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Beyond Balancing: Rethinking the Law of Embryo Disposition

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BEYOND BALANCING: RETHINKING THE LAW OF EMBRYO DISPOSITION

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Actress Sofia Vergara became the center of a new round of conflict about the disposition of embryos created using assisted reproductive technologies (ART): the conflict about the difference that abortion jurisprudence should make to case law on ART. This Article argues that the history of abortion jurisprudence sheds light on the problems with the leading approach to embryo-disposition cases like Vergara's.

In many instances, courts first look for a clear, binding agreement and look to a balancing analysis if no such agreement exists. As this Article shows, this is not the first time that courts have applied a balancing analysis to deal with clashing rights to seek and avoid genetic parenthood. The Article explores the history of two balancing approaches that have played a pivotal role in abortion law. These approaches have led to inconsistent results and cater to the prejudices of judges who are asked to weigh the relative merits of individual parties' views on reproduction.

This Article recommends that states adopt legislation detailing the requirements of an enforceable embryo disposition similar to the Uniform Premarital and Marital Agreements Act (UPMAA). In the embryo-disposition context, states should require parties to disclose legal rights and responsibilities rather than only finances. These disclosures should cover the preservation, implantation, or destruction of the embryos and the financial and legal responsibility for any resulting child. States should enforce an embryo-disposition agreement if it is voluntary, if the parties had counsel or the opportunity to access counsel, and if the parties had a full disclosure of the constitutional and common law rights implicated by the agreement.

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INTRODUCTION

Sofia Vergara's legal troubles have revitalized interest in the law surrounding embryo disposition.[1] Vergara's ex-fiancé, Nick Loeb, brought national attention to the issue in 2015 when he filed a lawsuit to protect and bring to term, two female embryos created by Loeb and Vergara during their relationship.[2] The couple had used in vitro fertilization (IVF) in the hope of later having a child together.[3] The pair twice attempted IVF, and as is often the case, created more

1. *See, e.g.*, Leanne Aciz Stanton, *Sofia Vergara Frozen Embryo Lawsuit Filed by Ex Nick Loeb Is Dismissed by Louisiana Judge*, US WKLY. (Aug. 26, 2017), http://www.usmagazine.com/celebrity-news/news/sofia-vergaras-frozen-embryo-case-dismissed-by-louisiana-judge; Brooke Stanton, *Sofia Vergara and the Fraudulent Science of 'Pre-Embryos,'* NAT'L REV. (Sept. 5, 2017, 8:00 AM), https://www.nationalreview.com/2017/09/sofia-vergara-embryos-pre-embryos-fraudulent-science-lawsuit-nick-loeb; *Louisiana Judge Rules Sofia Vergara's Frozen Embryos Are 'Citizens of California,'* WOMEN IN THE WORLD (Aug. 30, 2017), https://womenintheworld.com/2017/08/30/sofia-vergara-picks-up-major-legal-victory-in-bitter-dispute-over-frozen-embryos.

2. Nick Loeb, Opinion, *Sofia Vergara's Ex-Fiancé: Our Frozen Embryos Have a Right to Live*, N.Y. TIMES (Apr. 29, 2015), https://www.nytimes.com/2015/04/30/opinion/sofiavergaras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html.

3. *Id.*

embryos than would be implanted at a specific time.[4] Couples like Loeb and Vergara often sign consent forms addressing disputes between patients and fertility clinics, but Loeb and Vergara had no agreement spelling out what would happen if they broke up.[5] In 2014, their relationship ended; Loeb, seeking to use the embryos, filed a lawsuit to obtain custody of two embryos called Emma and Isabella.[6]

Because of Vergara's celebrity, Loeb quickly found a national audience. He penned a *New York Times* op-ed on what he saw as "fathers' rights."[7] Notably, Loeb also connected his case to the constitutional law governing abortion.[8] He wrote, "[a] woman is entitled to bring a pregnancy to term even if the man objects. Shouldn't a man who is willing to take on all parental responsibilities be similarly entitled to bring his embryos to term even if the woman objects?"[9]

Loeb's comment reflects a larger trend in cases involving the disposition of embryos created during IVF: the increasing injection of the abortion conflict into the law and politics of assisted reproductive technologies (ART).[10] Pro-life organizations have formed groups committed to the legal defense or adoption of embryos.[11] Groups like the National Right to Life Committee (NRLC), which have previously avoided the issue, have spoken out more forcefully against those seeking to discard embryos.[12]

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4. *Id.*

5. *Id.* On the use of consent forms by couples going through IVF, see Deborah L. Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J. AM. ACAD. MATRIM. L. 57, 58–60 (2011), discussing the inherent problems that arise when clinic consent forms regarding the disposition of frozen embryos upon death or divorce of the progenitors are considered enforceable contracts.

6. Loeb, *supra* note 2.

7. *Id.*; *see also* Stanton, *supra* note 1 (referring to the controversy as "[t]he case of Emma and Isabella versus Sofia Vergara").

8. *See* Loeb, *supra* note 2 ("Does one person's desire to avoid biological parenthood . . . outweigh another's religious beliefs in the sanctity of life and desire to be a parent?").

9. *Id.*

10. *See infra* notes 11–12 and accompanying text.

11. On the work of organizations involved in embryo defense or embryo adoption, see EMBRYO ADOPTION AWARENESS CTR., https://www.embryoadoption.org (last visited Dec. 3, 2018); EMBRYO DEF., http://embryodefense.org (last visited Dec. 3, 2018); *Snowflakes Embryo Adoption Program*, NIGHTLIGHT CHRISTIAN ADOPTIONS, https://www.nightlight.org/snowflakes-embryo-adoption-donation/embryo-adoption (last visited Dec. 3, 2018).

12. *See, e.g.*, Marilyn Synek, *A Person Is a Person No Matter How Small (or Frozen)*, NAT'L RIGHT TO LIFE NEWS TODAY (Jan. 8, 2015), http://www.nationalrighttolifenews.org/news/2015/01/a-person-is-a-person-no-matter-how-small-or-frozen (describing Synek's personal connection to the frozen embryo issue). *But see* Rebecca Taylor, *What Is the Pro-*

This Article argues that the history of abortion doctrine sheds light on the problems with the leading approach to embryo-disposition cases like Vergara and Loeb's. In many instances, courts first look for a clear, binding agreement between the parties and resort to a balancing analysis if no such agreement exists.[13] As this Article shows, this is not the first time that courts have applied a balancing analysis to deal with clashing rights to seek and avoid genetic parenthood. This Article explores the history of two balancing approaches that played a pivotal role in abortion law. First, in the late 1980s and early 1990s, pro-lifers, convinced that *Roe v. Wade*[14] would soon be overruled, stressed the need for courts to balance a woman's reasons for seeking an abortion against a man's interest in becoming a father.[15] Second, in the aftermath of the Court's decision in *Whole Woman's Health v. Hellerstedt*,[16] the lower courts adopted a balancing approach when determining whether regulations unduly burden women's rights to choose abortion.[17]

The historical application of these balancing tests illuminates serious problems attached to the balancing of competing interests in the context of ART. First, these tests have led to inconsistent results. Second, they cater to the prejudices of judges who are asked to weigh

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Life Catholic View of Human Embryo Adoption?, LIFENEWS.COM (June 29, 2011, 12:22 PM), http://www.lifenews.com/2011/06/29/what-is-the-pro-life-catholic-view-of-human-embryo-adoption (discussing differing opinions among Catholic pro-life supporters about the morality of embryo adoption).

13. Many courts follow this approach. *See, e.g.*, *In re* Marriage of Rooks, No. 15CA0990, 2016 WL 6123561, at *4–6 (Colo. App. Oct. 20, 2016) (ruling that the couple's embryo storage contract required the court to balance the parties' competing interests and in so doing award the embryos to the husband), *cert. granted*, No. 16SC906, 2017 WL 1377942 (Colo. Apr. 17, 2017); Kass v. Kass, 696 N.E.2d 174, 179–82 (N.Y. 1998) (upholding the parties' agreement signed prior to embryo storage stipulating that, in the event of divorce, pre-embryos would be donated to the IVF program); *In re* Marriage of Dahl, 194 P.3d 834, 840–42 (Or. Ct. App. 2008) (ruling in favor of the wife because the couple's prior agreement had designated the wife as the decision maker); Davis v. Davis, 842 S.W.2d 588, 598–605 (Tenn. 1992) (holding that, in the absence of an agreement, the husband's interest in avoiding procreation weighed more heavily than the wife's interest in wanting to donate embryos to another couple); Roman v. Roman, 193 S.W.3d 40, 48–55 (Tex. App. 2006) (enforcing the couple's written agreement to discard the embryos following divorce if the parties are unable to agree on the disposition of the remaining embryos).

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

15. *See infra* Section II.A (discussing the pro-life movement's promotion of a balancing analysis as a strategy for overruling *Roe v. Wade*).

16. 136 S. Ct. 2292 (2016).

17. *See infra* Section II.B (discussing abortion rights activists' insistence on an undue burden balancing test that has led to inconsistent outcomes).

the relative merits of individual parties' views on reproduction. As long as a balancing approach applies to embryo disputes, couples will be exposed to humiliating, open-court discussions of their private lives and judicial evaluation of the merits of their opinions on parenthood.[18] Those using ART will also lack badly needed guidance about what will happen in the event of a dispute.

Courts gravitate toward balancing tests largely because of problems with any potential contract between the parties or the absence of any agreement whatsoever.[19] But, instead of abandoning a contract approach, lawmakers should do more to ensure that couples' agreements on embryo disposition are meaningful and informed. This Article recommends that states adopt legislation detailing the requirements of an enforceable embryo disposition agreement similar to the Uniform Premarital and Marital Agreements Act (UPMAA).[20] The parallels between prenuptial agreements and embryo-disposition agreements are significant. The law on embryo-disposition contracts should reflect both the similarities and differences between the two types of bargain. In the embryo-disposition context, states should require parties to disclose legal rights and responsibilities, rather than only finances. These disclosures should cover the preservation, implantation, and destruction of the embryos and the financial and legal responsibility for any resulting child. Concerns about substantive unconscionability, most of which touch on financial unfairness to one party in the prenuptial context,[21] are out of place when it comes to the disposition of embryos. Indeed, asking the courts to weigh in on substantive unconscionability could create the same problems as balancing tests by inviting judges to dissect the parties' motives and personal lives.[22] States

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18. *See, e.g.*, *In re* Marriage of Rooks, 2016 WL 6123561, at *6–9 (upholding the trial court's finding that the wife's desire to have a fourth child did not outweigh the husband's desire not to father additional children with her and thus experience the moral and social obligation that would accompany another biological child); *Davis*, 842 S.W.2d at 603–04 (holding that the husband's desire to avoid additional financial responsibilities and his opposition to fathering a child that would have to live in a single-parent setting weighed more heavily than the wife's interest in wanting to donate embryos to another couple).

19. *See* Forman, *supra* note 5, at 61–62 (describing the *Davis* balancing test as "a last resort").

20. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT 2 (UNIF. LAW COMM'N 2012) http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf.

21. Ian Smith, *The Law and Economics of Marriage Contracts*, 17 J. ECON. SURVS. 201, 215 (2003).

22. *See supra* note 18 and accompanying text.

should determine that an embryo-disposition agreement is enforceable if it is voluntary, if the parties had counsel or had the opportunity to access counsel, and if the parties had a full disclosure of the constitutional and common-law rights implicated by the agreement.

This Article proceeds in four parts. Part I canvasses the current law on embryo disposition, focusing on legal and political trends in recent years that have knit ART and abortion law more closely together. Part II puts these doctrinal developments in historical context, by studying past efforts to use balancing to resolve rights to seek and avoid parenthood. These cases provide a fascinating parallel to contemporary embryo-disposition suits: at the time, when many believed that the Supreme Court would overrule *Roe* very soon, courts could freely balance competing values and commitments to procreation.[23] As Part II shows, "fathers' rights" litigation offered courts several reasons for avoiding a balancing analyses that reach beyond abortion case law.[24] Part III begins to develop an alternative approach by studying the similarities between prenuptial and embryo-disposition agreements.[25] Part III then proposes and defends a model approach.[26]

I. THE NEW LAW OF EMBRYO DISPOSITION

Embryo disposition has become one of the most widely-discussed issues involving reproductive health. Cases like Vergara's frequently make front-page news.[27] In recent years, organizations like Embryo Defense have formed to fund litigation and public education on the rights some assign to pre-embryos created during IVF.[28] Other

23. *See infra* Section II.A.

24. *See infra* notes 177–183, 208–216 and accompanying text.

25. *See infra* Section III.A.

26. *See infra* Section III.B.1.

27. *See supra* note 1 and accompanying text; *see also* Laurie J. Pawlitza, *Battle over Embryo Highlights Family Law's New Fertility Frontier*, FIN. POST (Sept. 5, 2018, 5:00 AM), https://business.financialpost.com/personal-finance/battle-over-embryo-highlights-family-laws-new-fertility-frontier (examining a dispute arising in Canada over embryos purchased from Georgia with no biological relation to either spouse); Julia Marsh, *Woman Must Turn over Embryo for Estranged Hubby to Destroy: Judges*, N.Y. POST (June 5, 2018, 7:34 PM), https://nypost.com/2018/06/05/woman-must-turn-over-embryo-for-estranged-hubby-to-destroy-judges (noting that the judge's decision was based on the contract that the couple had signed that "allowed either party to revoke their consent to use the embryo at any time").

28. *See* EMBRYO DEF., *supra* note 11 (featuring "resource[s] for all parents, advocates, lawyers, and anybody interested in saving frozen embryos").

organizations have specialized in embryo adoption.[29] The Snowflakes Embryo Adoption Program, founded in 1998, facilitated the first embryo adoption[30] and more recently, the United States Department of Health and Human Services' Office of Population Affairs has provided grants to increase awareness of embryo adoption as an option.[31]

From the outset, the relationship between embryo disposition and abortion was complex. In the mid-1980s, when the Vatican took a strong stand against IVF and other assisted reproductive technologies, most anti-abortion and social-conservative groups stayed on the sidelines.[32] While never focusing on IVF, pro-life groups have consistently opposed selective reduction,[33] a procedure in which a doctor implants more embryos than are expected to be born and then aborts some fetuses to maximize the chances that others will come to term.[34] Abortion opponents and some disability-rights groups have also opposed prenatal genetic diagnosis involved in ART, believing that it leads families to end pregnancies.[35] While judges have created

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29. *See* EMBRYO ADOPTION AWARENESS CTR., *supra* note 11 (promoting embryo adoption as a "proven successful process allowing families with remaining embryos to donate them to another family desiring to experience pregnancy and childbirth"); NIGHTLIGHT CHRISTIAN ADOPTIONS, *supra* note 11 (assisting adoptive families to "use . . . donated embryos to achieve a pregnancy and give birth to their adopted child").

30. *Why Choose Snowflakes?*, NIGHTLIGHT CHRISTIAN ADOPTIONS, https://www.nightlight.org/snowflakes-embryo-adoption-donation/embryo-adoption/why-choose-snowflakes (last visited Dec. 3, 2018).

31. *Embryo Adoption*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/opa/about-opa/embryo-adoption (last visited Dec. 3, 2018).

32. *See, e.g.*, Robin Toner, *The Vatican's Doctrine: Political Impact; Contrast to Abortion Is Discerned*, N.Y. TIMES (Mar. 12, 1987), https://www.nytimes.com/1987/03/ 12/us/the-vatican-s-doctrine-political-impact-contrast-to-abortion-issue-is-discerned.html (observing that the complex ethical questions posed by ART precluded the emergence of a powerful consensus on the right akin to that witnessed during the abortion debate).

