

## ARTICLES

### DOES THE RIGHT TO ELECTIVE ABORTION INCLUDE THE RIGHT TO ENSURE THE DEATH OF THE FETUS?

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*“Freedom to choose what is to happen to one’s body is one thing; freedom to insist on the death of a being that is capable of living outside one’s body is another. At present these two are inextricably linked, and so the woman’s freedom to choose conflicts head-on with the alleged right to life of the fetus. When ectogenesis [gestation in an artificial womb] becomes possible, these two issues will break apart, and women will choose to terminate their pregnancies without thereby choosing the inevitable death of the fetuses they are carrying.”*<sup>1</sup>

*“Women understand that abortion terminates pregnancy and that some form of life—for some a human life with full human attributes, for others, something more inchoate—is extinguished by virtue of the procedure; that is its very point.”*<sup>2</sup>

*“[T]he abortion patient has a right not only to be rid of the growth, called a fetus in her body, but also has a right to a dead fetus.”*<sup>3</sup>

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1. PETER SINGER & DEANE WELLS, MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION 120 (1985).

2. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 360 (2008).

3. *Planned Parenthood Ass’n of Kan. City v. Ashcroft*, 462 U.S. 476, 483 n.7 (1983)

## INTRODUCTION

The Supreme Court of the United States describes a woman's constitutional right to an elective abortion as a right to terminate her pregnancy prior to viability.<sup>4</sup> That description begs a question that may someday be as important in practice as it is in principle: whether the right to an elective abortion includes the right to "terminate"—that is, kill or otherwise ensure the death of—the pre-viable fetus.<sup>5</sup> In today's world, the conduct that would squarely present this question—killing a pre-viable fetus although it could have survived an abortion and become a child—cannot occur in practice. The right to elective abortion applies only to fetuses that are not viable, which means, by definition, that they have been determined to have no realistic chance of surviving outside the uterus, even with the help of neonatal intensive care.<sup>6</sup> Today's abortion methods almost invariably involve the violent killing of the fetus.<sup>7</sup> But even if abortion providers used fetus-

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(plurality opinion) (quoting, seemingly with distaste, the testimony of abortion provider Dr. Robert Crist).

4. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality opinion) ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*."); see *Roe v. Wade*, 410 U.S. 113, 164-66 (1973) (holding generally that a woman may terminate her pregnancy before viability).

5. Unless otherwise indicated, I will use the term "fetus" to refer to the human organism at every stage of development from conception to birth. *Accord* Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1571 (1979) (employing this usage).

6. See *Casey*, 505 U.S. at 870 (viability requires "a realistic possibility" of survival outside the womb); *Roe*, 410 U.S. at 160 (a fetus is viable if it is "potentially able to live outside the mother's womb, albeit with artificial aid").

7. During the first trimester, when about 90% of abortions are performed, the standard method is "vacuum aspiration," in which a vacuum tube is inserted into the uterus and the fetus, placenta, and amniotic sac are evacuated. *Carhart I*, 530 U.S. 914, 923 (2000). The overwhelming majority of second-trimester abortions are done by "dilation and evacuation" ("D&E"), in which the abortion doctor uses instruments to pull the fetus out of the uterus. *Id.* at 924. After the fifteenth week, the fetus is typically too large to be removed intact; in that event, the instruments are used to dismember it and the pieces are pulled through the cervix. *Id.* at 925. Occasionally, abortion doctors use the partial-birth abortion technique, which is a subset of what they prefer to call "intact D&E." *Id.* at 927. This method involves removing the fetus intact from the uterus, in breech position, until the head lodges in the cervix. The doctor then pierces the skull with a scissors, and vacuums out the brain, after which the collapsed skull can be pulled through the cervix. *Id.* The federal Partial-Birth Abortion Ban of 2003, upheld against constitutional challenges in *Carhart II*, makes it illegal to perform a partial-birth abortion on a *living* fetus. See *Carhart II*, 550 U.S. at 124, 164 (2007). But even when *Carhart I* was decided in 2000, it was common practice to administer a lethal injection to the fetus after the twentieth week "to facilitate evacuation," see 530 U.S. at 925, and nowadays the standard late-term abortion protocol includes a pre-abortion lethal fetal injection. See *Carhart I*, 530 U.S. at 924-25; David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 S. CT. REV. 1, 31 (2008); see also 18 U.S.C. § 1531 (2012). Finally, in a small

sparing methods rather than fetus-killing ones, aborted fetuses would die within minutes after being removed from their mothers' wombs.<sup>8</sup> Consequently, whether or not the woman's right to terminate her pregnancy includes a *legal* entitlement to kill the pre-viable fetus, elective abortion inevitably results in fetal death in practice. For that very reason, the woman has no choice in the matter: should she elect to terminate her pregnancy, the fetus will die even if she wants it to survive.<sup>9</sup>

Yet it would be a mistake to infer that this question is merely academic. Even if the legal consequences were identical, there is a momentous moral difference between a right to elective abortion that is limited to removing or expelling an unwanted fetus prior to viability, and a right that also entitles the woman affirmatively to kill it under at least some circumstances. Beyond that, already today, and even more as reproductive technologies advance, these opposing visions of the right to elective abortion have dramatically different legal implications.

Consider first two technological breakthroughs that may occur in the not-so-distant future: (1) improved surgical techniques that enable fetuses to be removed from their mothers' wombs intact and alive at any stage of gestation; and (2) artificial wombs in which these fetuses can be gestated to term.<sup>10</sup> Imagine further

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minority of second-trimester cases the abortion doctor induces labor prematurely. *Carhart I*, 530 U.S. at 924. Whether this method kills the fetus before delivery depends on how labor is induced. In the 1970s, when inducing labor was the most common second-trimester abortion method, the standard protocol was to inject saline solution into the amniotic sac. *Id.* This "instillation" method typically resulted in fetal death in utero from chemical burns or saline poisoning.

8. I will use the term "fetus-sparing abortion" to refer to a procedure (including induction of labor) in which the physician attempts prematurely to terminate a pregnancy by removing the fetus from the woman's body intact and alive, and the term "fetus-killing abortion" to refer to a procedure one of whose objectives is to kill the fetus either before or during its removal from the woman's body.

9. The Court may have overlooked this fact when it stated in *Harris v. McRae* that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." 448 U.S. 297, 325 (1980). The death of the fetus is very often—but not always—among the woman's purposes. In some cases, the woman chooses abortion knowing the fetus will die as a result, but would spare it if she could do so without carrying the pregnancy to term.

10. Researchers have reported some progress in recent years, and some observers have predicted that artificial wombs will be developed within the next few decades. Jeremy Rifkin, *The End of Pregnancy: Within a Generation There Will Be [sic] Probably Be Mass Use of Artificial Wombs to Grow Babies*, *GUARDIAN* (Jan. 16, 2002), available at [www.theguardian.com/world/2002/jan/17/gender.medicalscience](http://www.theguardian.com/world/2002/jan/17/gender.medicalscience). Others continue to believe, as the New York State Task Force on Life and the Law asserted in its 1988 report on Fetal Extrauterine Survivability, that "no technology exists to bridge the development gap

that the costs of these dual artificial-womb technologies—which I will refer to as “AW”—while much higher than those of a fetus-killing abortion, are low enough to enable the widespread use of AW;<sup>11</sup> that AW gives fetuses at all stages of gestation a realistic chance of survival to full term and beyond; and that the fetus-sparing abortion methods used in tandem with AW are very safe for women (even if not *as* safe as fetus-killing abortions). Under those circumstances, AW would be a feasible, effective, and safe alternative to today’s fetus-killing abortion methods—and would mean that pre-viable fetuses are rescuable via AW.<sup>12</sup> If they are aborted using fetus-killing methods such as those now in use, they will die. If instead they are subjected to fetus-sparing abortions, many of them will survive and be transferred to artificial wombs for gestation to full term.

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between the three-day embryo culture and the 24th week of gestation” and that complete extrauterine development is not a realistic possibility in the foreseeable future. NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, FETAL EXTRAUTERINE SURVIVABILITY 3 (1988) (quoted in *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 554 n.9 (1989) (Blackmun, J., concurring in part)). In short, it remains unclear whether or when artificial wombs will become practicable. For a useful discussion of the research that has been done on artificial wombs, see Jessica H. Schultz, *Development of Ectogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo?*, 84 CHI.-KENT L. REV. 877, 878–83 (2010).

11. It seems axiomatic that a procedure that must comply with the additional requirement that the fetus be removed alive and intact will, on average, be more difficult and hence more expensive than a procedure in which efficacy and maternal safety are the only objectives. And then there are the costs of gestating a fetus for up to nine months in an artificial womb. Precisely because an artificial womb would more successfully imitate nature than contemporary neonatal care can, one might predict that its costs would be appreciably smaller than the roughly \$200,000 average cost of caring for an extremely premature newborn in the United States. See William M. Gilbert, Thomas S. Nesbitt, & Beate Danielsen, *The Cost of Prematurity: Quantification by Gestational Age and Birth Weight*, 102 OBSTETRICS & GYNECOLOGY 488, 490 (2003). Nevertheless, between the costs of the artificial wombs themselves and the monitoring that they would presumably require, one would expect the average cost of gestation in an artificial womb to be quite high. See generally *General & Human Biology Bioethics Case Studies: Artificial Wombs*, MCGRAW HILL, [http://www.mhhe.com/biosci/genbio/olc\\_linkedcontents/bioethics\\_cases/g-bioe-17.htm](http://www.mhhe.com/biosci/genbio/olc_linkedcontents/bioethics_cases/g-bioe-17.htm) (last visited Apr. 3, 2015) (“If artificial wombs for humans become a reality, they are likely to be quite expensive.”).

12. For more than thirty years, commentators have pointed out that artificial wombs will raise the legal question whether the right to terminate an unwanted pregnancy includes a right to ensure the death of the fetus. See, e.g., Robert J. Favole, Note, *Artificial Gestation: New Meaning for the Right to Terminate Pregnancy*, 21 ARIZ. L. REV. 755 (1979); Mark A. Goldstein, Note, *Choice Rights and Abortion: The Begetting Choice Right and State Obstacles to Choice in Light of Artificial Womb Technology*, 51 S. CAL. L. REV. 877 (1978). Others have focused on the parallel moral question that will arise once AW is available. See, e.g., CHRISTOPHER KACZOR, *THE EDGE OF LIFE: HUMAN DIGNITY AND CONTEMPORARY BIOETHICS* 107 (2005) (discussing whether, if artificial wombs become available, defenders of a moral right to abortion will accept that it is limited to “evacuation abortion,” or insist that it includes “terminative abortion”).

If every fetus that can survive outside its biological mother's womb is *ipso facto* viable, these new technologies would mean that states could ban elective abortion even early in pregnancy. As I argue elsewhere, however, under *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, fetal viability includes an implicit developmental requirement: although the Court has never specified what that requirement is, this article will assume that the fetus must have developed sufficiently that it can survive outside *any* womb, even if it initially requires some less comprehensive type of artificial aid.<sup>13</sup> Consequently, the right to elective abortion will continue to apply to fetuses that are not yet developmentally viable—even though these fetuses can be rescued via AW.

Suppose that a state sought to protect these rescuable fetuses by enacting legislation prohibiting fetus-killing abortion methods, and providing AW at the state's expense to any woman who chose to terminate her pregnancy.<sup>14</sup> If the right to elective abortion includes a specific right to ensure the death of the pre-viable fetus, such a "fetal-rescue program" would plainly be unconstitutional. Conversely, a fetal-rescue program would unquestionably be constitutional if the right to elective abortion affords no protection to the woman's liberty interest in ensuring the death of her fetus.<sup>15</sup> If, as this article argues, the answer lies in between these extremes, the outcome should turn on whether the woman's protected liberty interest outweighs the state's interest in rescuing the fetus via AW.

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13. See Stephen G. Gilles, Two Concepts of Viability (unpublished manuscript) (on file with author).

14. See Hyun Jee Son, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability's Doctrinal Ambiguity*, 14 UCLA WOMEN'S L.J. 213, 219 (2005) (describing "embryonic extraction legislation" requiring that fetuses be transferred to AW rather than subjected to traditional abortion methods); Dr. Walter Block & Roy Whitehead, *Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy*, 4 APPALACHIAN J.L. 1, 24 (2005) (proposing a legal regime that allows "eviction" (i.e., a fetus-sparing abortion) but prohibits fetus-killing abortions). Son does not discuss who bears the pecuniary costs of "embryonic extraction." Block and Whitehead assert that the woman should not have to pay the additional costs of "eviction," but envision that these costs would be defrayed by pro-life groups rather than by the state. See *id.* at 33.

15. A state law prohibiting fetus-killing abortions, and requiring the woman to pay the presumably high costs of AW, would fail the undue burden standard even if the right to elective abortion protects only the woman's right to terminate her pregnancy, because it would make abortions unaffordable for most women.

Consider next an issue that is already with us: to what extent states may regulate the treatment and disposition of cryo-preserved embryos created in connection with in vitro fertilization. Many women decide not to gestate some of their cryo-preserved embryos, and arrange for their destruction or indefinite cryopreservation.<sup>16</sup> Under *Roe* and *Casey*, however, the state has an important interest in protecting all “postconception” fetal life,<sup>17</sup> and a strong argument can be made that conception is complete by the time cryopreserved embryos are frozen.<sup>18</sup> If so—and if the right to elective abortion is limited to terminating an unwanted pregnancy—states could presumably prohibit the destruction or indefinite cryopreservation of embryos, and require that unused embryos be transferred to state custody so that gestational mothers could be found for them. On the other hand, these requirements would presumably be unconstitutional if a woman’s right to elective abortion includes a specific right to ensure the death of her pre-viable fetus. Here too, this article argues for the intermediate position that the woman’s interest in ensuring the death of her cryopreserved embryos must be weighed against the state’s interest in protecting them.

Parts I–III of this article use a hypothetical AW fetal-rescue program to explore whether (and if so, to what extent) the right to elective abortion protects the woman’s liberty interest in ensuring the death of her pre-viable fetus.<sup>19</sup> Although the article argues that fetal-rescue programs are constitutional under *Casey*, the

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16. See Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States*, 76 WASH. L. REV. 759, 759–60 (1998) (detailing couples’ options when their fertility clinics have leftover embryos, including arranging for their destruction or keeping them frozen).

17. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (majority opinion) (describing *Roe*’s “scope” as encompassing “postconception potential life”).

18. The exact moment when “conception” is complete is a disputed question on which the constitutional status of cryopreserved embryos will likely turn. See Philip G. Peters, Jr., *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199–200 (2006). Part IV of this article argues that conception is complete by the two-cell stage of embryonic development. Consequently, cryopreserved embryos—which are typically frozen at the four-, six-, or eight-cell stage—qualify as “postconception” life for constitutional purposes. See Lyme M. Thomas, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection?*, 29 ST. MARY’S L.J. 255, 286 (1997).

19. In addition to the sources cited in note 14 *supra*, recent treatments of the potential legal ramifications of artificial wombs include Schultz, *supra* note 10; Eric Steiger, *Not of Woman Born: How Ectogenesis Will Change the Way We View Viability, Birth, and the Status of the Unborn*, 23 J. L. & HEALTH 143, 144 (2010); and Amel Algrhani, *The Legal and Ethical Ramifications of Ectogenesis*, 2 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 189 (2007).

basis for that conclusion is *not* a categorical rule that the woman has no constitutionally protected liberty interest in ensuring the death of the pre-viable fetus. On the contrary, Part I argues that, under *Casey*, her liberty interest is “specially protected,” meaning that state-imposed burdens on that interest are subject to more than rational basis scrutiny.

Part II then argues that the appropriate form of heightened scrutiny is the interest-balancing methodology employed in *Casey* to reestablish the right to elective abortion, rather than *Roe*’s strict scrutiny or the “undue burden” test *Casey* adopts for state laws that interfere with a woman’s ability to obtain an abortion. Consequently, the constitutionality of fetal-rescue programs turns on whether the state’s interest in protecting the pre-viable fetus outweighs the woman’s protected liberty interest in ensuring its death.

Part III addresses this question. After describing and evaluating the woman’s interest in ensuring the death of the fetus and the state’s interest in protecting pre-viable fetal life, analyzing and applying *Casey*’s implications for the relative strength of those interests, and presenting arguments bearing on which interest is stronger as a matter of “reasoned judgment,”<sup>20</sup> it arrives at this conclusion: the right to elective abortion does not include a right to ensure the death of the pre-viable fetus *if the fetus is rescuable via state-provided AW, so that rescuing it would directly advance the state’s interest in protecting its life*. In other words, the state’s interest in rescuing the pre-viable fetus via AW outweighs the woman’s interest in ensuring that it does not survive the termination of her pregnancy.<sup>21</sup>

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20. See *Casey*, 505 U.S. at 849 (asserting that the Court must rely on “reasoned judgment” to define the scope of the liberty protected by substantive due process).

21. Many writers have suggested that the Equal Protection Clause rather than the Due Process Clause is the proper constitutional source of abortion rights. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–86 (1985); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1036–37 (1984); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 351–53 (1992). *Carhart II*, Justice Ginsburg’s dissent seemed to endorse this approach, although without expressly invoking the Equal Protection Clause. See *Carhart II*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”). This article does not attempt to evaluate the arguments for recasting abortion rights in equal protection terms. For a critical treatment of them, see Erika Bachiochi,

In light of this conclusion, Part IV turns to state regulation of cryopreserved embryos. It argues that cryopreserved embryos created using current practices, which typically contain four, six, or eight cells,<sup>22</sup> are “postconception potential life,”<sup>23</sup> and as such are within the ambit of the state’s interest in protecting (and enabling the development of) pre-viable fetal life. Moreover, the woman’s interest in destroying her cryopreserved embryos (or in preventing their development by keeping them frozen indefinitely) is no stronger, and on average is likely weaker, than her interest in ensuring the death of a pre-viable fetus. Accordingly, state legislation prohibiting the destruction of cryopreserved embryos and requiring that they be gestated within a reasonable time, or else transferred to the state for adoptive gestation, is constitutional under *Casey*.

