

Comments

A War of Words: How Fundamentalist Rhetoric Threatens Reproductive Autonomy

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Introduction

THE FEDERALLY FUNDED Snowflakes Embryo Adoption Program (“Snowflakes”) endeavors to “share God’s love” by “[r]ecognizing and advocating the personhood of pre-born children.”¹ As part of this mission, Snowflakes facilitates one couple’s “adoption”² of human embryos created for use in another couple’s in-vitro fertilization (“IVF”),³ but which remain unused at the end of the process.⁴ This practice was regularly called “embryo donation” prior to Snowflakes’ formation in 1997,⁵ and terming it an “adoption” has import beyond the IVF con-

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1. Nightlight Christian Adoptions, About Us, <http://www.nightlight.org/About-Nightlight.html> (last visited Mar. 22, 2009) [hereinafter Nightlight, About Us].

2. In this Comment, I refer to “adoption,” set off by quotation marks, to emphasize my complete and total skepticism regarding the use of the word in the embryo context.

3. IVF allows for human conception completely outside of the uterus. Marcia Joy Wurmbrand, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1082 (1986) (describing IVF as “the method of uniting egg and sperm outside the body and transferring the resulting embryo to a woman’s uterus to achieve pregnancy”). The process enables the 6.5 to 10 million estimated couples in the United States who suffer from infertility to conceive a child. Olga Batsedis, Note, *Embryo Adoption: A Science Fiction or an Alternative to Traditional Adoption?*, 41 FAM. CT. REV. 565, 566 (2003).

4. See generally Nightlight Christian Adoptions Home Page, <http://www.nightlight.org> (last visited Mar. 22, 2009).

5. See Phillip Ball, *Embryos up for Adoption*, NATURE, June 10, 2005, available at <http://www.nature.com/news/2005/050610/full/news050606-16.html>; see also Liza Mundy, *Souls*

text. Indeed, because of the inherent ideological links between embryo “adoption” and the thorny debate over legal abortion, advances in the former are inextricably tied to limitations on the latter.

This Comment argues that the recent use of the term “adoption” to define the decision of one couple to donate an unused embryo to a different couple for implantation is simply an attempt by those opposed to abortion to chip away at reproductive rights. The belief that an embryo is entitled to the same legal protection as a living child placed for adoption is impossible to reconcile with the treatment of the fetus in current abortion law;⁶ and if we accept that embryos are “pre-born children waiting for a chance at life,” as Snowflakes suggests in its literature,⁷ this characterization will have far-reaching and damaging consequences in the context of abortion rights.

Part I of this Comment tracks the evolution of abortion jurisprudence over the last thirty-five years, from *Roe v. Wade*,⁸ to *Planned Parenthood v. Casey*,⁹ to *Stenberg v. Carhart* (“*Carhart I*”),¹⁰ and finally, to *Gonzales v. Carhart* (“*Carhart II*”).¹¹ *Casey* and *Carhart II* offer the starkest rhetorical contrasts and demonstrate the Roberts Court’s likely trajectory on the abortion issue in the coming years. Part II introduces the reader to Snowflakes and discusses other institutionalized uses of pro-life rhetoric to regulate IVF. Part III analyzes the effect of such rhetoric, and argues that the obvious interchangeability of “adoption” and “donation” in the IVF context demonstrates that Snowflakes is merely an extension of the war on abortion that was first

on Ice: America’s Embryo Glut and the Wasted Promise of Stem Cell Research, MOTHER JONES, July/Aug. 2006, available at <http://www.motherjones.com/politics/2006/07/souls-ice-americas-embryo-glut-and-wasted-promise-stem-cell-research> (“In the course of this debate, embryos have emerged as another tool for truly hardline conservatives looking for new ways to beat back abortion rights. Like ‘fetal rights’ laws that seemingly protect unborn children from acts of homicide, ‘embryo rights’ are being waved about as a weapon in the assault on abortion rights, as anti-abortion lawmakers talk about seizing control over frozen embryo stores; limiting the creation of new embryos; or both.”).

6. Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 CAP. U. L. REV. 303, 339 (2006). This is because embryos are only entitled to legal protection once viable. See *Planned Parenthood v. Casey*, 505 U.S. 833, 845–46 (1992); see also discussion *infra* Part I.B.

7. NIGHTLIGHT CHRISTIAN ADOPTIONS, SNOWFLAKES EMBRYO ADOPTIONS FACT SHEET 1 (2004), available at <http://www.nightlight.org/media/pdf/Snowflakesfacts.pdf> [hereinafter NIGHTLIGHT, SNOWFLAKES FACT SHEET].

8. 410 U.S. 113 (1973).

9. 505 U.S. 833.

10. 530 U.S. 914 (2000).

11. 127 S. Ct. 1610 (2007).

waged in the courtroom and that is now carried out in the far more hospitable realm of assisted reproductive technology.

I. The Rhetoric of Abortion Jurisprudence

Few political discussions elicit the same intensity or polarity as the debate over a woman's right to terminate her pregnancy. Advocates on both sides speak in absolute terms, often married to their views with an unshakable conviction.¹² Several United States Supreme Court decisions have noted this ferocity of opinion,¹³ and some of the more rhetorically charged decisions have even added to the debate.¹⁴ In these cases, any deliberate deviation from neutral treatment by the Court to the advantage of one side is vehemently protested by the other. There is virtually no room for compromise when the consequences that flow from the Court's diction are so important.

Such deeply held beliefs arise in part because the abortion debate implicates what is often religious-based disagreement over when and how life actually begins.¹⁵ On the one hand, those who believe that life begins at conception urge that the affirmative act of terminating a pregnancy at any stage after conception is akin to the murder of a

12. The reader will undoubtedly observe throughout the course of this Comment (if not from its title) that I have my own very passionate views on abortion, and what I perceive as recent attempts to chip away at *Roe*. Despite this bias, I have endeavored to appropriately temper my rhetoric where possible. The fact that I found it so difficult, however, is a true testament to the power that rhetoric wields in framing political viewpoints.

13. See, e.g., *Roe*, 410 U.S. at 116 ("We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires."); *Casey*, 505 U.S. at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.");

14. See, e.g., *Gonzales v. Carhart (Carhart I)*, 127 S. Ct. 1610 (2007); *Stenberg v. Carhart (Carhart II)*, 530 U.S. 914 (2000); see also discussion *infra* Part I.B-D.

15. See *Roe*, 410 U.S. at 116 ("One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."). The Catholic Church is unsurprisingly opposed to legal abortion: in February 2006, Pope Benedict XVI declared that the Church's belief in the "sacred . . . character of every human life . . . is valid already at the beginnings of life of an embryo, before it is implanted in the womb of the mother." Nicole Winfield, *In Vitro Embryos Sacred, Pope Says: Pontiff Affirms Church Teaching on Conception as the Start of Life*, COLUMBUS DISPATCH, Feb. 28, 2006, at A1; see also Katz, *supra* note 6, at 319. The Pope noted further that "[t]he love of God doesn't make any difference between the newly conceived, still in the womb of his mother, and the baby, or young person, or the mature man or the old man." Winfield, *supra*, at A1.

living, breathing baby.¹⁶ On the other hand, those who believe that life begins only once a fetus is viable and able to survive independent of the mother, argue that the right to seek an abortion derives from a woman's decisional and bodily autonomy.¹⁷

The Supreme Court has created a legal framework for regulating abortion based on the view that the Constitution enables a woman to make an informed decision about "whether or not to terminate her pregnancy," free from unduly burdensome government regulation.¹⁸ In order to understand the threat that "adoption" rhetoric poses to

16. See *Roe*, 410 U.S. at 150 (discussing the "theory" of the National Right to Life Committee that "human life is present from the moment of conception"); *id.* at 131 (noting that the Pythagoreans believed that "the embryo was animate for the moment of conception, and [that] abortion meant destruction of a living being"); see also Jaime E. Conde, *Embryo Donation: The Government Adopts A Cause*, 13 WM. & MARY J. WOMEN & L. 273, 284–85 (2006) (describing the "massacre" of "living human embryos" (internal quotation marks omitted)).

17. Still others maintain that life does not begin until actual birth. See *Roe*, 410 U.S. at 160 ("There has always been strong support for the view that life does not begin until live birth.").

18. *Id.* at 117. How the *Roe* Court framed the fundamental right at issue is particularly notable. The Supreme Court often uses broad definitions when finding a violation of a fundamental right, see, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."), and narrow definitions when denying the application of strict scrutiny, see, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that the right to privacy does not protect a right to engage in homosexual sodomy), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

Justices Scalia and Brennan noted the importance of framing in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), a decision addressing whether a natural father can control the upbringing of a child born out of wedlock. The two Justices disagreed on the right at issue and each pressed for a different result. In a footnote buried within the majority's opinion, Justice Scalia wrote: "[Justice] B[rennan] criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally 'whether parenthood is an interest that historically has received our attention and protection.'" *Id.* at 127 n.6. He continued:

We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, J[ustice] B[rennan] would choose to focus instead upon "parenthood." Why should the relevant category not be even more general—perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"?

Id. Indeed, Justice Scalia and Justice Brennan both recognized that even those comfortable infringing upon the rights of an "adulterous natural father" would undoubtedly find it more difficult to reject an individual's right to experience "emotional attachments." *Id.*

Similarly, just as the Court is willing to protect the "abortion decision," see *Roe*, 410 U.S. at 154, it might be equally unwilling to protect "the killing of an unborn child," if framed that way. This same rhetoric also informs the popular nomenclature that groups for and against abortion have adopted to describe their ideology: if you are in favor of abortion, you are "pro-choice," a label focusing on the right of the woman to make a deci-

this right, it is important to first understand the Court's trajectory on this issue over the past thirty-five years.

