] EMBRYO ADOPTION AWARENESS CENTER, *supra* note 287 (explaining that "current adoption law only applies to the placement of a child after they are born).

[292] *See* Polina M. Dostalik, *Embryo 'Adoption'? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867, 869-71 (2011) (discussing the lack of legal status of embryo adoption).

[293] *Id.* at 869-70.

adoption education program, undergo health checks, and pay a fee."[294] None of which is legally required for transferring an embryo from the progenitors to another individual or couple.[295] By applying traditional adoption principles to embryos, embryo adoption agencies such as Nightlight treat embryos like living children, conferring a personhood status onto the embryos.

B. Embryo Adoption is a Religious Construct That Confers a Personhood Status onto the Embryos

In the United States, some agencies that provide embryo adoption services hold the view that each embryo is a "person", and the agencies' adoption practices are motivated by this belief.[296] The Religious Right and the religiously motivated pro-life movements fully embrace the view that life begins at conception, and believe that every embryo should be treated as a "person" under the law.[297]

Some Christians believe that it is their duty to adopt unneeded embryos because the IVF process creates a child, "a human being, a person, who, although created in a laboratory, was nevertheless created by God."[298] Christian, particularly Catholic, scholars argue that the separation of the sex act and procreation is inherently immoral.[299] In order to continue the development of stem cell research, though, some personhood advocates have differentiated between the "life" of an embryo fertilized *in vivo,* or in the womb, versus *in vitro*, outside the womb.[300] However, this differentiation is rare and most advocates believe that embryos created *in vitro* require the status of a full moral person.[301]

Overall, there is not a secular argument for treating an embryo as a full moral person. Embryos created through IVF are particularly difficult to justify as a full person in a secular framework because the embryos do not possess the secular traits of personhood such as sentience and consciousness.[302] Instead, a secular framework differentiates between the human life and

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[294] *Id.* at 874.

[295] *Id.*

[296] *See id.* at 870; *What's the Difference Between the Terms Donation and Adoption?*, EMBRYO ADOPTION AWARENESS CENTER, http://www.embryoadoption.org/adopters/terminology.cfm (last visited Apr. 6, 2014). Christian donation agencies often use religious rhetoric to describe their operation; for example, Embryo Adoption Awareness Center suggests, "For the family wanting to parent the children born from such a gift [embryo donation], the term 'adoption' makes more emotional sense." *Id.* "You will be giving birth to a child. Adoption is the term that both legally and socially explains the transfer of parental rights associated with a traditional adoption." *Id.*

[297] *See supra* Part I.D.

[298] *Embryo Adoption*, AMERICAN LIFE LEAGUE, www.all.org/nav/index/heading/OQ/cat/NTk/id/NDc2NA (last visited Apr. 6, 2014).

[299] *See* Carl Cohen, *Sex, Birth Control, and Human Life*, 79 ETHICS 251, 252–53 (1969) (describing the Catholic views that sex and procreation are intrinsically intertwined and it is immoral to separate the concepts as a justification against using contraceptives); Arthur L. Greil, *The Religious Response to Reproductive Technology*, CHRISTIAN CENTURY (1989) (arguing that some Christians, particularly Catholics, oppose IVF because of the separation of the sex act from procreation).

[300] Gregoratos, *supra* note 273, at 986 ("Those who have accepted the theory of hominization would not find research on spare embryos morally repugnant as long as the research took place prior to the moment of ensoulment.").

[301] *See* Christi D. Ahnen, *Disputes Over Frozen Embryos: Who Wins, Who Loses, and How Do We Decide?: An Analysis of* Davis v. Davis*,* York v. Jones*, and State Statutes Affecting Reproductive Choices*, 24 CREIGHTON L. REV. 1299, 1300 (1991) (describing personhood objections to IVF).

[302] *See* CHRISTOPHER KACZOR, THE ETHICS OF ABORTION: WOMEN'S RIGHTS, HUMAN LIFE, AND THE

personhood elements of an embryo.[303] There is agreement that biological human life begins at conception, but that the qualities that make an embryo a person happen at another point in time.[304] Since the view that personhood begins at conception is rooted in religion, not secular ethics, and embryo adoption is commonly performed because of a belief in the personhood of an embryo, entire concept of embryo adoption is an inherently religious construct.