33. *See, e.g.*, Liza Mundy, *Too Much to Carry?*, WASH. POST (May 20, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051501730.html (arguing against the termination of any life following conception unless the mother's life is at risk); Alan L. Otten, *Technological Advances in the Science of Birth Alter the Setting of High Court's Abortion Ruling*, WALL ST. J., June 28, 1989, at A16 (noting ART's dilemma causing potential to both create a baby and encourage the abortion of fetuses in order to promote the long-term viability of others).

34. *See* Stacey Pinchuk, *A Difficult Choice in a Different Voice: Multiple Births, Selective Reduction and Abortion*, 7 DUKE J. GENDER L. & POL'Y 29, 30–31 (2000) (describing the medical procedures involved in selective reductions).

35. *See, e.g.*, Kim Painter, *How Much Do You Want to Know? Doctors Have Prenatal Tests for 450 Genetic Diseases*, USA TODAY, Aug. 15, 1997, at A1 (citing opponents' view that "testing itself is not the problem," but rather what is often done based on the test results).

rules that apply only to assisted reproduction, abortion law still casts a shadow over ART jurisprudence.[36]

Courts could choose to apply abortion doctrine to resolve ART disputes, as Professor Judith Daar has recommended.[37] In fact, on some matters, abortion doctrine has strongly influenced embryo-disposition cases. For example, abortion jurisprudence encouraged courts to view an embryo as neither a person nor a piece of property.[38] For the most part, however, courts have used ART cases as an opportunity to rethink the rights at stake in assisted reproduction and to create a better approach to clashing views about parenthood.[39]

Courts have created three main approaches to embryo-disposition cases: a balancing analysis[40]; a contract-based approach;[41] and the mutual, contemporaneous agreement approach.[42] This Part surveys each of these approaches and the arguments often used for and against them. This survey shows that notwithstanding criticisms of a balancing analysis, courts continue to adopt similar approaches because the

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36. *See, e.g.*, Mary Ziegler, *Abortion and the Constitutional Right (Not) to Procreate*, 48 U. RICH. L. REV. 1263, 1263–64 (2014) (warning that, although "abortion case law may provide the strongest constitutional foundation for [those] seeking rights to access ART or avoid unwanted parenthood[,] . . . abortion jurisprudence carries normative and political baggage").

37. *See generally* Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 458–69 (1999) (disputing court rulings that embryo disposition does not implicate women's constitutional right to privacy or bodily integrity in the context of reproductive choice and applying the abortion rights framework to pre-embryos).

38. *See, e.g.*, *In re* Marriage of Witten, 672 N.W.2d 768, 774–76 (Iowa 2003) (observing that "the factors that are relevant in determining the custody of children in dissolution cases are simply not useful" in the ART context); McQueen v. Gadberry, 507 S.W.3d 127, 141–49 (Mo. Ct. App. 2016) (classifying pre-embryos as "marital property of a *special character*"); Davis v. Davis, 842 S.W.2d 588, 594–97 (Tenn. 1992) (concluding that pre-embryos "occupy an interim category that entitles them to special respect because of their potential for human life").

39. *See supra* note 13 and accompanying text.

40. *See, e.g.*, *In re* Marriage of Rooks, No. 15CA0990, 2016 WL 6123561, at *6 (Colo. App. Oct. 20, 2016) (ruling that the couple's embryo-disposition agreement required the court to balance the parties' competing interests); *Davis*, 842 S.W.2d at 604 (using a balancing approach where spouses had not agreed on disposition of embryos in the event of divorce).

41. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 179–80 (N.Y. 1998) (looking to the parties' agreement to determine the disposition of disputed embryos).

42. *See, e.g.*, *In re Marriage of Witten*, 672 N.W.2d at 783 (holding that in the absence of mutual, contemporaneous consent, embryos are to remain in storage with the party opposing destruction paying storage fees).

parties lack a convincing contract and because the gravity of the interests involved, both constitutional and otherwise.

A. Davis *and the Balancing Approach*

Davis v. Davis,[43] the foundational case articulating a balancing approach, stemmed from the divorce of Mary Sue and Junior Davis.[44] The Davises previously pursued IVF after struggling to get pregnant.[45] Optimistic about the outcome, Mary Sue and Junior did not discuss or agree on the disposition of excess pre-embryos.[46] After one attempt at implantation failed, Junior filed for divorce,[47] and Mary Sue requested custody of the pre-embryos.[48] The trial court found that the pre-embryos were children and awarded custody to Mary Sue.[49] The Tennessee Court of Appeals reversed, holding that abortion doctrine—particularly the holding in *Roe* that a fetus was not a person—contradicted the trial court's ruling.[50] Mary Sue appealed this decision to the Tennessee Supreme Court.[51]

But what is a pre-embryo? To answer this question, the court first examined state and federal law and found little support for the idea that an embryo was a person.[52] However, the Tennessee Supreme Court also found it unconvincing to describe an embryo as property.[53] Relying on ethical guidance from the American Fertility Society, the court identified a middle-ground position: an embryo deserves special respect because of its "potential to become a person," but it should not be treated the same as an actual person.[54] In resolving embryo-disposition cases, the court articulated a preference for relying on contracts

43. 842 S.W.2d 588 (Tenn. 1992).
44. *Id.* at 592.
45. *Id.* at 591.
46. *Id.* at 592.
47. *Id.*
48. *Id.* at 589.
49. *Id.*
50. *See* Davis v. Davis, No. 180, 1990 WL 130807, at *2–3 (Tenn. Ct. App. Sept. 13, 1990) (examining Tennessee statutes that incorporate the *Roe* trimester framework); *see also Davis*, 842 S.W.2d at 594–95.
51. *See Davis*, 842 S.W.2d at 589–90.
52. *See id.* at 594–95 (affirming the Court of Appeals's finding that pre-embryos are not protected as persons under state or federal law).
53. *See id.* at 595–97.
54. *Id.* at 596 (quoting Ethics Comm. Am. Fertility Soc'y, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY & STERILITY S1, S35 (Supp. 2 June 1990)).

between the parties.[55] This preference reflected "the proposition that the progenitors, having provided the gametic material giving rise to the pre-embryos, retain decision making authority as to their disposition."[56]

But there was no clear agreement between Junior and Mary Sue, and the court refused to read the couple's very willingness to do IVF as an implied contract.[57] The court instead concluded that it had no choice but to balance the parties' interests in seeking or avoiding procreation.[58] Citing cases on contraception, abortion, and parental rights and responsibilities, the court concluded that "the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[59] In the IVF context, the rights at issue differ from those that apply in the abortion context.[60] In abortion jurisprudence, because only women (and trans-men) can become pregnant, concerns about women's bodily integrity justified more decision-making authority.[61] No similar physical limitations governed IVF.[62] In the context of ART, as the court in *Davis* reasoned, a court should look closely at each party's reasons for seeking and avoiding genetic parenthood.[63]

The court then applied this approach to the facts of *Davis*. Having grown up in a home for abandoned children, Junior strongly opposed raising a child in a home with only one parent.[64] On the other hand, Mary Sue wanted to donate the embryos to another couple to ensure that the difficulties she had endured during the IVF process were not in vain.[65] The *Davis* court reasoned that Junior's interest in avoiding parenthood outweighed Mary Sue's desire to give the embryos to an

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55. *See id.* at 597 ("We believe, as a starting point, that an agreement regarding disposition of any untransferred pre-embryos in the event of contingencies . . . should be presumed valid and should be enforced as between the progenitors.").

56. *Id.*

57. *Id.* at 598.

58. *See id.* at 603 ("One way of resolving these disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions.").

59. *Id.* at 601 (citing Prince v. Massachusetts, 321 U.S. 158 (1944); Roe v. Wade, 410 U.S. 113 (1973)).

60. *See id.* (noting the "inherent tension" between the two rights in the IVF context).

61. *See id.* (emphasizing that such concerns "precluded men from controlling abortion decisions").

62. *See id.* (viewing Mary Sue and Junior as "entirely equivalent gamete-providers" in the embryo-disposition analysis).

63. *Id.* at 602–03.

64. *Id.* at 604.

65. *Id.*

infertile couple.[66] Had Mary Sue wished to use the embryos herself, the *Davis* court would have allowed her to do so over Junior's objection only if doing so was her only way to become a parent.[67] Since Mary Sue could adopt, the court reasoned that her interest in seeking reproduction was less significant than Junior's interest in avoiding it.[68]

The *Davis* court, in some ways, seemed to reach a satisfactory outcome. Since few couples entered into meaningful written agreements before availing themselves of IVF, a balancing analysis seemed to be an important safety net in embryo disputes. Moreover, since both the right to procreate and to avoid procreation were arguably at stake in IVF cases, a balancing approach allowed courts to give each interest proper respect all the while paying attention to the specifics of each claimant's circumstances.[69] Indeed, *Davis*'s approach did attract adherents, as illustrated by the New York Court of Appeals's decision in *Kass v. Kass*.[70]

B. Kass *and the Contract-Based Approach*

While *Davis* praised a contract-based approach, *Kass* became the first to apply it.[71] *Kass* also involved a married couple who had struggled to conceive.[72] Maureen and Steve Kass enrolled in an IVF program at John T. Mather Memorial Hospital.[73] To participate in the program, the couple had to sign four forms.[74] In an addendum to one form, the two elected to have the excess eggs inseminated and cryopreserved for possible future use by the couple.[75] Maureen and Steve completed an additional consent form discussing what would happen in the event of the couple's death or "other unforeseen circumstances," and decided to allow the IVF program to use the remaining embryos for research.[76] The Kasses tried IVF using Maureen's sister as a surrogate, but the procedure

66. *Id.*
67. *Id.*
68. *Id.*
69. *See supra* note 18 and accompanying text.
70. 696 N.E.2d 174 (N.Y. 1998).
71. *See* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 72–73 (1999) (acknowledging that *Kass* is the only other decision from a state's high court to address the issue of pre-embryo disposition).
72. *Kass*, 696 N.E.2d at 175.
73. *Id.*
74. *Id.* at 176.
75. *Id.*
76. *Id.* at 176–77.

failed, and the two subsequently filed for divorce.[77] Maureen sought sole custody of the embryos, which she planned to have implanted.[78]

The trial court looked to abortion jurisprudence to evaluate the Kasses' dispute.[79] The court reasoned that just as a pregnant woman had sole decision-making authority in the context of ending a pregnancy, an infertile woman should determine what happened to fertilized embryos.[80] A divided Appellate Division reversed.[81] The New York Court of Appeals reiterated the value of written contracts in embryo-disposition matters.[82] The court explained that prior written agreements "both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision."[83]

The court then set out an approach to the interpretation of embryo-disposition contracts: judges should discern the parties' "overall intention" and then construe a contract accordingly.[84] Notwithstanding some ambiguity in the contract, the court concluded that its overall intent was for the parties to make a joint decision about the disposition of the embryos and to make the embryos available for research in the event of divorce, as well as the specifically enumerated "unforeseen circumstances."[85]

The *Kass* approach appealed to many courts tackling embryo disposition as a matter of first impression.[86] It seemed intuitively right to allow the parties to reach their own decision about embryo disposition rather than asking the court to balance the competing

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77. *Id.* at 177.

78. *Id.*

79. *See* Kass v. Kass, No. 95-02615, 1995 WL 110368, at *1–3 (N.Y. Sup. Ct. Jan. 18, 1995).

80. *See id.* at *3 (asserting that conception by IVF does not give rise to new rights on behalf of the father and therefore making the wife's interest paramount).

81. Kass v. Kass, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997).

82. *See Kass*, 696 N.E.2d at 180 (citing Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)) ("Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them . . . .").

83. *Id.*

84. *Id.* at 181.

85. *See id.* (reviewing the multiple consent forms signed by the couple as a whole).

86. *See, e.g.*, *In re* Marriage of Dahl, 194 P.3d 834, 840–41 (Or. Ct. App. 2008) (adopting the *Davis* and *Kass* framework of enforcing the intent of the progenitors' advance agreement); Litowitz v. Litowitz, 48 P.3d 261, 270–71 (Wash. 2002) (en banc) (bypassing the issue of whether the pre-embryos were "children" and basing its decision "solely upon the contractual rights of the parties under the pre-embryo cryopreservation contract").

interests and reach an outcome.[87] Many couples entered into an agreement with fertility clinics before beginning IVF, and these documents provided some guidance for judges.[88] Still, due to the dissatisfaction with *Kass*, other courts continued to search for an alternative approach.[89]

C. Witten *and Mutual, Contemporaneous Consent*

The Iowa Supreme Court's decision in *In re Marriage of Witten*[90] reflects discontent with the contract-centered approaches articulated in both *Davis* and *Kass*.[91] Trip and Tamera Witten had unsuccessfully tried to procreate using IVF, and after Trip filed for divorce, Tamara sought custody of the embryos.[92] The Wittens had executed an agreement with the University of Nebraska Medical Center, which provided that the embryos would not be released for use without the consent of both parties.[93] The only exception covered the death of Trip and/or Tamara.[94] The trial court relied on this agreement in determining what should happen to the embryos, and held that neither side could transfer or otherwise dispose of the embryos without the other's written consent.[95] The Iowa Supreme Court rejected this approach.[96]

The court concluded that the parties' agreement was broad enough to cover the parties' divorce,[97] but avoided the contract-based approach

87. *See Kass*, 696 N.E.2d at 180 ("To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.").

88. Forman, *supra* note 5, at 58–59 (noting that it is common practice for IVF clinics to require consent forms and the initial determination of courts to view them as binding).

89. *See, e.g.*, Coleman, *supra* note 71, at 88–89 (criticizing the *Kass* contract approach for failing to take into account the "contemporaneous wishes, values, and beliefs" of the parties).

90. 672 N.W.2d 768 (Iowa 2003).

91. *See id.* at 781–82 (finding that it was against public policy "to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos").

92. *Id.* at 772.

93. *Id.*

94. *Id.*

95. *See id.* at 773.

96. *See id.* at 783 (rejecting the contract approach but affirming the trial court's ruling that the embryos could not be used or transferred without the consent of both parties).

97. *Id.* at 773 (noting that the agreement did not expressly address disposition upon divorce but finding that it was encompassed by the general provision "release of embryos").

for policy reasons.[98] Given the importance of reproductive decisions, the court reasoned that individuals had the right to make decisions that align with their present-day values.[99] Further, the court stated that individuals would perform particularly poorly when predicting their decisions about major, distant events like parenthood.[100] The *Witten* court also criticized a pure balancing test and suggested that, in applying such a test, courts would too often substitute their views for those of the parties.[101]

As an alternative, the court adopted a mutual, contemporaneous consent approach. Under this approach, no embryo will be used, destroyed, or donated without the consent of both parties who created the embryo.[102] If the couple could not reach an agreement, the status quo of preservation would prevail regardless of any prior agreement.[103]

In *Witten*, the court prioritized the parties' present-day desire (or lack thereof) to seek out parenthood. In principle, allowing parties to avoid unwanted parenthood is just and sensible, and mutual, contemporaneous consent provides a mechanism whereby parties can resolve embryo disputes amongst themselves.[104] In practice, as a dispute resolution mechanism, mutual, contemporaneous consent seems far less than pragmatic. By the time the parties have dug in and embraced litigation, it is quite unlikely that anyone will reach a present-day consensus. Partly for this reason, balancing analyses have become increasingly significant.

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98. *Id.* at 780–82.