A. The Supreme Court Articulates a Standard in *Roe v. Wade*

Roe v. Wade provides the foundation for our current abortion jurisprudence. Prior to the 1973 decision, each state drafted its own laws to regulate abortion, depending on the public policy demands present within the jurisdiction.¹⁹ In *Roe*, however, the Supreme Court relied on the penumbral right to privacy and held that the decision to terminate a pregnancy falls within the constitutionally protected "zone[] of privacy,"²⁰ which can be regulated only when justified by a "compelling state interest."²¹ The Court importantly refused to recognize the unborn fetus as a person, and expressly acknowledged that the fetus bears no constitutional rights.²²

In order to balance the competing interests present in the debate, the *Roe* Court created a trimester framework, holding that states concerned with "protecting prenatal life" can limit access to abortion only in the third trimester (after roughly seven months of pregnancy).²³ Prior to the third trimester, *Roe* recognized only quality

sion about her body; in contrast, if you are opposed to abortion, you are "pro-life," a label placing emphasis on the fetus' so-called "right to life."

19. One such Texas law was subject to constitutional challenge in *Roe*. 410 U.S. at 117 (discussing the relevant provisions of the Texas Penal Code that make it a crime to "procure an abortion," except when the mother's health is at risk).

20. *Id.* at 153.

21. *Id.* at 155.

22. *Id.* at 158. As Justice Stevens recognized in his separate opinion in *Casey*, discussed *infra*, "[f]rom this holding, there was no dissent, indeed no Member of the Court has ever questioned this fundamental proposition." *Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part) (internal citations omitted).

The *Roe* majority noted the inconsistencies inherent in Texas's argument that the fetus is a rights-bearing "person" under the Constitution:

When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception [for the health and/or life of the mother] always exists. . . . But if the fetus is a person who is not to be deprived of life without due process of the law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

410 U.S. at 157 n.54.

The Court further belied the incongruity of Texas's position that a woman who seeks an abortion is not chargeable under the statute, and that the penalties for a criminal abortion are less than those for murder. *Id.* "If the fetus is a person, why is the woman not a principle or an accomplice? . . . If the fetus is a person, may the penalties be different?" *Id.*

23. *Id.* at 163–65. The Court observed that at this point in a pregnancy, the "fetus . . . presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163.

medical care and the protection of maternal health as sufficiently important state interests to justify restrictions on the procedure.²⁴ Notably absent from this pre-viability balancing is any claimed interest in abortion prevention.

In so holding, the Court endeavored to resolve the difficult abortion issue “by constitutional measurement, free of emotion and of predilection.”²⁵ Keeping with this goal, the decision places “emphasis upon [] medical and medical-legal history”²⁶ and expressly rejects any desire “[to] resolve the difficult [moral] question of when life begins.”²⁷ The Court therefore refrains from using charged language, referring instead to the “embryo,”²⁸ the “fetus,”²⁹ and the “unborn,”³⁰ all neutral terms, where appropriate.³¹ The decision also discusses the rights of both the “woman”³² and the “mother,”³³ and the “professional judgment”³⁴ of “respectable physicians.”³⁵ These uncontroversial rhetorical choices seemed obvious at the time and are only notable when analyzed alongside the emotionally charged terms used in later decisions.³⁶

B. A New Test Emerges in *Planned Parenthood v. Casey*

In 1992, *Planned Parenthood v. Casey* modified *Roe* to some degree, but also reaffirmed a woman’s constitutional right to seek an abortion.³⁷ *Casey* specifically rejected *Roe*’s “rigid” trimester framework³⁸ and instead adopted a new “undue burden” standard under which to

24. *Id.* at 164–65.

25. *Id.* at 117.

26. *Id.*

27. *Id.* at 159. The Court continued: “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.” *Id.*

28. *See, e.g., id.* at 131.

29. *See, e.g., id.* at 132.

30. *See, e.g., id.* at 130.

31. *Compare* Nightlight, About Us, *supra* note 1 (referring to “the personhood of pre-born children”), with OXFORD ENGLISH DICTIONARY ONLINE (2007) (Draft Entry) (defining “preborn” to mean “[o]f or designating a fetus,” and noting that the term originated with “anti-abortion campaigners”).

32. *See, e.g., Roe*, 410 U.S. at 129 (referring to “the pregnant woman’s life”).

33. *Id.* at 130 (referring to “the life of the mother”).

34. *Id.* at 165.

35. *See, e.g., id.* at 142.

36. *See* *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610 (2007); *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914 (2000); *see also* discussion *infra* Part I.C–D.

37. 505 U.S. 833, 834 (1992).

38. *Id.* at 872.

analyze state regulation of abortion.³⁹ The plurality observed that states do have an interest in the potentiality of human life that exists throughout the entire length of pregnancy, but held that interest becomes controlling only post-viability.⁴⁰ Thus, states can only restrict abortion prior to viability if such restrictions do not constitute a “substantial obstacle” in a woman’s choice to seek an abortion.⁴¹ After a fetus becomes viable (which the Court recognized is around six to seven months, accounting for advances in medicine), any state regulation of the procedure is permissible—including complete prohibition—provided that at all times there remains an exception for the health and life of the woman.⁴²

In so holding, the Court again employed neutral rhetoric. Writing for the plurality, Justices O’Connor, Kennedy, and Souter regularly used the term “fetus,”⁴³ and only referred to the fetus as a “child” once it developed past the point of “viability.”⁴⁴ Indeed, more broadly, while the Court conceded that abortion is a procedure “some deem nothing short of an act of violence against innocent human life,”⁴⁵ it also recognized that “the ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.”⁴⁶ Based on this important effect of *Roe*, the Court articulated its express unwillingness to abandon the precedent that so wholly “defin[ed] the capacity of women to act in society, and to make reproductive decisions.”⁴⁷

Other rhetoric in the *Casey* decision echoes this latter sentiment and focus on the reproductive rights of the woman.⁴⁸ Perhaps most

39. *Id.* at 887.

40. *Id.* at 869–71.

41. *Id.* at 877.

42. *See id.* at 846.

43. *See, e.g., id.* at 834.

44. *See, e.g., id.*

45. *Id.* at 852. The Court further noted that although “[s]ome of [the Justices] as individuals find abortion offensive to . . . basic principles of morality, . . . [the Court’s] obligation is to define the liberty for all, [and] not to mandate [the judges’] own moral code.” *Id.* at 850. In this sense, the *Casey* Court invoked the spirit of the *Roe* Court before it that abortion must be regulated “by constitutional measurement, free of emotion and of predilection.” *Roe v. Wade*, 410 U.S. 113, 116 (1973).

46. *Casey*, 505 U.S. at 856.

47. *Id.* at 860.

48. *See, e.g., id.* at 852 (noting that “the liberty of the woman [faced with a pregnancy] is at stake in a sense unique to the human condition and so unique to the law”); *id.* (“Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”).

notably, the first and last word in the Court's opinion is the same: "liberty."⁴⁹ With this rhetorical device, the plurality signaled emphatically that any analysis of the constitutional right to reproductive autonomy must start and end with consideration of the woman's "liberty." Indeed, the plurality makes clear that like other difficult issues that have come before the Court,⁵⁰ the decision to terminate a pregnancy "involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and which] are central to the liberty protected by the Fourteenth Amendment."⁵¹ Thus, concludes the Court, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁵²

Despite the apparent victory in reaffirming the right to an abortion, many pro-choice advocates remained skeptical of the *Casey* decision, as was Justice Blackmun, who stated in his concurrence: "I remain steadfast in my belief that the right to reproductive choice is entitled to the *full* protection afforded by this Court [in the past]."⁵³ Indeed, Justice Blackmun was forthright in his "fear for the darkness"⁵⁴ that would fall from "but a single [future] vote" against *Roe*.⁵⁵ He particularly "fear[ed]" Chief Justice Rehnquist's dissenting opinion, in which Justices White, Scalia, and Thomas joined. Justice Blackmun noted the "complete omission of any discussion [in Chief Justice Rehnquist's dissent] of the effects that compelled childbirth and motherhood have on women's lives."⁵⁶ Justice Blackmun's fear in this regard appears fully realized in *Carhart II*, where the woman is but a mere afterthought in the majority's consideration.⁵⁷

49. *Id.* at 844 ("Liberty finds no refuge in a jurisprudence of doubt."); see also *id.* at 901 ("We invoke [the covenant between past and future generations] to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.").

50. *Id.* at 851 (including within this category decisions regarding "marriage, procreation, contraception, family relationships, child rearing, and education").

51. *Id.*

52. *Id.*

53. *Id.* at 923 (Blackmun, J., concurring) (emphasis added).

54. *Id.*

55. *Id.* at 943.

56. *Id.* at 941.

57. See discussion *infra* Part I.D.

C. *Casey* Applied in *Carhart I*

In *Carhart I*, a Nebraska physician challenged a state law banning the so-called “partial birth abortion” procedure.⁵⁸ The Court analyzed the statute’s constitutionality using *Casey*’s “undue burden” standard and found that the law failed for two important reasons. First, the Court held that the language of the statute, aimed at one particular type of late-term abortion procedure, was overly broad and could too easily be interpreted to prohibit other, legal abortion procedures.⁵⁹ Second, the Court also warned that the statute was unconstitutional because it lacked a health exception for the woman.⁶⁰ Because *Casey* requires that post-viability restrictions on abortion have an exception for both the life and health of the woman, *Carhart I* reasoned the same must also be true of pre-viability restrictions.⁶¹

In reaching this conclusion, Justice Breyer discussed the various methods for performing abortions “in technical detail.”⁶² He conceded at the outset that his discussion might seem “cold or callous to some, [and] perhaps horrifying to others,” but noted that he found “no alternative way . . . to acquaint the reader with the technical distinctions . . . upon which the outcome of [the] case depends.”⁶³ Justice Breyer then proceeded to use medical terms where appropriate, including “fetus,”⁶⁴ “tissue,”⁶⁵ and “gestation,” among others.⁶⁶ Importantly, he also identified the relevant abortion procedures by their medical names, including “dilation and evacuation” (“D&E”),⁶⁷ “intact D&E,”⁶⁸ and “dilation and extraction” (“D&X”).⁶⁹

58. *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914, 915 (2000). Notable here is the Nebraska legislature’s powerful choice of rhetoric in terming the procedure “partial birth.” *See id.* at 921–22 (“No partial birth abortion shall be performed in this state . . .”) (quoting NEB. REV. STAT. ANN. § 28-328(1) (LexisNexis Supp. 1999)). The statute further defined “partial birth abortion” as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery.” *Id.* at 922 (quoting NEB. REV. STAT. ANN. § 28-326(9)) (emphasis added).