I. UNDER *ROE* AND *CASEY*, THE WOMAN’S LIBERTY INTEREST IN ENSURING THE DEATH OF HER FETUS IS SPECIALLY PROTECTED BY SOME TYPE OF HEIGHTENED SCRUTINY

Unlike *Roe*,<sup>24</sup> *Casey* does not classify the woman’s liberty interest in an elective abortion as “fundamental,” and therefore triggering strict scrutiny.<sup>25</sup> Nevertheless, *Casey* unquestionably treats that liberty interest as “specially ‘protected’ by the Constitution”<sup>26</sup>—that is, triggering a form of heightened scrutiny.<sup>27</sup> *Casey* reaffirms the right to elective abortion, which it treats as grounded in an interest-balancing judgment that the woman’s overall liberty interest in an elective abortion outweighs the state’s interest in protecting the pre-viable fetus.<sup>28</sup> Under *Casey*,

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*Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL’Y 889, 891, 949–50 (2011). Neither does this article attempt to work through the effects such a transformation would have on whether a woman is entitled to ensure the death of her pre-viable fetus when the state is prepared to rescue it via AW.

22. Peters, *supra* note 18, at 217 (“[R]obust but unused embryos are commonly frozen at the four-, six-, or eight-cell state so that they can be used in the future.”).

23. *Casey*, 505 U.S. at 859.

24. *See Roe v. Wade*, 410 U.S. 113, 122 (1973).

25. *See Casey*, 505 U.S. at 846 (majority opinion), 869–71 (plurality opinion) (reaffirming *Roe*’s central holding but opting for interest-balancing approach).

26. *Id.* at 980 (Scalia, J., dissenting).

27. *See Casey*, 505 U.S. at 851 (majority opinion) (arguing that abortion is among the “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” and that these decisions receive heightened “constitutional protection” because they are “choices central to personal dignity and autonomy . . . [and] central to the liberty protected by the Fourteenth Amendment”).

28. *See id.* at 857 (majority opinion). Interest balancing is appropriately characterized



it is interest balancing at a high level of generality—not strict scrutiny, and not rational basis scrutiny—that justifies the primary protection of the woman’s liberty interest: the rule that state prohibitions on pre-viability elective abortions are unconstitutional.<sup>29</sup>

In addition, however, *Casey* adopts the undue burden standard to evaluate laws that regulate (but do not prohibit) elective abortions.<sup>30</sup> An abortion law is unconstitutional if it has the purpose or effect of creating a substantial obstacle to women’s access to elective abortions.<sup>31</sup> Although the undue burden test rests on an interest-balancing judgment, it does not work by balancing interests: *all* regulations that have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” are unconstitutional.<sup>32</sup> Consequently, if the woman’s liberty to ensure the death of her fetus is among the interests protected by the right to an elective abortion, it will be necessary to determine which approach—interest balancing or the undue burden standard—applies to laws (such as fetal-rescue programs) that interfere with that interest. Part II will take up that question. The prior question, which this part addresses, is whether the woman’s liberty interest in the death of her fetus is specially protected under *Casey*.

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as a form of heightened scrutiny both because the Court has employed it for individual interests the Court plainly regards as particularly weighty, and because it places a heavier burden of justification on the state than rational basis review. Under the latter, the state need only show that its interest is legitimate, not that its interest outweighs the competing individual interest. *See generally* Richard H. Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1298–99 (2007) (discussing the Court’s employment of interest balancing, including in abortion cases).

29. *Casey*, 505 U.S. at 858 (majority opinion); *see also* Fallon, *supra* note 28, at 1299 (discussing the intermediate scrutiny applied in *Casey*).

30. *Id.* at 876, 881 (plurality opinion).

31. *Id.* at 876–77.

32. *Id.* at 877 (explaining that no law imposing an undue burden “could be constitutional”). This is not to deny that balancing may play some role in undue burden analysis. In particular, a court’s judgment about what counts as a “substantial obstacle” may reflect a comparison of the burden on women with the extent to which the state regulation in fact advances the state’s interest in protecting pre-viable fetuses. *See* Khiara M. Bridges, “*Life*” in the Balance: *Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1317–18 (2013). The federal courts of appeals are currently divided on this issue. *Compare, e.g., Whole Woman’s Health v. Lakey*, 769 F.3d 285, 297 (5th Cir.) *vacated in part*, 135 S. Ct. 399 (2014) (in applying the undue-burden test “we do not balance the wisdom or effectiveness of a law against the burdens the law imposes”), *with Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 912–13 (9th Cir.) *cert. denied*, 135 S. Ct. 870 (2014) (“The more substantial the burden, the stronger the state’s justification for the law must be to satisfy the undue burden test; conversely, the stronger the state’s justification, the greater the burden may be before it becomes “undue.”).

Before turning to this question, it is useful to take a closer look at the nature of this interest. Some women may choose abortion solely to avoid the considerable physical and emotional burdens of pregnancy and childbirth.<sup>33</sup> More often, however, the phrase “unwanted pregnancy” is a euphemism for “unwanted *child*”—that is, a child the woman is unwilling (or unable) to nurture and raise after it is born.<sup>34</sup> Legally speaking, every state allows the woman to escape child-rearing by renouncing her parental rights, in which event the child will be cared for by adoptive or foster parents.<sup>35</sup> Yet experience shows that many women find it exceedingly difficult to relinquish their newborn children, even when those children were (and perhaps still are) unwanted.<sup>36</sup> When *Roe* was decided, only 20% of single mothers put their children up for adoption—and that percentage has declined since then.<sup>37</sup> As Professor Reva Siegel points out,

A woman is likely to form emotional bonds with a child during pregnancy; she is likely to believe that she has moral obligations to a born child that are far greater than any she might have to an embryo/fetus; and she is likely to experience intense familial and social pressure to raise a child she has borne.<sup>38</sup>

When women *do* relinquish their infants, they frequently grieve for years over their separation from them.<sup>39</sup>

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33. See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortion: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPRODUCTIVE HEALTH 110, 113 table 2 (2005), available at <http://www.guttmacher.org/pubs/journals/3711005.pdf> (indicating that some women choose abortions for reasons such as, “[I] don’t want people to know I had sex or got pregnant” and “Physical problems with my health”).

34. *Id.* (showing that reasons such as, “Having a baby would dramatically change my life” and “Can’t afford a baby right now,” are significant factors in many decisions to have abortions).

35. See Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375, 389 (1996) (“Every state provides some irrevocable mechanism for both biological parents to relinquish their legal status.”).

36. See CHILD WELFARE INFO. GATEWAY, CHILDREN’S BUREAU, IMPACT OF ADOPTION ON BIRTH PARENTS 2–3 (2013), available at [https://www.childwelfare.gov/pubPDFs/f\\_impact.pdf](https://www.childwelfare.gov/pubPDFs/f_impact.pdf).

37. Jack Darcher, *Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees*, 8 SEATTLE J. SOC. JUSTICE 729, 732 (2010) (“In 1973, twenty percent of unwed mothers placed their children up for adoption; by 1982, this rate dropped to twelve percent.”). Even if, as seems likely, a significant subset of unwed mothers may have wanted to become pregnant, the generalization in text would still be warranted.

38. Siegel, *supra* note 21 at 372.

39. See CHILD WELFARE INFO. GATEWAY, *supra* note 36, at 2–3.

It seems fair to infer that many women view the emotional, reputational, and relational burdens involved in relinquishing an unwanted child as even greater than the expected burdens of raising it.<sup>40</sup> What is more, the available data concerning the reasons why women have abortions suggest that avoiding the post-natal burdens of raising or relinquishing an unwanted child is decisive far more often than avoiding pregnancy and childbirth.<sup>41</sup> Only a small minority of women list avoiding pregnancy and childbirth among their reasons for electing abortion,<sup>42</sup> while the most frequently cited reasons are disruption of life plans, economic difficulties, and problematic relations with the father.<sup>43</sup>

Thus, the woman who is pregnant with an unwanted child finds herself in this situation: the very fact that she does not want the child makes the burdens of pregnancy and childbirth harder to bear, and once she gives birth she must accept either the burdens of raising her newborn child, or those of relinquishing it.<sup>44</sup> An elective abortion will enable her to avoid pregnancy and childbirth (by terminating her pregnancy), and to avoid the raise-or-relinquish dilemma (by ensuring that her pre-viable fetus does not survive). Consequently, a law that prohibits elective abortions will frustrate *both* of these interests.

By contrast, a fetal-rescue program burdens only the latter interest, and burdens it in a different way. It puts the woman in what we might call the gestate-or-relinquish dilemma: carry the fetus to term or relinquish it to the state *prior to viability* for attempted rescue via AW. The gestate-or-relinquish dilemma can best be characterized as a pre-viability, prenatal version of the

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40. A variety of factors may explain why this is so. For example, a woman might discount the costs of child-rearing because they are spread out over the child's adolescence; might anticipate that she will adapt to the burdens of childrearing because she will come to love the child; or might anticipate that she will experience lasting sorrow because her child will be raised by others.

41. See *Finer et al.*, *supra* note 33 at 113, tbl.2.

42. The Alan Guttmacher Institute's surveys on the reasons women have abortions, as contained in the research journal *Perspectives on Sexual and Reproductive Health*, do not even list "avoiding the physical discomforts of pregnancy and childbirth" as a reason. About 12% of women listed "physical problem with my health" as one of their reasons for having an abortion, and it seems likely that some of those women were generally healthy but concerned about the physical burdens of pregnancy. See *id.*

43. See *id.* According to the survey, "Having a baby would dramatically change my life" was the most frequently cited reason for electing abortion (74%). The reasons, "Can't afford a baby now," and "Don't want to be a single mother or having relationship problems," were the next most common (48%). *Id.*

44. See *Regan*, *supra* note 5, at 1582.

raise-or-relinquish dilemma. Like its postnatal analogue, it frustrates the woman's interest in ensuring the death of the fetus. If she opts not to carry the fetus to term, she must relinquish it to the state, and if AW succeeds, her biological child will be raised by others.

As Part III explains, the burden of relinquishing one's pre-viable fetus is likely to be considerably less weighty than the burden of relinquishing one's newborn child. Nevertheless, in both cases the woman's basic interest is the same—ensuring that her fetus does not survive to become a child she will have relinquished. Consequently, if the woman has a specially protected liberty interest in avoiding the raise-or-relinquish dilemma, we can be confident that she also has a specially protected liberty interest in avoiding the gestate-or-relinquish dilemma triggered by fetal-rescue programs.

If *Roe* and *Casey* focused exclusively on the woman's interest in avoiding the burdens of pregnancy and childbirth, one could infer that her specially protected liberty interest in an elective abortion does not include ensuring the death of the fetus. Instead, however, *Roe* treats the burdens of child-raising (and by implication, those of child-relinquishing) as an important part of the case for recognizing that the woman's liberty to choose to terminate her pregnancy is encompassed by the "right of privacy."<sup>45</sup> An unwanted pregnancy, the Court said, "may force upon the woman a distressful life and future," in which her "health may be taxed by child care"; she may experience "the distress . . . associated with the unwanted child"; she may have to wrestle with "the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it"; and she may also experience "the additional difficulties and continuing stigma of unwed motherhood."<sup>46</sup> And while *Casey's* account of the woman's liberty begins by emphasizing the "anxieties," "physical constraints," and "pain" of pregnancy and childbirth, it culminates with the claim that "[h]er suffering is too intimate and personal for the State to in-

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45. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Although the Court made no specific mention of the raise-or-relinquish dilemma, its allusion to "the distress" associated with the unwanted child may be a veiled reference to it. *See id.* In any event, *Roe's* description of the burdens of giving birth to an unwanted child, which assumes that raising the child is the norm, leaves no doubt that the Court did not view adoption as an "easy way out" for pregnant women. *See id.*

46. *Id.*

sist, 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."<sup>47</sup> The "vision of the woman's role" to which the Court refers<sup>48</sup> is obviously her role as mother—and in our history and culture that includes child-rearing as well as child-bearing.

Similarly, if *Casey* had relied solely on a bodily autonomy rationale for the woman's liberty interest in elective abortion,<sup>49</sup> we could infer that ensuring the death of the fetus is not protected. Bodily autonomy cannot ground a right to destroy the fetus because it is not part of the woman's body, and because removing the fetus from her body will restore the woman to her pre-pregnant condition whether or not the fetus survives.<sup>50</sup> The *Casey* Court, however, also endorsed a reproductive liberty rationale, arguing that *Roe* stands in the line of cases specially protecting the liberty to decide "whether or not to beget or bear a child,"<sup>51</sup> and asserting that "in some critical respects the abortion decision is of the same character as the decision to use contraception."<sup>52</sup> Lest one think the common ground between abortion and contraception is solely that both enable a woman to avoid pregnancy and childbirth, *Casey* highlights the plight of a woman who believes that "the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent."<sup>53</sup> Although *Casey* does not spell out how the right to an elective abortion enables this woman to avoid bringing a child she is unable to care for into the world, there can be only one answer: by ensuring that her fetus does not survive the abortion. *Casey's* reasoning thus implies that the woman's liberty interest in not

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47. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (majority opinion).

48. *Id.*

49. *See id.* at 857 (stating that *Roe* may be seen as grounded in "personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection").

50. *See* John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 486–87 (1990) (arguing that the woman's right to elective abortion, understood as "a right of bodily integrity or freedom from unwanted bodily intrusions or burdens," is a right "to terminate the pregnancy . . . not a right to destroy the embryo/fetus if her bodily integrity may otherwise be protected").

51. *See Casey*, 505 U.S. at 857 (majority opinion).

52. *Id.* at 852; *see also id.* at 884 (plurality opinion) (referring to "the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy").

53. *Id.* at 853 (majority opinion).

reproducing is protected by the right to elective abortion as well as by the right to use contraception.<sup>54</sup>

## II. UNDER *CASEY*, THE WOMAN'S INTEREST IN ENSURING THE DEATH OF THE FETUS SHOULD TRIGGER AN INTEREST-BALANCING ANALYSIS, NOT STRICT SCRUTINY OR THE UNDUE BURDEN STANDARD

That the woman's liberty interest in ensuring the death of her fetus is protected by the right to elective abortion does not mean that she has a specific right to insist on the death of her pre-viable fetus and hence that fetal-rescue programs are unconstitutional.<sup>55</sup> This part argues that, under *Casey*, whether such a right exists should be determined by balancing the woman's interest in ensuring the death of her pre-viable fetus against the state's interest in protecting its life, and *not* by application of the undue burden standard.

Interest balancing underlies the right to elective abortion as redefined in *Casey*.<sup>56</sup> In place of *Roe*'s holding that there is a fundamental right to elective abortion until viability,<sup>57</sup> *Casey* holds that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."<sup>58</sup> *Casey* thereby grounds the right to elective abortion in a

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54. *Id.* at 852; *see id.* at 927 (Blackmun, J., concurring in part and dissenting in part).

55. Were *Roe*'s strict scrutiny controlling, fetal-rescue programs would plainly be unconstitutional: they interfere with the woman's fundamental right to terminate her pregnancy as she and her doctor think best (using a fetus-killing method), thereby frustrating one of the woman's protected interests (ensuring the death of the fetus)—and they do so to advance what *Roe* held to be the state's less-than-compelling, and therefore inadequate, interest in pre-viable fetuses. *Roe v. Wade*, 410 U.S. 113, 162, 163 (1973).

56. *See Casey*, 505 U.S. at 872–73 (plurality opinion).

57. *See Roe v. Wade*, 410 U.S. 113, 155, 164 (1973) (noting that the woman's liberty to choose an abortion constitutes a "fundamental right[]" that may be infringed only by laws that are narrowly tailored to advance a compelling state interest).

58. *Casey*, 505 U.S. at 846 (majority opinion); *see id.* at 869–71 (plurality opinion) (explaining that, after viability, "the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted"); *see also id.* at 954 (Rehnquist, C.J., dissenting) (noting that the joint opinion rejects the view that there is a fundamental right to elective abortion that can be overcome only by a compelling state interest); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1299 (2007) ("Whereas *Roe v. Wade* held that infringements on the fundamental right to abortion could be upheld only if necessary to promote a compelling governmental interest, *Planned Parenthood of Southeastern Pennsylvania v. Casey* substituted a formula under which courts now assess whether abortion regulations place an 'undue burden' on a woman's right to terminate an unwanted pregnancy.") (citations omitted).

new analytical foundation: a direct interest-balancing judgment that the woman's overall interest in having an abortion outweighs the state's interest in protecting pre-viable fetal life.<sup>59</sup> This interest-balancing judgment does not tell us whether the woman's interest in ensuring the death of the fetus, *standing alone*, outweighs the state's interest in protecting fetal life.<sup>60</sup> Under *Casey*, this is a question of first impression that should be decided by the same sort of direct interest balancing the plurality opinion relied on in reaffirming *Roe*'s central holding.<sup>61</sup>

In addition to interest balancing, however, *Casey* also adopted the undue burden standard to evaluate regulations that, while not prohibiting elective abortions, interfere with women's access to them to some extent.<sup>62</sup> Because fetal-rescue programs seem to fit that description, it could be argued that their constitutionality should be determined by applying the undue burden standard rather than by interest balancing. This issue is especially important, because there is a good chance that fetal-rescue programs would fail the undue burden standard.<sup>63</sup>

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59. *Casey*, 505 U.S. at 846; *see also id.* at 861 (describing viability as "the point at which the balance of interests tips").