99. *See id.* at 783 (concluding that one party can withdraw from a prior agreement after clearly expressing to the other party that "the agreement no longer reflects his or her current values or wishes").

100. *See id.* at 778 ("One's erroneous prediction of how she or he will feel about the matter at some point in the future can have grave repercussions.").

101. *See id.* at 779 (arguing that the same policy concerns precluding the enforcement of contracts against progenitors who have changed their minds also support the position that judges should not substitute their own decisions for that of the progenitors).

102. *See id.* at 782–83 (recognizing that a prior agreement can still serve as guidance for the parties until a party declares an objection to the agreement).

103. *Id.* at 783.

104. *See id.* at 783 (providing that the embryos will not be transferred, released, disposed of, or used without signed consent from both parties and that, if the parties cannot reach an agreement, the embryos will be preserved indefinitely, with the party opposing disposition bearing the costs).

D. The Prominence of Balancing

Most courts that have heard embryo-disposition disputes have adopted a version of the *Davis* and *Kass* approaches, applying a valid contract if possible and balancing the parties' interests if no viable agreement was in place.[105] Notwithstanding a stated preference for a contract-based approach, many states have had to turn to a balancing test.[106] When an agreement does exist, courts have hesitated to bind parties to them, especially since many of the forms do not specifically contemplate divorce.[107] Given potential problems with clinic-consent forms, the frequency of balancing might not seem to be a bad thing. The informed consent documents that parties sign at clinics are often long and complex, combining medical and legal matters.[108] Research suggests that couples frequently change their minds after starting

105. *See, e.g.*, Kass v. Kass, 696 N.E.2d 174, 177–78, 181 (N.Y. 1998) (recognizing the *Davis* balancing approach but enforcing the intent of the parties found in the contract agreement); *In re* Marriage of Dahl, 194 P.3d 834, 840–41 (Or. Ct. App. 2008) (adopting the *Davis* and *Kass* framework resulting in the enforcement of the progenitors advance agreement); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (noting that a "prior agreement concerning disposition should be carried out," but in the absence of an agreement, "the relative interests of the parties . . . must be weighed"); Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006) (enforcing the voluntary contractual agreement that explicitly dealt with the issue of disposition upon divorce).

106. *See, e.g.*, *In re* Marriage of Rooks, No. 15CA0990, 2016 WL 6123561, at *4–5 (Colo. App. Oct. 20, 2016) (applying the balancing approach after finding that the written agreement expressly left the determination of disposition to the court); Szafranski v. Dunston, 34 N.E.3d 1132, 1161–63 (Ill. App. Ct. 2015) (holding that advance agreements are enforceable but adopting a balancing approach in the absence of such agreement); J.B. v. M.B., 783 A.2d 707, 714–15, 719–20 (N.J. 2001) (finding that the written agreement did not contemplate divorce and resorting to a balancing test to determine disposition); Reber v. Reiss, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012) (adopting the balancing approach after determining that the disposition agreement was not enforceable due to the parties' lack of signature on the agreement); Litowitz v. Litowitz, 10 P.3d 1086, 1091–93 (Wash. Ct. App. 2000) (declining to read an implied willingness to continue with procreation upon divorce into the contract and implementing a balancing test to determine disposition), *rev'd*, 48 P.3d 261 (Wash. 2002).

107. *See, e.g.*, *Szafranski*, 34 N.E.3d at 1154–55 (finding that an informed consent form did not serve as an advanced agreement modifying the parties' oral contract); *J.B.*, 783 A.2d at 714–15 (determining that the contract did not specifically address disposition upon divorce, but rather left it to the court's determination); *Reber*, 42 A.3d at 1136 (refusing to enforce the agreement because it was not signed by the parties).

108. *See* Forman, *supra* note 5, at 69 (commenting that the large amount of information on consent forms can hinder decision-making).

treatment.[109] The circumstances surrounding the signing of an informed consent form suggest that at least some couples sign papers without even reading the contracts.[110]

Mutual, contemporaneous consent, while attractive in theory, almost inevitably favors the party who is happy with the status quo. Some couples will certainly be able to agree on the disposition of embryos after splitting up. But for many, there will never be any mutual, contemporaneous consent. In these scenarios, parties avoiding procreation will systematically do better than those seeking procreation.[111] While this may be a desirable result, the mutual, contemporaneous consent approach does not force courts to grapple with whether one of the two related procreative rights should outweigh the other.[112]

Is a balancing test the lesser of all evils? Part II addresses this question by studying the history of a similar balancing approach in the abortion context. Part II first examines pro-life efforts to convince the courts to adopt a balancing test when biological fathers and mothers disagree about abortion.[113] Then Part II explores the application of a more recent, but less closely related, balancing approach authorized by *Whole Woman's Health*.[114] This history suggests that a balancing approach to ART is far more problematic than we might have imagined.

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109. *See, e.g.*, Susan L. Crockin, *The "Embryo" Wars: At the Epicenter of Science, Law, Religion, and Politics*, 39 FAM. L.Q. 599, 615–16 (2005) (citing a 2003 study finding that seventy-one percent of patients contacted at least three years after freezing their embryos changed their initial dispositional choice). Research also suggested that fifty to seventy-five percent of patients who initially express a desire to donate excess embryos do not ultimately choose to do so. *Id.*; *see also* Susan C. Klock et al., *The Disposition of Unused Frozen Embryos*, 345 NEW ENG. J. MED. 69, 69 (2001) (explaining that, in a study at the IVF clinic at Northwestern University School of Medicine, seventy-one percent of couples changed their disposition choice after three months); C.R. Newton et al., *Changes in Patient Preferences in the Disposal of Cryopreserved Embryos*, 22 HUM. REPROD. 3124, 3124 (2007) ("[A] willingness to donate embryos for research purposes declined once couples had ended their participation in IVF compared with attitudes before treatment.").

110. *See* Forman, *supra* note 5, at 75–76 (explaining that, while no empirical study exists, evidence from adjudicated cases indicates that it is not uncommon for at least one party to fail to review the documents before signing).

111. *Davis*, 842 S.W.2d at 604 ("Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre[-]embryos in question.").

112. *In re* Marriage of Witten, 672 N.W.2d 768, 778 (Iowa 2003) (explaining the contemporaneous mutual consent framework in which disagreement between progenitors results in maintaining the "status quo" rather than judicial intervention).

113. *See infra* Section II.A.

114. *See infra* Section II.B.

II. THE PROBLEMS WITH BALANCING

Both pro-life and abortion-rights activists have relied on balancing analyses in the past.[115] This Part explores cases that illuminate the problems with adopting a similar approach in the context of ART. First, this Part explores how both pro-life and pro-choice activists have relied on balancing analyses in the past.[116] Pro-life activists urged courts to use a balancing test when a potential father objected to an abortion.[117] Pro-choice activists pitted a woman's rights to choose against a man's right to parent and urged courts to balance each potential parent's interest in seeking or avoiding parenthood.[118] Next, this Part examines the balancing test courts use to determine the constitutionality of state laws regulating a woman's access to abortion.[119] In *Whole Woman's Health*, the Supreme Court balanced the woman's interest in receiving an abortion against any benefits of the regulation.[120] By providing in depth case summaries, this Part demonstrates that each approach presents its own unique consequences that counsel against adopting similar approaches in the context of ART.

A. Balancing Men's Rights in the Abortion Context

In *Roe*, the Supreme Court held that women have a right to privacy, and this right includes the right to obtain an abortion.[121] To determine whether abortion regulations violate this fundamental right, the Court balanced the woman's privacy interest against the state's interest in regulating abortion.[122] Organized opposition to abortion reaches back to the 1930s and 1940s when Catholics linked anti-contraception and

115. *See* Martha Brannigan, *Suits Argue Fathers' Rights in Abortion—One Plaintiff Has Petitioned Supreme Court*, WALL ST. J., Aug. 23, 1988, at 29 (quoting the general counsel of the National Right to Life Committee stating that "[t]he right to an abortion is not an absolute one," and explaining their litigation strategy of asking courts for a case-by-case balancing approach of the father's interests against the mother's).

116. *See infra* Sections II.A, II.B.

117. *See infra* notes 142–145 and accompanying text.

118. *See infra* notes 144–151 and accompanying text.

119. *See infra* notes 242–243 and accompanying text.

120. *See infra* notes 258–271 and accompanying text.

121. *See* Roe v. Wade, 410 U.S. 113, 153 (1976) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or, as the District Court determined in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

122. *Id.*

anti-abortion sentiment.[123] These organizations reframed their opposition to abortion under the Declaration of Independence and the Equal Protection Clause of the Fourteenth Amendment. Under this approach, pro-life organizations argued that both the born and unborn were equally entitled to legal protection.[124]

After *Roe*, pro-lifers favored a constitutional amendment that would outlaw all abortions.[125] However, from the beginning, abortion foes also looked to pass laws that would limit access to abortion and favorably shape public opinion.[126] Statutes requiring women to obtain their husbands' consent seemed to satisfy these criteria.[127]

The Supreme Court addressed the constitutionality of a model spousal-consent statute in *Planned Parenthood of Central Missouri v. Danforth*.[128] In *Roe*, the Court specifically reserved the question of whether a state could require the consent of a woman's husband,[129] but

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123. *See* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 4–5 (2016) (articulating the connection between the argument against abortion and contraception which grew into the Catholics' argument for inalienable rights of an unborn fetus).

124. *See, e.g.*, *id.*; MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 37 (2015) (explaining the view that the Constitution contains an implied fundamental right to a life—a right that extends to the fetus because such supporters saw the fetus as a human).

125. *See, e.g.*, WILLIAMS, *supra* note 123, at 12; ZIEGLER, *supra* note 124, at 37.

126. *See* Nat'l Right to Life Comm. Ad Hoc Strategy Meeting, Meeting Minutes 2–7 (Feb. 11, 1973) (discussing legislative initiatives across the country to limit abortion and expressing the opinion that such initiatives keep pro-lifers "reved up" and educate the public).

127. *See, e.g.*, MO. REV. STAT. § 453.030.3 (1969), *invalidated by* Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976). Rights for men struck a chord with leading pro-life scholars. *Roe* "provided one more wedge to separate, undermine and ultimately destroy the nuclear family," argued Dennis Horan, a founding member of Americans United for Life (AUL). *See Abortion Part IV: Hearings Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 94th Cong. 258 (1975) (statement of Sen. Horan). Joseph Witherspoon, a professor at the University of Texas and leading NRLC member, argued that abortion violated the Thirteenth Amendment by taking the life of an unborn child and depriving fathers of their rights as men. *See Proposed Constitutional Amendments on Abortion Part I: Testimony Before the Subcomm. On Civil and Constitutional Rights of the H Judiciary Comm.*, 94th Cong. 543 (1976) (statement of Rep. Witherspoon).

128. 428 U.S. 52 (1976).

129. *See* Roe v. Wade, 410 U.S. 113, 165 n.67 (1973) ("Neither in this opinion nor in *Doe v. Bolton* . . . do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision . . . . We are aware that some statutes recognize the father under certain circumstances . . . . We need not now decide whether provisions of this kind are constitutional.").

Danforth struck down such a requirement.[130] The Court reasoned that if the government could not constitutionally veto a woman's abortion decision in the first trimester, the state could not delegate that power to anyone else.[131] To recognize a right for men to consent would, as the *Danforth* Court suggested, establish that abortion was not a full-fledged constitutional right.[132] While the Court suggested that women often did, and should, consult with their husbands, it saw the legal requirements quite differently.[133] "The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail," the *Danforth* Court reasoned.[134] The Court recognized that because pregnancy affects a woman more seriously, "the balance weighs in her favor."[135]

Despite the outcome of *Danforth*, pro-life groups continued looking for ways to give men rights in the abortion context.[136] Because Missouri's law awarded men an outright veto, pro-lifers hoped that a narrower law, or a spousal-notification statute,[137] would be constitutional.[138] Cases on the subject seemed to multiply rapidly, with men from Tennessee, Maryland, and Connecticut trying to stop their wives from having abortions.[139] Seven states passed spousal-notification

130. *See Danforth*, 428 U.S. at 69 ("We now hold that the State may not constitutionally require the consent of the spouse . . . as a condition for abortion . . . .").

131. *Id.*

132. *See id.* at 69–71.

133. *See id.* at 71 (reasoning that the objective of preserving the marital relationship will not be furthered by giving a husband unlimited veto power over his wife).

134. *Id.*

135. *Id.*

136. *See, e.g.*, Pamela Black, *Abortion Affects Men, Too*, N.Y. TIMES (Mar. 28, 1982), https://www.nytimes.com/1982/03/28/magazine/abortion-affects-men-too.html (illustrating "men's reactions to their partners' abortions" and the possible impact of spousal notification laws); *Husband Challenges Wife's Right to Abortion*, 12 OFF OUR BACKS 13, 13 (Nov. 1982) (discussing a husband who attempted to prevent his wife's abortion via a court-ordered injunction).

137. *See, e.g.*, KY. REV. STAT. ANN. § 311.735 (West 2018) (requiring the physician performing the abortion to "notify, if reasonably possible, the spouse of the woman upon whom the abortion is to be performed"); Black, *supra* note 136 (explaining that spousal-consent laws required women to obtain their husbands permission whereas spousal-notification laws merely required women to notify their husbands prior to having an abortion).

138. *See Danforth*, 428 U.S. at 69 (ruling that spousal-consent statutes were unconstitutional but giving no opinion on spousal-notification statutes).

139. *See Husband Challenges Wife's Right to Abortion*, *supra* note 136, at 13.

laws between 1976 and 1989.[140] Polls consistently suggested that a slight majority of Americans favored spousal-notification requirements, and some courts upheld them.[141]

As some activists urged state legislatures to enact a spousal-involvement statutes, two of the pro-life movement's leading lawyers, James Bopp Jr. (Bopp) and Richard Coleson (Coleson), promoted a case-by-case balancing approach.[142] Bopp and Coleson first advocated for a balancing approach in *Smith v. Doe*,[143] in which John Smith (a pseudonym), a twenty-four-year-old delivery truck driver from Vigo County, Indiana, sought to stop his eighteen-year-old girlfriend from terminating her pregnancy.[144] The two attorneys emphasized that Smith's interests in protecting and acting as a father to his unborn child outweighed any countervailing right that Jane Doe could identify.[145] "We think the courts have to decide how the rights of the father should be balanced against the rights of the mother," Bopp explained.[146] Bopp and Coleson claimed that a father's interest in unborn children outweighed any negative consequences a woman might face because of an unplanned pregnancy (such as the loss of

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140. *See* Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARR. & FAM. 41, 41, 49 (1989) (Florida, Illinois, Kentucky, Montana, Nevada, Rhode Island, and Utah).

141. For a more information about ongoing support for spousal-involvement laws for abortion, see *Abortion*, GALLUP, http://news.gallup.com/poll/1576/abortion.aspx (last visited Dec. 3, 2018); Lydia Saad, *Public Opinion on Abortion—An In-Depth Review*, GALLUP (Jan. 22, 2002), http://news.gallup.com/poll/9904/public-opinion-about-abortion-indepth-review.aspx.