59. *Id.* at 939–40. The majority reasoned that physicians might fear future prosecution for the performance of legal abortions, which could produce a chilling effect. *See id.*

60. *Id.* at 930–31.

61. *Id.* at 930. The Court recognized that this is especially true because the state’s interest in the “potentiality of human life” is weaker at this stage. *See id.*

62. *Id.* at 923.

63. *Id.* This harkens back to the approach adopted in *Roe*, which placed “emphasis upon [] medical and medical-legal history” *Roe v. Wade*, 410 U.S. 113, 117 (1973).

64. *See, e.g., Carhart I*, 530 U.S. at 924.

65. *See, e.g., id.* at 925–26.

66. *See, e.g., id.* at 924.

67. *See, e.g., id.* (internal quotation marks omitted)

68. *See, e.g., id.* at 927 (internal quotation marks omitted).

The dissenting opinions reject this medical terminology outright, employing instead the inflamed rhetoric at the very heart of the Nebraska statute,⁷⁰ rhetoric that so incenses the pro-choice community.⁷¹ Indeed, in the very first paragraph of his dissent, Justice Scalia writes of “the abortionist” who “kill[s] a human child” through a “live-birth abortion.”⁷² He describes the D&E procedure at issue as “horrible,” “visibly brutal,” and tending to “evoke[] a shudder of revulsion.”⁷³

Justice Kennedy embraces this same rhetorical assault in his separately written dissent. He, too, refers to the attending physician as an “abortionist”⁷⁴ and condemns the procedure in which, in his view, “[t]he fetus . . . dies just as a human adult or child would: It bleeds to death as it is torn limb from limb.”⁷⁵ Evoking this same sentiment, Justice Thomas writes that the specific late-term abortion procedure is “a method of abortion that millions find hard to distinguish from infanticide”⁷⁶ He debunks Justice Breyer’s description of the procedure as “sanitized”⁷⁷ and blasts the majority’s rejection of “partial

69. See, e.g., *id.* (internal quotation marks omitted).

70. See discussion *supra* note 58.

71. See, e.g., Press Release, National Organization for Women, NOW Blasts Passage of Abortion Procedures Ban, Denounces Deceptive Use of “Partial Birth” Rhetoric (Mar. 13, 2003), available at <http://www.now.org/press/03-03/03-13b.html> (reacting to similar rhetoric in the federal abortion ban). National Organization for Women President Kim Gandy states:

You won’t find the term “partial birth abortion” in any medical dictionary—instead try looking for it in the ultraconservative rhetoric manual Contrary to what opponents of abortion rights would have you believe, this bill is not about a specific late-term procedure. This bill, like each of its predecessors, is purposely worded so vaguely that it could criminalize even some of the safest and most common abortion procedures after twelve weeks and well before fetal viability.

Id. (internal quotation marks omitted); see also Mother Jones, *Partial Birth Abortion Ban’s Both Arbitrary and Dangerous*, <http://www.motherjones.com/mojo/2007/04/partial-birth-abortion-bans-both-arbitrary-and-dangerous> (Apr. 18, 2007, 11:29 PST) (blog post by Elizabeth Gettelman) (“[L]et’s get one thing clear: there is no such thing as a ‘partial birth abortion.’ This term was born of the clever marketing of the anti-choice movement (or ‘pro-life’ as they like to be called) and has no medical foundation whatsoever.”).

72. *Carhart I*, 530 U.S. at 953 (Scalia, J., dissenting).

73. *Id.* Justice Scalia further invokes *Korematsu v. United States*, 323 U.S. 214 (1944), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), suggesting that the Court’s reaffirmation of *Casey* and *Roe* is akin to these indefensible decisions which have long been overturned. *Carhart I*, 530 U.S. at 953 (“I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court’s jurisprudence”). He later bemoans the overturning of the “humane” and “antibarbarian” statute that bans this procedure, a result he finds “tragic.” *Id.* at 954.

74. *Id.* at 958.

75. *Id.* at 958–59.

76. *Id.* at 982.

77. *Id.* at 983.

birth” terminology (in favor of “intact D&E” or “D&X”) as ideologically motivated “to make this procedure appear to be medically sanctioned.”⁷⁸

In all of this, the dissenters endeavor to equate the fetus growing inside the woman’s uterus with a living, breathing child who can be “kill[ed].”⁷⁹ Quite aware of this motive, Justice Stevens rejects the dissenting opinions as mere “rhetoric.”⁸⁰ In his concurrence, he writes:

Justice G[insburg] and Judge Posner have, I believe, correctly diagnosed the underlying reason for the enactment of this legislation—a reason that also explains much of the Court’s rhetoric directed at an objective that extends well beyond the narrow issue that this case presents. The rhetoric is almost, but not quite, loud enough to obscure the quiet fact that during the past 27 years, the central holding of *Roe v. Wade* has been endorsed by all but 4 of the 17 Justices who have addressed the issue. That holding—that the word “liberty” in the Fourteenth Amendment includes a woman’s right to make this difficult and extremely personal decision—makes it impossible for me to understand how a State has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty.⁸¹

Justice Ginsburg stated this another way in her own concurrence when she noted the simple fact that the Nebraska statute at issue, while not reducing the actual number of abortions, simply “prohibits the [relevant] procedure because the state legislators seek to chip away at the private choice shielded by [*Roe*], even as modified by [*Casey*].”⁸² She concludes that “if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue.”⁸³

D. Take Two in *Carhart II*

Only three years after the Court’s decision in *Carhart I*, a conservative United States Congress passed the so-called Partial-Birth Abortion Ban of 2003,⁸⁴ a federal prohibition on the same procedure

78. *Id.* at 987 n.5.

79. *Id.* at 953. I argue that this broad pro-life objective also drives the rhetorical favoring of embryo “adoption” over “donation.” See discussion *infra* Part III.

80. *Carhart I*, 530 U.S. at 946 (Stevens, J., concurring).

81. *Id.* (internal citations omitted).

82. *Id.* at 952 (Ginsburg, J., concurring) (internal citations omitted).

83. *Id.*

84. Once again, the very title of the Act takes an ideological position. “The term ‘partial-birth abortion’ is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. The medical community refers to the procedure

targeted by the Nebraska statute.⁸⁵ Learning from *Carhart I* and heeding the advice in Justice O'Connor's concurrence, at least to some degree,⁸⁶ Congress used a more specific definition of the practice to be banned, and included a scienter requirement to ensure that unknowing physicians would not be punished under the Act.⁸⁷ Importantly, however, the statute still lacked an exception for the health of the woman, an omission that proved fatal to the Nebraska statute. Nonetheless, Justice Kennedy, writing for the majority, deferred to Congress's "findings" that the banned procedure is *never* required to protect the health of the mother, and therefore held that no health exception is required since there will always be an equally safe and legal alternative procedure.⁸⁸

The Court's decision in *Carhart II* is an "alarming" departure from past abortion jurisprudence in several respects.⁸⁹ First, the Court successfully continues the rhetorical attack against legal abortion first waged in the dissenting opinions to *Carhart I*. Justice Kennedy regards the fetus as a "child."⁹⁰ He labels the relevant abortion procedure "brutal,"⁹¹ "gruesome,"⁹² "shocking,"⁹³ and "inhumane,"⁹⁴ involving as it does "tear[ing] [the fetus] apart"⁹⁵ and "ripping [off]" its limbs.⁹⁶

as either dilation [and] extraction . . . or intact dilation and excavation . . ." *Gonzales v. Carhart (Carhart II)*, 127 S. Ct. 1610, 1640 n.1 (2007) (Ginsburg, J., dissenting) (internal citations omitted).

85. 18 U.S.C. § 1531 (2003). As observed by Justice Ginsburg: "The Act's sponsors left no doubt that their intention was to nullify [the Court's] ruling in [*Carhart I*] . . ." *Carhart II*, 127 S. Ct. at 1643 n.4 (Ginsburg, J., dissenting) (internal citations omitted); *see also id.* (citing 149 Cong. Rec. 5731 (2003) (statement of Sen. Santorum) ("Why are we here? We are here because the Supreme Court defended the indefensible . . . We have responded to the Supreme Court."); 148 Cong. Rec. 14,273 (2002) (statement of Rep. Linder) (rejecting the proposition that Congress has "no right to legislate a ban on this horrible practice because the Supreme Court says [it] cannot" (alternation in original))).

86. The federal statute still did not include an exception for the health of the mother. *See Carhart I*, 530 U.S. at 947-51.

87. *Carhart II*, 127 S. Ct. at 1628.

88. *Id.* at 1624. Congress specifically stated that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." *Id.* (quoting Pub. L. No. 108-105, § (2)7, 117 Stat. 1201 (reprinted in the notes following 18 U.S.C. § 1531 (2000))). Justice Ginsburg attacked the truth of this statement in her spirited dissent. *Id.* at 1644 (Ginsburg, J., dissenting).

89. *Id.* at 1641.

90. *Id.* at 1634 (majority opinion) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child.").

91. *Id.* at 1633.

92. *Id.*

93. *Id.* at 1634.

94. *Id.* at 1633.

95. *Id.* at 1621.