60. A parallel question would be presented by a state law that burdened the woman's interest in avoiding pregnancy and childbirth, but *not* her interest in ensuring the death of the fetus. But any state law that satisfied this description would fail to advance the state's interest in protecting fetal life, and consequently would be unconstitutional under an interest-balancing approach.

61. *See, e.g., id.* at 871 (plurality opinion); *see Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) ("Determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'") (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)).

62. *See Casey*, 505 U.S. at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

63. A regulation imposes an undue burden if its "purpose or effect" is to create a substantial obstacle to women seeking elective abortions. *Id.* at 877. The state's willingness to pay the heavy costs of AW gives rise to a compelling inference that the "purpose" of fetal-rescue programs is to save aborted fetuses, not to prevent women from obtaining abortions. Nevertheless, fetal-rescue programs might run afoul of the undue burden test's "effects" prong. The inquiry would focus on women who would much rather have a now-forbidden fetus-killing abortion than a fetus-sparing abortion followed by attempted rescue of their fetus via an artificial womb. *See id.* at 894 (majority opinion) ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."). While some of these women would reluctantly opt for fetus-sparing abortions, others would seek out illegal fetus-killing abortions (or travel to states where they are legal), and a third group would be deterred from terminating their pregnancies *tout court*. Depending in part on how widespread these effects were thought to be, they might either be deemed "incidental" or seen as imposing an undue burden on

Once we consider the intended function of the undue burden standard, however, the case for using it collapses. The undue burden test strikes a balance between the woman's *overall* liberty interest in an elective abortion and the state's interest in protecting fetal life by regulating (but not prohibiting) abortions.<sup>64</sup> As *Casey* explains, the undue burden test's domain consists of abortion regulations that "mak[e] it more difficult or more expensive to procure an abortion,"<sup>65</sup> thereby burdening *both* the woman's interest in avoiding pregnancy and childbirth and her interest in ensuring the death of the fetus. Regulations such as those at issue in *Casey*, which impose requirements that must be met before a woman can terminate her pregnancy, fall squarely within this description.<sup>66</sup> So would a statute that burdened the woman's liberty to terminate her pregnancy by requiring *her* to pay the high costs of AW. Fetal-rescue programs, by contrast, do not make it more difficult or more expensive for the woman to terminate her pregnancy. They burden only her interest in ensuring that her fetus does not survive the termination of her pregnancy, and consequently should not be subject to the undue burden test.

This analysis is confirmed by the anomalous results that might ensue if the Court evaluated fetal-rescue programs using the undue burden standard rather than by balancing the woman's interest in ensuring the death of the fetus against the state's interest in protecting its life. Were the Court to conclude that fetal-rescue programs impose an undue burden on women's access to elective abortions, it would be creating a new right to ensure the death of rescuable fetuses without ever having balanced the interests that *Casey's* own methodology indicates should determine whether such a right exists.<sup>67</sup> This cannot be right. Only by examining whether the state's interest in protecting the pre-viable fe-

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women's access to elective abortions. *See id.* at 874 (plurality opinion). Although the outcome is necessarily speculative in the absence of experience with AW technologies, there is clearly a realistic possibility that fetal-rescue programs would fail the undue burden test.

64. *See id.* at 876 ("[T]he undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."); *see also Carhart II*, 550 U.S. 124, 146 (2000) ("*Casey*, in short, struck a balance. The balance was central to its holding.")

65. *Casey*, 505 U.S. at 874 (plurality opinion).

66. *See id.* at 895 (majority opinion) (holding that Pennsylvania's spousal notification requirement posed an undue burden on a woman seeking an abortion, as it "[would] operate as a substantial obstacle to a woman's choice to undergo an abortion," and was therefore invalid).

67. *See id.* at 871 (plurality opinion) (discussing the Court's interest-balancing methodology).



tus outweighs the woman's interest in ensuring its death can we determine whether fetal-rescue programs are constitutional under *Casey*.

### III. THE STATE'S INTEREST IN RESCUING THE PRE-VIABLE FETUS OUTWEIGHS THE WOMAN'S INTEREST IN ENSURING ITS DEATH

The argument so far can be summarized as follows: under *Casey*, the woman's interest in ensuring the death of the fetus is within the liberty specially protected by the right to elective abortion; accordingly, fetal-rescue programs should be evaluated using the interest-balancing approach *Casey* itself used in reaffirming *Roe*'s central holding. In conducting this analysis, I will assume that the woman's overall interest in an elective abortion outweighs the state's interest in protecting the pre-viable fetus—and thus that the right to elective abortion is, on *Casey*'s premises, sound on the merits as well as supported by *stare decisis*.<sup>68</sup> On that assumption, this part (1) provides thorough descriptions—and assessments—of the woman's interest in ensuring the death of the fetus and the state's interest in protecting pre-viable fetal life; (2) analyzes and applies *Casey*'s implications for the relative

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68. In a companion article, I present a different (but related) interest-balancing argument that, if correct, would establish the constitutionality of fetal-rescue programs. Stephen G. Gilles, *Why the Right to Elective Abortion Fails Casey's Own Interest-Balancing Methodology—and Why It Matters*, 91 NOTRE DAME L. REV. \_\_ (forthcoming). The thrust of that argument is that, setting aside *stare decisis*, the right to elective abortion fails the interest-balancing analysis that, under *Casey*, would be necessary to justify that right as an original matter. See *id.* at \_\_, \_\_. The judgments of a majority of the Justices in *Casey*, a careful comparison of the state's interest in pre-viable fetal life with the woman's interest in an elective abortion, and the traditional protections Anglo-American law accorded to fetuses, all support the judgment that the state's interest outweighs the woman's even in the earliest stages of pregnancy. Consequently, even if (as *Casey* holds) the right to elective abortion should be preserved by virtue of *stare decisis*, 505 U.S. at 860–61, legislation such as fetal-rescue programs should be evaluated on the understanding that the state's interest in protecting the pre-viable fetus outweighs the woman's interest in an elective abortion. If the argument is correct, the constitutionality of fetal-rescue programs follows *a fortiori*. Given that the state's interest in the pre-viable fetus outweighs the woman's overall interest in an elective abortion, which includes *both* avoiding pregnancy and ensuring the death of the fetus, it must also outweigh the interest with which a fetal-rescue program interferes—her stand-alone interest in ensuring the death of the fetus.

Although I continue to think that the argument just summarized is cogent, there is no need to repeat it in full here. For even if that argument is wrong, the interest-balancing analysis this article presents suffices to show that the state's interest in pre-viable fetal life outweighs the woman's interest in the death of the fetus. (Some duplication, however, is unavoidable: in particular, Parts III.B–III.D of this article draw heavily on the companion article's interest-balancing case against the right to elective abortion).

strength of those interests; and (3) presents arguments bearing on which interest is stronger as a matter of “reasoned judgment.”<sup>69</sup>

The ultimate question we are addressing is whether the woman’s interest in ensuring the death of her pre-viable fetus outweighs the state’s interest in rescuing it via AW. Some of the arguments I will be presenting address this interest-balancing question directly. In addition, however, two other interest-analysis questions are especially relevant. As Part III.A argues, the woman’s interest in ensuring the death of her pre-viable fetus is much weaker than her overall interest in an elective abortion. But this means that the state’s interest in protecting the pre-viable fetus outweighs the woman’s interest in ensuring its death *unless that state interest is also much weaker than her overall interest in an elective abortion*. Part III.C argues that this condition is not satisfied: the state’s interest in protecting the pre-viable fetus is almost as great as (if not greater than) the woman’s interest in an elective abortion.

Moreover, we know that the state’s interest in protecting the viable fetus outweighs the woman’s interest in an elective abortion (which is why the right to elective abortion ends at viability).<sup>70</sup> Given Part III.A’s conclusion that the woman’s interest in ensuring the death of the fetus is much less weighty than her overall interest in an elective abortion, it follows that the state’s interest in protecting the pre-viable fetus prevails *unless that interest is much less weighty than the state’s interest in the viable fetus*. Part III.D will argue that this condition is not satisfied: the state’s interest in protecting the pre-viable fetus is almost as great as its interest in protecting the viable fetus.

A. *The Woman’s Interest in Ensuring That Her Pre-Viable Fetus Does Not Survive Is Substantially Weaker Than Her Overall Interest in an Elective Abortion*

Under *Casey*, the right to an elective abortion rests on an interest-balancing judgment that the woman’s interests in having

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69. Because our legal tradition has never been faced with a situation in which the woman’s interest in ensuring the death of a pre-viable, but rescuable, fetus is pitted against the state’s interest in protecting and rescuing it via AW, this article does not examine the history of abortion regulation in the Anglo-American legal tradition.

70. See *Casey*, 505 U.S. at 869 (plurality opinion).

an abortion outweigh the state's interest in protecting pre-viable fetal life.<sup>71</sup> Fetal-rescue programs are not governed by this judgment, because the woman's interest in ensuring the death of the fetus is, for two reasons, substantially weaker than her combined interests in having an elective abortion.

First, unlike prohibitions on abortion, fetal-rescue programs permit the woman to terminate her pregnancy, thereby avoiding the serious and invasive burdens of pregnancy and childbirth. A partial enumeration of the common physical burdens would include faintness, nausea and vomiting, tiredness, insomnia, shortness of breath, tender breasts, constipation, frequent need to urinate, backache, edema of the feet and ankles, foot and leg cramps, varicose veins, hemorrhoids, mastitis, dry skin, irritability, depression, loss of sexual desire, weight gain, the often severe pain of labor if delivery is vaginal, and the risks, pain, and scarring of a C-section if it is not.<sup>72</sup> As Donald Regan writes, "The ills of pregnancy, delivery, and beyond make an impressive list. . . . [I]t is an unusually lucky woman who does not put up with enough pain, discomfort and disruption of appearance and emotional state to add up to a major burden."<sup>73</sup> As he also points out, these "pains and discomforts . . . are likely to be significantly aggravated when the entire pregnancy is unwanted."<sup>74</sup> The imposition of these physical and mental burdens on unwilling women has always been a linchpin of the case against laws that prohibit elective abortions. Unlike such prohibitions, fetal-rescue programs allow the woman to avoid these burdens by terminating her pregnancy whenever she chooses.

Second, whereas prohibitions on abortion force the woman to choose between raising or relinquishing a child to which she has given birth, fetal-rescue programs force her to choose between raising or relinquishing a pre-viable fetus. The latter dilemma is less burdensome because the woman's emotional bond with an unwanted fetus will normally be much weaker than the bond she would likely experience with her newborn child.<sup>75</sup> During the se-

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71. *Casey*, 505 U.S. at 846 (majority opinion).

72. *See Regan*, *supra* note 5, at 1579–81.

73. *Id.* at 1582.

74. *Id.*

75. *See generally* Carl M. Corter & Alison S. Fleming, *Psychobiology of Maternal Behavior in Human Beings*, in 2 HANDBOOK OF PARENTING 93 (Marc H. Bornstein ed., 1995) (explaining that maternal behavior and psychological attachment develop gradually throughout the duration of a pregnancy).

cond half of pregnancy, many women experience increased maternal feelings toward the fetus.<sup>76</sup> Often, those feelings intensify dramatically after the woman has given birth. Indeed, roughly half of the women who have decided on adoption before birth change their minds after birth.<sup>77</sup>

The likelihood and extent of harm to the woman's relationships and reputation should also be much smaller when she relinquishes her pre-viable fetus than when she relinquishes her newborn child. To begin with, it will surely be far easier, should she wish to do so, for a woman to conceal from the father or her family that she has had a pre-viability abortion and relinquished her fetus than that she has given birth and relinquished her child. Furthermore, in many families and communities there are strong social expectations that the woman who carries a pregnancy to term will raise her child. There are no parallel expectations about the woman who decides to have a pre-viability abortion, and no reason to expect such expectations to emerge in the wake of fetal-rescue programs. And whereas the child's father and other relatives may form bonds of their own with the woman's newborn child—bonds that would often be disrupted if she relinquishes the child—that is less likely to have happened early in pregnancy, even if the woman has told the father and other relatives she is pregnant.

Yet even if relinquishing a first- or second-trimester fetus will typically be much less psychologically taxing than relinquishing a newborn infant, it seems inevitable that many women will experience it as deeply distressing. Some women become attached to their fetuses as soon as they learn they are pregnant, and this can occur even when the pregnancy is unwanted.<sup>78</sup> Quite apart

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76. Studies have confirmed that women often experience increased maternal feelings toward the fetus from about the twentieth week of gestation onwards. *See id.* That is surely one reason why the vast majority of second-trimester abortions occur prior to the twentieth week. *See* Lilo T. Strauss et al., *Abortion Surveillance—United States, 2003*, 55 *MORBIDITY & MORTALITY WKLY. REP.* 1, 4 (2006).

77. Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 *TENN. L. REV.* 509, 539 (2005). As one court observed, "Experience has evidenced a host of cases in which a mother plans to give her unborn child to adoptive parents, only to change her mind after going through child-birth and the resulting mother-child attachment." *In re Adoption of BGD*, 713 P.2d 1191, 1193 (Wyo. 1986).

78. Some research suggests that women who suffer early miscarriages are as distressed when the pregnancy is unwanted as when it is wanted. *See* Jack P. Carter, *Pre-Personality Pregnancy Losses: Stillbirths, Miscarriages, and Abortions*, in 1 *HANDBOOK OF DEATH AND DYING* 267 (2003).

from attachment, some women will be strongly averse to the prospect that someone else will rear their child. Others may fear that third parties, or the resulting child, will attribute parental responsibility to them in the short or long run.<sup>79</sup> For all these women, fetus relinquishment may result in heavy and long-lasting psychological and emotional burdens.

In sum, although the woman's interest in ensuring the death of the pre-viable fetus is substantial and lies within the specially protected realm of intimate decisions about the family and reproduction, it is also much less weighty than her overall interests in having an elective abortion, which include avoiding both unwanted pregnancy and childbirth and the more burdensome postnatal version of the raise-or-relinquish dilemma. The question of how much less weighty obviously cannot be determined with anything resembling exactitude.<sup>80</sup> But if the woman's overall interests in having an elective abortion are given a total weight of 100, it would be difficult to defend giving her interest in ensuring the death of the pre-viable fetus an average weight of 90—or of 10. In the context of avoiding *postnatal* relinquishment, a weight of 60 or even 70 might be defensible. In the context of avoiding the raise-or-relinquish dilemma early in pregnancy, to go much more above half that weight range would devalue the difference in traumatic intensity between relinquishing a pre-viable fetus and

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79. Writing in the context of disputes over IVF embryos, Glenn Cohen has argued that the putative “right not to be a parent” can usefully be understood as a “bundle” that includes three distinct possible rights—“a right not to be a gestational parent, a right not to be a genetic parent, and a right not to be a legal parent.” I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140 (2008) [hereinafter Cohen, *Rights Not to Procreate*]. As Cohen points out, however, this categorization

does not exhaust the category of types of parenthood, in that there is a residual social category of parenthood—what I call “attributional parenthood”—that remains. . . . [T]he law fails as a mechanism for allocating this kind of parenthood or, perhaps more accurately, it fails at unbundling this kind of parenthood from genetic parenthood.

I. Glenn Cohen, *The Right Not to Be A Genetic Parent*, 81 S. CAL. L. REV. 1115, 1135–36 (2008) [hereinafter, Cohen, *Right Not to Be A Genetic Parent*]. Cohen's insight is that society, the resulting child, or the parent herself (or himself) may assign general parental status and responsibility for the child to a genetic parent, even if that person is not the child's gestational or legal parent. *Id.* at 1136–37. These attributions of parental responsibility, in turn, may be a source of emotional distress and reputational harm to the unwilling genetic parent. *Id.* at 1142–43.

80. The numerical weights in this and the other examples in this part are meant as illustrations that help bring the critical factors for interest balancing into clearer focus, and are not intended to suggest that those interests can be quantified or that the weights in the examples are the “best” ones. I have, however, attempted to assign weights that fall within the range of intuitive plausibility.

relinquishing a newborn child. I will accordingly use 40 (out of 100) as an upper-bound estimate of the average weight to be given to the woman's interest in ensuring the death of the pre-viable fetus in the context of fetal-rescue programs.<sup>81</sup>

We are now in a position to do a preliminary analysis of the constitutionality of fetal-rescue programs. The state interest a fetal-rescue program advances—protecting the life of the pre-viable fetus—is the same state interest that would be advanced by a law prohibiting elective abortions. But whereas a ban on elective abortions frustrates the woman's combined interests in avoiding pregnancy and the postnatal raise-or-relinquish dilemma, a fetal-rescue program frustrates only her much less weighty interest in not relinquishing her pre-viable fetus. This implies that fetal-rescue programs are constitutional unless the woman's interests in an elective abortion *greatly* outweigh the state's interest in protecting pre-viable fetuses. For example, if the woman's overall interests in an elective abortion are again assigned a weight of 100, and her interest in not relinquishing her pre-viable fetus is assigned a weight of 40, fetal-rescue programs are constitutional unless the state's interest in protecting pre-viable fetuses is assigned a weight *below* 40.

Moreover, under *Roe* and *Casey*, the state's interest in protecting the life of the viable fetus outweighs the woman's combined interests in an elective abortion.<sup>82</sup> Therefore, unless the state's interest in protecting the pre-viable fetus (beginning at conception) is much less weighty than its interest in protecting the viable fetus, the state's interest in the pre-viable fetus must outweigh the woman's interest in ensuring its death. If the state's interest in the viable fetus is assigned a weight of 110 as against the woman's overall interest of 100 in an elective abortion, the state's interest in the pre-viable fetus prevails against the woman's isolated interest (40) even if it carries only half the weight it would have at viability (55).