142. *See, e.g.*, Brannigan, *supra* note 115, at 29 (discussing Bopp's "well-organized and multifaceted campaign" to bring anti-abortion cases to court); *Father's Rights at Issue in Abortion Case*, CHI. TRIB., Apr. 15, 1988, at 3 [hereinafter *Father's Rights at Issue*] (illustrating Bopp's efforts to take legal action on behalf of would-be fathers attempting to prevent women's abortions); Tamar Lewin, *Woman Has Abortion, Violating Court's Order on Paternal Rights*, N.Y. TIMES (Apr. 14, 1988), https://www.nytimes.com/1988/04/14/us/woman-has-abortion-violating-court-s-order-on-paternal-rights.html (discussing men using the legal system to try to stop their partners' abortions); David G. Savage, *Fathers' Appeals to Justices Ask Equal Rights to Children, Even Unborn*, L.A. TIMES (Sep. 25, 1988), http://articles.latimes.com/1988-09-25/news/mn-3861_1_equal-rights (noting husbands' and wives' competing interests in unborn children in a divorce dispute).

143. 492 U.S. 919 (1988).

144. *See Abortion Case Sent to Lower Court*, CHI. TRIB., Apr. 15, 1988, at 1; *Father's Rights at Issue*, *supra* note 142; Lewin, *supra* note 142.

145. *See* Petition for Writ of Certiorari at 8–22, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837); *see also* Lewin, *supra* note 142 (emphasizing balancing the mother's and father's rights).

146. Lewin, *supra* note 142.

opportunities for further education or a career, the stigma of unwed motherhood, or the financial burden of raising a child, and so on).[147]

Bopp and Coleson certainly wanted to help John Smith, but they thought that a balancing test could undermine abortion rights more broadly. First, if a court looked at case-specific factors, like a woman's interest in education or financial security, the availability of an abortion right would depend entirely on a woman's ability to tell a story that was emotionally compelling to a particular judge.[148] Judges' prejudices or embrace of sex stereotypes would limit any applicable abortion right.[149] Moreover, if a court suggested that men's interests in parenthood outweighed at least some women's abortion rights, then abortion rights would be far weaker.[150] Second, the lawyers believed that they could package a balancing test as a modest measure, or as a step that a court could take without officially rejecting a constitutional right to abortion.[151]

Additionally, Bopp and Coleson understood how going to court could deter women from exercising their abortion rights. Jane Doe's experience in *Smith v. Doe* reinforced their conclusions. Noting that she would be forced to testify about her sexual history and moral positions, Jane Doe refused to testify.[152] Ultimately, Judge Robert Howard Brown, of the Vigo Circuit Court, sided with Bopp and Coleson and issued an order blocking her from terminating her pregnancy.[153] Notwithstanding the court's conclusion that *Roe* recognized a fundamental abortion right for women, it found that Jane Doe did not have sufficient reasons for terminating her pregnancy.[154] The court stated that John Smith would suffer considerable emotional harm if his child died, while Jane Doe would suffer considerably less.[155] She would not suffer stigma from

147. *See* Petition for Writ of Certiorari, *supra* note 145, at 8–22.

148. *See Father's Rights at Issue*, *supra* note 142; Savage, *supra* note 142 (discussing a husband's and wife's competing interest in an unborn child, including the husband's steady job).

149. *See Father's Rights at Issue*, *supra* note 142.

150. *See* Brannigan, *supra* note 115, at 29.

151. *See id.*

152. *See* Respondent's Brief in Opposition at 4, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837); *see also* Lewin, *supra* note 142 (noting that Jane Doe's attorneys did not present any evidence relating to paternity because they did not believe it was "a proper subject for judicial review").

153. *See Abortion Case Sent to Lower Court*, *supra* note 144; Lewin, *supra* note 142.

154. *See Father's Rights at Issue*, *supra* note 142 (quoting Bopp's description of Jane Doe's abortion reasoning process as "immature" and "frivolous").

155. Lewin, *supra* note 142.

unwed motherhood and would not face "a distressful life or future."[156] The only trauma she would face if the pregnancy came to term involved her desire "to look nice in a bathing suit this summer, her desire not to be pregnant in the summertime, and her desire not to share the petitioner with the baby."[157]

In opposing a subsequent petition to the United States Supreme Court, Jane Doe outlined some of the costs of a balancing approach.[158] Jane Doe expressed the humiliation she experienced after her physician was subpoenaed, attorneys debated her mental health, physical well-being, and sexual history, and her acquaintances testified in open court about her sex life.[159]

While seeking expedited review from the Indiana Supreme Court, Jane Doe ignored the judge's order and terminated her pregnancy.[160] Bopp and Coleson still asked the United States Supreme Court to review the case,[161] and both parties' filings revealed deeply different views about the promise of a balancing test in the abortion context.[162] Working with attorneys from Indiana and the national ACLU Reproductive Freedom Project, Jane Doe first argued that balancing presented the same problems as state-mandated spousal involvement.[163] "Whether imposed by court order on a case-by-case basis or by state statute, the deprivation of a woman's constitutional right is equally complete," Jane Doe contended.[164] Jane Doe reiterated that "[e]very adult woman has the right to decide to have an abortion and to effectuate that decision without government interference, regardless of her very personal reasons or having to reveal those reasons."[165] Forcing her to do otherwise, Jane Doe concluded, suggested that she had no constitutional abortion right.[166]

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156. *Id.*
157. *Id.*
158. *See* Respondent's Brief, *supra* note 152, at 3–5.
159. *See id.*; *see also* Lewin, *supra* note 142 (noting that the judge's intrusion into Doe's personal matters was particularly troublesome).
160. Respondent's Brief, *supra* note 152, at 5; *see also* Lewin, *supra* note 142.
161. Lewin, *supra* note 142.
162. *See* Petition for Writ of Certiorari, *supra* note 145; Respondent's Brief, *supra* note 152, at 3–5.
163. *See* Respondent's Brief, *supra* note 152, at 7.
164. *Id.*
165. *Id.* at 8.
166. *See id.* at 7–8.

Further, Jane Doe suggested that balancing in the reproductive context was doomed from the start.[167] Given the range of religious, medical, and personal factors in play in decisions about reproduction, judges applying a balancing test could too easily impose their "purely subjective observations and personal beliefs."[168] If the Court disagreed, courts would likely be flooded with "countless highly personal disputes involving abortion, sterilization, and the use of birth control, between spouses and lovers."[169] The very use of balancing might deter some women from exercising their reproductive rights. Forcing a woman to publicly defend her private decision to terminate her pregnancy might tax her abortion right into non-existence.[170]

Bopp and Coleson's petition for writ of certiorari made clear that the adoption of a balancing test was intended to allow pro-lifers to chip away at abortion rights.[171] First, Bopp and Coleson argued that even if the Constitution recognized an abortion right, it was not a strong one—the interest could be overcome by a significant number of government interests.[172] Indeed, Bopp and Coleson contended that "a state's interest in protecting the interests of fathers in their unborn children rise[s] to the level of being compelling."[173] As Bopp and Coleson framed it, abortion was not a fundamental right for women; women had a right to override fathers' decisions only if they had compelling enough reasons to do so.[174] The lawyers' petition for writ of certiorari mentioned the following example: if because of reproductive capacity, a man stood to lose his last chance of having a genetic child, a woman should lose out if she had "relatively weaker reasons" for choosing abortion, such as wanting a boy rather than a girl.[175] An individualized balancing analysis meant that women had to

167. *See id.* (asserting that "[c]ourts are ill-equipped to evaluate" all the factors involved in the abortion decision).

168. *Id.* at 8.

169. *Id.*

170. *Id.*

171. *See* Petition for Writ of Certiorari, *supra* note 145, at 7–17 (arguing the state has a compelling interest in protecting a man's interest in his unborn child).

172. *See id.* at 7–10 (contending the right to abortion is not absolute and *Danforth* did not preclude states from balancing paternal rights).

173. *Id.* at 10.

174. *See id.* at 6–12.

175. *Id.* at 14.

deserve their abortion rights.[176] Women who acted for the wrong reasons would have few rights at all.[177]

Bopp and Coleson's analysis of Smith's case offered additional insight into how a balancing test would apply. Bopp and Coleson emphasized the intensity of a father's interest in parenthood and willingness to accept custody and complete financial responsibility for having a child.[178] The petition for writ of certiorari also described Jane Doe's reasons for choosing abortion as frivolous, such as an interest in keeping herself free from responsibilities that would compromise her ability to find a future romantic partner.[179]

The Supreme Court declined to take the case,[180] but it was just the first of many in the late 1980s that pro-lifers would bring using a balancing test to erode women's abortion rights.[181] Abortion-rights attorneys responded by arguing that cases like *Danforth* had settled the matter.[182] But despite any similarities between *Danforth* and the more recent cases, those on both sides recognized that the make-up of the Court had changed, and the outcome could be quite different with President Reagan nominees on the bench.[183]

While Bopp and Coleson saw a balancing approach as an opening to attack legal abortion immediately, the Court was not yet ready to overrule *Roe*. In 1986, the Supreme Court issued its most recent abortion decision, *Thornburgh v. American College of Obstetricians & Gynecologists*.[184] In *Thornburgh*, the Court struck down each part of a challenged Pennsylvania statute and rebuked those who did not accept that *Roe* was the law.[185] However, four justices dissented, including Chief Justice Warren Burger, one of the justices who had voted with

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176. *See id.* at 5–14.
177. *See id.*
178. *See id.* at 14–16.
179. *See id.* at 15–17.
180. *See* Smith v. Doe, 492 U.S. 919 (1988) (denying certiorari).
181. *See supra* note 136 and accompanying text.
182. *See* Respondent's Brief, *supra* note 152, at 6–8.
183. For a discussion on pro-lifers' hopes that Anthony Kennedy, the most recent Supreme Court nominee at the time, would be the fifth vote to overrule *Roe*, see Dave Andrusko, *Pro-abortionists Unsure Whether to Appeal Decision Upholding Parent Notification Law*, NAT'L RIGHT TO LIFE NEWS, Aug. 28, 1988, at 5.
184. 476 U.S. 747 (1986).
185. *See id.* at 758–71 (emphasizing that "the constitutional principles that led this Court to its decision in 1973 still provide compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy").

the majority in *Roe*.[186] Several of the dissenters explicitly called for the reexamination of *Roe*.[187]

The 1987 retirement of Lewis Powell made the overruling of *Roe* more likely.[188] Ronald Reagan quickly nominated Robert Bork, a judge on the United States Court of Appeals for the District of Columbia Circuit, to replace Powell.[189] Bork's nomination became one of the most polarizing nominations in American history.[190] A group of disparate, left-leaning organizations formed the Block Bork Coalition to doom the judge's nomination.[191] Bork had been an outspoken critic of *Roe* and other substantive due process decisions, and had suggested that they represented particularly egregious examples of judicial activism.[192]

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186. *See id.* at 782–85 (Burger, C.J., dissenting); *id.* at 785–14 (White, J., dissenting); *id.* at 814–25 (O'Connor, J., dissenting). Justice Rehnquist joined in the dissents of Justices White and O'Connor. *See id.* at 785 (White, J., dissenting); *id.* at 814 (O'Connor, J., dissenting).

187. *See id.* at 785 (Burger, C.J., dissenting) ("[W]e should reexamine *Roe*."); *id.* at 788 (White, J., dissenting) (arguing that *Roe* does not deserve the deference of stare decisis because it "departs from a proper understanding of the Constitution").

188. *See, e.g.*, Glen Elsasser, *Powell Quits Supreme Court*, CHI. TRIB. (June 27, 1987), http://www.chicagotribune.com/news/ct-xpm-1987-06-27-8702170248-story.html; Stuart Taylor, Jr., *Powell Leaves High Court; Took Key Role on Abortion and on Affirmative Action*, N.Y. TIMES (June 27, 1987), https://www.nytimes.com/1987/06/27/us/powell-leaves-high-court-took-key-role-on-abortion-and-on-affirmative-action.html.

189. *See, e.g.*, LAURA COHEN BELL, WARRING FACTIONS: INTEREST GROUPS, MONEY, AND THE NEW POLITICS OF SENATE CONFIRMATION 56 (2002) (discussing how Bork was considered "extremely conservative" but generally respected by members of the Senate); ALFRED S. REGNERY, UPSTREAM: THE ASCENDANCE OF AMERICAN CONSERVATISM 247 (2008) (examining the public's reception to the news that President Reagan's intended to nominate Bork).

190. *See, e.g.*, JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES vii (1995) (noting that over 300 liberal interest groups expressly protested Bork's nomination, while over 100 conservative interest groups supported his nomination); SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776–2011 392 (6th ed. 2012) (characterizing Bork's nomination as "without parallel in the history of judicial nominations"); STEPHEN W. STATHIS, LANDMARK DEBATES IN CONGRESS: FROM THE DECLARATION OF INDEPENDENCE TO THE WAR IN IRAQ 445 (2009) (describing the "intense political battle" surrounding Bork's nomination and the "unprecedented role" that the media played in his confirmation).

191. *See* LANNY DAVIS, SCANDAL: HOW "GOTCHA" POLITICS IS DESTROYING AMERICA 110 (2006) (illustrating the Coalition's grassroots methodology for attacking Bork's nomination); Neal Devins, *Substantive Due Process, Public Opinion, and the "Right" to Die*, *in* THE REHNQUIST LEGACY 327, 335 (Craig M. Bradley ed., 2006) (outlining the Coalition's method of attacking Bork's opinion of privacy rights in order to discredit his nomination).

192. *See, e.g.*, MARK GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 24–25 (1996).

In early October, Bork's bid for the Court failed in committee.[193] Although many expected the nominee to concede defeat, both Bork and President Reagan called for a full Senate debate.[194] Given that Democrats controlled the Senate, the outcome of the final vote did not come as a surprise: Bork's nomination failed by a vote of 42–58.[195] Bork's hearings started a new era of Supreme Court nominations; one marked by increasing partisanship and high-stakes interest group spending.[196]

Reagan's next nominee, Anthony Kennedy, a judge from the United States Court of Appeals for the Ninth Circuit, had no trouble in Congress.[197] By February 1988, the Senate voted unanimously to confirm him.[198] NRLC leaders obviously saw Kennedy, and other Supreme Court nominees, as the linchpin of a bolder attack on *Roe*.[199] "Justice Sandra Day O'Connor has described *Roe v. Wade* as being on a collision course with itself," wrote NRLC President John Willke.[200] "Justices Antonin Scalia and Anthony Kennedy have not yet voted directly on a law restricting abortion, . . . but [i]t is hoped that all three will vote to overrule *Roe v. Wade* if and when the time comes."[201] As important to their attack on Roe, George H.W. Bush, Reagan's vice

193. *See* Edward Walsh & Al Kamen, *Senate Panel Votes 9–5 to Reject Bork*, WASH. POST (Oct. 7, 1987), https://www.washingtonpost.com/archive/politics/1987/10/07/senate-panel-votes-9-5-to-reject-bork/8369c6f2-1226-447c-8397-5c70fc2eda73.

194. *See, e.g.*, *Senate Rejects Bork, 58–42, Six Republicans Bolt Party Ranks to Oppose Judge*, L.A. TIMES (Oct. 23, 1987), http://articles.latimes.com/1987-10-23/news/mn-10814_1_senate-rejects-bork (suggesting that Bork wanted the debate to be judged in the future by a full record of the confirmation proceeding).

195. *See id.*

196. *See* DAMON ROOT, OVERRULED: THE LONG BATTLE FOR CONTROL OF THE U.S. SUPREME COURT 109 (2014); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 169–70 (2008); MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 335–36 (2005).

197. *See, e.g.*, Linda Greenhouse, *Senate, 97 to 0, Confirms Kennedy to High Court*, N.Y. TIMES (Feb. 4, 1988), https://www.nytimes.com/1988/02/04/us/senate-97-to-0-confirms-kennedy-to-high-court.html; Al Kamen, *Kennedy Confirmed, 97–0*, WASH. POST (Feb. 4, 1988), https://www.washingtonpost.com/archive/politics/1988/02/04/kennedy-confirmed-97-0/6c29af9a-96d6-4902-97f4-daebf674e468; Al Kamen, *Kennedy Moves Court to Right; Justice More Conservative than Expected*, WASH. POST, Apr. 11, 1989, at A1.