IV. MARYLAND STATE-ENDORSED "EMBRYO ADOPTION" IS UNCONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The First Amendment to the United States Constitution both protects an individual's right to practice their religious beliefs freely and prohibits the establishment of a state religion.[305] Despite the attempt to avoid religious tension,[306] the Establishment Clause jurisprudence is considered "inconsistent and unprincipled" by many Constitutional scholars.[307] While some argue that the Supreme Court's motivation behind such unpredictable Establishment Clause jurisprudence is a reliance on modern exigencies,[308] this article focuses only on the constitutionality of embryo adoption under current Establishment Clause jurisprudence.

First, this section will describe modern Establishment Clause jurisprudence—specifically, the concept of impermissible religious entanglement.[309] Then, this section will argue that § 10–438 of the Maryland Stem Cell Research Act is a state endorsement of embryo adoption—a religious construct—and is unconstitutional.[310]

A. The Establishment Clause of the First Amendment Prohibits the State from Endorsing Religion

The Supreme Court did not decide many cases under the Establishment Clause of the First Amendment prior to the 1940s, when several cases were decided on Establishment Clause grounds as applied through the Fourteenth Amendment.[311] The first modern Establishment Clause case, *Everson v. Board of Education of Ewing Township*, found that a statewide New Jersey

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QUESTION OF JUSTICE 56 (2011) (describing common secular characteristics of personhood).

[303] STEINBOCK, *supra* note 189, at 52-55 (describing the moral difference between "human" and "person" when describing embryos).

[304] *Id.*

[305] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…").

[306] William J. Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?,* 16 ST. MARY'S L.J. 1, 3 (1984) ("The religion clauses were designed to avoid rather than cause trouble.").

[307] *Id.* at 8.

[308] *Id.* at 8–9.

[309] *See infra* Part IV.A.

[310] *See infra* Part IV.B.

[311] Naomi Rivkind Shatz, *Unconstitutional Entanglements: The Religious Right, the Federal Government, and Abstinence Education in the Schools*, 19 YALE J.L. & FEMINISM 495, 499 (2008). "Despite the well-established idea of a separation between church and state in American law, the Supreme Court has only decided seventy cases on Establishment Clause grounds." *Id.* 'Few cases were decided under the Establishment Clause before the First Amendment was made applicable to states through the Fourteenth Amendment in 1940." *Id.*

program providing students with bus fares to both public and parochial schools did not violate the Establishment Clause.[312] Because the parochial schools receiving bus services met state secular educational guidelines and because the treatment of public and parochial school transportation was the same, the New Jersey busing system did not violate the Establishment Clause.[313]

Significantly, the *Everson* Court found:

> Neither a state nor the Federal Government can . . . force [an individual] to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs . . . [since] the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[314]

Although this firm belief in separation of Church and State still resonates today as a primary reason behind the Establishment Clause, the *Everson* Court upheld the use of state taxpayer money in the busing scheme because a state was required to be neutral toward, and not an adversary to, religion.[315] While the *Everson* Court in dicta noted some instances in which state funds can provide a benefit to a religious group,[316] the Court did not provide a framework for determining whether those benefits violate the Establishment Clause until decades later, in *Lemon v. Kurtzman*.[317]

The *Lemon* test—a multi-factor test to determine if a law violates the Establishment Clause—remains the primary test for constitutionality under the Establishment Clause.[318] Under the *Lemon* test's three-pronged analysis, a statute complies with the Establishment Clause if 1) it has a secular legislative purpose; 2) its primary effect neither advances nor inhibits religion; and 3) it does not "foster an excessive government entanglement with religion."[319]

In 1985, Justice O'Connor advocated a refinement to the first prong of the *Lemon* test in a concurring opinion to *Lynch v. Donnelly*.[320] *Lynch* enhances the secular legislative purpose prong of the *Lemon* test by creating a separate endorsement test.[321] The endorsement test requires a court to examine "whether the government intends to convey a message of endorsement or disapproval of religion."[322] The Court solidified the endorsement test in the 2005 case, *Van Orden v. Perry,* which challenged the erection of a monument of the Ten Commandments on the grounds of the Texas State Capitol.[323] Finding that the monument had historical significance outside of the religious context, the *Van Orden* Court concluded that the monument did not violate the

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312 330 U.S. 1, 17 (1947).