We have, then, three interest-analysis inquiries that can help to determine whether or not fetal-rescue programs are constitu-

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81. For purposes of constitutional interest balancing, I assume that each interest is measured according to its *average* weight across the spectrum of women facing unwanted pregnancies.

82. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

tional under *Casey*. First, does the woman's interest in ensuring that her pre-viable fetus dies when her pregnancy is terminated outweigh the state's interest in rescuing it via AW? Second, do the woman's overall interests in an elective abortion greatly outweigh the state's interest in protecting the pre-viable fetus? (Put differently, does the interest-balancing judgment that underlies the right to elective abortion present a close and difficult question, or do the woman's interests easily and clearly prevail?) Third, is the state's interest in pre-viable fetal life much less weighty than its interest in viable fetal life? In turning next to how *Roe* and *Casey* characterize the state's interest in protecting the pre-viable fetus, I will refer when appropriate to each of these questions. Our ultimate interest, of course, lies in answering the first question. But, because *Roe* and *Casey* deal with the woman's overall interest in an elective abortion, rather than with her isolated interest in ensuring that her pre-viable fetus does not survive abortion, those decisions have more immediate implications for the second and third inquiries.

B. *Under Casey, the State Has a "Profound" Interest in Protecting the Pre-Viable Fetus*

In describing the state's interest in pre-viable fetal life, it is best to begin with *Roe*. The *Roe* Court rejected—as widely contested and inherently unprovable<sup>83</sup>—Texas' claim that the state has an overriding interest in “protecting prenatal life. . . . on the theory that a new human life is present from the moment of conception.”<sup>84</sup> Yet *Roe* accepted the state's “less rigid claim that as long as at least *potential* life is involved” it can invoke a legitimate interest in protecting the fetus.<sup>85</sup> In describing the fetus as “potential life,” the *Roe* Court did not suggest—nor could it have—that there is any serious debate about whether a fetus is a living organism, about whether that organism is biologically human (that is, belongs to the species *Homo sapiens*), or about whether it is genetically distinct from its parents.<sup>86</sup> Instead, the

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83. See *Roe*, 410 U.S. at 159 (invoking the lack of consensus on when normatively human life begins among “those trained in the respective disciplines of medicine, philosophy, and theology”).

84. *Id.* at 150, 153.

85. *Id.* at 150.

86. See *Carhart II*, 550 U.S. 124, 147 (2007) (“[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is

*Roe* Court's evident meaning was that the fetus is not yet a "new human life"<sup>87</sup>—that is, a *normatively* human being.

*Roe*'s terminology confirms this analysis: the opinion interchangeably employs the terms "potential life,"<sup>88</sup> "potential human life,"<sup>89</sup> and "the potentiality of life,"<sup>90</sup> and uses them in contradistinction to the terms "new human life,"<sup>91</sup> "life, as we recognize it,"<sup>92</sup> and "persons in the whole sense."<sup>93</sup> "Potential human life" is thus shorthand for what one might call "new life that will naturally become a normatively human being if allowed to develop."<sup>94</sup> Although *Roe* holds that the state's interest in protecting "potential human life" is not compelling prior to viability, it also concedes that this state interest is "legitimate and important" as soon as conception is complete.<sup>95</sup> *Roe* thus permits the state to adopt in law the theory that "potential human life" begins at conception, and to assert an important interest in protecting each fe-

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viable outside the womb.").

87. See *Roe*, 410 U.S. at 150 (emphasis added).

88. *Id.* at 154.

89. *Id.* at 159.

90. *Id.* at 162.

91. *Id.* at 150.

92. *Id.* at 161.

93. *Id.* at 162.

94. Jed Rubenfeld argues that *Roe* means something very different by "potential life": that the fetus is to be "considered solely as a 'potential' person," and not as a living entity in itself. See Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 600 (1991). Thus, according to Rubenfeld, "[t]o understand the fetus as a 'potential life' is not to understand it as an actual, but less than human, animal." *Id.* at 609. I have argued elsewhere that "Rubenfeld misunderstands both the relevant facts about human development and the construction the *Roe* Court put on those facts." See Gilles, *supra* note 68, at \_\_\_, n.\_\_\_. For present purposes, it suffices to address the latter point. Rubenfeld ignores *Roe*'s recognition that abortion differs qualitatively from contraception because the pregnant woman "carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus," and that, as a result, "[t]he woman's privacy is no longer sole." *Roe*, 410 U.S. at 159. This entity—the fetus—is the entity *Roe* refers to in the same paragraph as "potential human life." *Id.* Clearly, *Roe* views the fetus as a "second biological life," but a life that is not yet human—in other words, "an actual, but less than human, animal." Gilles, *supra* note 68, at \_\_\_, n.\_\_\_; Rubenfeld, *supra* at 609. And so does *Casey*. See Gilles, *supra* note 68, at \_\_\_, n.\_\_\_.

95. See *Roe*, 410 U.S. at 159 (acknowledging that abortion is "inherently different" from contraception because the woman "carries an embryo, and later, a fetus," and holding that the state can reasonably "decide that at some point in time" its interest in "potential human life, becomes significantly involved"). *Casey* likewise describes *Roe*'s "scope" as encompassing all "postconception potential life." *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 859 (majority opinion); see also Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 848 (2007) (describing *Roe* as holding that "[a]lthough embryos and fetuses are not constitutional persons, states have legitimate and important interests in their development and potential for personhood").



tus, understood as a new life whose nature is to become human if the pregnancy is not aborted.

In limiting the right to elective abortion to pre-viable fetuses, the *Roe* Court asserted that the state's interest "grows in substantiality as the woman approaches term,"<sup>96</sup> and becomes compelling at viability, because the fetus has then acquired "the capability of meaningful life outside the mother's womb."<sup>97</sup> By the time the fetus has developed enough to be viable, there is no longer widespread disagreement about whether it is normatively human: the resemblance between the fetus's capabilities and those of a newborn child is sufficiently strong—and sufficiently widely acknowledged to be strong—to warrant recognition of a compelling state interest should the state elect to assert it.<sup>98</sup> Under *Roe*, then, both the fetus's potential to become a normatively human being and its already-developed capabilities—which vary greatly depending on its stage of development—weigh in the constitutional balance.<sup>99</sup> Even in its first stages of development, the fetus's innate potential to become normatively human gives the state an important interest in protecting its life; at viability, the capabilities that enable the fetus to survive outside the womb, together with its continuing potential,<sup>100</sup> make the state's interest

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96. *Roe*, 410 U.S. at 162–63.

97. *Id.* at 163.

98. See Nancy Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 *YALE L.J.* 639, 643 (1986) (arguing that *Roe* implicitly adopted "the assumption that a viable fetus was one that was substantially developed and had reached 'late' gestation, and the ethical precept that late in gestation a fetus is so like a baby that elective abortion can be forbidden"). As Rhoden suggests, the "dichotomy between late and early abortion . . . is perhaps the closest this society has come to a consensus about the morality of abortion." *Id.* at 669. By the time the fetus is developmentally viable, the great majority of Americans would view it as "new human life." See *id.* As I argue elsewhere, see Gilles, *supra* note 13, the developmental viability line dovetails with *Roe's* argument that the absence of consensus about when normatively human life begins precludes recognition of a compelling state interest in fetal life throughout pregnancy. *Roe*, 410 U.S. at 160–62.

99. This perspective is not unique to *Roe*. See, e.g., KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 131–32 (1988) (suggesting that "the intuitive moral sense of most people in our culture is that both potential capacity and present or past characteristics matter").

100. One might surmise that the fetus's "potential" to become normatively human is exhausted at viability, because it can then be deemed to be 'actual human life.' But if we ask what *caused* the fetus to develop to the stage at which it is viable, the superficiality of this reasoning becomes evident. Over a period of roughly twenty-three weeks, the viable fetus develops from a zygote to a fetus weighing roughly a pound because its own nature—including its innate genetic endowment—directed its development. And this natural genetic endowment will *continue* to drive the development of the viable fetus, before and after birth, until it becomes a mature human being.

weighty enough to override the woman's right to an elective abortion.

Like *Roe*, *Casey* recognizes that the state could claim an overriding interest in protecting fetal life if it could demonstrate that normatively human life begins at conception.<sup>101</sup> Also like *Roe*, *Casey* denies that any such demonstration is possible.<sup>102</sup> On the other hand, both *Casey* and *Roe* acknowledge that the truth of the proposition that "potential human life" begins at conception is sufficiently clear that the state can assert a legitimate and important interest in protecting that life.<sup>103</sup> Under *Casey*, that is the premise on which interest balancing must be conducted: *the pre-viable fetus is not a normatively human being, but the state may recognize it as "potential" human life, and may claim an important interest in protecting it as such.*<sup>104</sup>

Yet although the five Justices in the *Casey* majority reaffirmed that the state has a "legitimate interest[] from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child,"<sup>105</sup> their coalition fractured when it came to the character of this interest and the weight to be accorded it. The controlling *Casey* plurality argued that *Roe*'s recognition of the state's "important and legitimate interest" in fetal life was "given too little acknowledgment and implementation by the Court in its subsequent cases," and elected to "rely upon *Roe*, as against the later cases."<sup>106</sup> The plurality proceeded to reject *Roe*'s trimester framework, holding that "in practice it undervalues the State's interest in the potential life within the woman," and replacing it with the undue-burden test.<sup>107</sup> And whereas *Roe* treated the state's interest as (at most) "important,"<sup>108</sup> the *Casey* plurality described it as "profound."<sup>109</sup> In short, the plurality opinion held that the state may assert a *more* weighty interest in the pre-viable fetus *on the*

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101. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality opinion).

102. See *id.* at 850 (asserting that reasonable persons can disagree about when new human life begins, and that the state cannot by law "resolve th[is] philosophic question[] in such a definitive way that a woman lacks all choice in the matter"); *Roe*, 410 U.S. at 159 ("We need not resolve the difficult question of when life begins.").

103. See *Casey*, 505 U.S. at 871; *Roe*, 410 U.S. at 150.

104. *Casey*, 505 U.S. at 846 (majority opinion).

105. *Id.*

106. *Id.* at 871 (plurality opinion).

107. *Id.* at 875-76.

108. *Roe*, 410 U.S. at 163.

109. *Casey*, 505 U.S. at 878 (plurality opinion).

*same theory Roe permitted*—that new life whose nature is to become normatively human is present when conception is complete (or at such time thereafter as the state specifies).<sup>110</sup> Justices Blackmun and Stevens would have given much less weight to the state’s interest than the plurality;<sup>111</sup> but because the four dissenting Justices would have given the state’s interest even *greater* weight than the plurality, the plurality’s position constitutes *Casey’s* holding on this issue.<sup>112</sup>

C. *Under Casey, the Woman’s Interest in an Elective Abortion At Most Slightly Outweighs the State’s Interest in the Pre-Viable Fetus*

As we have just seen, the controlling *Casey* plurality opinion confirms that the state’s interest in pre-viable fetal life is grounded in an understanding that the fetus is new life that is becoming human and that has an interest in its own future development, thereby affirming that this state interest is profoundly weighty throughout pregnancy.<sup>113</sup> Standing alone, this does not prove that the state’s interest in the pre-viable fetus outweighs the woman’s interest in ensuring its death—but it does lay the foundation for that conclusion.

We have not yet considered, however, *Casey’s* implications as to the relative weights of the state’s interest in protecting the pre-viable fetus and the woman’s overall interest in an elective abortion. The previous analysis established that, *unless the woman’s overall interest is much weightier than the state’s*, her isolated in-

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110. *Id.* at 871.

111. Justice Stevens argued that the state has only “an indirect interest” in “expanding the population” and minimizing the “offense” to persons who believe abortion “reflects an unacceptable disrespect for potential human life.” *Id.* at 914–15 (Stevens, J., concurring). Justice Stevens’ recasting of the state’s interest completely removes the fetus from the equation and leads inexorably to the conclusion that the woman’s interest in an elective abortion greatly outweighs the state’s interest in protecting “potential life.” *See id.* For his part, Justice Blackmun claimed that prior to viability the fetus “cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman.” *Id.* at 932–33 (Blackmun, J., concurring) (quoting *Webster v. Reprod. Heath Servs.*, 492 U.S. 490, 553 (1989) (Blackmun, J., dissenting)). Justice Blackmun’s formulation treats the fetus as if it were merely part of the woman’s body until viability, when it abruptly becomes an individual rights-bearer. *See id.* The *Casey* plurality disagreed, acknowledging that even before viability the fetus is a “second life” that *can* be “the object of state protection,” so long as that protection does not “override[]” the woman’s rights. *Id.* at 870.

112. *See id.* at 966, 979; *see also infra* note 123.

113. *See id.* at 876 (plurality opinion).

terest in ensuring that her pre-viable fetus does not survive the abortion must be outweighed by the state's interest in rescuing the fetus. As I will now argue, seven of the Justices in *Casey* were clearly of the view that the woman's overall interest in an elective abortion is *not* much greater than the state's interest in protecting the pre-viable fetus.<sup>114</sup>

Only six of the nine Justices who decided *Casey* explicitly stated their views about whether, as an original matter, the woman's liberty interest in an elective abortion outweighs the state's interest in protecting the pre-viable fetus.<sup>115</sup> Unsurprisingly, the four dissenting Justices (Chief Justice Rehnquist and Justices White, Scalia, and Thomas) argued that the state's interest outweighed the woman's.<sup>116</sup> Of the five Justices in the *Casey* majority, only Justices Blackmun and Stevens defended the majority's affirmation that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion"<sup>117</sup> on the merits. Justices Blackmun and Stevens also joined portions of the joint opinion co-authored by Justices O'Connor, Kennedy, and

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114. My interpretations of the Court's abortion decisions, and of *Casey* in particular, are based on the opinions of the Court in those cases—which constitute the judge-made constitutional law arising out of them—and on the dissenting and concurring opinions, which stake out the official, public positions of the Justices who signed them. In turn, my assessment of the views of the individual Justices in *Casey* is based on the opinions they authored or joined. I have not relied on sources such as the papers of individual Justices, which might shed revealing light on their motivations and deliberations, but cannot alter the public meaning of their opinions.

115. 505 U.S. at 846 (majority opinion).

116. The dissenters' primary argument was that, contrary to the Court's usual substantive due process jurisprudence (and to any defensible understanding of the Fourteenth Amendment's Due Process Clause), *Roe* recognized an unenumerated fundamental right to elective abortion despite the fact that "the longstanding traditions of American society have permitted it to be legally proscribed." *Id.* at 980 (Scalia, J., dissenting); *see also id.* at 952–53 (Rehnquist, C.J., dissenting) ("[O]n this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as 'fundamental' under the Due Process Clause of the Fourteenth Amendment"). But the dissenters also argued that *Roe* was wrong even in its own interest-balancing terms, because it simply assumed that "what the State is protecting is the mere 'potentiality of human life.'" *Id.* at 982 (Scalia, J., dissenting). As the dissenters saw it, the *Roe* Court should have deferred to the state's reasonable judgment that the fetus *is* "a human life" whose claim to protection from the state outweighs the woman's interest in terminating the pregnancy. *See id.* (Scalia, J., dissenting).

117. *Id.* at 846 (majority opinion); *see id.* at 932 (Blackmun, J., concurring) ("[T]he *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life.") (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 553 (1989) (Blackmun, J., dissenting)); *id.* at 912 (Stevens, J., concurring) ("*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.").

Souter, thereby conferring majority-opinion status on those sections. But although the *Casey* majority opinion reaffirmed the right to elective abortion, and characterized it as grounded in a judgment that the woman's liberty interest outweighs the state's interest in protecting pre-viable fetal life, *the joint opinion specifically declined to endorse this judgment on the merits*. Instead, it explained that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."<sup>118</sup> As that statement implies, one or more members of the *Casey* majority had grave doubts about the soundness of *Roe*'s central holding, and voted to reaffirm it only after taking into account "the force of *stare decisis*."<sup>119</sup>

In Part IV of their opinion, which Justices Blackmun and Stevens refused to join, but which constitutes the controlling opinion of the Court under the rule set out in *Marks v. United States*,<sup>120</sup> *Casey*'s co-authors acknowledged that "the difficult question faced in *Roe*" was "[t]he weight to be given th[e] state interest" in "protecting the potentiality of human life."<sup>121</sup> As we have already seen, Justices O'Connor, Kennedy, and Souter went on to rule that *Roe* and later cases undervalued the state's interest in protecting pre-viable fetal life.<sup>122</sup> Their explanation of their "reservations" about

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118. *Id.* at 853 (majority opinion).

119. *Id.*

120. 430 U.S. 188, 193 (1977) (ruling that when "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (joint opinion)); *see also Carhart I*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) (applying the rule in *Marks* to the plurality opinion in *Casey*). In the twenty-plus years since *Casey* was decided, all of the Justices who expressed an opinion in *Casey* have agreed that the joint opinion, including the portions joined only by three authors (the "plurality opinion"), as well as those joined by Justices Blackmun and Stevens (the "majority opinion"), constitutes the Court's authoritative ruling. *See Carhart II*, 550 U.S. 124, 150, 156 (2007) (rejecting undue burden challenges to the federal Partial-Birth Abortion Ban of 2003 by applying the *Casey* plurality's undue burden standard); *id.* at 188 (Ginsburg, J., dissenting) (finding an undue burden on the relevant class of women by applying the *Casey* standard); *Carhart I*, 530 U.S. at 945–46 (Kennedy, J., dissenting) (finding no undue burden under *Casey*); *id.* at 982 (Thomas, J., dissenting) (finding no undue burden under *Casey*'s standard). Thus, subject to the usual rules distinguishing dicta from holdings and their supporting rationales, the *entire* joint opinion in *Casey* is binding law. This is because the three-Justice "plurality" portions of that opinion allow more state regulation of abortion than Justices Blackmun and Stevens would have allowed, but less regulation than the four dissenters would have sanctioned.