Furthermore, Justice Kennedy's opinion again draws an analogy between the fetus and an infant,⁹⁷ noting that "[t]he Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process."⁹⁸ In one of the opinion's the most shocking, oft-quoted passages, Justice Kennedy recounts the "clinical" observations of a nurse during an abortion procedure:

The baby's little fingers were clasp[ing] and unclasp[ing], and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he's going to fall.⁹⁹

The fact that the nonviable fetus here is referred to as a "baby" demonstrates the majority's obvious decision to equate abortion with a crime—in this case, infanticide. As Justice Ginsburg notes in her dissent, however, the fetus at this point remains nonviable, and the Court's language in this regard¹⁰⁰ is merely an attempt to blur *Casey's* once-crucial dividing line between viability and nonviability.¹⁰¹ Indeed, these passages from the *Carhart II* majority demonstrate the fevered pitch reached in the abortion debate, and according to Justice Ginsburg, amount to nothing more than an "antiabortion shibboleth."¹⁰²

Carhart II also adopts a markedly paternalistic tone, noting, even in the absence of "reliable data to measure the phenomenon," the "regret" many women feel after choosing to have an abortion.¹⁰³ Justice Ginsburg sums up the majority's flawed reasoning as follows:

96. *Id.* at 1622.

97. *Id.* at 1632.

98. *Id.* at 1632–33.

99. *Id.* at 1622. Justice Kennedy further applauds the abortion ban for "express[ing] respect for the dignity of human life." *Id.* at 1631.

100. See also *id.* at 1650 (Ginsberg, J., dissenting) ("The Act [legitimately] appl[ies] both previability and postviability because . . . a fetus is a living organism while within the womb, whether or not it is viable outside the womb.").

101. *Id.* at 1647 ("Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures—along with the D&E by dismemberment—the Court says, saves the ban on intact D&E from a declaration of unconstitutionality." (internal citations omitted)).

102. *Id.* at 1648.

103. *Id.* at 1634 (majority opinion). Although admitting that there exists "no reliable data to measure the phenomenon," Justice Kennedy remarks that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." *Id.*

Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the [majority] worries, doctors may withhold information about the nature of [relevant abortion] procedure. The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.¹⁰⁴

Finally, and most strikingly, Justice Kennedy's opinion embodies an almost complete indifference towards women and their reproductive autonomy.¹⁰⁵ Throughout the majority's detailed description of the various abortion procedures, the Court scarcely mentions women at all; instead, Justice Kennedy writes only of "the fetus," "the cervix," and the "abortion doctor,"¹⁰⁶ obviously a pejorative term for the attending physician.¹⁰⁷ Gone is the Court's concern with the liberty of the woman making the difficult decision to terminate her pregnancy, which the Court previously derived from her "dignity and autonomy," her "personhood," and her "conception of . . . her place in society."¹⁰⁸ To the contrary, *Carhart II* employs sleight-of-hand rhetoric that removes the focus from the woman and places it instead on the unborn fetus. Indeed, the dissenting Justices recognized this obvious framing for exactly what it is: a sinister attempt to dismantle *Roe* and the right to a legal abortion.¹⁰⁹

II. The Evolution of Embryo "Adoption"

Against this backdrop, laden as it is with moral and theological quandaries about the beginnings of life, IVF emerged as a new tech-

104. *Id.* at 1648–49 (Ginsberg, J., dissenting) (internal citations omitted). In a footnote to this passage, Justice Ginsburg forcefully declares that "[e]liminating or reducing women's reproductive choices is manifestly *not* a means of protecting them." *Id.* at 1648 n.9.

105. Compare *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) ("[T]he ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives."), and *id.* at 860 (noting that the right to choose an abortion has "defin[ed] the capacity of women to act in society, and to make reproductive decisions.").

106. *Carhart II*, 127 S. Ct. at 1624–25.

107. Justice Ginsburg notes this in her dissent. *Id.* at 1650 (Ginsberg, J., dissenting).

108. *Id.* at 1640 (quoting *Casey*, 505 U.S. at 851–52).

109. *Id.* at 1653 ("In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives."); *cf. id.* at 1650 (noting that "*Casey's* principles, confirming the continuing vitality of the essential holding of *Roe*, are merely 'assume[d]' for the moment, rather than retained or reaffirmed" (internal citations and quotation marks omitted)).

nology that allows human conception outside of the uterus. As a practical matter, doctors performing IVF regularly produce more embryos than are needed to implant in the woman who desires to become pregnant, leading to an “exploding frozen [embryo] population.”¹¹⁰ Recent estimates indicate that there are currently between 400,000 and 500,000 embryos in storage in the United States.¹¹¹ As a result, a new and difficult question has arisen over how best to deal with the destruction, preservation, donation, or, at issue in this Comment, so-called “adoption” of these unused embryos.¹¹²

Mirroring the sentiments of the pro-life community in general, those in favor of “adoption” believe that human life begins at conception, even if that conception occurs in a Petri dish.¹¹³ This view is justified in part by the belief that each fertilized embryo has a unique composition,¹¹⁴ a proposition that at least one scholar finds “debatable.”¹¹⁵ For these individuals, destruction of the embryo is strictly prohibited and in instances in which couples are left with more embryos

110. *Embryonic Stem Cell Research: Hearing Before the H. Comm. on Gov't Reform Subcomm. on Criminal Justice, Drug Policy and Human Resources*, 107th Cong. 75 (2001) (statement of Joann L. Davidson, Program Director, Snowflakes Embryo Adoption Program).

111. Katz, *supra* note 6, at 304. Snowflakes claims the number is as high as 500,000. Nightlight Christian Adoptions, Snowflakes Frequently Asked Questions by Adopting Families, http://www.nightlight.org/programs_SnowflakesFrozenEmbryoFaqs.html (last visited Mar. 22, 2009).

112. See Katz, *supra* note 6, at 305–06 (“Views on the moral status of the ex utero embryo range across a wide continuum . . . [At one end of the spectrum,] many believe that the embryo is the equivalent of a born human being even if it is in storage. They believe that failure to show full respect for embryonic life is to de-value all human life. Supporters of this view oppose stem cell research and embryo freezing, and some espouse embryo donation of surplus embryos and/or their mandatory transfer to other women’s uteri for attempts at pregnancy. At the other end of the continuum is the view that the ex utero embryo is just another type of bodily tissue, nothing but a clump of cells. Because these cells lack sentience, have no interests to be protected, and are neither conscious nor self-conscious, embryos enjoy no moral claims of their own. Some scholars find significance in the fact that the fertilized egg *in vitro* cannot develop into a fetus all by itself.” (internal citations and quotation marks omitted)); see also *id.* at 304 (“[P]rogenitors have a number of options for the disposition of their frozen embryos. They may use the embryos for attempts at a future pregnancy, donate them to be used for research, give them to another couple who hopes to initiate a pregnancy, leave them in cryostorage indefinitely, or request that they be discarded.”).

113. See Batsedis, *supra* note 3, at 571 (discussing the view that “embryos . . . [are] human persons with the same moral status as adults and children” (internal quotations omitted)).

114. Even Former President George W. Bush, as he vetoed a bill permitting stem cell research, commented that “[e]ach of these human embryos is a unique human life with inherent dignity and matchless value. . . .” David Stout, *In First Veto, Bush Blocks Stem Cell Bill*, N.Y. TIMES, July 19, 2006, available at <http://www.nytimes.com/2006/07/19/washington/19cnd-stem.html>.

115. Katz, *supra* note 6, at 320.

than are needed to complete their own IVF, offering these embryos for “adoption” is the only accepted alternative.¹¹⁶

The other side generally believes that life begins at birth, and thus, that “embryos are a mere cluster of cells, and no moral duty is owed to them.”¹¹⁷ This view, however, is not necessarily entertained only by those who support abortion. Abortion opponent Senator Orrin Hatch, for example, is also a proponent of stem cell research, which generates much the same debate as IVF.¹¹⁸ Senator Hatch has famously stated that he has great difficulty equating “a child living in the womb, with moving toes and fingers and a beating heart, with an embryo in the freezer.”¹¹⁹ Although pro-choice advocates would take serious issue with Senator Hatch’s characterization of a fetus living in the womb as a “child,” they would agree with his characterization of the embryos at issue.

A. Snowflakes Embryo Adoption Program

Soon after its advent in the late 1970s,¹²⁰ the medical community began grappling with the moral and ethical issues associated with IVF.¹²¹ The debate heated up further in 1983 when a donated embryo was successfully implanted in an infertile woman, resulting in the first viable pregnancy of this kind.¹²² Although that pregnancy did not re-

116. See *id.*; see also Batsedis, *supra* note 3, at 566–67 (noting that those opposed to the destruction of the embryo “maintain that stem cell research is analogous to infanticide or brazen homicide”); Conde, *supra* note 16, at 284–85 (describing the “massacre” of “living human embryos”).

117. Batsedis, *supra* note 3, at 571.

118. Katz, *supra* note 6, at 320.

119. *Id.* Senator John McCain and Former Senator Bill Frist, also strong opponents of abortion, support expanding federal funding for embryonic stem cell research, which requires the utilization of embryos created for but not used in IVF. *Id.* at 320–21; see also Sheryl Gay Stolberg, *Reconsidering Embryo Research*, N.Y. TIMES, July 1, 2001 (stating that Senator John McCain, who is in the “pro-life camp,” supports stem cell research); *Politics, Science, Morality of Stem Cell Issue*, CNN.COM, July 18, 2001, <http://archives.cnn.com/2001/ALLPOLITICS/07/18/Bash.debrief.focus/> (reporting that Senator Bill Frist also supports federal funding for research on stem cells).

120. Louise Brown, the world’s first “test tube baby,” was born on July 25, 1978. Anne Taylor Fleming, *New Frontiers in Conception*, N.Y. TIMES, July 20, 1980, at SM4.

121. See, e.g., ROBERT EDWARDS & PATRICK STEPTOE, *A MATTER OF LIFE* (1980) (discussing the role of science in creating human life); see also Dena Kleiman, *Anguished Search to Cure Infertility*, N.Y. TIMES, Dec. 16, 1979, at SM10; Janet Bataille, *Research in Human Embryos Raises Fear and Hope*, N.Y. TIMES, Mar. 3, 1980, at A14; Allen L. Otten, *Study Cites Lack of Success with In Vitro Fertilization*, WALL ST. J., May 18, 1988, at 1. Note that this is about the same time that *Roe*, decided in 1973, was dominating popular discourse.