198. *See supra* note 193 and accompanying text.

199. *See, e.g.*, J. C. Willke, *From the President's Desk: Of Greatest Importance*, NAT'L RIGHT TO LIFE NEWS, Sept. 12, 1988, at 3 (1988 National Right to Life News Box, Dr. Joseph Stanton Library, Sisters for Life Convent, Bronx, New York).

200. *See id.*

201. *See id.*

president, won the 1988 election and pledged to continue nominating judges like Bork.[202]

The stakes of a balancing approach became clearer when Bopp and Coleson took the case of Erin Andrew Conn.[203] Conn and his wife, Jennifer, had a five-month old daughter, Crystal, but their marriage was failing.[204] Nineteen-year-old Jennifer, who had scheduled an abortion to end her six-week pregnancy, told Erin that she was filing for divorce.[205] Bopp and Coleson brought suit, as they had in similar fathers' rights cases, to ask for an injunction to stop Jennifer from ending her pregnancy.[206]

In *Conn v. Conn*,[207] Bopp and Coleson offered more insight into what a balancing test would require. The two suggested that such a test was appropriate in the abortion context because both genetic mothers and fathers had constitutional interests at stake in the dispute.[208] Nonetheless, the two favored a balancing test because it suggested that whatever interest women had in abortion, it was not a fundamental right.[209] "[T]his Court has demonstrated that a compelling interest is not always necessary when rights and interests of the parties are at stake," Bopp and Coleson wrote.[210] The two pointed to the Supreme Court's adoption of balancing in parental-involvement cases as evidence that abortion was not a right in any traditional sense.[211] The Court had created "a scheme grounded in individual judicial determination on a case by case basis of whether a minor's abortion

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202. For a discussion on Bush's promises regarding the Court, see JAN CRAWFORD GREENBERG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 85–88 (2007); JULIE NOVKOV, THE SUPREME COURT AND THE PRESIDENCY: STRUGGLES FOR SUPREMACY 8 (2013).

203. *See* Henry J. Reske, *Court Rejects Man's Abortion Appeal*, UPI (Nov. 14, 1988), https://www.upi.com/Archives/1988/11/14/Court-rejects-mans-abortion-appeal/5840615958570.

204. *Id.*

205. *Id.*

206. *See* Petition for Writ of Certiorari at 8–30, Conn v. Conn, 488 U.S. 955 (1988) (No. 88-347), 1988 WL 1093818.

207. 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd*, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 488 U.S. 955 (1988).

208. *See* Petition for Writ of Certiorari, *supra* note 206, at 15–21 (arguing that a father has a constitutional right and interest in procreation, a biological relationship with the unborn child, and his status in the family relationship).

209. *See id.* at 22–26 (asserting that a father's interest in the unborn child is sufficient to limit a woman's ability to terminate a pregnancy).

210. *Id.* at 24.

211. *See id.* at 24–25 (citing to Bellotti v. Baird, 428 U.S. 132 (1976); Bellotti v. Baird, 443 U.S. 622 (1979)).

should be authorized or precluded."[212] Bopp and Coleson believed that by adopting a balancing test, the trial court signaled its willingness to retreat from protecting abortion rights.[213]

The Supreme Court declined to hear *Conn*, but the push for men's rights in abortion continued.[214] In 1989, the Supreme Court decided *Webster v. Reproductive Health Services*.[215] In *Webster*, the Court upheld a Missouri anti-abortion law, and a plurality of the Justices suggested that *Roe*'s trimester framework was no longer tenable.[216] In the aftermath, pro-lifers looked for a vehicle for ending legal abortion, and balancing approaches took a back seat to more aggressive alternatives.[217] NRLC promoted a model law which claimed to ban abortion as a form of "birth control"; the law allowed abortions only in cases of rape, incest, or a threat to a woman's life or health.[218]

In 1992, the Court again weighed men's rights in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[219] *Casey* involved a multi-part

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212. *Id.* at 25.

213. *See id.* at 25–26.

214. *See* Conn v. Conn, 488 U.S. 955 (1998) (mem.) (denying petition for writ of certiorari from the Supreme Court of Indiana); *see also* Glen Elsasser, *Court Won't Hear Father's Abortion Appeal*, CHI. TRIB. (Nov. 15, 1988), http://articles.chicagotribune.com/1988-11-15/news/8802160348_1_abortion-decision-abortion-dispute-fetal-rights; Al Kamen, *Court: Husband Can't Veto Abortions*, WASH. POST (Nov. 15, 1988), https://www.washingtonpost.com/archive/politics/1988/11/15/court-husband-cant-veto-abortion/a61f1003-2c64-4b1f-a728-064dc5ef675c.

215. 492 U.S. 490 (1989).

216. *See id.* at 518–20 (Rehnquist, C.J.).

217. On the efforts pursued by pro-lifers to overrule *Roe* after *Webster*, see Timothy Egan, *Anti-Abortion Bill in Idaho Takes Aim at Landmark Case*, N.Y. TIMES (Mar. 22, 1990), https://www.nytimes.com/1990/03/22/us/anti-abortion-bill-in-idaho-takes-aim-at-landmark-case.html; *Idaho House OKs Stiffest Abortion Curbs in Nation*, L.A. TIMES (Mar. 10, 1990), http://articles.latimes.com/1990-03-10/news/mn-1791_1_abortion-law. On NRLC's investment in similar laws, see Paul Houston, *Abortion Opponents to Press States to Pass Wide-Ranging Curbs*, L.A. TIMES (Oct. 3, 1989), http://articles.latimes.com/1989-10-03/news/mn-579_1_abortion-opponents; *Idaho's Strict Abortion Bill Advances*, L.A. TIMES (Mar. 17, 1990), http://articles.latimes.com/1990-03-17/news/mn-210_1_abortion-bill; Tamar Lewin, *States Testing the Limits on Abortion*, N.Y. TIMES (Apr. 2, 1990), https://www.nytimes.com/1990/04/02/us/states-testing-the-limits-on-abortion.html.

218. *See* Egan, *supra* note 217; Houston, *supra* note 217; Lewin, *supra* note 217. Pro-lifers also took note when the territory of Guam passed a law banning most abortions. On Guam's law, see Jane Gross, *Guam Approves Bill Posing Challenge to Abortion Ruling*, N.Y. TIMES (Mar. 16, 1990), https://www.nytimes.com/1990/03/16/us/guam-approves-bill-posing-a-challenge-to-abortion-ruling.html; *Guam Oks Restrictive Abortion Bill*, CHI. TRIB., Mar. 16, 1990, at D5.

219. 505 U.S. 833 (1992).

Pennsylvania law that included a spousal-notification requirement.[220] Pennsylvania made it illegal for a doctor to perform an abortion without first receiving a signed written statement from a woman that she had notified her husband about the abortion.[221] A woman further had the option of furnishing an alternative written statement, indicating:

> that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her.[222]

The *Casey* Court famously refused to overrule *Roe*.[223] The Court did, however, upend the doctrinal framework that applied to abortion law.[224] *Casey* reasoned that because the government's interest in protecting fetal life applied throughout pregnancy, *Roe*'s trimester framework was fatally flawed.[225] As an alternative, the Court adopted the undue burden standard, which asks whether a law has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion.[226]

In *Casey*, the Court applied the undue burden test and struck down Pennsylvania's spousal-notification law.[227] Canvassing scholarly research and studying the trial court's findings of fact, the Court reasoned that most women who refused to tell their husbands did so for valid reasons, including the threat of domestic violence.[228] Furthermore, the Court did not think that the exceptions written into the Pennsylvania statute made a difference.[229] As the Court saw it, domestic violence victims would often be deterred from seeking an

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220. *See id.* at 844.
221. *See id.* at 887.
222. *Id.*
223. *See id.* at 845–46 ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").
224. *See id.* at 870–73 (rejecting *Roe*'s trimester framework and adopting a viability rationale).
225. *See id.* at 872–73 (recognizing that a state's interest in protecting the unborn, "even in the earliest stages of pregnancy," allows the state to enact laws "to ensure that [a woman's] choice is thoughtful and informed").
226. *See id.* at 876–78 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").
227. *Id.* at 893–95.
228. *Id.* at 888–93.
229. *See id.* at 893.

abortion by the notification requirement.[230] In cases of sexual assault, the exception seemed especially useless: many victims of sexual assault would fail to meet reporting requirements, especially if their husbands were notified that an investigation was taking place.[231] "Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution," the Court explained.[232] "Women do not lose their constitutionally protected liberty when they marry."[233]

The Court's rejection of the spousal-notification law was especially striking given the Justices' willingness to uphold every other part of the disputed law.[234] For example, the Court upheld the statute's medical emergency provision, which did not allow for abortion for certain serious health conditions, including "eclampsia, inevitable abortion, and premature ruptured membrane."[235] *Casey* certainly did not close the door on new abortion restrictions,[236] but it seemed unwise for abortion foes to focus on men's rights or the kind of balancing approach that Bopp and Coleson had used.

Just the same, the use of balancing tests in the abortion context tell a cautionary tale. Bopp and Coleson gravitated toward a balancing test because they believed that such an approach implied that women did not have a fundamental abortion right.[237] Similarly, in cases involving ART, where important constitutional interests are likely in play, a balancing approach seems to be in tension with the possible future recognition of any procreative right. As Bopp and Coleson recognized,

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230. *See id.* at 893–94 ("The spousal notification requirement . . . does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle.").

231. *See id.* at 893 (observing that the sexual assault exemption required women to notify law enforcement of the assault within ninety days).

232. *Id.* at 898.

233. *Id.*

234. *See id.* at 880 (definition of medical emergency); *id.* at 882–83 (providing state published materials); *id.* at 886 (twenty-four hour waiting period); *id.* at 887 (informed consent); *id.* at 899 (parental consent for minors seeking abortion); *id.* at 901 (recordkeeping and reporting requirements).

235. *Id.* at 880 (citing 18 PA. CONS. STAT. §§ 3203, 3205(a), 3206(a), 3209(c) (1990)).

236. Katherine Q. Seelye, *Abortion Vote Signals a Shift in Political Momentum*, N.Y. TIMES (Mar. 23, 1997), https://www.nytimes.com/1997/03/23/us/abortion-vote-signals-a-shift-in-political-momentum.html; Abby Goodnough, *Trenton Bill Would Require Abortion Wait*, N.Y. TIMES (Jan. 29, 1888), https://www.nytimes.com/1998/01/29/nyregion/trenton-bill-would-require-abortion-wait.html.

237. *See supra* notes 209–213 and accompanying text.

balancing analyses implied that a number of interests could outweigh whatever liberty women have.[238]

Courts are still grappling with how the Constitution applies in assisted-reproduction cases. Case law on the subject sends contradictory messages about whether there is a fundamental right to seek or avoid procreation.[239] By focusing so much on the facts of individual cases, courts have not consistently explained the nature of either right or the relationship between them.[240] Because of these unpredictable results, it is difficult for parties using ART to know ahead of time how an embryo-disposition suit will end. By finding that other interests outweigh an interest in seeking or avoiding procreation, courts can also suggest that there is no right to seek or avoid genetic parenthood. Judges should not weigh in on these crucial constitutional questions without more careful consideration and briefing of the issues.

As important, Bopp and Coleson preferred a balancing test because it encouraged judges to zero in on individual's reasons for seeking or avoiding parenthood. By sifting through the most intimate details of people's lives, judges would certainly reach unpredictable results, and the door might remain open for decisions forcing a woman to carry a pregnancy to term. The same invasiveness and prejudice can easily characterize balancing in the context of ART.

B. Whole Woman's Health *and Balancing*

More than two decades after *Casey*, a balancing approach was once again at the center of abortion law. In *Whole Woman's Health*, the Court also addressed what *Casey*'s undue burden standard required.[241] The Court ultimately answered this question by laying out a balancing analysis required by the undue burden test.[242] This Article next examines how *Whole Woman's Health* adopted such an approach, how the lower courts have applied it, and what the uses of balancing reveal

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238. *See supra* notes 209–213 and accompanying text.

239. *See* Kass v. Kass, 1995 WL 110368, at *2–3 (N.Y. Sup. Ct. Jan. 18, 1995) (explaining that, as with abortion, ART does not provide fathers with additional rights to compel or avoid procreation), *rev'd*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998). *But see* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (stating that "a right to procreational autonomy is inherent in our most basic concepts of liberty" and is made up of two equal parts—"the right to procreate and the right to avoid procreation").

240. *See supra* notes 40–42 and accompanying text.

241. *See* 136 S. Ct. 2292, 2309 (2016) (articulating that *Casey* requires courts to balance "the burdens a law imposes on abortion access together with the benefits those laws confer").

242. *See id.*

about its limitations. *Whole Woman's Health* concerned two parts of Texas's H.B. 2 (HB2).[243] One provision required abortion doctors to have admitting privileges at a hospital within thirty miles.[244] The second provision mandated that abortion clinics comply with state regulations governing ambulatory surgical centers (ASCs) even if a clinic relied on medication abortion.[245]

The impact of HB2 seemed likely to be profound. Most providers did not have, and likely could not get, admitting privileges because, among other reasons, not enough women went to the hospital after an abortion to meet threshold admitting requirements.[246] For many clinics, the ASC requirements, especially those demanding the overhaul of clinic facilities, would be prohibitively expensive.[247] Data suggested that it would cost clinics $1 million to comply with the ASC regulations; it would be three times more to build a new facility.[248]

Abortion providers first challenged only the admitting privileges law.[249] While the district court held that the requirement created an undue burden, the Fifth Circuit reversed.[250] Shortly after, abortion providers returned to court, this time challenging the ASC regulation and arguing that the admitting privileges mandate was unconstitutional as applied to clinics in McAllen and El Paso.[251] The district court again sided with Whole Woman's Health,[252] and the Fifth Circuit reversed a second time.[253] In part, the Fifth Circuit relied on the doctrine of res judicata, emphasizing that providers could have raised the same challenges during their original lawsuit.[254] The court further offered its perspective on what the undue burden standard

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243. *Id.* at 2300.

244. *See id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2013)).

245. *See id.* (citing § 245.010(a)).

246. *See id.* at 2312.

247. *Id.* at 2314–16 (explaining that the surgical center requirements would reduce the number of abortion facilities in Texas to only seven or eight).

248. Brief for Petitioners at 6–7, Whole Woman's Health v. Cole, (U.S.) (No. 15-274), 2015 WL 9592289.

249. *Whole Woman's Health*, 136 S. Ct. at 2300 (citing Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891, 901 (W.D. Tex. 2013)).

250. *Id.* at 2300–01 (citing Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 592 (5th Cir. 2014)).

251. *Id.* at 2301; *see also* Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014).

252. *Whole Woman's Health*, 136 S. Ct. at 2303 (citing to *Lakey*, 46 F. Supp. 3d at 687).

253. *Id.* (citing Whole Woman's Health v. Cole, 790 F.3d 563, 567 (5th Cir. 2015) (per curiam)).