313 *Id.* at 17-18.

314 *Id.* at 15–16 (citation omitted).

315 *Id.* at 18.

316 *Id.* at 16-18.

317 Lemon v. Kurtzman, 403 U.S. 602 (1971).

318 *See* Shatz, *supra* note 311, at 499.

319 *Lemon*, 403 U.S. at 612-13.

320 Lynch v. Donnelly, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring).

321 *Id.* at 690-92.

322 *Id.* at 691.

323 Van Orden v. Perry, 545 U.S. 677, 681 (2005).

Establishment Clause.[324] In sum, a law will pass the purpose prong of the *Lemon* test as long as it has a secular purpose.

The second prong of the *Lemon* test, the effect of the law, has also been refined through further case law. In *McCreary County v. ACLU of Kentucky*, the Court held that a display of the Ten Commandments in "a very high traffic area" of a Kentucky county courthouse violated the Establishment Clause.[325] The *McCreary* Court found that the effect of the local law requiring display was religious because an "objective observer" standard showed that a reasonable person would conclude it was a government endorsement of a religion.[326]

The final prong to the *Lemon* test, government entanglement, is one that has been construed very differently by different justices—making its application sometimes difficult to predict.[327] In *Aguilar v. Felton*, the Court struck down a New York program that sent public teachers to a parochial school to teach remedial processes holding the program required excessive entanglement to be sure state funds were not used for religious purposes.[328] Dissenting from the *Aguilar* opinion, Justice O'Connor would have upheld the program instead of invalidating it "merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion."[329] Later, in *Agostini v. Felton,* the Court revisited the *Aguilar* case and overturned the prior ruling, finding that it had become inconsistent with subsequent Establishment Clause jurisprudence.[330]

The Supreme Court has declined to apply the *Lemon* test in a few specific instances.[331] In a case addressing the constitutionality of opening each session of the Nebraska legislature with a clergy-led prayer, *Marsh v. Chambers*, the Court emphasized the importance of tradition and history of the religious practice.[332] While the *Marsh* opinion did not overturn the *Lemon* test, Justices Brennan and Marshall dissented from the ruling because the court had explicitly not followed the formal test established in *Lemon*[333]—which likely would have led to invalidation of the Nebraska practice. Despite these refinements and other holdings, the *Lemon* test is still the best assessment of the constitutionality of laws under the Establishment Clause.[334]

B. Section 10–438 of the Maryland Stem Cell Research Act is an Impermissible State Endorsement of "Embryo Adoption" and is Unconstitutional

The Maryland Stem Cell Research Act (MSCRA) was intended to allow funding for

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[324] *Id.* at 690.

[325] McCreary County v. ACLU of Kentucky, 545 U.S. 844, 851, 870 (2005).

[326] *Id.* at 862-63.

[327] Amy J. Alexander, *When Life Gives You the Lemon Test: An Overview of the Lemon Test and Its Application,* 3 PHX L. REV. 641, 661–62 (2010).

[328] Aguilar v. Felton, 473 U.S. 402, 404, 414 (1985).

[329] *Id.* at 421, 430 (O'Connor, J., dissenting).

[330] Agostini v. Felton, 521 U.S. 203, 208-09 (1997).

[331] *See* Shatz, *supra* note 311, at 500 (noting that some Justices have offered up their own Establishment Clause tests).

[332] Marsh v. Chambers, 463 U.S. 783, 784, 792 (1983) (holding that the historical establishment of the Nebraska legislature, and the historical context surrounding the evolution of the clause, posed "no real threat").

[333] *Id.* at 795-97 (Brennan, J., dissenting).