122. Alan Trounson et al., *Pregnancy Established in an Infertile Patient After Transfer of a Donated Embryo Fertilised In Vitro*, 286 BRIT. MED. J. 835 (1983), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1547212&blobtype=pdf>.

sult in a live birth, researchers were soon able to achieve the first donor egg birth in 1984¹²³ and the first donated embryo birth in 1985.¹²⁴ Since then, concerns about regulation of this newfound technology have continued to dominate scientific, medical, and political discourse.¹²⁵ Only recently, however, has the discussion shifted from embryo “donation” to embryo “adoption.”¹²⁶

On July 25, 2002, the U.S. Office of Public Health and Science, as part of the Department of Health and Human Services (“DHHS”), first announced the provision of federal funds “to develop and implement public awareness campaigns regarding embryo adoption.”¹²⁷ The funding for this new campaign—\$1 million allocated to DHHS earlier that year—was to be used “to inform Americans about the existence of spare embryos and options for couples to adopt an embryo or embryos in order to bear children”¹²⁸ DHHS further defined embryo “adoption” as “the *donation* of frozen embryo(s) from one party to a recipient who wishes to bear and raise a child.”¹²⁹ Although “adoption” may be the preferred pro-life rhetoric of choice (since it places the emphasis on the embryo being adopted, rather than the couple who is “donating”), it is interesting, and certainly revealing, that even the federal government is unable to define the former without reference to the latter.

123. Sandra Blakeslee, *Infertile Woman Has Baby Through Embryo Transfer*, N.Y. TIMES, Feb 4, 1984; see also Peter Lutjen et al., *The Establishment and Maintenance of Pregnancy Using In Vitro Fertilization and Embryo Donation in a Patient with Primary Ovarian Failure*, 307 NATURE 174 (1984), available at <http://www.nature.com/nature/journal/v307/n5947/abs/307174a0.html>.

124. W. Feichtinger et al., *Pregnancy After Total Ovariectomy Achieved by Ovum Donation*, LANCET, Sept. 28, 1985, at 722–23; see also Conde, *supra* note 16, at 279.

125. See Otto Friedrich, *A Legal, Moral, Social Nightmare*, TIME, Sept. 10, 1984; Claudia Wallis, *The New Origins of Life*, TIME, Sept. 10, 1984.

126. Sarah Blustein, *Embryo Adoption*, N.Y. TIMES, Dec. 11, 2005 (“This year, opponents of abortion stepped up their use of a carefully chosen phrase—“embryo adoption”—that describes a couples’ decision to have a baby using the embryos of another couple.”).

127. Announcement of the Availability of Financial Assistance and Request for Applications to Support Development and Delivery of Public Awareness Campaigns on Embryo Adoptions, 67 Fed. Reg. 48,655 (July 25, 2002).

128. H.R. Rep. No. 107-342, at 112 (2001).

129. Announcement of the Availability of Financial Assistance and Request for Applications to Support Development and Delivery of Public Awareness Campaigns on Embryo Adoptions, 67 Fed. Reg. at 48,655 (emphasis added). Interestingly, also in 2002, DHHS “issued a new regulation making embryos and fetuses eligible for health care benefits under the State Children’s Health Insurance Program (‘SCHIP’), while [simultaneously] rejecting calls to expand coverage to uninsured pregnant women.” Susan L. Crockin, *“What Is an Embryo?”: A Legal Perspective*, 36 CONN. L. REV. 1177, 1184 (2004). Crockin notes further that “[c]ritics have questioned whether post-partum or post-miscarriage care would be delivered to the woman whose fetus had been covered.” *Id.*

The Snowflakes Embryo Adoption Program, a division of the California-based Nightlight Christian Adoption agency, soon became the leading provider of “adoptions” under this federal grant.¹³⁰ Developed in 1997, the agency takes its name from its notion that frozen embryos, like snowflakes, “are unique and fragile,” and can never be created in exactly the same way twice.¹³¹ Although the group possesses no medical background or expertise, it emerged as a leader in its field based simply on its belief that “[an] embryo is a baby from the minute it [comes into existence] in a laboratory dish.”¹³² Former President George W. Bush is a Snowflakes cheerleader, advocating for “adoption” as a “life-affirming alternative.”¹³³ In July 2006, he staged a public relations coup of sorts when he used his first presidential veto on a stem-cell research bill while surrounded by several “snowflake babies” and their families.¹³⁴

According to the Snowflakes website, embryo “adoption” is a process where “individuals who have their own frozen embryos agree to release them to the adopting couple.”¹³⁵ The process begins once an “adoptive” family contacts Snowflakes and indicates its desire to receive a donated embryo.¹³⁶ The family then fills out an application that consists of a “Dear Genetic Parent” introduction letter, a short

130. Katz, *supra* note 6, at 321.

131. NIGHTLIGHT, SNOWFLAKES FACT SHEET, *supra* note 7; see also Press Release, President Discusses Embryo Adoption and Ethical Stem Cell Research (May 24, 2005) (on file with author) (“[T]here is no such thing as a spare embryo. Every embryo is unique and genetically complete, like every other human being.”); Batsedis, *supra* note 3, at 569 (“[Snowflakes] is an agency that treats embryos just as if they were regular babies.”).

132. Arthur Caplan, *The Problem with “Embryo Adoption,”* MSNBC.COM, June 24, 2003, <http://www.msnbc.msn.com/id/3076556/>.

133. Press Release, President Discusses Embryo Adoption and Ethical Stem Cell Research, *supra* note 131.

134. Rick Klein, *Bush Vetoes Stem Cell Research Bill*, BOSTON GLOBE, July 20, 2006, available at http://www.boston.com/news/science/articles/2006/07/20/bush_vetoes_stem_cell_research_bill/. According to one scholar, President Bush defers to “ideologically charged culture of life rhetoric to promote embryo adoptions as the only alternative to dispose of [embryos].” Conde, *supra* note 16, at 273 (internal quotation marks omitted). Another scholar notes that “the [Bush] administration . . . steadily and stealthily inject[ed] a right-to-life policy agenda into the petri dish and laboratory.” Crockin, *supra* note 129, at 1183.

135. Embryo Adoption Awareness Center, What is Embryo Adoption and Donation?, <http://www.embryoadooption.org/about/index.cfm> (last visited Mar. 22, 2009). The agency provides both open and closed “adoptions,” in which the genetic couple can choose to take either an active role or a completely anonymous role in the future child’s life, assuming the donation results in a viable birth. *Id.* For the most part, Snowflakes prefers open adoptions so that donating couples have the opportunity to play a role in the selection of the “adoptive” couple. Batsedis, *supra* note 3, at 569.

136. NIGHTLIGHT, SNOWFLAKES FACT SHEET, *supra* note 7.

biography on the family, and a photo collage.¹³⁷ Although Snowflakes claims that it “work[s] with families of various faiths,” the organization does explicitly require that “adoptive” families “commit[] to providing their child with a . . . spiritual home environment.”¹³⁸ Furthermore, Snowflakes requires couples seeking a donation to have been married for at least two and a half years at the time of their application.¹³⁹

After a couple has applied, Snowflakes is licensed by the California State Department of Social Services to conduct a home study of the “adoptive” family.¹⁴⁰ This process includes a background check for criminal history and child abuse, as well as education for the “adoptive” family on how to raise a child, should one result from the implantation of the “adopted” embryo.¹⁴¹ Once cleared through the home study process, families are matched with donors based on the genetic couple’s preferences on everything from ethnicity, to age, to religion, to family size, to geographic location, to education, and even to family income.¹⁴²

137. *Id.* at 2.

138. *Id.* at 1.

139. *Id.* at 2. This requirement effectively excludes homosexual couples and single mothers from the program. Even if a gay couple were legally married (in a state such as California, Connecticut, or Massachusetts), it is doubtful that the fundamentalist Snowflakes would approve of such a marriage, or that many donating families would allow the placement of their embryo in the home of a gay couple. See Liza Mundy, *Out of the Freezer, Into the Family*, SLATE, May 31, 2005, <http://www.slate.com/toolbar.aspx?action=print&id=2119845> (“The typical Snowflakes donor, while not necessarily Christian or conservative, is unlikely to favor gays, lesbians, or even single mothers.”); see also Shari Roan, *The Embryo Dilemma: She Can Donate; Who Will Adopt?*, L.A. TIMES, Oct. 6, 2008, at F7 (“Wolfe rejected using an embryo adoption service because many of those centers have restrictive criteria about who can adopt an embryo, such as requiring that the parents be married heterosexuals.”).

140. NIGHTLIGHT, SNOWFLAKES FACT SHEET, *supra* note 7, at 1–2.

141. Nightlight Christian Adoptions, Snowflakes Frequently Asked Questions by Embryo Placing Families, http://www.nightlight.org/programs_SnowflakesFrozenEmbryoPlacingFAQs.html (last visited Mar. 22, 2009) [hereinafter Frequently Asked Questions by Embryo Placing Families].

142. NIGHTLIGHT, SNOWFLAKES FACT SHEET, *supra* note 7, at 2; see also, e.g., Adoptive Families Sought for Immediate Matching, http://www.nightlight.org/programs_SnowflakesImmediatePlacement.html (last visited Mar. 22, 2008). According to Joann Davidson, Program Director of Snowflakes Embryo Adoption, “embryo adoption is better than embryo donation because it involves a thorough screening process designed to ensure that embryos are placed with stable families” Brandon S. Mercer, *Embryo Adoption: Where are the Laws?*, 26 J. JUV. L. 73, 81. Thus, the purpose of adoptive family evaluation is “to assess [the couple] as potential adoptive parents (physically, emotionally, and financially).” *Id.* at 82.