254. *See id.* (explaining the Fifth Circuit's rationale for reversing the district court).

required.[255] The court first applied a rational basis test, then asked whether the law unduly burdened a woman's abortion decision.[256]

When the Supreme Court took the case, those on both sides disputed what the undue burden standard required.[257] Representing Whole Woman's Health, the Center for Reproductive Rights (the Center) insisted that "[t]he undue burden standard strikes a careful balance between a woman's liberty to make decisions about childbearing . . . with 'the State's profound interest in potential life.'"[258] The Center argued that the courts had to weigh "the severity of the obstacle relative to the strength of the state's interest in imposing it."[259] To determine the purpose of the law, as the Center saw it, the Court should not blindly accept legislators' account of what they were doing.[260] Instead, the Court would have to evaluate whether a law reasonably advanced its stated end.[261]

The Center argued that the decrease in abortion access would have an impermissible effect, "increasing the wait time for appointments at abortion facilities and the distances that many women would have to travel to reach those facilities."[262] Insisting that these effects had to be weighed against the health benefits (or lack thereof) created by the Texas law, the Center argued that HB2 unduly burdened women's rights.[263]

Texas read the undue burden standard quite differently.[264] Rather than evaluating the strength of the government's purpose, the Court,

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255. *See id.* (noting the Fifth Circuit's undue burden standard found a statute constitutional if "(1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest" (quoting *Cole*, 790 F.3d at 572)).

256. Whole Woman's Health v. Lakey, 769 F.3d 285, 293 (5th Cir. 2014) (staying the district court's second injunction against the two HB2 provisions at issue).

257. *See* Brief for Petitioners, *supra* note 248, at 2 ("Under no circumstances . . . may a state enact '[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992))); Brief for Respondents at 15, Whole Woman's Health v. Hellerstedt (U.S.) (No. 15-274), 2016 WL 344496 ("The undue burden test analyzes the degree of an abortion law's burden to determine whether it imposes a substantial obstacle to abortion access; it does not reweigh the medical justifications for a law by balancing them against the law's burdens").

258. Brief for Petitioners, *supra* note 248, at 44 (quoting *Casey*, 505 U.S. at 878).

259. *Id.* at 45.

260. *See id.* at 47.

261. *See id.*

262. *Id.* at 49.

263. *See id.*

264. *See* Brief for Respondents, *supra* note 257, at 20.

as Texas saw it, should recognize that "[c]onstitutional analysis of a statute's purpose is highly deferential."[265] The fact that lawmakers knew or should know that HB2 would close clinics did not change the analysis.[266] "In any industry, businesses that do not meet governing regulations may not be able to operate, and a legislature may be well aware of that fact," Texas reasoned.[267] "But that does not prove a legislative purpose to produce whatever effects may flow from closing a business, rather than to achieve the public-welfare benefits of the regulations."[268] Furthermore, Texas argued that the law would have little effect, as most women would still live near metropolitan areas with an abortion clinic.[269]

In June 2016, a short-handed Court handed down a five-to-three decision adopting a balancing analysis similar to the one the Center proposed.[270] After holding that res judicata did not bar the petitioners' challenge, the Court turned to the meaning of the undue burden standard.[271] The Court first clarified that *Casey* required "that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[272] How would this analysis work? The Court offered little guidance but referred to two provisions analyzed by *Casey*: the parental-notification law upheld in that case and the spousal-notification measure struck down by the Court.[273] In both of these cases, as the Court in *Whole Woman's Health* explained, the Court performed a "balancing."[274]

The Court further clarified what kind of evidence would factor into the balance *Casey* commanded.[275] Texas argued that under the Court's earlier decisions, lower courts should defer to lawmakers' assessments of contested scientific evidence.[276] Thus, although the Court should

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265. *Id.* at 31.
266. *See id.* at 42.
267. *Id.*
268. *Id.*
269. *See id.* at 45.
270. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–10 (2016) (concluding that the district court applied the correct standard while the Fifth Circuit did not). *Whole Woman's Health* was argued and decided after the death of Justice Scalia.
271. *Id.* at 2309.
272. *Id.*
273. *See id.*
274. *Id.*
275. *See id.* at 2310.
276. *See id.* at 2309–10 (rejecting the undue standard applied by the Court of Appeals that relied on Gonzales v. Carhart, 550 U.S. 124 (2007), which upheld the

defer to Texas legislators' conclusion that HB2 would protect women's health,[277] it rejected this argument.[278] Instead, it held that courts performing a balancing test should place the most "weight upon evidence and argument presented in judicial proceedings."[279]

The Court's application of the balancing test offered additional guidance.[280] The Court stressed that the record contained no evidence that the admitting privileges provision solved a problem.[281] The Court in *Whole Woman's Health* reasoned that the complication rate for abortion was low, that even fewer complications resulted in hospitalization, and that more serious complications did not become apparent at the clinic when admitting privileges would come into play.[282] The Court further measured the benefit achieved by the admitting privilege law as compared to the measures that were previously in place.[283] The Court in *Whole Woman's Health* performed a similar analysis of the ASC provision.[284]

The Court weighed the burdens created by the admitting privilege and ASC provisions of HB2 against their lack of achieved benefits.[285] The Court in *Whole Woman's Health* reasoned that there was enough evidence supporting the district court's conclusion that the facilities that could comply with HB2 could not meet the demand created by

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federal Partial Birth Abortion Ban Act); Brief for Respondents, *supra* note 257, at 16 ("As *Gonzales* held, where the medical evidence is in dispute, legislatures have 'wide discretion' to enact medical regulations . . . . *Gonzales* does not permit a district court to choose one version of the disputed medical evidence, under the guise of making witness-credibility determinations, and use that disputed view to find abortion laws unconstitutional." (citations omitted)).

277. *See Whole Woman's Health*, 136 S. Ct. at 2310; Brief for Respondents, *supra* note 257, at 26 (arguing that the Fifth Circuit Court of Appeals correctly applied *Gonzales* by deferring to legislative judgment).

278. *See Whole Woman's Health*, 136 S. Ct. at 2310 ("[I]n *Gonzales* the Court, while pointing out that we must review legislative 'fact-finding under a deferential standard,' added that we must not 'place dispositive weight' on those 'findings.'" (quoting *Gonzales*, 550 U.S. at 165)).

279. *Id.*

280. *See generally id.* at 2310–18 (applying the balancing test to the challenged provisions of the Texas statute).

281. *See id.* at 2311 (finding that, although the provision was enacted to ensure "easy access to a hospital" in the event of complications during an abortion procedure, "nothing in Texas' record evidence . . . shows that . . . the new law advanced Texas's legitimate interest in protecting women's health").

282. *See id.* (discussing the evidence and expert testimony in the record).

283. *Id.* at 2311–12.

284. *Id.* at 2314–18.

285. *Id.* at 2310–18.

the number of clinics HB2 would force to close.[286] The Court further reasoned that given the lack of benefit delivered by the law, other burdens were also constitutionally cognizable.[287] The Court noted that if HB2 went into effect, women would be "less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered."[288]

At first, *Whole Woman's Health* may seem to cast balancing approaches in a positive light. After all, the Court used a balancing analysis to put real teeth in the undue burden standard and strengthen protections for abortion rights.[289] In the context of ART, it seems possible to use a balancing analysis to protect emerging constitutional interests in seeking or avoiding parenthood. *Whole Woman's Health* also appears to offer solid guidance about how balancing should proceed.

However, the lower courts' application of *Whole Woman's Health* should create concern for those who hope to use a balancing test to sort out the competing interests at stake in embryo-disposition cases. This Section next explores these efforts to apply *Whole Woman's Health.*

C. Knowing What to Balance: The Aftermath of Whole Woman's Health

Since the Court decided *Whole Woman's Health*, lower courts have grappled with exactly how the Court's balancing analysis fits in existing abortion jurisprudence. The case law created in the aftermath of *Whole Woman's Health* should give us pause.

For example, several courts have dealt with laws similar to HB2's admitting privileges requirement.[290] Some of these cases address laws virtually identical to HB2 that required admitting privileges at a hospital within thirty miles of a clinic.[291] Others vary slightly, such as

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286. *Id.* at 2316–18.

287. *Id.* at 2318.

288. *Id.*

289. *See id.* at 2310.

290. *See, e.g.*, Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 955–56 (8th Cir. 2017); Hopkins v. Jegley, 267 F. Supp. 3d 1024, 1033–34 (E.D. Ark. 2017), *appeal filed*, No. 17-2879 (8th Cir. Aug. 28, 2017); June Med. Servs. LLC v. Kliebert, 250 F. Supp. 3d 27, 33 (M.D. La. 2017), *rev'd by* June Med. Servs. L.L.C. v. Gee, No. 17-30397, 2018 WL 4611031 (5th Cir. Sept. 26, 2018).

291. *See, e.g.*, *Kliebert*, 250 F. Supp. 3d at 53–54 ("Act 620 provides that every physician who performs or induces an abortion shall 'have active admitting privileges at a hospital that is located no further than thirty miles from the location at which the abortion is performed or induced . . . .'" (quoting LA. STAT. ANN. § 1061.10(A)(2)(a) (2016), formerly LA. REV. STAT. § 40.1299.35.2A(1) (2014))).

Arkansas's requirement that abortion providers contract with a physician or hospital that can deal with any ensuing complications.[292]

The results in these cases showcase the difficulty of understanding—and applying—a balancing analysis consistently when the facts (and courts' views of the constitutional stakes) vary. Consider the clashing results reached by the district court and the Eighth Circuit when evaluating the Arkansas Abortion-Inducing Drug Safety Act.[293] This law requires any physician dispensing medical abortion to have a contract with a physician dedicated to handling emergencies.[294] That physician, in turn, must have "active admitting, gynecological/surgical privileges at a hospital designated to handle any emergencies associated with . . . an abortion-inducing drug."[295]

Relying on *Whole Woman's Health*, Planned Parenthood of Arkansas and Eastern Oklahoma challenged the constitutionality of the law.[296] In applying *Whole Woman's Health*'s balancing test, the district court first considered whether the law added any benefit when compared to the protocols that Planned Parenthood already had in place.[297] Arkansas claimed that the law guaranteed continuity of care for women, thereby improving health outcomes.[298] In evaluating this argument, the district court focused on the language of the statute, noting that Arkansas did not require the physician addressing complications to have a prior relationship with a patient, accompany her to the hospital, or otherwise guarantee continuity of care.[299]

The court also reasoned that the law did not guarantee more continuity of care than did Planned Parenthood's protocols.[300]

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292. *See, e.g.*, *Jegley*, 864 F.3d at 955–56 (examining the constitutionality of Arkansas's Abortion-Inducing Drugs Safety Act, which requires that the "physician who gives, sells, dispenses, administers, or otherwise provides or prescribes the abortion-inducing drug shall have a signed contract with a physician who agrees to handle complications" (quoting ARK. CODE ANN. § 20-16-1504(d)(1) (2014))).

293. ARK. CODE ANN. §§ 20-16-1501–1510. *Compare Jegley*, 864 F.3d at 958–60 (prioritizing safety concerns over potential burdens), *with* Planned Parenthood of Ark. & E. Okla. V. Jegley, No. 4:15-cv-00784-KGB, 2016 WL 6211310, at *29–32 (E.D. Ark. Mar. 14, 2016) (finding that the burdens outweighed the benefits given the existing protections in place).

294. *See* § 20-16-1504(d)(1).

295. § 20-16-1504(d)(2).

296. *See Jegley*, 2016 WL 6211310, at *12–13.

297. *See id.* at *18, *20, *25 (analyzing the benefits of the contracted physician and final printed label requirements of the Arkansas law).

298. *Id.* at *15.

299. *See id.* at *16.

300. *See id.*

Because abortion was relatively safe, women rarely reported complications; and, Planned Parenthood instructed patients to call Planned Parenthood's twenty-four-hour helpline.[301] When the circumstances demanded it, Planned Parenthood also referred patients to emergency facilities, communicated with hospital staff, and arranged for follow-up care.[302] Because Planned Parenthood took extensive precautions to address complications, and because there did not seem to be any problem in the first place, the court found that the Arkansas statute was a "solution in search of a problem."[303]

When it came to the effect of the law, the court observed that Planned Parenthood had not been able to contract with a physician and would be unable to do so in the future.[304] If the contracted physician provision went into effect, as the court explained, only one clinic would continue providing abortions in the state and all of them which would be surgical.[305] As the court saw it, the burdens of Arkansas's law outweighed the benefits.[306]

However, the Eighth Circuit reversed, seeing *Whole Woman's Health*'s balancing analysis quite differently.[307] The court's analysis turned on the meaning of *Casey*'s large-fraction test, under which the plaintiff can prevail by demonstrating that "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[308] The Court in *Whole Woman's Health* clarified that the large-fraction test applied to women "for whom [the provision] is an actual rather than irrelevant restriction."[309]

The district court had zeroed in on women affected by the law,[310] but as the Eighth Circuit saw it, the district court abused its discretion by failing to estimate a specific number of women who would be burdened

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301. *See id.* at *17.
302. *See id.*
303. *Id.* at *18.
304. *See id.* at *29.
305. *See id.* at *30.
306. *See id.* at *30–31.
307. *See* Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 958–60 (8th Cir. 2017).
308. *Id.* at 958 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992)).
309. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016).
310. *See Jegley*, 2016 WL 6211310, at *4, *7–8 (finding evidence that the requirements would increase travel and costs for women, which could force them to seek abortions later and would therefore require riskier surgical abortions rather than medication abortions).

by the Arkansas law.[311] Although insisting that the district court did not need to calculate the exact number of women who would have to postpone or forego abortions, the court demanded more specificity.[312]

The Eighth Circuit also suggested that Planned Parenthood needed to do more to show that existing facilities could not expand to meet increased patient demand.[313] The court further questioned whether even under *Whole Woman's Health*, increased wait times, crowding, and lower quality of care would count as a burden in the first place.[314] Whereas the lack of a health benefit was decisive in *Whole Woman's Health*, the benefit, or lack thereof, played no part in the Eighth Circuit's analysis.[315]

The Eighth Circuit's approach stood in tension with that of other courts considering admitting privilege statutes. Consider *June Medical Services LLC v. Kliebert*,[316] a Louisiana case involving another law similar to HB2.[317] Louisiana "Act 620" mandates that abortion performing physicians have "active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed . . . and that provides obstetrical or gynecological health care services."[318] The district court enjoined enforcement of the law, stressing that Louisiana lacked any evidence demonstrating that abortion clinics improperly treated abortion or that admitting privileges would prevent any negative outcomes.[319] The court estimated that 10,000 women sought abortions in Louisiana.[320] If the

311. *See Jegley*, 864 F.3d at 958–60 (acknowledging that the district court correctly narrowed the affected population to "women seeking medication abortions in Arkansas" but had abused its discretion in failing to determine how many woman who would face "increased travel distances," "would forgo abortions," or "postpone their abortions").

312. *See id.* at 960.

313. *See id.* at 959 (noting that the record did not provide evidence that the remaining facilities would be unable to "absorb" a higher demand for services if Planned Parenthood had to close).

314. *See id.* (suggesting that, since the Supreme Court relied on *Gonzales* in the *Hellerstedt* ruling, state and federal legislatures still had "wide discretion to pass legislation in areas where there is medical and scientific uncertainty" (quoting Gonzales v. Carhart, 550 U.S. 124, 163 (2007))).

315. *See id.* at 960 (remanding on the grounds that the district court record noted "no concrete . . . findings" that a large fraction of women would be unduly burdened by the Arkansas requirements).

316. 250 F. Supp. 3d. 27 (M.D. La. 2017), *rev'd by* June Med. Servs. L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018).

317. *See Kliebert*, 250 F. Supp. 3d at 53–54 (analyzing the constitutionality of Louisiana's Unsafe Abortion Protection Act, LA. STAT. ANN. § 40:1601.10 (2014)).