[334] Shatz, *supra* note 311, at 500.

ethical stem cell research in Maryland,[335] and is the only Maryland law governing the disposition of unused reproductive material from IVF.[336] Specifically, § 10–438 of the MSCRA requires IVF practitioners to educate their patients about options for unused material from fertility treatment.[337] By statute, the IVF practitioners must present patients with the options of "(i) storing or discarding any unused material; (ii) donating any unused material for clinical purposes in the treatment of infertility; (iii) . . .donating any unused material for research purposes; and (iv) donating any unused material for adoption purposes."[338] The concept of embryo donation as a means of assisting others for fertility purposes—similar to the donation of other materials such as sperm and eggs—is fully encompassed by the second clause.[339] This makes the final clause, regarding donation for adoption purposes[340] superfluous for the goal of educating patients about their option to donate excess embryos to others for infertility treatment. This indicates that the final clause serves no separate, secular purpose other than educating patients about the availability of religious embryo adoption in the state.

The religious motivation behind embryo adoption in the MSCRA is clearly present in its legislative history. A review of the MSCRA's legislative history shows a great deal of activism within the religious community in both support of and opposition to the law.[341] The only materials provided supporting the term *embryo adoption*, both in testimony and letters to the legislature, were from religiously motivated groups.[342] Notably, major religious groups such as the United Methodist Church and the Maryland Jewish Alliance supported the bill as a way to conduct

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[335] MD. CODE ANN., ECON. DEV. § 10-434(b) (LexisNexis 2008).

[336] MD. CODE ANN., ECON. DEV. § 10-438(a) (LexisNexis 2008).

[337] *Id.* (creating a duty for IVF practitioners to counsel patients about disposition options for unused reproductive material).

[338] *Id.* at § 10-438(a)(2).

[339] *Id.* at § 10-438(a)(2)(ii) ("donating any unused material for clinical fertility purposes").

[340] *Id.* at § 10-438(a)(2)(iv).

[341] *See Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Letter from Nancy E. Fortier, Maryland Catholic Conference, dated Feb. 27, 2006) (objecting to S.B. 144 on moral grounds that it does not prevent the implantation of a cloned embryo); *Bill File, SB 144/ HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Testimony of David Whitney, Pastor of Cornerstone Evangelical Free Church of Pasadena, Md.) (asserting that his daughter had personhood status when she was a four cell embryo, and implying that it would have been immoral for her to have been "killed" at that stage of development); *Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Testimony of Bishop John R. Schol, United Methodist Church, dated Jan. 25, 2006) (supporting the use of unused embryos for research as long as they 1) would otherwise be discarded, 2) the progenitors have given their informed consent, and 3) the embryos were not purchased, or 4) deliberately created for research); *Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Letter from Don Schroeder, Bishop's Deputy for Pub. Pol'y, Episcopal Diocese of Md., dated Jan. 25, 2006) (supporting S.B. 144 because it creates sufficient ethical grounds for genetic research while prohibiting human cloning); *Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Testimony of Md. Jewish Alliance, dated Jan. 25, 2006) (supporting stem cell research as a way to alleviate human suffering while recognizing that a blastocyst is not a person).

[342] *See Bill File, SB 144/ HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Testimony of David Whitney, Pastor of Cornerstone Evangelical Free Church of Pasadena, Md.) (asserting that his daughter had personhood status when she was a four cell embryo, and implying that it would have been immoral for her to have been "killed" at that stage of development); *Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Letter from Leigh Heller, Legislative Dir. of Md. Right to Life, dated Jan. 19, 2006) (advocating "adoption" of "snowflake babies," a term used by many embryo adoption agencies).

therapeutic stem cell research to alleviate human suffering—thereby rejecting the view that an embryo is a person.[343] Only Catholics and Evangelicals actively opposed the bill on the grounds that personhood begins at conception.[344] The most ardent advocates for "embryo adoption" were the Maryland Right to Life members who directly opposed embryonic stem cell research and the discarding of excess embryos because it "killed" them.[345]

The MSCRA's use of the term *embryo adoption* is unconstitutional under the Establishment Clause of the First Amendment. The statute fails every prong of the *Lemon* test. First, IVF practitioners educating patients about embryo adoption violate the secular purpose prong. Second, the primary effect of the law is an advancement of a specific religious view of personhood, one that is not supported by other major Christian sects. Finally, the statute constitutes excessive state entanglement in religion.

