

The Uncertainty of Embryo Disposition Law: How Alterations to *Roe* Could Change Everything

“[P]oliticians—and judges, for that matter—should be wary of the assumption that the future will be little more than an extension of things as they are. . . . [I]n the next 10 or 15 years, as technology and science continue to advance and America’s demographic profile continues to change, the Supreme Court will, in all likelihood, be asked to decide a fascinating array of divisive issues that are now only dimly on the horizon.”¹

I. INTRODUCTION

The New York Court of Appeals noted in *Kass v. Kass*² that “[a]s science races ahead, it leaves in its trail mind-numbing ethical and legal questions.”³ The number of infertile couples, as well as the number of couples postponing reproduction until later in life, continues to expand at an unprecedented rate.⁴ This combination of increased infertility and postponement of reproduction has led to the growing use and acceptance of assisted reproductive technologies (ART).⁵ Couples are opting to use various forms of ART, including in vitro

1. Jeffrey Rosen, *Roberts v. The Future*, N.Y. TIMES, Aug. 28, 2005, at 624 (examining political tendencies of new Chief Justice to Supreme Court).

2. 696 N.E.2d 174 (N.Y. 1998).

3. *Id.* at 178 (citing John A. Robertson, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994)) (indicating few states have adopted statutes addressing disposition of embryos); see also *J.B. v. M.B.*, 783 A.2d 707, 715 (N.J. 2001) (affirming advances in medical technology outpacing laws regarding reproductive technology).

4. See American Reproductive Society for Reproductive Medicine (ASRM), *Frequently Asked Questions (FAQ)—Infertility*, <http://www.asrm.org/Patients/faqs.html> (last visited Nov. 12, 2006) (providing statistics on infertility). A couple is considered infertile after twelve months of not using contraception and failing to conceive. *Id.* As of 1995, infertility affected approximately 6.1 million women and their partners in the United States, constituting ten percent of the reproductive-aged population. *Id.* Approximately one-third of couples have fertility problems when the female partner is thirty-five years or older. AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, PATIENT FACT SHEET, PREDICTION OF FERTILITY POTENTIAL IN OLDER FEMALE PATIENTS 1 (2005), available at http://www.asrm.org/Patients/FactSheets/Older_Female-Fact.pdf (indicating infertility increases with age). By age forty, two-thirds of women will not conceive spontaneously. *Id.*; see also Massachusetts General Hospital, Center for Women’s Mental Health, *Infertility and Mental Health*, <http://www.womensmentalhealth.org/topics/infertility.html> (last visited Oct. 29, 2006) (listing postponement of reproduction among factors for increased use of ART).

5. See Joseph Russell Falasco, *Frozen Embryos and Gamete Providers’ Rights: A Suggested Model for Embryo Disposition*, 45 JURIMETRICS J. 273, 273 (2005) (stating delaying reproduction results in difficulty conceiving because of bodily deterioration); see also Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 928 (2000) (revealing ability of woman to produce viable eggs significantly decreases with age); AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, PATIENT FACT SHEET,

fertilization (IVF), to assist them in conceiving.⁶ IVF involves stimulating a woman's ovaries to produce additional eggs, removing those eggs from the woman's uterus, fertilizing the eggs with sperm in a clinic or laboratory, allowing the fertilized eggs to mature into pre-embryos, and transferring the developing embryo(s) into the uterus of the would-be mother.⁷ Excess embryos produced in this process are cryogenically preserved.⁸ Estimates reveal that as of 2003 approximately 400,000 cryogenically preserved embryos existed in the United States alone.⁹

Although couples are increasingly turning to alternative means to reproduce, the divorce rate in the United States remains high.¹⁰ The increased use of IVF in conjunction with this high divorce rate will likely result in increased litigation regarding the disposition of excess cryogenically preserved embryos.¹¹ Unfortunately, the laws regarding reproductive technology, at both

PREDICTION OF FERTILITY POTENTIAL IN OLDER FEMALE PATIENTS 1 (2005), available at http://www.asrm.org/Patients/FactSheets/Older_Female-Fact.pdf (discussing increased use of fertility treatments).