Once Snowflakes selects a match, it drafts a pre-pregnancy contract for the parties to sign.¹⁴³ Snowflakes admits, however, that while it hopes “current laws for adoption will simply be expanded to include embryos,” these contracts are currently based on the concept of embryos as property.¹⁴⁴ The donating couple agrees to relinquish all parental rights over the unimplanted embryo, and states that any baby resulting from the embryo transfer “will bear the name of the adoptive parents and have inheritance rights through only the adoptive family.”¹⁴⁵ On the other side, the receiving family must agree that “following the adoption and implantation, any embryos not used by the adopting couple must be returned to their genetic parents.”¹⁴⁶ Importantly, but not surprisingly, excess embryos “cannot be destroyed, nor may they be aborted.”¹⁴⁷

Despite such a formalized process for linking donors and “adoptive” families, and despite receiving funding each year since 2001, only 185 children have been born to 138 families (including 23 families who had sibling pregnancies).¹⁴⁸

B. Codification in State Law

The Supreme Court abortion cases discussed in Part I explicitly recognize that a fetus does not hold any substantive rights under our Federal Constitution, which is in large part why abortion is legal in this country.¹⁴⁹ The same is not true, however, for the IVF embryos before they are implanted in a woman’s uterus. No federal law or Supreme Court decision prevents individual states from assigning rights to or mandating the protection of embryos used in assisted reproduction.¹⁵⁰ That leaves states free to attempt regulation beyond and apart from the reach of *Roe v. Wade*, even if embryo protection statutes ultimately erode the very premise upon which legalized abortion is largely based.

143. Frequently Asked Questions by Embryo Placing Families, *supra* note 141.

144. *Id.*

145. Batsedis, *supra* note 3, at 570.

146. *Id.*

147. *Id.* According to Batsedis, “[a]s a result, most adopting couples tend to be religious Christians. In fact, those affiliated with Snowflakes tend to want their embryos raised with a religious family. Snowflakes has admitted that most of its ‘clients believe that life begins at conception.’” *Id.* at 572.

148. Frequently Asked Questions by Embryo Placing Families, *supra* note 141. Sibling pregnancies are those where the mother gives birth to more than one child, a common phenomenon with IVF.

149. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

150. See Katz, *supra* note 6, at 326.

No state court has yet assigned the embryo any explicit legal personhood.¹⁵¹ Instead, courts consistently treat IVF embryos as some form of property, rather than as a human child that possesses individual rights.¹⁵² This accords with the American Society of Reproductive Medicine's ethical statement on the regulation of IVF, which clearly states that frozen embryos are the "property" of their progenitors.¹⁵³

In contrast, embryos have been granted legal personhood by the legislatures of at least two different states: Louisiana and New Mexico.¹⁵⁴ In Louisiana, by far the most radical in this respect, a statute establishes that the "human embryo"¹⁵⁵ is "a juridical person"¹⁵⁶ that is entitled to "sue or be sued."¹⁵⁷ Importantly, the statute prohibits the embryo from being "intentionally destroyed"¹⁵⁸ by either the IVF couple or the treating physician, referred to in the statute as the "temporary guardian."¹⁵⁹ Instead, IVF couples who renounce their "parental rights" to these embryos are mandated to make them available for "adoptive implantation" by "another married couple."¹⁶⁰ A similar

151. See *id.* at 316. The hesitancy by courts to weigh in on embryo protection echoes the sentiments of the Court in *Roe*, when it stated:

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

Roe, 410 U.S. at 159.

152. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) ("We conclude that preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that [the progenitors] have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."); see also Katz, *supra* note 6, at 327 ("Although [some] courts have recognized the dispositional authority of the gamete providers, they have taken care not to classify the embryos as property but rather as occupying an interim category Nevertheless, when the courts state that contracts may govern the disposition of the unused embryos, they are tacitly treating the embryos as property.")

153. See Batsedis, *supra* note 3, at 567 (citing Am. Fertility Society, *Ethical Statement on In Vitro Fertilization*, 41 FERTILITY & STERILITY 12 (1984)).

154. Katz, *supra* note 6, at 323. Furthermore, a Florida statute adopts the rhetoric of Snowflakes and defines "fertility technique" to include "artificial embryonation, artificial insemination, whether in vivo or in vitro, egg donation, or embryo adoption." F.S.A. § 63.213(2)(h)(i)(6)(c) (2008) (emphasis added).

155. LA. REV. STAT. ANN. § 9:121 (2008).

156. *Id.* § 9:124.

157. *Id.*

158. *Id.* § 9:129.

159. *Id.* § 9:126. If the progenitors fail to express their identity, the physician is further empowered to "protect the in vitro fertilized human ovum's rights." *Id.*

160. *Id.* § 9:130; see also Batsedis, *supra* note 3, at 567; Katz, *supra* note 6, at 323 (citing LA. REV. STAT. ANN. § 9:129). Notice how the statute assumes that both the donating par-

statue in New Mexico requires that all IVF treatments performed in the state be structured to “insure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient.”¹⁶¹ Because these statutes effectively deny the IVF couple the decision-making control over their “property,” they are of questionable constitutionality and could possibly be subject to challenges based on procreative liberty.¹⁶²

Noteworthy in both of these state statutes is the use of charged language implicating the debate over legal abortion.¹⁶³ Observe how the Louisiana State Legislature uses “adoptive implantation,” a derivative of the word “adoption” to describe the mandatory implantation of excess embryos.¹⁶⁴ Similarly, the New Mexico statute defines the fertilized embryo as “living.”¹⁶⁵

In fact, Louisiana is particularly aggressive in legislating against a woman’s right to choose: Louisiana was one of nine states to draft anti-abortion legislation in the wake of the confirmation of Justices Alito and Roberts to the Supreme Court in early 2006.¹⁶⁶ As a result of this and other efforts in the state, the parent of a minor must consent before an abortion is provided;¹⁶⁷ a woman must receive state-directed counseling that includes information designed to discourage her from having an abortion and then wait twenty-four hours before the procedure is provided;¹⁶⁸ and public funding for abortions is limited to cases of life endangerment, rape, or incest.¹⁶⁹ Given this relationship

ents and the adoptive parents are married. This view that only married couples should consider parenthood is entirely consistent with the view adopted by Snowflakes. See discussion *supra* note 139 and accompanying text.

161. N.M. STAT. ANN. § 24-9A-1(D) (West 2000); see also generally Cynthia Reilly, *Constitutional Limits on New Mexico’s In Vitro Fertilization Law*, 24 N.M. L. REV. 125 (1994) (discussing the New Mexico statute).

162. See Crockin *supra* note 129, at 1180; see also discussion *supra* Part II.B.

163. “According to Professor Paula J. Manning, pro-life advocates prefer the emotionally charged term embryo adoption because they believe all embryos are potential children.” Conde, *supra* note 16, at 280.

164. LA. REV. STAT. ANN. § 9:126 (“adoptive”).

165. N.M. STAT. ANN. § 24-9A-1(D).

166. Ed Anderson, *State Abortion Ban goes to House Floor*, TIMES-PICAYUNE, May 18, 2006, at A1, available at <http://www.nola.com/news/t-p/capital/index.ssf?/base/news-3/1147938887224000.xml&coll=1>; see also LA. REV. STAT. ANN. § 40:1299.30 (2008) (“‘Unborn human being’ means an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth.”); State Facts About Abortion in Louisiana, <http://www.guttmacher.org/pubs/sfaa/louisiana.html> (last visited Mar. 22, 2009).

167. LA. REV. STAT. ANN. § 40:1299.33(D) (2008).

168. *Id.* § 40:1299.35.6(B)(1).

169. *Id.* § 40:1299.34.5(A)-(B).

between Louisiana's regulation of embryo disposition and the aggressive limitations on the availability of abortion in the state, the inference arises that Louisiana may have been motivated by priorities outside of the IVF context when drafting their respective statutes. (The same may also be true of New Mexico, although the state does not have any similar restrictions on abortion.) Indeed, these statutes exemplify the war of words that fuels the abortion debate, where a change in language can mean a change in the ability of women to access a legal medical procedure.

III. Implications of "Adopting" a New Rhetoric to Define Embryo Donation

While it may be difficult to attack the commendable decision by an IVF couple to donate their unwanted embryos to a deserving infertile couple,¹⁷⁰ the recent trend towards terming this act an "adoption" has sparked a heated backlash from the pro-choice community.¹⁷¹

170. This is indeed a testament to our increasing comfort with the concept of IVF, as is the fact that at least sixteen states have statutes addressing assisted reproduction. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 125315 (West 2006) (requiring fertility doctors to inform patients about the option to store, donate, or discard unused embryos); COLO. REV. STAT. § 19-4-106 (1999) (discussing the parental status of children resulting from assisted reproduction); DEL. CODE ANN. tit. 13, § 8-102 (2004) (defining "assisted reproduction" to include the "donation of embryos"); FLA. STAT. § 742.14 (2005) (stating that donation of preembryos results in the relinquishment of parental rights); LA. REV. STAT. ANN. § 9:126 (1991) (providing that progenitors can make excess embryos available for "adoptive implantation"); N.H. REV. STAT. ANN. § 168-B:1 (1991) (defining donor as "an individual who contributes for the purpose of artificial insemination, in vitro fertilization, or implantation in another, or a woman who contributes a preembryo"); N.J. STAT. ANN. § 26:2Z-2 (West 2002) (requiring fertility doctors to inform patients about the option to store, donate, or discard unused embryos); N.M. STAT. ANN. § 24-9A-1 (West 1985) (requiring fertility doctors to inform patients about the option to store, donate, or dispose of unused embryos); N.D. CENT. CODE § 14-20-02(4) (2005) (defining "assisted reproduction" to include the "[d]onation of embryos"); OHIO REV. CODE ANN. § 3111.97 (LexisNexis 1986) (establishing rules for embryo donation and specifying that the birth mother, rather than the donor, is the natural mother of the child); OKLA. STAT. tit. 10 § 556 (2000) (regulating "human embryo transfer" and providing that a child born as a result of embryo implantation has no rights with respect to the donating couple); TEX. FAM. CODE ANN. § 160.102 (Vernon 2007) (defining "donor" as "an individual who provides eggs or sperm to a licensed physician to be used for assisted reproduction"); UTAH CODE ANN. § 78B-15-102 (2005) (defining "assisted reproduction" to include "donation of eggs" and "donation of embryos"); VA. CODE ANN. § 20-158 (2000) (providing that "[a] donor is not the parent of a child conceived through assisted conception"); WASH. REV. CODE § 26.26.011 (2005) (defining "assisted reproduction" to include the donation of eggs and embryos); WYO. STAT. ANN. § 14-2-902 (2003) (providing that "[a] donor is not a parent of a child conceived by means of assisted reproduction").