121. *Casey*, 505 U.S. at 871 (plurality opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

122. *See supra* notes 116–18 and accompanying text.

reaffirming *Roe*'s central holding shows that, after correcting for that undervaluation, *each* of them found it difficult to conclude that the woman's interest in an elective abortion outweighs the state's interest in pre-viable fetal life. No Justice who thought that the woman's interest greatly outweighs the state's could experience any such difficulty.

To be sure, *Casey*'s co-authors, invoking *stare decisis*, declined

to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.<sup>123</sup>

But although their reticence may leave some doubt about whether Justices O'Connor, Kennedy, and Souter each believed that *Roe* was *wrongly* decided as an original matter,<sup>124</sup> their "reservations" undeniably establish that they did not believe *Roe* was *clearly correct* as an original matter. Any uncertainty on this point is eliminated by the *Casey* majority opinion's elaborate argument that *Roe*'s central holding should have "rare precedential force" because *Roe* "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."<sup>125</sup> This argument would have been utterly superfluous had Justices O'Connor, Kennedy, and Souter each believed that the woman's interest greatly outweighed the state's. Indeed, their declared objective—ensuring that *Roe*'s central holding remained settled law<sup>126</sup>—would have been far better served had they joined forces with Justices Blackmun and Stevens and reaffirmed *Roe*'s central holding on the merits, while buttressing that holding with a "normal *stare decisis* analysis."<sup>127</sup>

To summarize, in *Casey*, a majority of five Justices reaffirmed the right to elective abortion prior to viability on the basis of an interest-balancing judgment that only two Justices were willing

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123. *Casey*, 505 U.S. at 871.

124. See Gilles, *supra* note 68, at \_\_ (arguing that the *Casey* joint opinion shows that at least one of its authors believed *Roe* was wrongly decided as an original matter).

125. *Casey*, 505 U.S. at 867.

126. *Id.* at 844 (majority opinion) ("Liberty finds no refuge in a jurisprudence of doubt.").

127. *Id.* at 861 (plurality opinion). That is exactly what the Court had done in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419–20 & n.1 (1983) (reaffirming *Roe* on *stare decisis* grounds); *id.* at 426–27 (reaffirming *Roe* on the merits).

to endorse on the merits, that four Justices argued was erroneous on the merits, and that the remaining three Justices believed was either erroneous or, at best, a very close call. These views were not mere dicta. The dissenters' conviction that *Roe's* central holding was erroneous, combined with the plurality's "reservations" about the soundness of that holding, altered the structure and reasoning of the majority opinion in *Casey*. Because only two Justices were prepared to affirm *Roe's* soundness on the merits,<sup>128</sup> the *Casey* majority was forced to rely heavily on *stare decisis* and "principles of institutional integrity."<sup>129</sup> For that reason, one might argue that the plurality's reservations form part of *Casey's* *ratio decidendi*, and are therefore entitled to *stare decisis* effect. But even if not, the fact that seven of the Justices in *Casey* rejected the proposition that the woman's interest in an elective abortion greatly outweighs the state's interest in protecting the pre-viable fetus should be given substantial weight in an interest-balancing analysis under *Casey*.

D. "*Reasoned Judgment*" Suggests That the State's Interest in Protecting the Pre-Viable Fetus Is Almost on Par with Its Interest in Protecting the Viable Fetus or Full-Term Infant

Let's now compare the state's interest in rescuing the pre-viable fetus via AW with the woman's interest in ensuring the death of the fetus from the broader standpoint of "reasoned judgment," which includes considering intuitions about the importance of these competing interests at stake. We have seen that *Casey* follows *Roe* in treating the fetus as "potential human life" rather than actual, normatively human life.<sup>130</sup> Yet we have also seen that the *Casey* plurality opinion accords much greater weight to the state's interest in protecting pre-viable fetal life than *Roe* did, that *Casey's* co-authors were unable (apart from

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128. The plurality's "reservations" about the validity of *Roe's* central holding as an original matter also altered the manner in which the joint opinion reaffirmed *Roe's* viability line. Although the plurality opinion invokes both *stare decisis* and *Roe's* own explanation of why viability is the tipping point when the state's interest can override the woman's, *Casey*, 505 U.S. at 870, its defense of the viability line is contingent on the assumption that the woman's interests outweigh the state's interest in pre-viable fetal life—an assumption the plurality was unwilling to defend on the merits. *See id.* at 871. Thus, the plurality opinion depicts the viability line as the most defensible way to *delimit* the right to elective abortion, assuming, without deciding, the validity of the interest-balancing judgment on which that right depends in the first instance.

129. *Id.* at 845–46 (majority opinion).

130. *Id.* at 871, 876 (plurality opinion).

“the force of *stare decisis*”) to affirm that the woman’s interest outweighs that state interest,<sup>131</sup> and that it can fairly be inferred that they believed the state’s interest was almost as great as (if not greater than) the woman’s overall interest in an elective abortion. This juxtaposition may seem highly counterintuitive. How is it possible to accept for purposes of constitutional law that the fetus is *not* a normatively human being and yet be persuaded that the state’s interest in protecting this “potential human life” is at least roughly on par with the woman’s weighty interests in terminating her pregnancy?

We cannot be sure from their joint opinion how Justices O’Connor, Kennedy, and Souter would have answered this question. Justice White’s 1986 dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*, however, expressly undertook to do so.<sup>132</sup> Justice White argued that the state has a compelling interest in protecting the pre-viable fetus *even if Roe is right that the pre-viable fetus is not yet “new human life.”*<sup>133</sup> His central thesis was that

[h]owever one answers the metaphysical or theological question whether the fetus is a “human being” or the legal question whether it is a “person” as that term is used in the Constitution, one must at least recognize . . . that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others.<sup>134</sup>

As a living human organism that is developing into a normatively human being, the fetus is qualitatively different from sperm or egg, and the fact that abortion “involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place.”<sup>135</sup>

In *Thornburgh*, Justice White used this reasoning as a platform to argue that *Roe* should be overruled. My goal here is a more limited one: on the assumption that the right to elective

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131. *Id.* at 871.

132. 476 U.S. 747, 785–86 (1986) (White, J., dissenting).

133. *Id.* at 792–93 n.2 (White, J., dissenting) (arguing that the difference between contraception and abortion—the destruction of the fetus—goes both to “the weight of the state interest in regulat[ion]” and “the characterization of the liberty interest [as fundamental]”; *id.* at 795 (White, J., dissenting) (arguing that the state’s interest is compelling throughout pregnancy).

134. *Id.* at 792 (White, J., dissenting).

135. *Id.* at 792 n.2 (White, J., dissenting).



abortion remains good law (whether solely on *stare decisis* grounds or also as an original matter), I will argue that the state's interest in rescuing the pre-viable fetus outweighs the woman's interest in ensuring that it does not survive the abortion. And I will do so within the framework of *Casey's* interest-balancing methodology, which calls for a "reasoned judgment" about the relative weights of the competing state and individual interests.<sup>136</sup> In arriving at a reasoned judgment on such matters, it is necessary to describe the grounds on which one's judgment is based, explain why one values pre-viable fetal life more or less highly, and critically examine why those who disagree arrive at a different value.

How much weight, then, should we attach to state protection of the pre-viable fetus, understood as a living organism that is biologically human but not yet normatively human?<sup>137</sup> To evaluate the life of the fetus, we must start with the event that begins its life: the completion of the process of fertilization, which yields the zygote that is the first stage of fetal life. As Justice White saw, this event marks a dramatic, qualitative change—the beginning of a new, biologically human life.<sup>138</sup> Unlike sperm and egg, the pre-viable fetus is a genetically complete, biologically human organism. It is perhaps debatable whether sperm and egg are better viewed as specialized parts of the men and women whose gametes they are, or as distinct organisms "whose existence is fundamentally oriented toward *uniting* with another gamete."<sup>139</sup> What is *not*

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136. *Casey*, 505 U.S. at 849 (majority opinion) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.").

137. My account of the fetus is greatly indebted to Robert P. George and Christopher Tollefsen. See generally ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* (2008) [hereinafter *EMBRYO*]. Unlike their book, however, this article does not argue that "the human embryo is a human person worthy of full moral respect." *Id.* at 4.

138. *Thornburgh*, 476 U.S. at 792 (White, J., dissenting).

139. *EMBRYO* *supra* note 137, at 39. The fact that sperm and egg play a functional role in the lives of the human beings whose gametes they are—enabling those beings to reproduce—argues for considering them as parts, rather than distinct organisms. See *id.* at 34 (arguing that sperm and egg are "parts of the human organism, the sperm a part of the male, the egg a part of the female"). The fact that sperm and egg are genetically distinct from all other cells of the human beings whose gametes they are—not only because they are haploid rather than diploid, but because their chromosomes are genetically different as a result of chromosomal crossover during meiosis—argues for considering them as distinct haploid organisms that will either die or be transformed through fertilization "into a single entity, the human embryo." *Id.* at 31–32, 35–37.

debatable is that neither sperm nor egg is a genetically *complete* organism belonging to our species. Sperm and egg each have only one-half of the forty-six chromosomes that every somatic cell of every normal member of our species contains.<sup>140</sup> “This haploidy of the gamete cells distinguishes them from whole human beings.”<sup>141</sup> No such distinction exists between the cells of a fetus, regardless of its stage of development, and those of any other biologically human being. Once fertilization is complete, the zygote contains the full complement of forty-six chromosomes necessary for a complete, biologically human organism.

Possessing forty-six chromosomes, of course, is necessary but not sufficient to qualify the fetus as a human *organism*. Every somatic cell has forty-six chromosomes,<sup>142</sup> but although each cell is biologically human it is not an organism. Rather, it is a *part* of a single human organism—the biologically human beings that constitute our physical selves. What distinguishes each human being, viewed as an organism, is that it is an integrated whole that “has the capability to sustain itself as an independent entity.”<sup>143</sup> The fetus possesses that capability as soon as conception is complete: if it can obtain “the resources needed by all organisms, namely nutrition and a reasonably hospitable environment, it will continue (assuming adequate health) to grow and develop.”<sup>144</sup>

The fetus’s capability to grow and develop is inherent in its nature:<sup>145</sup> “It contains within itself the ‘genetic programming’ and epigenetic characteristics necessary to direct its own biological progress. It possesses the active capacity for self-development toward maturity using the information it carries.”<sup>146</sup> More than that, the nature of the fetus is to *exercise* this capacity: “The human embryo, from conception onward, is fully programmed and has the active disposition to use that information to develop him-

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140. *Id.* at 30.

141. *Id.* at 40–41.

142. *Id.* at 30.

143. Nicanor Pier Giorgio Austriaco, *On Static Eggs and Dynamic Embryos: A Systems Perspective*, NAT. CATH. BIOETHICS QUAR., 659, 666–67 (2002).

144. EMBRYO, *supra* note 137, at 41.

145. In this respect as well, the embryo is radically different from sperm and egg, or from the nucleus of a non-zygotic cell and an enucleated egg, none of which can grow and develop without first combining (or being combined) to become an embryo. *See id.* at 52–53. And even when fertilization (or somatic-cell nuclear transfer, in the case of cloning) occurs, the gametes (or cellular components) “do not survive; rather, their genetic material enters into the composition of a new organism.” *Id.* at 53.

146. *Id.* at 41.

self or herself to the mature stage of a human being, and, unless prevented by disease or violence, will actually do so.”<sup>147</sup> The fetus’s dynamic, self-directed biological development shows that it is “a whole living member of the species *Homo sapiens* in the earliest stage[s] of his or her natural development.”<sup>148</sup>

The pre-viable fetus is also the *same* living organism that will later become a viable fetus, infant, child, adolescent, and adult if its development is not cut short for one reason or another.<sup>149</sup> Consequently, the pre-viable fetus, no less than the viable one, has what Don Marquis famously termed a “future like ours,”<sup>150</sup> in which it will have developed into a conscious, normatively human being who can actively seek his or her happiness. Like every living being, the fetus has an interest in its own good—and it is good for the fetus to develop into a normatively human being, and bad for it to be killed before it can do so.<sup>151</sup>

As *Roe* and *Casey* require, however, we are assuming that the life of the pre-viable fetus must be regarded as less valuable than that of an actual human—“a person[] in the whole sense,” as *Roe* puts it<sup>152</sup>—because its already-present capabilities are not yet sufficiently advanced. But the key question is: How much less valuable? Here, following Justice White’s lead, I take issue with the popular belief that, once it is accepted that the pre-viable fetus is

147. *Id.* at 50.

148. *Id.*

149. In the special case of monozygotic twinning, which can occur only in the first two weeks after conception, the embryo becomes two or more embryos, each of which will develop into a normatively human being. Some writers argue that until the possibility of monozygotic twinning can be excluded (around fourteen days after conception) the embryo cannot be regarded as an individual. *See, e.g.,* BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* 50–51 (1992). Literally speaking, that seems true enough, but it also seems myopic from the standpoint of valuing the life of the early embryo. The embryo is a new living organism that will in most cases become one normatively human being, but that will become *two* normatively human beings if twinning occurs. That possibility would seem to make it *more* intrinsically valuable, not less.

150. Don Marquis, *Why Abortion is Immoral*, 86 *J. PHIL.* 183, 191 (1989).

151. Contrary to the common-sense view that every living being has an interest in its own good, many writers on abortion have asserted that pre-viable fetuses are inherently incapable of having interests (or rights), because they are not conscious and are thus incapable of having desires or preferences or of feeling pain. *See, e.g.,* RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 15–19 (1993); STEINBOCK, *supra* note 149, at 40–41. Because *Casey* treats the pre-viable fetus as a living being that has an interest in its own life, this article does not present an extended argument in defense of the common-sense view, or against the revisionist one.

152. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

not a normatively human being, it necessarily follows that its life is *drastically* less valuable than the life (and other important interests) of a human being. This belief sometimes stems from an assumption that human beings are the *only* living beings the state can have an overriding interest in protecting on account of their intrinsic worth. This premise is highly debatable: many observers would endorse intelligent mammals such as dolphins and chimpanzees as counter-examples.<sup>153</sup> It is true that a mature member of those species has far greater capabilities than a pre-viable fetus. On the other hand, no dolphin or chimpanzee can match the fetus's innate potential to develop the full capabilities of a mature human being. If we are prepared to grant great intrinsic value to members of other intelligent species, we should assign at least as much value to pre-viable fetuses.

Let us assume for argument's sake, however, that the state cannot claim an overriding interest in protecting non-human beings. So what? The pre-viable fetus cannot be classified as a *non-human* being. Whereas every other living being that is not presently a human being will *never* be a human being, the fetus's own nature impels it to *become* a human being. The fetus is *sui generis*: it is the one and only living being that is *not-yet-human* rather than *non-human*, because it is in the process of becoming human. Moreover, this process is driven by the fetus itself—its nature is to become human. It therefore seems incumbent upon us to assign *greater* value to the pre-viable fetus than we would to any non-human animal.

Thus, it is not unreasonable to assign to the life of this not-yet-human being a value that is only modestly lower than the value we assign to an already-human being (that is, one of us). Within the conceptual framework established by *Roe* and *Casey*, whether we *should* do so turns on the relative weight we assign to the “po-

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153. See, e.g., PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS 17–20 (1975); STEPHEN WISE, DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS 144–54 (2002). The legal protection of endangered species—which is not predicated on a judgment about the intelligence of each species' members—supplies additional reason to question the claim that the state may only protect the lives of human beings. Protecting endangered species often imposes great costs on human beings, and thereby demonstrates that the lives of non-human animals can in some circumstances outweigh even weighty human interests. See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 172–73 (1978) (holding that the Endangered Species Act “require[s] the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million” to ensure “the survival of a relatively small number of three-inch fish among all the countless millions of species extant”).

tential” of a human being as against his or her already-developed “capabilities.” Those who would assign a much lower value to the pre-viable fetus will argue that it lacks the capabilities that make a human being normatively human, and that those capabilities, precisely because they are what distinguishes us as human beings and persons, are worthy of much greater weight and respect.

Once we attempt to specify these capabilities, the weakness of this argument becomes apparent. Given that *Roe* and *Casey* (as well as public opinion) effectively recognize the viable fetus as a new, normatively human being,<sup>154</sup> it cannot be argued that being normatively human requires the already-developed abilities to speak, reason, or exhibit more than the most rudimentary awareness.<sup>155</sup> Unlike a newly implanted embryo, the viable fetus is fully formed, and many of its organs—such as its heart and kidneys—are functioning.<sup>156</sup> But that describes the pre-viable second-trimester fetus as well.<sup>157</sup> What distinguishes the viable fetus from fetuses earlier in the second trimester is primarily its more advanced lung and brain development.<sup>158</sup> Because there is nothing particularly “human” about our lungs—whereas consciousness, cognition, language, and emotion are seated in our ‘big brains’—it is not surprising that some defenders of the viability line have tried to turn it into a proxy for brain development.<sup>159</sup> The difficulty with this move is that the brain development that is crucial for viability is the brain’s ability to maintain homeostasis,<sup>160</sup> rather

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154. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (majority opinion); *id.* at 870 (plurality opinion); *Roe*, 410 U.S. 113, 163 (1973); Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP (Jan. 22, 2013), <http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx>.

155. Much the same could be said of full-term newborn infants, and consequently the argument made here does not turn on whether the threshold for becoming normatively human is set at viability or full term.