6. See CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES, NATIONAL SUMMARY AND FERTILITY CLINICAL REPORTS, 52 (2004), available at <http://www.cdc.gov/ART/ART02/index.htm> (last visited Nov. 12, 2006) (noting increase in fertility procedures). The number of ART cycles performed in the United States increased seventy-eight percent overall, from 64,681 cycles in 1996 to 115,392 in 2002. *Id.*; see also VITAL AND HEALTH STATISTICS, FROM THE CENTERS FOR DISEASE CONTROL AND PREVENTION/NATIONAL CENTER FOR HEALTH STATISTICS, FERTILITY, FAMILY PLANNING, AND WOMEN'S HEALTH: NEW DATA FROM THE 1995 NATION SURVEY OF FAMILY GROWTH Series 23, No. 19 (1997), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_019.pdf (verifying increase in use of fertility procedures). As of 1995, estimates showed about fifteen percent, or 9.3 million women of reproductive age have used fertility treatments. *Id.* This is an increase from 6.8 million, or twelve percent, in 1988. *Id.*

7. Waldman, *supra* note 5, at 902-03 (explaining how IVF procedure works). Technically there is a difference between an embryo and a pre-embryo. *Davis v. Davis*, 842 S.W.2d 588, 593-94 (Tenn. 1992). The earlier stage of developing cells are called pre-embryos while more matured cells are called embryos. *Id.* For purposes of this Note both will be referred to as embryos.

8. See Shana Kaplan, Note, *From A to Z: Analysis of Massachusetts' Approach to the Enforceability of Cryopreserved Pre-Embryo Dispositional Agreements*, 81 B.U. L. REV. 1093, 1095 (2001) (clarifying why cryopreservation of embryos preferred method of reproductive technology procedures). Cryopreservation reduces many of the risks that accompany IVF treatment, such as multiple births, ovarian hyperstimulation syndrome, and ovarian cancer; it also reduces the number of procedures a woman must undergo. Waldman, *supra* note 5, at 903-04.

9. Rev. Phillip C. Cato, Ph.D., *Engineering Eden: Investigating the Legal & Ethical Dilemmas of Modern Biotechnology*, ST. JOHN'S J. LEGAL COMMENT. 45, 52 (2005) (indicating number of embryos currently preserved in the United States). See generally David I. Hoffman, M.D., et al., *Cryopreserved Embryos in the United States and their Availability for Research*, 79 FERTILITY & STERILITY 1063 (2003), available at http://www.asrm.org/Professionals/Fertility&Sterility/cryoembryos_may2003.pdf [hereinafter *Hoffman Study*] (presenting research into number of embryos currently cryogenically preserved in United States).

10. See Scott M. Stanley, "What Really is the Divorce Rate?", http://divorcesupport.about.com/es/divorcestep1/a/aa061699_2.htm (last visited Nov. 12, 2006) (stating divorce rate between forty and fifty percent). See generally CTR FOR DISEASE CONTROL AND PREVENTION (CDC), 54 NATIONAL VITAL STATISTICS REPORTS No. 6 (2005), available at http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_06.pdf (providing statistics on marriage and divorce).