Embryo adoption in the MSCRA does not serve a secular purpose. To overcome the first prong of the *Lemon* test, a "statute must have a secular legislative purpose."[346] In assessing a statute's secular legislative purpose, the *Van Orden* endorsement test is applied to determine "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[347] As previously established, embryo adoption is a religious construct used by embryo personhood advocates to advance the view of personhood as beginning at conception—a relatively new concept in several major sects of Christianity.[348] The embryo donation encompasses the same practical actions while maintaining that an embryo is either property or property owed special consideration due to its ability to produce human life.[349] Using the term *embryo adoption* instead of *embryo donation* endorses the religious view that an embryo is a person. Additionally, the legislative history of the MSCRA indicates that the only proponents of using the term *embryo adoption* in addition to *embryo donation* were religious and other pro-personhood organizations.[350]

The statute also fails the second prong of the *Lemon* test because the primary effect of

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[343] *Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Testimony of Bishop John R. Schol, United Methodist Church, dated Jan. 25, 2006) (supporting the use of unused embryos for research as long as they 1) would otherwise be discarded, 2) the progenitors have given their informed consent, and 3) the embryos were not purchased, or 4) deliberately created for research); *Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Testimony of Md. Jewish Alliance, dated Jan. 25, 2006) (supporting stem cell research as a way to alleviate human suffering while recognizing that a blastocyst is not a person).

[344] *See Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Letter from Nancy E. Fortier, Maryland Catholic Conference, dated Feb. 27, 2006) (objecting to S.B. 144 on moral grounds that it does not prevent the implantation of a cloned embryo); *Bill File, SB 144/ HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Testimony of David Whitney, Pastor of Cornerstone Evangelical Free Church of Pasadena, Md.) (asserting that his daughter had personhood status when she was a four cell embryo, and implying that it would have been immoral for her to have been "killed" at that stage of development).

[345] *See Bill File, SB 144/HB 1: Maryland Stem Cell Research Act of 2006*, Reg. Sess. Md. Gen. Assembly (2006) (Letter from Leigh Heller, Legislative Dir. of Md. Right to Life, dated Jan. 19, 2006) (advocating "adoption" of "snowflake babies," a term used by many embryo adoption agencies).

[346] *Lemon*, 403 U.S. at 612.

[347] Wallace v. Jaffree, 472 U.S. 38, 67, 69 (1985) (O'Connor, J., concurring). The standard, first articulated in *Jaffree*, was adopted by the *Van Orden* Court as part of the *Lemon* test. *See Van Orden*, 545 U.S. at 682-83.

[348] *See supra* Part III.B.

[349] *See supra* Part III.A.

[350] *See* sources cited *supra* notes 341-45.

the statute is to advance the specific religious view that an embryo is a person. Maryland law rarely addresses ARTs, but recent developments strongly support the conclusion that Maryland's policy treats embryos like property, and not as persons.[351] The state actively endorses the use of ARTs that are likely to create excess embryos, as shown by the requirement that health insurers in Maryland cover up to three IVF treatments per live birth, or $100,000 of treatment over a lifetime.[352] Applying a personhood status to embryos, as MSCRA § 10–438(a)(2)(iv) does, is contradictory to these other policy options, as it would severely limit the ability of Marylanders to access infertility services like IVF.[353]

Finally, the statute fails the third prong of the *Lemon* test by impermissibly entangling the government and religion. The degree of entanglement between religion and government is difficult to determine, but courts generally determine it based on state public policy grounds.[354] Although Maryland was heavily influenced by Catholics during colonial times,[355] modern Maryland has become much more secular and opposed to such levels of entanglement. Currently, Maryland is very friendly toward all ARTs[356] and has embraced the diverse composition of families in modern America.[357] Adopting such a staunch view of personhood would be contradictory to these public policy goals. In sum, the MSCRA's use of embryo adoption fails every element of the *Lemon* test in violation of the Establishment Clause of the First Amendment.