156. *Fetal Development Timeline*, BABYCENTER, [http://www.babycenter.com/0\\_fetal-development-timeline\\_10357636.bc](http://www.babycenter.com/0_fetal-development-timeline_10357636.bc) (last visited Apr. 3, 2015).

157. *Id.*

158. *Id.*

159. See, e.g., Rubinfeld, *supra* note 94, at 622 (arguing that at viability the fetal “brain begins to take on the cortical structure capable of higher mental functioning”). Others have proposed that the right to elective abortion should end when the fetus becomes capable of organized cortical brain activity. See DAVID BOONIN, *A DEFENSE OF ABORTION* 116–29 (2003) (arguing that, even erring on the side of caution, this capability does not occur prior to the twentieth week, and probably not before the twenty-fifth week).

160. Defined as “[t]he tendency of an organism or a cell to regulate its internal conditions, usually by a system of feedback controls, so as to stabilize health and functioning, regardless of the outside changing conditions.” *Homeostasis: Definition*, BIOLOGY-ONLINE, <http://www.biology-online.org/dictionary/Homeostasis>.

than its ability to support higher-order activities such as awareness and thought.<sup>161</sup>

Nevertheless, by the time of viability, the fetus's cerebral cortex has developed sufficiently that it may have periods of alertness and may be capable of responding to experiences such as hearing music or human voices.<sup>162</sup> Yet these capabilities, divorced from the viable fetus's potential for further development, seem less impressive than those of many wild and domestic animals.<sup>163</sup> Indeed, as Kent Greenawalt has suggested, if most children "never developed capacities beyond those that newborn babies have," and those who would not could be identified at birth, it is unlikely that we would regard them "as having the inherent worth of developed human beings."<sup>164</sup> It seems accurate to say, therefore, that when we treat the viable fetus (or, for that matter, the full-term infant) as a normatively human being, we are in fact giving much greater weight to its "potential" to further develop its rudimentary capabilities than to those capabilities as they then are. And if this is so, consistency requires us to give equally great weight to the "potential" of the pre-viable fetus, which currently lacks those rudimentary capabilities, but whose future development will confer and then gradually perfect them.

This point can be generalized: we value *every* biologically human life—whether that of a fetus, an infant, or an adult—not only for its present capabilities, but also for the continued development and future life that still lies ahead of it. At least in the cases of fetuses and young children, the lion's share of what we value is their inherent, self-directed "potential" to continue developing and live a full human life. If the fetus is aborted before viability, it will never realize its potential to become normatively human, and will have been deprived of "a future like ours."<sup>165</sup> For that reason, even assuming the validity of *Roe's* holding that the state

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161. This is demonstrated by the fact that profoundly retarded human beings can live for many years.

162. See BOONIN, *supra* note 159, at 110–11, 128 (arguing that "organized cortical brain activity" probably first occurs between twenty-five and thirty-two weeks of gestation, and almost certainly does not occur prior to twenty weeks); Note, *The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2010, 2014 (2002) (fetuses "can respond to sound from 20 weeks and discriminate between different tones from 28 weeks") (quoting Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 BRIT. J. OBSTETRICS & GYNECOLOGY 881 (1999)).

163. See PETER SINGER, PRACTICAL ETHICS 150–51 (2d ed. 1993).

164. KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 132 (1988).

165. Marquis, *supra* note 150, at 191.

cannot claim normatively human status for pre-viable fetal life,<sup>166</sup> the state should be able to assign great value to the fetus beginning at conception, and to assert an interest in protecting the pre-viable fetus that is only modestly less weighty than its interest in protecting the viable fetus or the full-term infant. It follows that the state's interest in protecting the pre-viable fetus outweighs the woman's interest in ensuring its death.

E. *The Woman Has No Right to Ensure the Death of the Pre-Viable Fetus If the State Is Prepared to Rescue It, and Recognizing Such a Right Would Place Inordinately Great Weight on Fetal Viability*

Imagine that, after the invention of AW, a new and untreatable virus infects a substantial number of pregnant women and their pre-viable fetuses. The virus normally causes no harmful symptoms to either the woman or her fetus. If, however, the woman's pregnancy is terminated in a manner that kills the fetus while it is still within her body, the virus will trigger a systemic autoimmune reaction that severely impairs her health. On the other hand, once the fetus is removed from her body intact and alive, its subsequent death will pose no danger to the woman. In this scenario, infected women who wished to terminate their pregnancies would obviously prefer that a fetus-sparing method be used. But those who also wished to ensure the deaths of their pre-viable fetuses would want them to be killed (or left to die) after the abortion, rather than gestated in an artificial womb.

Under these circumstances, few observers would deny that the woman could be compelled to surrender the still-living, pre-viable aborted fetus for attempted rescue by the state via AW.<sup>167</sup> Although the woman might suffer serious and enduring emotional distress if the fetus becomes a child, that burden is outweighed by the benefit of allowing the fetus to become a normatively human

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166. See *Roe*, 410 U.S. at 164–65.

167. See BOONIN, *supra* note 159, at 254 (rejecting, as “plainly unacceptable,” the claim that “if the baby survived an attempted abortion, or was born prematurely, before the woman had an opportunity to have the abortion performed, then she would still have the right to have it killed”). I don't doubt that there would be exceptions. After all, some intellectuals think that infanticide is morally permissible. See, e.g., Alberto Giubilini & Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?*, J. MED. ETHICS (2012), available at <http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full.pdf+html>. It is much harder to see how anyone could reasonably believe both that infanticide is impermissible and that it is permissible to kill pre-viable but rescuable fetuses.

being. And if this is true when the fetus is outside the woman's body, it should be equally true when the fetus is *inside* her body. What matters is not the fetus's location, but the fact that state intervention can enable the fetus to realize its potential via AW without imposing on the woman the burdens of pregnancy and childbirth. Accordingly, this thought experiment confirms that the state may prevent the woman (and her doctor) from killing the rescuable fetus even while it is still inside her body, so long as the state provides AW at public expense.<sup>168</sup> Notwithstanding her specially protected liberty interest, the woman is not entitled to kill the fetus when the state is able and willing to gestate it.<sup>169</sup>

It might be objected that this thought experiment is tainted by what is generally assumed to be a corollary of *Roe's* holding that the unborn are not Fourteenth Amendment persons:<sup>170</sup> that anyone born alive *is* a Fourteenth Amendment person, regardless of gestational age at birth. Intuitions about the still-living aborted fetuses in the thought experiment, the argument goes, are colored by the fact that we think of them as Fourteenth Amendment persons because they have been born alive.<sup>171</sup> Because Fourteenth Amendment personhood does not extend to the entity fetal-rescue programs seek to protect—the *unborn* (albeit rescuable) fetus—our intuitions about the treatment of non-viable *persons* (i.e., still-living aborted fetuses) are beside the point.

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168. If, on these hypothetical facts, the state were to require any woman who had an abortion to pay the costs of AW for her aborted fetus, a very different question would be presented. Those presumably very high costs would deter many women from having the only kind of abortions that would protect their health under these circumstances (fetus-sparing ones), and would thus seemingly interfere with the right to elective abortion in the same way as a ban on an abortion method that is the only safe method in some cases. See *Carhart II*, 550 U.S. 124, 166–67 (2007) (upholding federal ban on partial-birth abortion method “given the availability of other abortion procedures that are considered to be safe alternatives”).

169. I am *not* arguing that there would be consensus for the proposition that it is unjustifiable to kill the fetus after separation from the woman if it is pre-viable and AW is not available. In today's world, a pre-viable fetus that survives delivery or extraction from the woman's body will die from lack of oxygen, and may well suffer during the minutes it lives. Given these facts, some would argue that the deliberate euthanasia of these pre-viable neonates is in their best interest, provided it can be done without inflicting greater suffering on them, and others would argue that even if deliberately killing such a fetus should be unlawful, it should not be treated as homicide.

170. See *Roe*, 410 U.S. at 156–57.

171. See U.S. CONST. amend. XIV, § 1 (“All *persons* born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.”) (emphasis added).



The short answer to this objection is that very few people derive their intuitions about fetuses that survive abortions from their understandings of the Fourteenth Amendment. The intuition is more a matter of common sense: a still-living fetus that has been separated from its mother *should* be rescued if it *can* be rescued, whether or not its mother wants it to survive. What explains this intuition? A judgment that the good the state is seeking to do—rescue the fetus so that it can realize its potential to become “new human life”—clearly outweighs the harm to the woman whose desire that the fetus die will be frustrated if the rescue succeeds.<sup>172</sup>

A similar intuition arises when we consider the difference between a fetus-killing elective abortion today, and a fetus-killing elective abortion to prevent the state from rescuing the fetus via AW. Today, when a woman terminates her pregnancy before viability, the fetus will rapidly and inevitably die even if a fetus-sparing abortion method is used. Therefore, no great additional harm is done to this fetus if the abortion is performed using a method that affirmatively kills it.<sup>173</sup> Should AW be invented, however, fetuses will be rescuable months before they become developmentally viable. If a fetus is rescuable—and if the state offers to bear the costs of rescuing it—the woman *does* impose great additional harm on the fetus when she insists on using a fetus-killing abortion method. For in so doing, she eliminates what would otherwise be the fetus’s realistic chance of surviving via AW. Whereas currently the woman’s refusal to gestate the pre-viable fetus can arguably be justified on the grounds that she has no duty to rescue the fetus herself, no such justification can be offered for her refusal to allow the state to rescue the pre-viable fetus. Only if the woman has the right affirmatively to kill her pre-viable fetus is a fetus-killing abortion justifiable under these circumstances.

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172. Beyond that, the objection’s premise may well be mistaken. The Supreme Court has never defined what it means to be “born” alive for Fourteenth Amendment purposes, and the Court’s understanding of birth, like its understanding of viability, may include an implicit developmental requirement. In particular, it is far from clear that the Court would hold that a first-trimester aborted fetus which will die in a matter of minutes unless placed in an artificial womb has been “born” alive and is thus a Fourteenth Amendment person.

173. This formulation assumes that the fetus will be killed painlessly, or at any rate before it can consciously experience pain.

To recognize such a constitutional right would create a dramatic and indefensible disparity between the state's ability to protect pre-viable fetuses and its parallel ability to protect viable ones. At viability, the state may prohibit elective abortions altogether—thus imposing on the woman a duty to gestate her viable fetus, as well as to refrain from killing it. Prior to viability, the state would not only be forbidden to mandate that the woman gestate the fetus; it would be forbidden to override her insistence that the fetus be killed lest the state rescue it via AW.

This enormous disparity in treatment is unjustifiable unless the state's interest in protecting the fetus is dramatically stronger at viability. As Part III.D argued, this is not the case: the state's interest in protecting the viable fetus is only modestly greater than its interest in protecting the pre-viable one. What is more, the development of AW will significantly reduce the differences between pre-viable and viable fetuses. Currently, they differ in two respects: the pre-viable fetus is less developed, and it is exclusively dependent on the woman for its survival. Post-AW, the pre-viable fetus will still be less developed. Thanks to AW, however, the pre-viable fetus will no longer be exclusively dependent on the woman's uterus. That leaves the viable fetus's more advanced development as the *only* basis for assigning greater weight to the state's interest in protecting it. Even if more advanced development can reasonably be given significant weight, it cannot reasonably be given far greater weight than the unique potential to become normatively human with which fetuses are endowed regardless of their gestational age.

Faced with the problem of defending a viability line that has such extreme consequences, pro-choice advocates may argue that fetal-rescue programs, even if constitutional as to fetuses that are approaching viability, are unconstitutional as applied to the first trimester, when the vast majority of abortions are performed. If *Roe* were still controlling, its assertion that the state's interest in protecting fetal life "grows in substantiality as the woman approaches term"<sup>174</sup> would support this argument. But *Casey* conspicuously does not endorse *Roe*'s dictum, and the *Casey* plurality opinion is more consistent with the view that there are two critical stages in early human development—conception and viability—than with a sliding-scale approach in which the state's inter-

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174. *Roe v. Wade*, 410 U.S. 115, at 162–63 (1973).

est incrementally increases from week to week.<sup>175</sup> On that understanding, the state's interest is as weighty prior to implantation as it is shortly before viability, and fetal-rescue programs are constitutional as applied to fetuses at all stages of development.

F. *Whether the Woman's Interest Is Viewed as Avoiding Emotional Distress or Acting on Convictions About Responsible Parenting, It Is Less Weighty Than the State's Interest in the Rescuable Fetus*

In the final analysis, evaluating the constitutionality of fetal-rescue programs requires weighing the life of the rescuable fetus against the woman's emotional distress if the fetus survives via AW.<sup>176</sup> Although there is no direct way to measure the weights that should be assigned to these opposing interests, the balance struck by fetal-rescue programs is more reasonable than the balance that would be struck by a constitutional ruling invalidating them.

Women who want fetus-killing abortions will likely experience emotional distress if they must instead have fetus-sparing abortions and relinquish their fetuses to the state for attempted rescue via AW. In some cases, aversion to that emotional distress will induce women to forgo fetus-sparing abortions, travel to jurisdictions where fetus-killing abortions are legal, or obtain such abortions illegally. These consequences attest to the serious and long-lasting nature of the emotional distress some women fear they would suffer if their fetuses survive via state-provided AW.

Nevertheless, that distress is likely to be palliated by the fact that the woman can relinquish her ties to the fetus early in pregnancy, when her emotional attachment to it is comparatively weak, rather than after gestating and giving birth to it.<sup>177</sup> Avoid-

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175. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846, 869–71 (1992) (plurality opinion).

176. One might argue that the costs of rescuing the fetus include both the woman's emotional distress and the expense to the public of rescuing the fetus via AW, but by the same token the benefits include both the benefit of continued life to the fetus and the indirect benefits to the public of a new citizen should AW succeed.

177. *See generally* CHILD WELFARE INFO. GATEWAY, *supra*, note 36, at 2–3 (detailing a birth parent's grief after giving up her child for adoption). The subset of women who develop very strong emotional ties to their early-stage fetuses may also be more likely to experience guilt and regret should they have fetus-killing abortions despite the availability of AW. Put another way, some of these women may be so conflicted about their pregnancies (and their fetuses) that they would suffer significant, long-lasting emotional distress

ing this level of emotional distress is an insufficient justification for deliberately killing a living being that could survive and become a child via state-provided AW.<sup>178</sup> In balancing terms, it is unreasonable to assign less weight to the life (and future) of the fetus than to a single aspect of the woman's well-being that, while important,<sup>179</sup> lacks the life-changing quality of the postnatal raise-or-relinquish dilemma. As *Casey* suggests, carrying an unwanted child to term, giving birth to it, and then, as a birth mother, confronting the raise-or-relinquish dilemma may in many cases "shape" the woman's "destiny."<sup>180</sup> Having a fetus-sparing abortion and relinquishing the fetus to be gestated by the state seems highly unlikely to have effects of that magnitude.

But perhaps there is more to the woman's interest in ensuring the death of her pre-viable fetus than avoiding emotional distress. Several writers have suggested that women who seek to ensure the deaths of their fetuses typically do so for reasons of conscience that should carry especially great weight. For example, Leslie Cannold maintains that what she memorably describes as women's "killing from care' decisions" stem from deeply held views about what it means to be a good, responsible mother.<sup>181</sup> Along

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even if the state simply offered AW as an option.

178. Glenn Cohen argues that

[w]hile compelled unwanted gestational and legal parenthood has obvious tangible effects on an individual, compelled genetic parenthood does not when it does not carry with it any gestational or legal burdens. It may cause emotional distress, but . . . while an individual has an interest in avoiding these negative emotional effects . . . it is not at all clear that we think that interest is superordinate or of constitutional significance.

Cohen, *Rights Not to Procreate*, *supra* note 79, at 1165. Insofar as the emotional distress to which Cohen refers involves only a woman's general desire not to reproduce, his analysis may be right (although query whether the right to contraception affords some protection from that emotional distress). But insofar as it involves a woman's intense aversion to relinquishing her offspring to be nurtured and raised by others, the analysis presented in Part IV shows that this interest does have "constitutional significance" under *Casey*. The decisive question, however, is *how much* weight to assign to this interest: for the reasons given in text, I agree with Cohen that this form of emotional distress should not constitute a "superordinate" interest as against the state's interest in protecting the pre-viable fetus.

179. Although our legal tradition increasingly protects persons from the unwarranted infliction of emotional distress by others, in some contexts the law clearly assigns less weight to avoiding emotional distress than to avoiding physical or dignitary injury. For example, "The privilege of self-defense typically applies when the injury threatened consists of physical harm, inappropriate touching, or confinement," but "does not apply if the conduct in question threatens only to result in . . . distress to[] the victim." JOHN C.P. GOLDBERG, ANTHONY J. SEBOK, & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 652 (3d ed. 2012).

180. *Casey*, 505 U.S. at 852 (majority opinion).

181. See LESLIE CANNOLD, *THE ABORTION MYTH: FEMINISM, MORALITY, AND THE HARD*

similar lines, Stephen Ross suggests that many women see child-bearing as “one of the more important things [they] ever do,” and “want to do it in a responsible way; that is, only when [they] can raise [the child] in a loving, attentive, unambivalent fashion.”<sup>182</sup> For women with these values, Ross argues that abortion is “best seen . . . as the only means by which they can regain their situation antecedent to pregnancy where there simply was no child and consequently no one with whom to either succeed or fail as a parent.”<sup>183</sup> Stephen Coleman agrees, although he concedes that because “the foetus is a potential person, some special justification would appear to be necessary in order to kill it.”<sup>184</sup> Like Ross, Coleman finds this justification in the woman’s urgent need to avoid “the special relationship” the fetus will have with her after birth—a relationship that will violate her sense of what it means to be a “good parent,” whether she keeps the child or relinquishes it.<sup>185</sup>

Distinguishing genuinely idealistic beliefs about being a good mother from self-serving rationalizations is not an easy task. I will avoid that problem by focusing on women whose decisions can rightly be characterized as conscientious. We then have a conflict between the woman’s deeply held belief that her fetus should not survive the termination of her pregnancy, and the state’s contrary view that the fetus is not hers to kill, but rather a future person (and citizen) the state is entitled to rescue if it can.