171. *See* Batsedis, *supra* note 3, at 570 ("While some believe embryo adoption is a scientific break-through, others believe it could be the next big battlefield in the abortion de-

One scholar contends the shift towards “adoption” rhetoric is meant simply to encourage IVF couples to offer their unwanted embryos to infertile couples.¹⁷² This explanation, however, only demonstrates the relative interchangeability of the words “adoption” and “donation” in this context, and begs the question of whether there exists any functional or meaningful distinction between the two terms.

A. An Attempt to Refocus the Discussion

One of the most incendiary, inflammatory, and offensive law review articles published in recent years was written by self-professed “anti-abortionist[s]” who firmly believe that all unwanted embryos should be candidates for “adoption.”¹⁷³ Beyond the implicit link be-

bate.” (internal quotation marks omitted)). In addition, the American Civil Liberties Union, Planned Parenthood, and the American College of Obstetricians and Gynecologists all warn that the “attempt to give an embryo the status of a person raise[s] concerns with respect to reproductive rights.” Lynne Marie Kohm, *What’s My Place In This World? A Response to Professor Ellen Waldman’s What Do We Tell The Children?*, 35 CAP. U. L. REV. 563, 584 (citing A.B. 1926, Bill Analysis, http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1901-1950/ab_1926_cfa_20060330_165950_asm_comm.html (last visited Mar. 22, 2009)).

172. Batsedis, *supra* note 3, at 570.

173. Dr. Walter Block & Roy Whitehead, *Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy*, 4 APPALACHIAN J. L. 1, 44 (2005). Given my thesis in this Comment, I do not use “incendiary,” “inflammatory,” or “offensive” lightly. Instead, I believe Block and Whitehead’s article is objectively outrageous. The authors open their article by stating that the “easy availability [of abortion] fuels the ire of and represents the equivalent of a holocaust to anti-abortion advocates.” *Id.* at 1. The authors apparently consider themselves as among this group of anti-abortionists, as they agree with this sentiment later in the article:

[One] analogy [from history] is that between abortion and the Nazi holocaust. Both incidents are associated with massive slaughter of innocents. If the immorality of an act is correlated with the helplessness and innocence of the victims, then the moral outrage now directed at Nazis might better be vented in the direction of pro-choicers. For surely the Jews who were slaughtered, no matter how innocent of any wrong doing themselves, were at least more responsible for their fate than the fetuses victimized by abortion. This practice attacks the weakest and most defenseless members of our society. It is one thing to do away with adults, as in the case of the Jewish Holocaust, the Bosnian “ethnic cleansing,” or the mass murder in Rwanda. The suffering is pitiful, but at least for the most part the victims were adults. In the event, they were unable to protect themselves against their enemies. But they had this option, at least theoretically.

Id. at 14–15.

Not content with that shocking analogy, the authors go on to compare abolitionists who freed slaves in the pre-Civil War era with anti-abortionists fighting to make abortion illegal today. Their article states:

Each attempts (attempted) to safeguard the well-being and even the very lives of a particularly helpless group of people. If anything, the present day pro-life forces are in a worse position than their nineteenth century counterparts. For one thing, the fetus is far more helpless than was the black slave. The latter could “run away” with the help of the Underground Railroad and other such institutions. No three-

tween the authors' anti-abortion views and their pro-"adoption" views, important in its own right, this article is instructive in allowing pro-choice advocates an important glimpse into "enemy" territory.

In their article, Dr. Walter Block and Roy Whitehead describe the key steps that must be achieved in order to overturn the Supreme Court's holding in *Roe*.¹⁷⁴ Among those steps, Block and Whitehead contend that the pro-life community "must establish by law, government policy, and most important, in the minds of voters, *that a fetus is a human being*."¹⁷⁵ They continue: "If a fetus is human it warrants the equal protection of the law afforded to the mother."¹⁷⁶

Indeed, Snowflakes's rhetoric achieves exactly what Block and Whitehead call for in their article: it refocuses the discussion on embryonic life and advances a transparently pro-life agenda.¹⁷⁷ When Snowflakes refers to the service it provides as "adoption," the implication arises that a living, breathing baby is somehow involved in the process.¹⁷⁸ This is because the term "adoption" places the emphasis on the rights of the putative would-be baby—to be adopted—while

week old fetus has the maturity to initiate or even remotely cooperate in any such venture. True, the pro-lifers can try to convince a pregnant woman not to abort, but in order to save the baby's life they have to convince the potentially evil doer mother, not of course the fetus. In contrast, the organizers of the underground railroad did not have to convince the masters of anything—not very likely, in any case—but only the slaves, a far less difficult task.

Id. at 14 (footnotes omitted).

I quite evidently and very firmly disagree with the authors and their "thesis." I do, however, think there is value in considering Block and Whitehead's perspective, if only to understand the approach of those with whom I undoubtedly disagree. For as unfortunate as I may find the view embodied in their article, I fear that it is more common than many would perceive.

174. *Id.* at 2.

175. *Id.* (emphasis added) (footnote omitted).

176. *Id.*

177. See Michelle L. Anderson, *Are You My Mommy? A Call for Regulation of Embryo Donation*, 35 *CAP. U. L. REV.* 589, 618 ("Although the terms 'embryo adoption' and 'embryo donation' refer to the same procedure, they are used in such a way to reveal the user's motivations. President Bush, for example, uses only the term embryo adoption, because one of his ultimate goals is to eliminate the use of frozen embryos in stem cell research. IVF professionals, on the other hand, refer to the procedure as embryo donation. Pro-life advocates use the term embryo adoption because they feel that any non-implantation use of an embryo amounts to the taking of a human life. Pro-choice advocates, on the other hand, use the term embryo donation, because embryos are not human lives in their view." (citations omitted)).

178. Katz, *supra* note 6, at 321; see also Bradley Mattes, *Saving Lives with Embryo Adoption*, LIFE ISSUES CONNECTOR, Jan. 2007, http://www.lifeissues.org/connector/2007/Jan_EmbryoAdoption.htm ("From the Executive Director") ("It's important that pro-lifers use the correct terminology when talking about ending the life of human embryos. We should always say that the embryos are 'killed' not 'destroyed.' Things are destroyed, but human

the term “donation” highlights the rights of the parents—to donate.¹⁷⁹ If the pro-“adoption” (or anti-abortion) community successfully shifts the focus from the parents, or specifically the woman, to the baby, then this would be an “important symbolic step toward . . . granting embryos the rights of human beings.”¹⁸⁰ This, in turn, would “[enter a] wedge in the fight against legal abortion.”¹⁸¹

The Supreme Court’s willingness to accept the principle of legal abortion rests on the notion that a woman’s right to reproductive autonomy outweighs any state interest in “potential life.”¹⁸² This is because the Court expressly refused to recognize the unborn fetus as a person, at least until the fetus is medically viable.¹⁸³ Should the law evolve to view embryos as the equivalent of unborn children from the moment of conception, however, as many “adoption” advocates desire, then the interests of the fetus could immediately begin to factor into the Supreme Court’s balancing regarding the right to an abortion.¹⁸⁴ Further, it remains unsettled whether the rights of the fetus may eventually outweigh the interests of the mother in the *Casey* balancing test.¹⁸⁵

In a worst-case scenario, at least from a pro-choice perspective, the Supreme Court could hold that the fetus, from the moment of conception or implantation, is a human being entitled to the same legal protections as its parents.¹⁸⁶ This would include the protection of “due process of the law” under the Fifth¹⁸⁷ and Fourteenth¹⁸⁸

beings are killed. It helps to keep the humanity of this tiny person at the focus of our debate and discussions.”).

179. Kohm, *supra* note 171, at 584.

180. Katz, *supra* note 6, at 321 (quoting Sarah Blaustain, *Embryo Adoption*, N.Y. TIMES (Magazine), Dec. 11, 2005, at 67–68).

181. *Id.* at 333–34.

182. *Roe v. Wade*, 410 U.S. 113, 153, 163 (1973).

183. *Id.* at 158; *Planned Parenthood v. Casey*, 505 U.S. 833, 833 (1992).

184. The Supreme Court noted and the Appellants conceded as much in *Roe*, 410 U.S. at 156–57 (“The appellee and certain amici argue that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’[s] right to life would then be guaranteed specifically by the Amendment.”).

185. See Katz, *supra* note 6, at 339 (“[S]uch a shift would be incompatible with the treatment of the fetus in abortion jurisprudence. Whether the woman’s interest in her bodily integrity would outweigh the interest of the fetus is an open question.”).