318. LA. STAT. ANN. § 40:1601.10(A)(2)(a).

319. *Kliebert*, 250 F. Supp. 3d at 86–87.

320. *See id.* at 87.

law went into effect, only one provider would remain.[321] The court concluded that there was no way for this doctor, who currently performed fewer than 3000 abortions a year, to meet the demand that would be created by the law.[322] Based on these findings, the court reasoned that the number of self-induced abortions would increase and women would face delays, increased travel distances, and a lower quality of care.[323] The Fifth Circuit reversed the district court in *June Medical Services L.L.C. v. Gee*,[324] insisting that the Louisiana law differed from the one in *Whole Woman's Health*.[325] Because the law would result in fewer clinic closures and because the Fifth Circuit found evidence that Louisiana's law would benefit women, the court distinguished it from *Whole Woman's Health*.[326]

It is possible to distinguish the laws analyzed in these cases: for example, the Arkansas law did not specify a distance to a hospital at which a doctor had admitting privileges.[327] In theory, the Supreme Court could resolve any ambiguities in how the *Whole Woman's Health* balancing approach should apply. The Court could explain how precise a lower court needs to be in its estimate of the number of women affected by a law or how important it is that a law does not seem to address a grave problem.

Without such guidance, the Court's balancing approach invites the kind of inconsistency that now characterizes the lower courts' decisions. In *Whole Woman's Health,* the court took an approach that is inherently open-ended and fact-intensive. Under such an approach, lower courts are able to uphold laws that look almost exactly the same as the one struck down in *Whole Woman's Health* by simply distinguishing the facts of the case. The Eighth Circuit suggested that Arkansas's contracted-physician requirement might impact a relatively smaller number of women than HB2.[328] The court further suggested

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321. *See id.*
322. *See id.*
323. *See id.* at 66, 89.
324. 905 F.3d 787 (5th Cir. 2018).
325. *Id.* at 815.
326. *Id.* at 811.
327. *Compare Kliebert*, 250 F. Supp. 3d at 31–36, 47 (finding a statute that requires hospital admitting privileges by physicians performing abortions to be an undue burden on women), *with* Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 957–58 (8th Cir. 2017) (en banc) (holding that a statute requiring hospital admitting privileges to be constitutional since plaintiffs failed to prove a large fraction of women seeking abortions were burdened).
328. *See Jegley*, 864 F.3d at 957–59.

that the burdens stressed in HB2—including increased travel distances, waiting times, or a lower quality of care—mattered because of the facts of that case rather than because of any generalizable principle.[329]

Moreover, courts have reacted differently to *Whole Woman's Health*'s conclusion that abortion is safe and that admitting privilege requirements do not address a real problem.[330] For some courts, a law delivering no benefit cannot justifiably benefit women even if the burdens remain hard to quantify precisely.[331] For the Eighth Circuit, by contrast, the burden is paramount.[332] Even if the Arkansas Abortion-Inducing Drug Safety Act did almost nothing for women, it would be constitutional so long as it did not burden a sufficiently large number of women.[333]

The aftermath of *Whole Woman's Health* highlights additional problems with a balancing approach. When it comes to politically-charged issues like embryo disposition or abortion, courts will almost inevitably view the facts differently. Balancing approaches invite discordant results. In the abortion context, for example, courts can disagree about the degree of the benefit or burden created by a law and the relative importance of the advantages and disadvantages of a law. Courts can also reach conflicting results when the evidence is—or is claimed to be—contested, resolving medical or factually uncertain questions in disparate ways. Something similar can easily take place in the ART context. Courts can disagree about the relative importance of competing interests in seeking and avoiding procreation and the hierarchy of procreative rights. When there are medical questions about the prospects of future fertility or ideological questions about the comparability of adoption, courts can also reach strikingly different outcomes.

In the ART context, this uncertainty is especially disturbing. As the Supreme Court recognized in *Casey*, women have ordered their lives

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329. *See id.*

330. *Compare Kliebert*, 250 F. Supp. 3d at 48–50 (requiring admitting privileges provided no benefit that would outweigh the burden on women seeking abortion), *with Jegley*, 864 F.3d at 960 (holding that requiring admitting privileges was constitutional because the benefit to the safety of women outweighed the potential burden).

331. *See, e.g.*, *Kliebert*, 250 F. Supp. 3d at 88–89 ("Any marginal health benefits would be dramatically outweighed by the obstacles the restriction erects to women's access to their constitutional right to abortion.").

332. *See Jegley*, 864 F.3d at 957–58.

333. *See id.* at 960.

around the availability of legal abortion.[334] The legal uncertainty that is so obvious in the aftermath of *Whole Woman's Health* makes it harder for women to know when and if abortion will be available. Inconsistent results can have an even greater chilling effect. Couples using ART undergo a time-consuming procedure like IVF to procreate, and often they complete extensive paperwork addressing their options after embryos are created.[335] With an uncertain balancing test in place, those using ART have no way of knowing ex ante how a court will view the soundness of the documents governing embryo disposition or the facts of a particular case. While ART holds out the possibility of well-planned, deliberate reproduction, balancing approaches show that any such promise is hollow.

By looking at the history evaluated here, Part III closely examines the problems with leading approaches to embryo-disposition disputes. Part III then proposes a solution that should lead to more predictable, fair, and constitutionally sound outcomes in embryo-disposition suits.

III. BEYOND BALANCING

Most courts addressing embryo-disposition cases conclude that it would be better if the parties reached their own decision about what to do. For this reason, the majority of courts that follow the court's approach in *Kass* and look for an appropriate contract to resolve embryo-disposition suits.[336] Even the mutual, contemporaneous agreement strategy adopted in *Witten* demands an agreement on the part of those contesting embryo disposition.[337] In practice, however, an adequate contract is hard to come by. Most of those who use IVF, like Vergara and Loeb, at most, sign forms that address disputes

334. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853–57 (1992) ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.").

335. *See, e.g.*, Forman, *supra* note 5, at 61–89 (detailing the situation for many fertility patients of facing a "thick packet" of consent forms before beginning treatment).

336. *See* Kass v. Kass, 696 N.E.2d 174, 174 (N.Y. 1998) (applying a balancing approach if no valid disposition contract can be found).

337. *See In re* Marriage of Witten, 672 N.W.2d 768, 781–82 (Iowa 2003) (holding that state enforcement of a prior agreement after one of the parties changed their mind about their reproductive choice was against public policy).

between patients and fertility clinics.[338] Some have no written agreement at all.[339] Lacking a convincing agreement, courts often fall back on a balancing analysis.[340]

The history of balancing in the abortion context illuminates some of the problems that will arise if courts continue to follow a similar approach in embryo-disposition suits. First, a balancing analysis makes it harder for courts to get right the tricky constitutional questions that will inevitably come up in embryo-disposition suits. Judges applying balancing tests could send the message that the right to abortion is not truly fundamental.[341] By siding with a father, courts would send the message that many men have personal circumstances that could outweigh any liberty interest in abortion that the Constitution recognizes.[342] As important, a balancing test tends to generate quite different results in different jurisdictions, sending conflicting messages about the relative strengths of someone's interest in seeking or avoiding procreation.[343]

ART has started a series of crucially important debates about the relationship between constitutional law and reproduction.[344] The Supreme Court's case law on abortion and contraception suggests that the Constitution recognizes rights to seek and avoid procreation,[345] but related constitutional questions have no clear answer. Does the Constitution just recognize a right to terminate a pregnancy or use contraception? Is there a broader right to seek parenthood? What kind of parenthood: functional, gestational, or genetic? Does a right to seek parenthood outweigh the right to avoid parenthood?

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338. *See, e.g.*, Forman, *supra* note 5, at 83, 86 ("[C]linics provide the forms and their primary purpose is to provide written documentation of the patients' informed consent and thereby protect the physician from liability.").

339. *See id.* at 61.

340. *See supra* notes 58–64 and accompanying text (detailing why many courts continue to use the balancing analysis in fertility cases, despite ongoing criticisms).

341. *See supra* notes 132–133 and accompanying text (explaining that some scholars support the use of the balancing test since it implies that women do not have a fundamental abortion right).

342. *See supra* notes 142–157 and accompanying text.

343. *See supra* notes 291–297 and accompanying text.

344. *See* Ziegler, *supra* note 36, at 1263–70.

345. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–11 (2016); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870–77 (1992); Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

These are significant questions, and balancing approaches send a puzzling message about these constitutional issues. Courts have reached conflicting results in these cases. In some instances, courts have held that one party's interest in avoiding parenthood outweighs another's desire to seek parenthood.[346] Others have sided with the party seeking parenthood if the use of embryos represents someone's last procreative chance.[347] The constitutional dimensions of embryo-disposition questions remain obscure. State courts have just begun to illuminate the boundaries and relative strength of these rights, and federal courts have barely weighed in.[348] The courts should address blockbuster questions of this kind after appropriate deliberation, argument, and briefing.

Balancing tests invite judges to base their decisions on the relative weight of a particular person's interest in seeking or avoiding procreation. These decisions can send a message that the Constitution generally does or does not recognize a particular right without giving courts the best possible opportunity to consider the many issues in play in the ART context.

Balancing approaches also invite judges to impose their own views about an individual's desire to be (or not to be) a parent. As the history considered here suggests, judges focus on the strength of the reasons people have in making parenting decisions.[349] In debate about abortion, judges weighed people's sexual histories, lifestyles, attitudes about parenting, and life plans.[350] Prejudices can affect the judgments of courts applying a balancing analysis. These prejudices lead to

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346. *See, e.g.*, *In re* Marriage of Rooks, No. 15CA0990, 2016 WL 6123561, at *6–7 (Colo. App. Oct. 20, 2016) (finding husband's interest in not producing offspring to outweigh wife's desire in having another child); J.B. v. M.B., 783 A.2d 707, 716–19 (N.J. 2001) (holding wife's desire to avoid biological parenthood outweighed husband's interest in using embryos); Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992) (finding husband's interest in avoiding parenthood outweighed wife's interest in donating unused embryos).

347. *See, e.g.*, Szafranski v. Dunston, 34 N.E.3d 1132, 1162–63 (Ill. App. Ct. 2015) (holding the wife's interest in using embryos after becoming infertile outweighed husband's interest in not becoming a biological parent); Reber v. Reiss, 42 A.3d 1131, 1140–42 (Pa. 2012) (same).

348. *See, e.g.*, I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP. 13, 13–14, 16, 18 (July–Aug. 2016), https://onlinelibrary.wiley.com/doi/epdf/10.1002/hast.600.

349. *See supra* notes 327–335 (detailing the issues with the inconsistent application of the balancing test following ambiguities in the *Whole Woman's Health* decision).

350. *See supra* notes 153–159 (noting a woman's hesitation to testify due to questions about her sexual history and the subsequent subpoena of her physician).

unpredictable results and to highly unfair outcomes. Someone's ability to become a parent—or avoid unwanted parenthood—should not depend so much on judges' personal proclivities and evaluations of the parties' characters.

The history studied here further suggests that balancing approaches fail to deliver the kind of clarity that parties need when making vital reproductive decisions. When pro-lifers championed men's rights, the outcome in court depended on the stories told by individual parties and the ideological predisposition of individual judges.[351] Following *Whole Woman's Health*, courts have also reached clashing decisions, reading the facts differently and disagreeing about the relative weight of the different factors to be balanced. Individuals and couples using ART need legal guidance about the likely consequences of deeply important personal decisions. Balancing approaches will not likely do the job.

A. Lessons from Family Law Contracting

Due to the potentially significant inefficiencies that are inherent when using the balancing approach, a better alternative must be found when analyzing ART cases. In looking for strategies for improvement, we should look at the rules governing contracting in family law, including those covering premarital agreements, mid-marriage contracts, separation agreements, and surrogacy contracts. Of course, embryo-disposition agreements are quite different from some of these family law contracts. Separation agreements, for example, come into a play after a relationship is over when a couple lays out how they want to handle matters from marital property division to child custody.[352] By contrast, couples routinely enter into embryo-disposition agreements before a pregnancy takes place and when a romantic relationship between partners is ongoing.[353]

Surrogacy agreements are also dissimilar from embryo-disposition contracts. In most states, surrogacy is legal only under limited circumstances, such as when a couple is unable otherwise to bring a

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351. *See supra* notes 148, 183 and accompanying text (discussing the impact that a personal story can have on a judge).

352. *See, e.g.*, BRIAN H. BIX, THE OXFORD INTRODUCTIONS TO U.S. LAW: FAMILY LAW 150 (2013) (explaining that courts tend to favor separation agreements over marital agreements since separation agreements are made knowing that divorce is imminent and the parties will likely not be "clouded by romantic feelings").

353. *See, e.g.*, Anne Drapkin Lyerly et al., *Factors that Affect Infertility Patients' Decisions About Disposition of Frozen Embryos*, 85 FERTILITY & STERILITY 1623, 1629 (June 2006) (explaining that most clinics require consent forms to be filled out at the onset of treatment).

pregnancy to term or only for couples rather than individuals.[354] Surrogacy agreements thus focus partly on avoiding the legal missteps that could otherwise void a contract. There are fewer laws limiting access to IVF or regulating the disposition of excess embryos,[355] and embryo-disposition contracts do not seem to touch on some of the concerns some hold about surrogacy, including the psychological risks for surrogates and the exploitation of poor, non-white women as gestational carriers.[356] As important, surrogacy agreements deal primarily with the relationship between respective parental rights of the intended parents and the gestational carrier.[357] Embryo-disposition contracts, by contrast, should center on the wishes of the intended parents and the relationship between them.

B. A Model for Contracting

While mid-marriage and premarital agreements both deal with issues related to those in embryo-disposition contracts, prenuptial contracts offer the best analogy. Couples enter into mid-marriage agreements in some states when one spouse is contemplating divorce.[358] The agreements change the terms of property division

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354. *See Intended Parents: Surrogacy Laws by State*, SURROGATE.COM, https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state (last visited Dec. 3, 2018) [hereinafter *Intended Parents*].

355. One of the most significant statutory controversies surrounding IVF involves the variation in state laws on insurance coverage for infertility treatments. *See, e.g.*, Sean Rossman, *What Your Sexuality, Age and Location Have to Do with Your IVF Coverage*, USA TODAY (Apr. 24, 2017, 9:39 AM), https://www.usatoday.com/story/news/nation-now/2017/04/22/what-your-sexuality-age-and-location-have-do-your-ivf-coverage/100594874.

356. There are plenty of concerns surrounding surrogacy. *See, e.g.*, MARTHA FIELD, SURROGATE MOTHERHOOD (1993); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 237 (1989); CHRISTINE OVERALL, HUMAN REPRODUCTION: PRINCIPLES, PRACTICES, POLICIES 113 (1993); JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 68 (1994); Anita L. Allen, *The Black Surrogate Mother,* 8 HARV. BLACKLETTER J. 17, 31 (1991) (raising racial concerns connected with the use of surrogacy and advocating alternately for a ban on surrogate contracts or refusal to enforce surrogate contracts); Katharine T. Bartlett, *Re-Expressing Parenthood,* 98 YALE L.J. 293, 333–34 (1998); A.M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 L., MED. & HEALTH CARE 34, 36 (1988).

357. *See Intended Parents*, *supra* note 354.