Arguments that women should be allowed to kill their fetuses because they have deeply held ethical reasons for doing so frequently presuppose that the fetus has no significant intrinsic value that society may recognize and protect. Coleman, for example, asserts that “the moral status of the embryo is very nearly the same as the moral status of the gametes that produce that embryo, and that the developing human does not acquire significant intrinsic moral status until sometime well into pregnancy,” when it becomes “sentient.”<sup>186</sup> This position is flatly contradicted by *Casey*’s emphatic recognition that “there is a substantial state inter-

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CHOICES WOMEN MAKE 135 (1998).

182. Stephen L. Ross, *Abortion and the Death of the Fetus*, 11 PHIL. & PUB. AFF. 232, 241 (1982).

183. *Id.*

184. STEPHEN COLEMAN, *THE ETHICS OF ARTIFICIAL UTERUSES* 132 (2004).

185. *Id.* at 130–32.

186. *Id.* at 105, 114–15.

est in potential life throughout pregnancy.”<sup>187</sup> Precedent aside, the arguments I have presented provide strong reasons to reject Coleman’s value judgment and treat *all* fetal life as endowed with “significant intrinsic moral status.”

Some, however, might argue that even if the state may assign great intrinsic value to the fetus, the woman’s convictions should tip the balance in favor of her choice to have a fetus-killing abortion. Although *Casey* recognizes that such beliefs “may originate within the zone of conscience and belief,” it also reaffirms that abortion’s “consequences . . . for the life or potential life that is aborted” demand that states be able to “act in some degree to further their own legitimate interests in protecting prenatal life.”<sup>188</sup> The conscientious character of the woman’s beliefs helps make the case that her liberty to act on them should be specially protected, yet those beliefs are not a trump. Unlike prohibitions on elective abortion, fetal-rescue programs do not deprive the woman of “all choice in the matter”<sup>189</sup> of dealing with her unwanted pregnancy. They leave her free to terminate her pregnancy, but forbid her to choose a fetus-killing abortion that would frustrate the state’s efforts to rescue her fetus via AW. And they do so on the eminently defensible ground that the state’s interest in preserving the life and future of the fetus is weightier than the woman’s desire to “regain [her] situation antecedent to pregnancy where there simply was no child.”<sup>190</sup>

Moreover, however conscientious their beliefs, women facing unwanted pregnancies are subject to a conflict of interest that can distort their judgments about whether the gains to them from an elective abortion outweigh the harm to their pre-viable fetuses.<sup>191</sup> To be sure, there is also a real risk that the state will enact overly broad prohibitions on elective abortions because the woman, not the state, bears the antenatal and postnatal burdens of pregnan-

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187. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (plurality opinion).

188. *Id.* at 852–53 (majority opinion).

189. *Id.* at 850.

190. Ross, *supra* note 182, at 241.

191. This point is not confined to women confronting unwanted pregnancies. Devaluing the fetus serves our own self-interest (as persons whose personhood is beyond question) as well as the interests of persons we care about and identify with. *See id.* As one perspicacious defender of the permissibility of abortion has written, “We should . . . be wary of the possibility of abortion becoming an unreflective practice, like meat eating, simply because it serves the interests of those who have the power to determine whether it is practiced.” JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* viii (2002).

cy. In the context of fetal-rescue programs, however, the state's judgment is less likely to be skewed: rather than requiring the woman to bear the burdens of pregnancy and child-rearing (or child-relinquishing), the state is assuming the burdens of gestating—and finding suitable parents for—the aborted fetus. Under these circumstances, there is all the more reason to permit the state to conclude that the gains to the pre-viable fetus outweigh the harm the woman will suffer if her desire to ensure the death of the fetus is frustrated by state-provided AW.

#### IV. IMPLICATIONS FOR STATE REGULATION OF THE CREATION, DESTRUCTION, AND INDEFINITE NON-USE OF CRYOPRESERVED EMBRYOS

The preconditions for fetal-rescue programs—the availability of fetus-sparing abortions and artificial wombs at all stages of pregnancy—do not yet exist. By contrast, in vitro fertilization and cryopreserved embryos are an established feature of reproduction in the United States today.<sup>192</sup> This part applies the reasoning of Part III to state laws regulating the treatment of cryopreserved embryos.

Cryopreserved embryos are embryos that are frozen at below-zero temperatures at the pre-implantation stage.<sup>193</sup> As its name suggests, cryopreservation can preserve the embryo for long periods of time, while simultaneously preventing it from continuing to develop.<sup>194</sup> Cryopreserved embryos retain the ability (once thawed) to develop and successfully implant at roughly the same rate as fresh embryos.<sup>195</sup> It is unknown whether cryopreserved embryos eventually become unable to implant or develop, but

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192. JOHN HOPKINS MEDICINE, *Options for Women Before Treatment*, [http://www.hopkinsmedicine.org/gynecology\\_obstetrics/specialty\\_areas/fertility\\_services/fertility\\_preservation/options\\_for\\_women\\_before\\_treatment.html](http://www.hopkinsmedicine.org/gynecology_obstetrics/specialty_areas/fertility_services/fertility_preservation/options_for_women_before_treatment.html) (last visited Apr. 3, 2015).

193. GEORGIA REPRODUCTIVE SPECIALISTS, *Human Embryo Cryopreservation*, <http://www.ivf.com/cryo.html> (last visited Apr. 3, 2015).

194. Melonyce McAfee, *Ice Ice Baby: How Long Can You Keep an Embryo Frozen?*, SLATE (Jan. 16, 2007, 7:29 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2007/01/ice\\_ice\\_baby.html](http://www.slate.com/articles/news_and_politics/explainer/2007/01/ice_ice_baby.html).

195. THE ONCOFERTILITY CONSORTIUM AT NORTHWESTERN UNIVERSITY, *Chance of Pregnancy After Oocyte Cryopreservation*, <http://oncofertility.northwestern.edu/oocyte-cryo-preservation> (last visited Apr. 3, 2015).

pregnancies have been reported from embryos stored for as many as twenty years.<sup>196</sup>

It is estimated that there are now more than 600,000 cryopreserved embryos in the United States.<sup>197</sup> Disputes between biological parents over the disposition of their cryopreserved embryos have led to several state court decisions,<sup>198</sup> but there has been little, if any, litigation over state regulation of the treatment of cryopreserved embryos.<sup>199</sup> For simplicity, I will focus on a hypothetical state law that aims to rescue cryopreserved embryos under certain circumstances, and will assume that the biological parents agree about what should be done with the cryopreserved embryos they have created. The hypothetical embryo-rescue program<sup>200</sup> contains the following key provisions:

It shall be unlawful to destroy a cryopreserved embryo that is capable of resuming its development after being implanted in the womb of a gestational mother.

If the biological parents decline to pay the storage costs of continued cryopreservation, the facility where the embryos are stored must transfer custody of the embryos to the state. The state will pay the storage costs and will attempt to find a voluntary gestational mother for each embryo.

If the biological parents are paying the costs of continued cryopreservation for the embryos they created, but fail to arrange for the implantation of the embryos either in the biological mother or some other woman within twenty years after the embryos are created, custody of the embryos must be transferred to the state, which will assume the costs of continued storage and will attempt to find a willing gestational mother for each embryo.

To prevent the use of the right to elective abortion to frustrate the purposes of the embryo-rescue program, it shall be unlawful to ar-

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196. See Mara Hvistendahl, *Baby Born From 20-Year-Old Frozen Embryo*, POPULAR SCIENCE (Oct. 11, 2010), <http://www.popsoci.com/science/article/2010-10/baby-born-20-year-old-frozen-embryo>.

197. U.S. DEP'T OF HEALTH & HUM. SERVS., *Embryo Adoption*, <http://www.hss.gov/opa/about-and-initiatives/embryo-adoption/> (last visited Apr. 3, 2015).

198. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) (holding that "decisional authority rests in the gamete-providers alone . . . because no one else bears the consequences of these decisions in the way" they do).

199. See, e.g., *id.* at 590 (noting the "uniqueness of the [issue]" and the seeming absence of litigation); Jennifer Hodges, Comment, *Thursday's Child: Litigation over Possession of Cryopreserved Embryos as a Call for Legislation*, 40 SANTA CLARA L. REV. 257, 262 (1999) ("Relatively little litigation exists surrounding the IVF procedure and the disposition of cryogenically preserved embryos.").

200. In some respects, this hypothetical statute draws on Louisiana's statute regulating the disposition of cryopreserved embryos. See LA. REV. STAT. ANN. § 9:121-9:133 (2008).



range for the implantation of cryopreserved embryos with the intent to terminate the pregnancy for the purpose of destroying them.

The first question that must be answered in evaluating the constitutionality of this embryo-rescue program is whether cryopreserved embryos qualify as pre-viable fetuses. As Part III showed, *Roe* recognized the state's important interest in "potential human life" beginning at conception,<sup>201</sup> and *Casey's* description of *Roe* as "concern[ed] with postconception potential life"<sup>202</sup> reaffirms that understanding. Thus, whether cryopreserved embryos come within the ambit of the state's interest in protecting fetal life depends on whether they are frozen—and their development suspended—before conception is complete. The question of when conception is complete thus turns out to be the critical question on which the constitutional status of cryopreserved embryos turns.<sup>203</sup>

To simplify somewhat, there are two competing positions. The first, endorsed by the President's Council on Bioethics, holds that conception is complete "at syngamy when the diploid embryonic genome is constructed from the chromosomes contributed by the sperm and the egg. . . . roughly twenty-four hours after penetration of the egg by a sperm."<sup>204</sup> The second, for which some scientists and bioethicists argue, is that conception is not complete until the embryonic genome is *activated* and begins actively directing the embryo's development (a task initially performed by the fertilized egg's mitochondrial DNA and specialized enzymes contained in its cytoplasm).<sup>205</sup> This development occurs at approximately the eight-cell stage, "roughly forty-eight to seventy-two hours after insemination of the egg," when the embryo begins to grow in size (rather than simply subdividing), and when its individual cells cease to be totipotent and cell differentiation begins.<sup>206</sup> Because cryopreserved embryos are typically frozen at the four-, six-, or eight-cell stage, they would clearly qualify as "postconception" life for constitutional purposes under the syngamy definition

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201. *Roe v. Wade*, 410 U.S. 113, 150, 159 (1972).

202. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (majority opinion).

203. *See* Peters, *supra* note 18, at 199–200.

204. *Id.* at 228; *see id.* at 212.

205. *Id.* at 212–13.

206. *Id.* Some scientists believe that the activation of the embryonic genome occurs even later. *See* text accompanying note 223 *infra*.

of conception, but would fail to qualify under the genomic-activation definition.<sup>207</sup>

Although a comprehensive treatment of this issue is beyond the scope of this article, I will summarize the arguments for these competing accounts of when conception is complete, and explain why the syngamy theory seems more persuasive. In doing so, I will draw on the illuminating treatments of the topic by Robert George and Christopher Tollefsen, who argue that conception is complete “*no later than at syngamy*,”<sup>208</sup> and by Philip Peters, who argues that conception is not complete until the diploid genome is activated, which occurs (at the earliest) at the six-cell or eight-cell stage of development.<sup>209</sup> For ease of exposition, I will adopt Peters’ terminology, which treats the completion of conception as the point at which “a new human embryo” has come to be.<sup>210</sup>

The following basic facts are not in dispute. The process of conception starts when a sperm penetrates the outer wall of the ovum.<sup>211</sup> This triggers the division of the ovum’s forty-six chromosomes into two sets of twenty-three chromosomes, one of which is expelled from the ovum.<sup>212</sup> The fertilized egg—still a single cell—now contains the full complement of forty-six chromosomes (twenty-three from the sperm, twenty-three from the egg) necessary for the development of a human being.<sup>213</sup> During the initial stages of fertilization, the DNA in these chromosomes is chemically inactivated by the ovum’s mitochondrial DNA, and development is controlled by the ovum’s mitochondrial DNA and by enzymes contained in the cell’s cytoplasm.<sup>214</sup> At their direction,

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207. Peters, *supra* note 18, at 217. The status of eight-cell embryos under genomic-activation definition is not altogether clear, and might even turn on whether the embryo is in the early or late phases of the eight-cell stage. What seems clear, however, is that if only embryos with at least eight cells were deemed to be postconception life for purposes of constitutional law, IVF clinics could adjust their practices so that embryos were cryopreserved at the four- or six-cell stage. *See id.* at 200 (arguing that “laws triggered by conception should not take effect until the process of conceiving a new diploid embryo is complete,” which “occurs when the embryonic genome begins to function. . . at the eight-cell stage”).

208. EMBRYO, *supra* note 137, at 38.

209. *See* Peters, *supra* note 18, at 200.

210. *Id.* at 199–200. George and Tollefsen frame the question in terms of when “the zygote comes to be.” EMBRYO, *supra* note 137, at 38.

211. Peters, *supra* note 18, at 205.

212. *Id.* at 206, 208.

213. *Id.* at 208–09.

214. *Id.* at 207. The sperm’s mitochondrial DNA is destroyed after penetration of the egg, and plays no role in these processes. *Id.*

the cell forms two pronuclei, one containing the “paternal” chromosomes and the other containing the “maternal” chromosomes.<sup>215</sup> Each pronucleus then duplicates its chromosomes, again in response to the cell’s mitochondrial DNA and enzymes.<sup>216</sup>

After duplication is complete, the membranes of the two pronuclei dissolve, and the chromosomes migrate to the center of the cell.<sup>217</sup> Approximately twenty-four hours after fertilization, the two sets of maternal and paternal chromosomes align themselves to form two complete sets of chromosomes (syngamy).<sup>218</sup> The resulting one-celled zygote shortly thereafter undergoes “cleavage” into two cells, each of which contains a complete human genome in its nucleus.<sup>219</sup>

Peters describes the situation at this juncture as follows:

At syngamy, however, the newly assembled embryonic genome is still dormant. Activation will not occur until its nuclear DNA has been demethylated and the genes begin transcribing DNA. Many authorities believe that this occurs at about the eight-cell stage, roughly forty-eight to seventy-two hours after insemination of the egg. Others believe activation occurs much later . . . at the thirty-two to sixty-four cell stage . . . [or even at] the morula stage, roughly four to seven days after insemination when the embryo has hundreds of cells. Thus, most scientists believe that the new embryonic genome takes control of embryonic development no sooner than the six- to eight-cell stage and possibly as long as several days later.<sup>220</sup>

Given these facts, George and Tollefsen frame the issue as follows: “When is there a single biological system with a developmental trajectory, or active developmental program, toward the mature stage of a human being? That is a question for which there is, in principle, a definitive scientific answer.”<sup>221</sup> The answer, in their view, is that conception is complete “once the sperm has entered and united with the oocyte.”<sup>222</sup> The sperm breaks up except for its nucleus, which remains in the ovum; the ovum’s ex-

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215. *Id.* at 208–09. Although the “maternal” chromosomes are inherited from the mother, and the “paternal” chromosomes are inherited from the father, they are genetically distinct from each parent’s own chromosomes, due to the recombination of genes that occurs during meiosis in both sperm and egg. *See* EMBRYO, *supra* note 137, at 31–32.

216. Peters, *supra* note 18, at 209.

217. *Id.* at 210.

218. *Id.*

219. *Id.* at 210–11.

220. *Id.* at 212–13.

221. EMBRYO, *supra* note 137, at 39.

222. *Id.* at 38.

ternal membrane (the zona pellucida) hardens to prevent fertilization by another sperm; and the ovum completes its second meiotic division.<sup>223</sup> These changes, they argue, show that sperm and ovum are no longer “distinct organic parts,” each with its own “distinct identity.”<sup>224</sup>

George and Tollefson recognize, however, that it does not necessarily follow that when sperm and ovum lose their distinct identities, a new organism has come into being. Their argument, rather, is that the hardening of the zona, the lining up of the maternal and paternal chromosomes in preparation for syngamy, and the second meiotic division are evidence that “there now appears to be a distinct organism directing its own processes of growth and development.”<sup>225</sup> Accordingly, they suggest that a new human embryo comes into being even before the completion of syngamy.<sup>226</sup> But even if there is no new human embryo *prior* to the formation of the zygote, George and Tollefson maintain, the zygote unquestionably qualifies: it is genetically unique, its sex is determined, it has (two copies of) the full complement of forty-six chromosomes, and it is a totipotent cell that contains within itself all the genetic information necessary to direct its own development.<sup>227</sup>

Peters argues for a very different characterization of the embryological facts. Here is the core of his argument:

[Prior to activation of the diploid genome,] the development of the inseminated egg is not governed by either its original haploid genome or its forthcoming diploid genome. Instead, the transition is driven by materials in the cytoplasm of the egg. Thus, the period of transition is more aptly characterized as cytoplasmic than as haploid or diploid. This transitional cytoplasmic stage briefly bridges the boundary between more important haploid and diploid stages in the human life cycle.<sup>228</sup>

At bottom, this amounts to a claim that the inseminated egg—even after it becomes a zygote—although no longer a functioning haploid gamete, is not yet a functioning diploid organism.<sup>229</sup> In

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223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 38–39.

227. *Id.* at 39–41.