186. See *id.* at 334. “If the ex utero embryo, which even if implanted has a small chance of resulting in a child, is protected life, then surely the developing in vivo embryo or fetus should be protected.” *Id.*

187. U.S. CONST. amend. V.

188. U.S. CONST. amend. XIV.

Amendments, as well as, presumably, any applicable homicide statutes.¹⁸⁹ In this case, abortion would have to be illegal in every conceivable scenario because the fetus would be protected even in cases where the woman's health was at risk: if the fetus is a person, then its life is worth no less than its mother's, and the law could never chose to save one, and not the other. South Dakota is at least one state that has prepared for such a scenario. Its legislature recently rejected all limitations that might mitigate an outright ban on abortion, including proscribing the procedure in the case of rape or incest, irrespective of the health or life of the mother.¹⁹⁰

Even if the Court responds less drastically and simply elevates the state's interest in the potentiality of human life before viability (justified by the implication of the fetus's personhood), the effect nonetheless constitutes a serious threat to the fundamental right to an abortion.¹⁹¹ With such wide license to limit an unpopular procedure, our conservative Court could find that even the state interests in the promotion of life and the reduction of abortions (which are present from the time of conception) justify significant restrictions on the right to seek the procedure at all times throughout the pregnancy. This could mean that the Court proscribes all, or nearly all abortions, perhaps limited only where the woman's life or health is in grave danger. In fact, several states, including Ohio, Indiana, Louisiana, Georgia, Tennessee, and Kentucky have already prepared their abortion statutes for such a scenario.¹⁹² This reality makes the pro-choice community's fear more than a mere conspiracy theory, and demonstrates the real consequences at stake in the embryo "adoption" discussion.

B. Complications that Develop from the Use of "Adoption" Rhetoric

Beyond the transparent threat that embryo "adoptions" pose to abortion, they are additionally suspect because of the problems they create when the term "adoption" is applied literally in our legal system. As recognized by one scholar, "[s]imply calling embryo donation 'embryo adoption' does not, and cannot, make [the process] fit

189. *Roe*, 410 U.S. at 156–57 (recognizing that if the fetus is guaranteed the protection of the Constitution, then it implicitly has the right to life).

190. Evelyn Nieves, *S.D. Abortion Bill Takes Aim at "Roe,"* WASH. POST, Feb. 23, 2006, at A1. Lawmakers feared that the articulation of such "special circumstances" would have diluted the bill and its impact on the national scene." *Id.*

191. This scenario appears even more plausible since the Court already began to move in that direction with *Casey*, and more recently, with *Carhart I* and *Carhart II*.

192. Nieves, *supra* note 190.

within those legal constructs”¹⁹³ For example, the term “adoption” and the implication that embryos are human beings does nothing to clarify the relationship between an embryo and other human life. Although much of this Comment assumes that the life of the embryo would be regarded as equal to all other human life, can that be right? If an embryo is truly regarded as the functional equivalent of a living child, then in a custody dispute, such as the one seen in *Davis v. Davis*,¹⁹⁴ where a divorcing couple disagreed over disposition of their frozen embryos, would the court use “a best interest of the child” analysis in determining which party should get custody over the embryo?¹⁹⁵ In fact, application of this standard from traditional adoption law would have reversed the ultimate decision of the *Davis* court: because Mrs. Davis wanted the unused embryos to be donated to an IVF couple, and Mr. Davis simply wanted the embryos destroyed, a court applying a “best interest” standard would have awarded custody to Mrs. Davis.¹⁹⁶ However, this decision would make Mr. Davis a genetic father against his will and create a whole new set of problems in reconciling embryo law with other reproductive freedoms.¹⁹⁷

193. Crockin, *supra* note 129, at 1184; *see also* James B. Boskey & Joan Heifetz Hollinger, *Placing Children for Adoption*, in *ADOPTION LAW AND PRACTICE*, § 3.01[1] (Joan Heifetz Hollinger et al. eds., 2005) (describing the legal fundamentals of traditional adoption).

194. 842 S.W.2d 588 (Tenn. 1992).

195. Katz, *supra* note 6, at 309. Quizzically, the notion of “matching” parents with a yet-to-be-born child could prove difficult, if not impossible. Furthermore, if the “best interests” standard is adopted, at least one scholar fears that parents would often be required to “place [the interest of the child] above their own rights as adults.” Kohm, *supra* note 171, at 567.

196. *Davis*, 842 S.W.2d 588.

197. The Louisiana statute discussed *supra* Part II.B, which assumes that mandated donation is acceptable because the parties to whom the IVF embryos belong are being spared the “inconvenience of pregnancy,” would have a similar effect. Block & Whitehead, *supra* note 173, at 43. However, this view misses that, often, “[w]hat [IVF couples] want is not to be saved from . . . pregnancy or the task of raising a . . . [child; instead,] what they want is *not to be parents*.” *Id.* at 43 (internal quotation marks omitted); *see also In re Marriage of Whitten*, 672 N.W.2d 768 (Iowa 2003) (recognizing that the right not to procreate will outweigh the right to procreate when parties disagree on the use of extra IVF embryos); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (same); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) (same); *Davis*, 842 S.W.2d 588 (same); *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (same).

In a recent article on the so-called “right not to procreate,” Harvard Law Fellow Glenn Cohen attacks the assumption that cases such as *Criswold v. Connecticut*, 381 U.S. 479 (1965), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), implicitly guarantee the right not to be a genetic parent. *See* Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 *STAN. L. REV.* 1135 (2008). Instead, Cohen unpacks the right to procreative autonomy to include three separate, albeit related rights: “[T]he right not to be a genetic parent, the right not to be a legal parent, and the right not to be a gestational parent.” *Id.* at 1135. Using these distinctions, Cohen concedes that Supreme Court jurisprudence unquestionably recognizes that the right not to be a gestational parent is a fundamental right (under

Yet another issue that arises is the degree to which society would be required to extend the analogy between embryonic cell life and “unborn” human life. As one scholar observed, “[i]t seems doubtful that even the strongest supporters of personhood for embryos intend that embryos should be treated as exemptions for income tax purposes, be counted in the census, or require passports if they are transported across international boundaries.”¹⁹⁸ And yet, these are some of the logical conclusions that result from treating an embryo as an “unborn” or “preborn” human being. The genetic parents would have no right to deprive their embryos of life under any circumstances, lest they be charged with homicide.¹⁹⁹ This means that if unnecessary for further attempts to achieve a pregnancy, “the embryo would end up in state custody and could be offered to other infertile couples.”²⁰⁰ Of course, our government does not have the resources to protect and eventually implant the “massive number” of embryos created for IVF use, and “it is unlikely there would be enough homes for all these children or enough resources to support their development to adulthood.”²⁰¹ Should the government then impose restrictions on the number of IVF embryos that each couple can create, to ensure that no embryo goes without a loving home?²⁰²

These important questions—or more specifically, their lack of any satisfying answers—exemplify the danger posed by even just a small change in rhetoric. Ironically, the change from donation to “adoption” could have the ultimate effect of making assisted reproductive treatment all but impossible: doctors and clinics might start to fear civil, and even criminal liability for the intentional or accidental destruction of frozen embryos;²⁰³ and because the destruction of frozen embryos might eventually be illegal, IVF might also be prohibited because of the general risk it poses to the many embryos that do not result in successful pregnancy during each treatment.²⁰⁴ One wonders

Roe, as amended by *Casey*); however, he argues that there is no similar right not to be a genetic parent. *Id.* If that is the case, it would lend credibility to the constitutionality of the Louisiana and New Mexico statutes explored *supra* Part II.B.

198. Katz, *supra* note 6, at 335.

199. *Id.* at 314, 335.

200. *Id.* at 326. Professor Katz suggests that, “[i]f embryos are persons, then logic dictates that adoption law with all of its regulations and restrictions should govern the process of embryo donation.” *Id.* at 337.

201. Ann Marie Noonan, *The Uncertainty of Embryo Disposition Law: How Alterations to Roe Could Change Everything*, 40 SUFFOLK U. L. REV. 485, 513 (2007).

202. *Id.*

203. *Id.* at 514–15.

204. *Id.* at 512–13; see also Katz, *supra* note 6, at 334.

how an organization like Snowflakes would respond to such a proposition, and whether this would change the organization's view on "adoption."

Conclusion

Over the last thirty-five years, the pro-choice community has become all too familiar with attempts to slowly and incrementally deprive women of their right to reproductive autonomy. The Partial-Birth Abortion Ban of 2003 is the perfect example of such an overt assault.²⁰⁵ There, the then-conservative Congress strategically attacked an unfortunate procedure that even pro-choice advocates were hard pressed to defend, picking up major gains in the greater rhetorical war against *Roe* along the way. Rather than terming the Act "The Late Term Abortion Ban" or "The D&X Abortion Ban," Congress capitalized on an opportunity to insert the word "Birth" into the Act's name, and to further push its anti-abortion agenda. For if fetuses can be born, then their destruction amounts to death—and even murder.

Not all attacks on the right to choose are as obvious, of course. Take "Laci and Conner's Law," for example.²⁰⁶ Signed into law by then President George W. Bush in the wake of the tragic murder of Laci Peterson by her husband Scott Peterson, the Unborn Victims of Violence Act of 2003 recognizes that a "child in utero" can be the victim of a homicide.²⁰⁷ Although the statute includes an explicit exception for abortion,²⁰⁸ the assignment of rights to a fetus is troubling, even in such a sympathetic context as protecting pregnant women from their violent husbands.

This Comment demonstrates how the tactical favoring of the term embryo "adoption," as opposed to embryo donation, is an effort by the pro-life community to use a comparatively safe environment to strike at the heart of more controversial political issues. Because it is difficult to argue against the donation of excess embryos, especially when this donation leads to happy, healthy babies being born into loving families,²⁰⁹ organizations such as Snowflakes exploit our goodwill for the procedure, and pull a bait-and-switch of sorts in reframing

205. 18 U.S.C. § 1531 (2003).

206. Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified as amended at 18 U.S.C. § 1841 *et seq.*) (2004).

207. *Id.* As used in the statute, "the term 'unborn child' means . . . a member of the species homo sapiens, at any stage of development, who is carried in the womb." *Id.*

208. 18 U.S.C. § 1841(c)(1).

209. One need only look to the Snowflakes website to see these happy babies on prominent display. See Snowflakes Program Home Page, <http://www.nightlight.org/snowflake>

the rhetoric. If we continue to let these attempts go unchecked, however, the pro-life agenda will emerge in less sympathetic contexts, culminating in what many pro-choice advocates fear will be an outright ban on the right to an abortion that was first guaranteed in *Roe*. Although we are only talking about words, their power in this context is immeasurable, and the ramifications that flow from this rhetorical shift are serious and alarming.