358. *See, e.g.*, Pacelli v. Pacelli, 725 A.2d 56, 58 (N.J. Super. Ct. App. Div. 1999) (exemplifying a case where a plaintiff sought advice of counsel for mid-marriage agreement when contemplating divorce). States have been more reluctant to enforce agreements when a contract is not made in contemplation of divorce. *See* John Tingley & Nicholas B. Svalina, *Postnuptial Agreement Not Made in Contemplation of Imminent*

upon divorce and serve as a means of reconciling the parties.[359] While both mid-marriage and embryo-disposition agreements come into play during intact relationships, the circumstances surrounding the forging of these contracts can be quite different. Some courts tolerate mid-marriage agreements, often called reconciliation contracts, as a way to avoid divorce.[360] Couples entering embryo-disposition contracts will not often be contemplating separation or divorce.[361] Indeed, before IVF begins, couples may be unduly optimistic about the outcome of ART procedures and the future of a romantic relationship.[362] The threat of abuse inherent in each type of agreement is also different. Courts have criticized mid-marriage agreements because one partner can leverage another's attachment to an existing union to get a more favorable property settlement.[363] Embryo-disposition agreements more often raise concerns because partners will not have thought out possible contingencies or vital legal consequences.[364]

Prenuptial agreements and embryo-disposition contracts cover the most common ground. Couples often enter into these types of contracts before forging a legal relationship—when either partner might have trouble anticipating changing circumstances. Optimism bias might affect those entering into either type of agreement, and since those forming either kind of agreement are usually in a

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Divorce Affecting Property Rights on Separation or Divorce, *in* 2 MARITAL PROPERTY LAW § 27.8 (2d ed. Supp. 2015).

359. *See, e.g.*, Abigail Trafford, *A Mid-Marriage Change in the Rules May Make Sense*, WASH. POST (May 27, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/05/23/AR2008052302562.html (explaining that one of the goals of the postnuptial agreement is for estate planning).

360. *See, e.g.*, *id.* (identifying that some couples use mid-marriage agreements to "heal" a marriage).

361. *See, e.g.*, Deborah Forman, *Embryo Disposition, Divorce, and Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 431 (2013) (finding that because "couples entering into pre-marital contracts often suffer from optimism bias," they "seldom believe they will fall into divorce).

362. *See, e.g.*, *id.*

363. *See, e.g.*, *Pacelli*, 725 A.2d at 59 (explaining that a spouse can coerce a partner into signing a mid-marriage agreement by threatening "the destruction of a family and the stigma of a failed marriage").

364. *See, e.g.*, Forman, *supra* note 5, at 66–89 (summarizing research suggesting that IVF participants do not fully grasp the consequences of their decisions or the impact of informed-consent forms provided by clinics).

functioning relationship, the parties to such an agreement will trust one another and not bargain at arms' length.[365]

The legal treatment of prenuptial agreements provides a starting point for a new approach to embryo-disposition contracts. Some states still treat all prenuptial agreements as inherently suspect, but many others honor such contracts if certain procedural and substantive safeguards are in place.[366] States have attached special importance to "due process in formation . . . and certain minimal standards of substantive fairness."[367]

The most recent draft of the Uniform Premarital and Marital Agreements Act (UPMAA) offers a starting point for states searching for a better approach to embryo disposition.[368] Under the UPMAA, a written premarital agreement signed by both parties is unenforceable if the party against whom enforcement is sought can prove one of the following: the agreement was involuntary or the result of duress, the party seeking enforcement did not have access to legal counsel, or the agreement was signed without full financial disclosure by one of the parties.[369] As an alternative to legal counsel, the party seeking enforcement can point to a notice of waiver of rights or a plainly written explanation of the rights and responsibilities changed by the contract.[370] Independently of these procedural requirements, courts can refuse to enforce a term in the agreement if, taken in the context of the agreement as a whole, the term

365. *See* Smith, *supra* note 21, at 208, 213 (discussing optimism bias in pre-marital relationships); Forman, *supra* note 361, at 431 (explaining that couples entering into pre-marital contracts specifically often suffer from optimism bias).

366. *See* J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades,* 19 DUKE J. GENDER L. & POL'Y 83, 83–84 (2011). Some states require full disclosure of financial information or require that each party have access to counsel. *See, e.g.*, CONN. GEN. STAT. § 46b–36g (2018) (requiring "fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party" and a "reasonable opportunity to consult with independent counsel" before a prenuptial agreement will be enforced); *see also* Sean Hannon Williams, *Postnuptial Agreements,* 2007 WIS. L. REV. 827, 838–39 (2007) (comparing various states' requirements for enforceable prenuptial and postnuptial agreements).

367. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT 2 (UNIF. LAW COMM'N 2012) http://www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf.

368. *See id.* at 1–2.

369. *Id.* § 9(a).

370. *Id.* § 9(a)(3).

was unconscionable at the time of signing[371] or enforcement of the term imposes substantial hardship on one party.[372]

Underlying the provisions of the UPMAA are several core assertions. First, the procedural focus of the act reflects a belief that independent counsel or an alternative "is crucial for a party waiving important legal rights."[373] The substantive dimensions of the UPMAA deal both with the threat to economically-vulnerable parties and with outcomes that do not even roughly correlate with the parties' contributions to a marriage.[374] Courts have looked at a variety of factors in measuring unconscionability.[375]

Unconscionability does not seem relevant to embryo-disposition agreements. Courts view some contracts as unconscionable partly because prenuptial agreements deal so heavily with money.[376] If enforcing an agreement will make one party dependent on the state for support, for example, states often bar enforcement.[377] Embryo-disposition agreements do not deal with the division of financial assets. Anxieties about the poverty of one party common to prenuptial agreements will not arise in the context of embryo-disposition agreements.

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371. *Id.* § 9(f).

372. *Id.* § 9(g).

373. *Id.* § 9 cmt.

374. *See id.* (explaining that when analyzing marital agreements, courts tend to look at a number of financial factors, including the contributions made by each spouse and the potential disparity that may arise if an agreement is enforced).

375. *Id.* ("[D]uration of the marriage, the purpose of the agreement, the current income and earning capacity of the parties, the parties' current obligations to children of the marriage and children from prior marriages, the age and health of the parties, the parties' standard of living during the marriage, each party's financial and homemaking contributions during the marriage, and the disparity between what the parties would receive under the agreement and what they would likely have received under state law in the absence of an agreement.").

376. Russ Alan Prince, *How to 'Bust' Prenuptial Agreements*, FORBES (Apr. 4, 2018, 7:22 AM), https://www.forbes.com/sites/russalanprince/2018/04/04/how-to-bust-prenuptial-agreements.

377. *See, e.g.*, CONN. GEN. STAT. § 46b-36g(b) (1995) ("If a provision of a premarital agreement . . . causes one party to the agreement to be eligible for support under a program of public assistance . . . a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid such eligibility."); FL. STAT. § 61.079(7)(b) (2018); TEX. FAM. CODE ANN. § 4.006 (West 1997) (following the format of the UPMAA); O'Daniel v. O'Daniel, 419 S.W.3d 280, 284 (Tenn. Ct. App. 2013) ("[T]here is also a near universal exception which precludes specific enforcement of such agreements if enforcement would deny to one spouse support that he or she cannot otherwise obtain and therefore result in that spouse becoming a public charge.").

Courts can also view agreements as unconscionable because they do not reflect the contributions of each partner to a marriage.[378] The law of both marital property and spousal maintenance turns on the idea that marriage is a partnership; each partner's treatment after the dissolution of a relationship mirrors what that person added to the partnership.[379] The same principles do not govern embryo-disposition agreements.

However, the concerns about informed consent animating the UPMAA resonate powerfully on in the context of embryo disposition. Rarely do couples starting IVF consult a lawyer.[380] Any explanation of the rights imposed or waived by an agreement may be buried deep in page-long forms that couples can easily miss.[381]

Of course, when parties sign most contracts, ignorance of the terms of an agreement is not a defense.[382] But in the case of either embryo disposition or marriage, the stakes are considerably higher.[383] Indeed, when it comes to embryo disposition, constitutional rights may be in play. As important, the parties to both kinds of agreement are not as likely to defend themselves, trusting unduly in their partner and exaggerating the odds of a favorable outcome.

By passing a model statute, states can make clear ex ante what the parties need to do to ensure that courts will enforce an agreement. Moreover, in mandating that agreements satisfy certain procedural requirements, states can increase the odds that couples using IVF will understand the gravity of embryo-disposition decisions.

1. The model statute

First, states should demand that embryo-disposition agreements be voluntary. In the context of premarital contracts, courts have defined

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378. *See, e.g.*, Lane v. Lane, 202 S.W.3d 577, 583–84 (Ky. 2006) (finding an prenuptial agreement unconscionable since it did not factor the wife's important contributions to the marriage as a homemaker); *see also* Gross v. Gross, 464 N.E.2d 500, 509–10 n.11 (Ohio 1984).

379. *See, e.g.*, JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 73–84 (2014) (exploring the ways courts determine marital contributions by each party, focusing specifically on the economic contributions).

380. *See, e.g.*, Forman, *supra* note 5, at 76, 85.

381. *See, e.g.*, *id.* at 76.

382. *See, e.g.*, Upton v. Tribilcock, 91 U.S. 45, 50 (1875) ("That the defendant did not read the charter and by-laws . . . was his own fault. It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained.").

383. *See, e.g.*, Forman, *supra* note 5, at 70 (citing a 2011 study that showed substantial evidence that embryo disposition decisions are "extremely difficult" to make).

voluntariness in radically different ways.[384] All states treat agreements as involuntary if one couple used physical violence to coerce another into signing on.[385] Other states go further, treating an agreement as involuntary if one partner presents it in the days immediately before a wedding when it would be embarrassing, emotionally difficult, or financially trying to refuse to sign.[386] Which of these approaches makes the most sense in the context of embryo disposition? If a couple must enter into a contract before beginning IVF, there is nothing suspect about forging an agreement shortly before a procedure begins. Nevertheless, more extreme forms of duress, including domestic violence, can shape the terms of an agreement, and courts should void any contract resulting from it.

Second, states should require those entering into an embryo-disposition agreement to have both access to independent counsel and a full disclosure of the rights created or destroyed by different disposition decisions. Access to counsel, in turn, should mean time to identify appropriate representation. As an added safeguard, the agreement itself should spell out the ramifications of each disposition decision. Courts should resort to a balancing analysis only if an agreement fails one of these enforcement criteria.

Such a model statute is far from perfect. Just as is the case with prenuptial agreements, embryo-disposition agreements can come before the courts years after their original signing. Given the delay between contract formation and enforcement, it is hard for the parties to anticipate changing circumstances. As the *Witten* Court notably pointed out, people routinely change their minds about matters as intimate as embryo disposition, and a model statute would still hold

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384. *See, e.g.*, Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 359–400 (2007).

385. RESTATEMENT (SECOND) OF CONTRACTS § 174 (AM. LAW INST. 2018).

386. *Compare In re* Marriage of Bernard, 204 P.3d 907, 910–13 (Wash. 2009) (en banc) (finding agreement not enforceable when significantly revised version of premarital agreement was presented a day before the wedding), *and* Peters-Riemers v. Riemers, 644 N.W.2d 197, 205–07 (N.D. 2002) (finding agreement presented three days before wedding to be "involuntary" and emphasizing the absence of independent counsel and adequate financial disclosure), *with* Brown v. Brown, No. 2050748, 19 So. 3d 920 (Ala. Civ. App. 2007) (finding assent to agreement presented day before wedding to be "voluntary"), *aff'd sub. nom*, *Ex parte* Brown, 26 So. 3d 1222, 1223–27 (Ala. 2009), *and* Binek v. Binek, 673 N.W.2d 594, 596–98 (N.D. 2004) (finding agreement sufficiently "voluntary" to be enforceable despite being presented two days before the wedding); *see also* Mamot v. Mamot, 813 N.W.2d 440, 447 (Neb. 2012) (summarizing five-factor test many courts use to evaluate "voluntariness" under the UPMAA).

the parties to a contract that may not reflect their present-day feelings about procreation.[387] Inevitably, some couples will not enter into any agreement or will disregard the consequences written into a contract. After all, those beginning IVF are likely to be optimistic about both their relationship to one another and the success of ART and may not take seriously warnings about what an agreement truly entails.

Just the same, a model statute would represent a significant improvement—one that has advantages that other alternatives do not. Many of the informed-consent documents on which courts have relied are not designed to deal with disputes between the parties using IVF. There is evidence that parties cannot easily digest the information in lengthy forms and almost never have the assistance of counsel in doing so.[388] Putting some guardrails in place will improve the odds that contracts reflect the informed consent of both people who have created embryos.

The model statute also will deliver fairer outcomes than the mutual, contemporaneous consent approach recommended in *Witten*. Ideally, the disposition of embryos would always reflect the consensus of both embryo creators in the present day. In practice, however, embryo-disposition disputes arrive in court because creators cannot arrive at any such agreements.[389] A mutual, contemporaneous consent approach systematically disfavors the person seeking to use the embryos.[390] Such a result may not best capture any common ground between the creators.

Other scholars have argued that courts should always side with a party avoiding, rather than seeking, procreation.[391] There are sound

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387. *In re* Marriage of Witten, 672 N.W.2d 768, 781 (Iowa 2003).

388. *See* Forman, *supra* note 5, at 67, 76, 85.

389. *See supra* notes 102–104 and accompanying text (detailing the contemporaneous consent approach used in *Witten*).

390. *See supra* notes 102–103 and accompanying text (arguing that the contemporaneous consent approach inherently favors the party vying for the "status quo").

391. *See, e.g.*, *In re* Marriage of Rooks, No. 15CA0990, 2016 WL 6123561, at *6–7 (Colo. App. Oct. 20, 2016) (holding husband's desire not to procreate outweighed wife's intention to use embryos, since husband may feel a "moral and social obligation" to the biological child, even if no legal obligation would exist should the implantation be successful); J.B. v. M.B., 783 A.2d 707, 718 (N.J. 2001) (rejecting husband's request to use embryos, since doing so would force wife to become a biological parent against her will); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (finding husband's desire to avoid procreation outweighed wife's desire to donate embryos, since "[d]onation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited).

arguments in support of this point.[392] However, since the contours of the rights to seek or avoid procreation remain unclear, the relative weight—and boundaries—of the rights tied to genetic parenthood deserve much further consideration before a court adopts a one-size-fits-all approach to ART disputes. As judges hash out the constitutional rights in play in embryo-disposition cases, courts should honor the informed, written wishes of those mostly deeply affected by embryo disposition.

CONCLUSION

The front-page fight between Vergara and Loeb is just the most notorious of the many battles about the disposition of embryos. The courts have developed a number of approaches to these disputes, but most have followed *Kass*, looking for a valid contract and applying a balancing test if no such agreement can be found. In practice, balancing analyses continue to play a vital role in embryo-disposition struggles. Possible contracts—often informed-consent documents covering the relationship between a clinic and a couple—may not address the most important issues in embryo disposition. Although states have adopted different versions, balancing analyses generally ask courts to weigh each individual's interest in seeking or avoiding genetic parenthood.

In the past, balancing tests have played a central role in determining who has rights in the context of reproduction. Balancing approaches can send a powerful message about the relative weakness of the constitutional rights at stake in assisted reproduction. Balancing analyses also play to the prejudices of judges about the character of individual litigants and the relative merits of seeking or avoiding parenthood. Moreover, balancing almost always guarantees uncertain outcomes, making it much harder for couples to plan out their reproductive futures.

Looking to other family law contracts, particularly those governing prenuptial agreements, provides guidance about how to improve the odds that couples will make an informed, thoughtful decision about the future of the embryos they create. Better contracts will hardly deliver perfect results. But the fate of embryos is politically, personally, and ideologically important. It is imperative that the law better encourages people to take embryo-disposition decisions as seriously as they should.

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392. *See supra* note 391.