C. An Easy Remedy: Revising the Maryland Stem Cell Research Act

Remedying the unconstitutionality of MSCRA § 10–438(a)(2)(iv) is a simple task. As previously established, the unconstitutional section is superfluous to the core goals of the MSCRA.[358] The purpose behind MSCRA § 10–438 is to educate IVF patients about the options available for the disposition of unused reproductive material, while simultaneously creating an

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[351] *See* Kristi Tousignant, *Judge: Mother Gets Frozen Embryos*, MD. DAILY REC. (Jan. 2, 2013), http://thedailyrecord.com/2013/01/02/judge-mother-gets-frozen-embryos (describing a recent Prince George's County case that found cryogenically preserved embryos were not marital property to be divided in a divorce dispute because the disposition of the embryos is governed by a contract both progenitors created before undergoing infertility treatment. The dispute is the first Maryland case addressing the disposition of cryogenically embryos in divorce).

[352] MD. CODE ANN., INS. § 15–810(d) (LexisNexis 2011).

[353] *See supra* Part.II.C.

[354] *See* Cornelius, *supra* note 306, at 3-4.

[355] *See* Tricia T. Pyne*, The Politics of Identity in Eighteenth-Century British America: Catholic Perceptions of Their Role in Colonial Society*, 15 U.S. CATH. HIST. 1, 3–4 (1997) (describing the Catholic influence in Maryland based on the Catholicism of founding Lord Baltimore in 1634, and the fact that 10 percent of Marylanders in the period were Catholic).

[356] *See* MD. CODE ANN., INS. § 15–810 (requiring health insurance coverage for IVF); Hilary Neiman, *Maryland: A Friendly Surrogacy State*, INT'L COUNCIL INFERTILITY INFO. DISSEMINATION (Nov. 18, 2009), http://www.inciid.org/article.php?cat=thirdparty&id=782 (last visited Apr. 6, 2014) (noting that Maryland allows traditional and gestational surrogacy for all persons).

[357] *See* Brian Witte, *Many Weddings as Gay Marriage Becomes Legal in Md,* ASSOCIATED PRESS (Jan. 1, 2013) (describing the beginning of legal gay marriage in Maryland after voters supported the measure in the 2012 election, the first time in the United States that gay marriage was established by popular vote)*;* Editorial Staff, *Maryland Should Embrace Gay Adoption*, BALT. SUN (Nov. 14, 2011), http://articles.baltimoresun.com/2011-11-14/news/bs-ed-gay-adoption-20111114_1_gay-adoption-adoptions-by-unmarried-couples-address-adoptions (describing current state embrace of gay adoption in certain jurisdictions, like Baltimore City, and encouraging statewide support).

[358] *See supra* Part IV.B.

avenue for ethical stem cell research through an informed donation process.[359] Sections of the statute already encompass patient education of donating excess embryos to others for infertility treatment, making the embryo adoption section unnecessary for reaching that goal.[360] Therefore, the best solution for remedying the constitutionality of MSCRA § 10–438 is to simply strike MSCRA § 10–438(a)(2)(iv) from the law. By removing just this section of the statute, the secular intent and effect of the law will be unchanged. Striking the section would only remove the policy confusion made by conveying a personhood status to embryos—in contravention of state public policy.

V. CONCLUSION

The Maryland Stem Cell Research Act was established to promote ethical stem cell research in Maryland in response to President George W. Bush's restrictive policies, which were motivated by his personal, religious view that life begins at conception. Influenced by the lobbying of religious organizations, the Maryland General Assembly incorporated the concept of embryo adoption into the act, contrary to other Maryland state laws and general public policy. Adoption conveys a personhood status onto embryos and is inherently religious. General concerns regarding the designation of an embryo as a person—as shown by other state personhood initiatives—would create the most restrictive reproductive rights policies since the Comstock era and have a chilling effect on the lucrative Assisted Reproductive Technology industry. Under the *Lemon* test, MSCRA §10–438(a)(2)(iv) is an unconstitutional state endorsement of religion that violates the Establishment Clause of the First Amendment. To remedy the unconstitutionality of the statute, Maryland should strike MSCRA §10–438(a)(2)(iv) from the law while maintaining the rest of the act.

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359 *See* MD. CODE ANN., ECON. DEV. § 10-438(a)(1) (LexisNexis 2008).

360 *See* MD. CODE ANN., ECON. DEV. § 10-438(a)(2)(ii) (LexisNexis 2008).