228. Peters, *supra* note 18, at 205.

229. *See id.*

Peters' view, there is no new human embryo until the embryonic genome begins to direct the organism's development.<sup>230</sup> Only when "the new diploid genome assumes principal governance of the embryo's development" and "takes over from the maternal enzymes that directed development during the transformation from the haploid to the diploid stages of the human life cycle" is conception complete—and only then is there a new human embryo.<sup>231</sup>

Peters' account is both factually and morally unsound. Peters treats the new diploid genome as if it *alone* is constitutive of a new human organism, to the exclusion of what he calls the "maternal mitochondrial DNA."<sup>232</sup> But although that mitochondrial DNA is ordinarily identical to the mother's mitochondrial DNA, it is misleading to call it "maternal"—as if *her* DNA were still directing the ovum's development. Putting aside mutations, which occur roughly once per 1000 generations, the mother's mitochondrial DNA is genetically identical to *her* mother's mitochondrial DNA, and so on up the matrilineal line of descent.<sup>233</sup> For that reason, it is more accurate to describe mitochondrial DNA as *matrilineal* DNA: it is neither unique to the woman whose egg has been fertilized, nor to the egg.<sup>234</sup> Both the ovum's "maternal" chromosomes and its mitochondrial DNA were *contributed* by the embryo's mother, but they are integral components of the fertilized ovum while it is becoming, and after it becomes, a zygote.<sup>235</sup> The "cytoplasm" Peters wants to treat as the basis for a third (and transitory) stage of human existence is the cytoplasm of a living cell that no longer behaves like a haploid ovum after it is penetrated by a sperm cell.<sup>236</sup> That cell behaves like a new *organism* whose mitochondrial DNA directs the assembly of its diploid genome—which will in turn direct the later stages of the organism's development.<sup>237</sup>

Nor does Peters ever explain why a functioning—in the sense of *controlling*—diploid genome should be a prerequisite to status

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230. *See id.* at 228.

231. *Id.* at 213.

232. *Id.* at 207, 213.

233. Stephen Oppenheimer, *Mitochondrial DNA: The Eve Gene*, BRADSHAW FOUND., <http://www.bradshawfoundation.com/journey/eve.html> (last visited Apr. 3, 2015).

234. *See id.* It is not a distinctive attribute belonging to the ovum's mother—it is an attribute shared by the entire line. *See id.*

235. *Id.*; Peters, *supra* note at 18, at 207.

236. *Id.* at 205.

237. *See id.* at 213.

as a new human embryo.<sup>238</sup> The maternal and paternal chromosomes do not *direct* the initial post-fertilization developments, but they certainly continue to function: they replicate themselves, they move, and they combine at syngamy.<sup>239</sup> That these actions are carried out in response to chemical signals from mitochondrial DNA which was present in the ovum before it was fertilized does not prove that no new organism exists. On the contrary, it is precisely because the sperm penetrated the ovum, thereby triggering changes that “activated” its mitochondrial DNA, that the mitochondrial DNA temporarily assumes this directive role.

Peters also overlooks the nature of the “potential” that gives rise to a profound state interest in protecting postconception, biologically human life under *Roe* and *Casey*. He argues that the fertilized ovum’s potential to become a child “seems insufficient to explain the normative role assigned to conception,” because “[a]rguably, similar potential is created whenever a sperm and ovum are placed in the same petri dish,” and yet “no one seriously argues that the selection of two gametes constitutes conception.”<sup>240</sup> This argument depends on an equivocation: when sperm and ovum are placed in the same petri dish it is likely that they will combine to form an organism that is capable of directing its own development and becoming a child.<sup>241</sup> But those who argue that the embryo’s “potential” is morally and legally significant are referring to the latter meaning (potential as the capacity for self-directed, organic development) not the former (possibility or probability).<sup>242</sup> Only *after* fertilization is the latter type of potential present.

Finally, Peters argues that “[o]nly a functioning diploid genome confers on humans the potential to develop the higher capacities that make humans morally distinct.”<sup>243</sup> This is simply false. The embryo’s assembled diploid genome already has the “potential” to direct the embryo’s development, and it will begin to exercise that

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238. Peters simply asserts that “[o]nly a functioning diploid genome confers on humans the potential to develop the higher capacities that make humans morally distinct.” *Id.* at 227. I respond to this assertion below. *See* text accompanying notes 247–48 *infra*.

239. *Id.* at 210–11.

240. *Id.* at 220.

241. *See id.*

242. *Id.*

243. *Id.* at 227.

capability when the developing zygote itself “activates” its chromosomes at (on Peters’ account) the six-cell or eight-cell stage.<sup>244</sup>

Thus, once the zygote is formed, there is a new, biologically human organism that has begun to direct its own development. As such, the zygote qualifies as a new human embryo—and as “postconception potential life”<sup>245</sup> for purposes of constitutional law. Consequently, the state has the same interest in protecting four-, six-, and eight-cell embryos that are cryopreserved by IVF clinics that it has in protecting all other pre-viable fetuses.<sup>246</sup> Under *Casey*, the state’s important interest in protecting “the life of the fetus that may become a child”<sup>247</sup> extends to the cryopreserved embryo no less than to the second-trimester fetus on the threshold of viability.

The state’s interest in protecting cryopreserved embryos obviously is advanced by a legal prohibition on destroying them. It would likewise be advanced by a requirement that the genetic parents of the embryos pay for their continued cryopreservation, and by a provision that the state will pay for their cryopreservation if the parents are unable to do so. But what about legal requirements that the cryopreserved embryos be transferred to the state for embryo adoption unless they are *implanted*, either in their genetic mother or in another woman, within a certain time? Cryopreservation prevents the fetus from achieving its potential and becoming a normatively human being, and therefore impli-

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244. *Id.* at 213.

245. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (majority opinion).

246. In *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), the Tennessee Supreme Court argued that Tennessee’s trimester-based system of abortion regulation supported an inference that “the state’s interest in the potential life embodied by these four- to eight-cell preembryos . . . at best slight,” and concluded that “the state’s interest in the potential life of these preembryos is not sufficient to justify any infringement upon the freedom of [the biological parents] to make their own decisions as to whether to allow a process to continue that may result in such a dramatic change in their lives as becoming parents.” *Id.* at 602. Although the *Davis* Court’s interest-balancing analysis was conducted in the course of interpreting the state constitution, it could easily be recast as an application of *Roe*’s suggestion that the state’s interest gradually increases throughout pregnancy. See *Roe v. Wade*, 410 U.S. 113, 150, 162–63 (1973). The plurality opinion in *Casey*, however, not only declined to endorse *Roe*’s dictum; it characterized the state’s interest in *all* postconception “potential life” as “profound,” not slight. 505 U.S. at 878 (plurality opinion). Moreover, the *Davis* court did not consider the respects in which the woman’s interest in not becoming a genetic parent is less weighty than her overall interests in an elective abortion. 842 S.W.2d at 603–04. Viewed as if it were a Fourteenth Amendment interest-balancing judgment, then, *Davis*—which was decided before *Casey*—does not survive that decision.

247. *Casey*, 505 U.S. at 846 (majority opinion).

cates the state's interest in ensuring that the fetus has the opportunity to become a child. There is, however, a complication: it could be argued that the fetus is no better off being gestated now than at some point in the indefinite future. But no one knows whether there is a time limit on the "shelf life" of cryopreserved embryos, or, if there is a limit, what it is. Indefinite cryopreservation may decrease or eliminate a given embryo's chance of becoming a child even if it is eventually implanted. By requiring that embryos be made available for third-party implantation, if the woman does not gestate them herself within a reasonable time after they are cryopreserved (e.g., twenty years), the state advances its important interest in ensuring that pre-viable fetuses realize their potential to become children.<sup>248</sup>

Let us now turn to the woman's liberty interest in deciding what will become of her cryopreserved embryos. In the abortion context, the woman's liberty overrides that of the fetus's father because she alone bears the burdens of pregnancy and childbirth.<sup>249</sup> In the cryopreserved embryo context, those burdens are not present (although the burdens of obtaining eggs for IVF are considerably greater than the burdens of obtaining sperm).<sup>250</sup> To bypass the complications that arise when one biological parent wants the embryos to be destroyed (or preserved indefinitely) and the other wants them to be gestated, I will assume that both parents agree that the embryos should not be gestated. In the abortion context, the Court has never suggested that the state would need a stronger interest to override the joint decision of both parents than it does to override the woman's unilateral decision. Accordingly, I will focus solely on the woman's liberty interest in deciding what is done with her cryopreserved embryos.

The next question is whether the woman's liberty interest in destroying or otherwise preventing the gestation of her embryos is specially protected. Technically, neither the right to use contraception nor the right to elective abortion applies to the destruc-

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248. In addition, unless the biological parents are able to pay for indefinite cryopreservation, the state will be required to do so. The state certainly has an important interest in minimizing such payments by arranging for the cryopreserved embryos to be implanted within a reasonable period of time.

249. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976).

250. The woman must first receive hormone shots, and then undergo a surgical egg-removal process that requires anesthesia. See Sandra T. Jimenez, "My Body, My Right": A Look into IVF Regulation Through the Abortion Legal Framework, 33 *WOMEN'S RTS. L. REP.* 375, 379-80 (2012).



tion of cryopreserved embryos. If the right to use contraception is the right to prevent conception—its literal meaning—it cannot apply to new, postconception life;<sup>251</sup> if the right to contraception is the right to avoid becoming *pregnant*, and thus includes methods that prevent an embryo from implanting in the woman’s uterus, it has no application to a cryopreserved embryo, which poses no risk of implantation in its current state and location.<sup>252</sup> As for the right to elective abortion, the woman’s right to terminate her pregnancy before viability has no application to the cryopreserved embryo precisely because she is not pregnant with it.

Nevertheless, it seems evident that the woman’s liberty interest in not reproducing remains specially protected even when it does not fit within the categories of contraception or abortion. *Casey*’s broad understanding of the woman’s protected liberty encompasses the full range of deeply personal decisions about whether or not to bring children into the world.<sup>253</sup> Given that the woman has a specially protected liberty interest in ensuring the death of an embryo that is about to implant in her womb—or that has already succeeded in doing so—she must also have a specially protected liberty interest in ensuring the death of her cryopreserved embryo.

How should we assess the character and weight of the woman’s liberty interest in not becoming the genetic mother of the children her embryos may become if gestated by other women? She might want to secure that interest by having the embryos destroyed (or removed from cryopreservation and allowed to die). Alternatively,

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251. The *Casey* joint opinion suggests in dictum that *Roe*’s concern with “postconception potential life” is also “likely to be implicated . . . by some forms of contraception protected independently under *Griswold* and later cases . . .” Planned Parenthood of S.E. Pa. v. *Casey*, 505 U.S. 833, 859 (1992). This dictum appears to be a veiled assertion that the right to contraception likely overlaps with the right to elective abortion prior to implantation, thereby providing an independent basis for destroying (or preventing the implantation of) pre-implantation embryos. A full treatment of this issue is beyond the scope of this article, but the joint opinion’s unexplained dictum is inconsistent with both the standard dictionary definition of “contraception” as “the intentional prevention of fertilization of the human ovum,” WEBSTER’S NEW WORLD DICTIONARY, 308 (David B. Guralnik ed., 2d College ed. 1980), and *Roe*’s acknowledgement that once a woman “carries an embryo . . . [t]he situation is inherently different from marital intimacy . . . or procreation.” *Roe*, 410 U.S. at 159. In any event, even if the dictum were to become law, the interest-balancing analysis presented in this article would appear to apply with equal force to the right to contraception once the state’s interest in protecting post-conception fetal life is present.

252. See Robertson, *supra* note 50, at 499 n.162 (“*Roe* by its terms protects a woman’s interest in terminating pregnancy. It says nothing about the right to cause the destruction of extracorporeal embryos.”).

253. See *Casey*, 505 U.S. at 859.

she might prefer that the embryos simply remain cryopreserved indefinitely, or at any rate until she herself dies. Her interest in any of these alternatives parallels a pregnant woman's interest in ensuring the death of her fetus. The common ground is the emotional burden she may suffer knowing that a child of hers is being raised by others and without her. But just as the magnitude of that emotional burden is likely to be smaller for the woman before viability than after she has given birth, it is likely to be smaller when the woman is not pregnant at all than when she is carrying a pre-viable fetus.<sup>254</sup>

Thus, the state's interest in the cryopreserved embryo is on par with its interest in the pre-viable fetus, and the woman's interest in destroying the embryo is no greater (and likely weaker) than her interest in destroying the fetus. Therefore, given Part III's conclusion that the state's interest in pre-viable fetal life outweighs the woman's interest in ensuring that her fetus does not survive via AW, it is a foregone conclusion that a state law forbidding the destruction of cryopreserved embryos is constitutional.

The harder question concerns laws requiring that cryopreserved embryos be gestated by the woman (or by someone to whom she transfers custody of the embryos) within a reasonable time, or else transferred to the state so it can search for a willing gestational mother. As already noted, the state's interest in the embryo's realizing its potential sooner rather than later seems weaker than its interest in ensuring that the embryo is not destroyed.<sup>255</sup> On the other hand, the woman's interest in blocking the gestation of her embryos decades after they were created seems more likely to diminish over time than to increase. Moreover, women who are concerned that their cryopreserved embryos may be seized by the state for gestation by a volunteer mother can either refrain from creating cryopreserved embryos, or can create no more embryos than they intend to use. In light of the uncertainty about how long cryopreserved embryos can remain capable of being gestated to term, the balance of interests favors the state on this question as well.

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254. See *supra* Part III.A.

255. See *supra* note 247–48 and accompanying text.

## CONCLUSION

In *Roe*, the principal claim made on behalf of the fetus was that it is normatively human beginning at conception.<sup>256</sup> In *Casey*, the claim that caused the plurality seriously to question *Roe*'s soundness was that, even if the fetus is not yet normatively human, its unique status and value as "potential human life"—that is, new life whose nature is to become human—should outweigh the woman's interest in an elective abortion.<sup>257</sup> Although the *Casey* plurality declined to address that claim on the merits, it unequivocally rejected the specious inference that, because the state may not treat the pre-viable fetus as a new, normatively human being, the fetus has little or no intrinsic value.<sup>258</sup> Instead, *Casey* acknowledges that the state has a "profound" interest in protecting the fetus throughout pregnancy.<sup>259</sup> Under *Casey*, therefore, the specific question this article has addressed (i.e., "Does the right to an elective abortion include a right to ensure the death of the pre-viable fetus?") turns on whether the state's profound interest in the pre-viable fetus outweighs the woman's interest in ensuring that it does not survive her elective abortion via state-provided AW.

Although *Roe* and *Casey* imply that the life of a pre-viable fetus is *less* valuable than the life of an "actual" human being (a category that may well include viable fetuses),<sup>260</sup> the critical question is "how much less valuable?" Although reasonable people will disagree, the range of reasonable disagreement is not unlimited. To treat the life of a pre-viable fetus as dramatically and disproportionately less valuable than the life of a viable fetus or an infant is outside the range of reasonable disagreement, as well as inconsistent with *Casey*.

Because of the limitations of current technology, to prohibit elective abortion means demanding both that the woman bear the heavy burdens of an unwanted pregnancy and childbirth, and that, having done so, she face the dilemma of raising or relin-

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256. See *Roe*, 410 U.S. at 150.

257. See *Casey*, 505 U.S. at 871 (plurality opinion).

258. See *id.*

259. See *id.* at 878.

260. See Rubinfeld, *supra* note 94 at 635 ("[D]espite its vocabulary of potential life, the Court in all essential respects made a determination about when the states could deem the fetus a person." (i.e., at viability)).

quishing her own newborn child. These are great sacrifices, as *Casey* correctly realized, and thus—granting the premise that the fetus is not yet normatively human—it is arguably reasonable to conclude that the woman’s interest in avoiding them outweighs the state’s interest in enabling the fetus to realize its potential to become a normatively human being.<sup>261</sup> This article has imagined, however, that it will someday become possible to terminate a pregnancy in a way that is safe for the woman, while still enabling the fetus to survive the abortion and to develop to full term in an artificial womb. If under these circumstances the state prohibits fetus-killing abortions and requires that surviving fetuses be transferred to the state for attempted rescue in an artificial womb, it will *not* be possible reasonably to conclude that the woman’s interest in a fetus-killing abortion outweighs the state’s interest in the life of the pre-viable fetus. The state will no longer be requiring the woman to make the sacrifices involved in pregnancy and childbirth; and while it will be requiring her to relinquish her offspring to the state for attempted rescue, that is a far less traumatic separation than a birth mother’s relinquishment of her newborn infant. Granted, by forbidding the woman to direct that her fetus be killed before or during the termination of her pregnancy, the state is requiring her to bear emotional burdens that can be heavy and long-lasting. But to treat these burdens as outweighing the life of the fetus that will by nature become a human being if AW succeeds is implicitly to devalue fetal life far more than *Casey* requires states to do when regulating elective abortions.

This reasoning leads ineluctably to the conclusion that states should also be free to forbid the destruction or indefinite disuse of cryopreserved embryos. Under *Casey*, the state has a “profound interest” in protecting all postconception life,<sup>262</sup> and cryopreserved embryos fall within that category. No less than the implanted fetus, the cryopreserved embryo is new life that will by nature become a normatively human being. The woman’s interest in preventing its development is, if anything, weaker than her interest in ensuring the death of her pre-viable fetus. And the very fact that cryopreserved embryos are deliberately created strengthens

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261. *Casey*, 505 U.S. at 878. *But see* Gilles, *supra* note 13 (arguing that the state’s interest in protecting the pre-viable fetus outweighs the woman’s interests in an elective abortion).

262. *Casey*, 505 U.S. at 878.

2015]

RIGHT TO ELECTIVE ABORTION

1069

the case for forbidding the woman to destroy them or prevent the state from rescuing them should the passage of time make it reasonably certain that she will never gestate them herself.