11. Judith Daar, *Frozen Embryo Disputes Revisited: A Trilogy of Procreation-Avoidance Approaches*, 29

the state and federal levels, have not kept pace with advances in reproductive science.¹² As a result, judges are left to make difficult decisions regarding the disposition of embryos with little guidance.¹³ To date, no court in the United States has “forced parenthood”; no court has permitted any litigant to use or donate an embryo when the opposing party, whose sperm or egg created the embryo, objected.¹⁴ The courts in these cases base their holdings on the tenet that, when they conflict, the right not to procreate prevails over the right to procreate.¹⁵

Many believe that *Roe v. Wade*¹⁶ firmly established the right not to procreate when the Supreme Court held that within the right to privacy exists a woman’s right to terminate her pregnancy, at least prior to viability.¹⁷ The continuing vitality of *Roe*’s holding is questionable.¹⁸ If the Supreme Court overturns or further limits a woman’s right to terminate her pregnancy, courts might change their position in disputes over cryogenically preserved embryos, forcing implantation and the development of all embryos.¹⁹ Many argue that it is unlikely the Court will ever overturn *Roe*, but today, more than ever, the chances of the Supreme Court overturning or restricting the application of *Roe*

J. L. MED. & ETHICS 197, 197 (2001) [hereinafter *Disputes Revisited*] (explaining inevitability of disputes because increased use of IVF and high divorce rate); Waldman, *supra* note 5, at 906 (projecting high divorce rate coupled with increased IVF use will result in more embryo disputes).

12. *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1055-56 (Mass. 2000) (confirming lack of law governing disposition of embryos); *Kass v. Kass*, 696 N.E.2d 175, 178 (N.Y. 1998) (noting both statutory and decisional law in area of reproductive technology slow to develop); *see also* Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 206 (2004) (indicating need for legislature to act).

13. *See* Daar, *Disputes Revisited*, *supra* note 11, at 201 (indicating couples undergoing IVF cannot predict outcome because of conflicting decisions by courts); *see also* Kim Pittman, *Resolving Disputes Over the Disposition of Frozen Preembryos: Playing Catch-Up with IVF Technologies*, 20 ME. B.J. 228, 231 (2005) (indicating lack of legislation leaves courts to resolve disputes); Waldman, *supra* note 5, at 899 (noting divergent views of courts when resolving embryo disposition disputes).

14. *See, e.g.*, *In re Marriage of Witten*, 672 N.W.2d 768, 782-83 (Iowa 2003) (maintaining status quo by refusing to allow implantation when couple could not agree on disposition); *A.Z.*, 725 N.E.2d at 1058-59 (holding enforcement of agreement would violate public policy); *J.B. v. M.B.*, 783 A.2d 707, 719-20 (N.J. 2001) (ignoring agreement because of change of mind and finding for party opposing implantation).

15. *See* Falasco, *supra* note 5, at 294 (revealing same result whether court enforces or refuses to enforce contract no implantation).

16. 410 U.S. 113 (1973).

17. *See id.* at 153 (holding right to privacy broad enough to include right to terminate pregnancy).

18. *See* Evelyn Nieves, *S.D. Abortion Bill Takes Aim at ‘Roe’*, WASH. POST, Feb. 23, 2006, at A1 (indicating opinion of some legislatures that now is time to challenge *Roe*); *see also infra* notes 19-21, 149-153 and accompanying text (discussing uncertain future of abortion and *Roe*’s continuing force).

19. *Cf.* Rachel Anne Fenton, *Catholic Doctrine Versus Women’s Rights: The New Italian Law on Assisted Reproduction*, 14 MED. L. REV. 73, 82-83 (2006) (revealing new, more restrictive Italian assisted reproduction law reopened abortion debate in Italy); *see also* Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENT U.L. REV. 67, 77 (2002) (suggesting anything “biologically alive” and “genetically human” entitled to Fourteenth Amendment protections). Hollowell believes that if the Court re-examines *Roe* in light of modern technology, it will conclude that life begins at conception. Hollowell, *supra*, at 87.

are great.²⁰ Although the majority of Americans favor *some* form of legalized abortion, they re-elected a President who favors overturning *Roe*.²¹ In addition, following the death of Chief Justice Rehnquist and the retirement of Justice O'Connor, a key vote on issues of reproductive freedom, President Bush appointed Justices who may be inclined to reconsider *Roe* and change its central holding.²²

Part II of this note examines the current status of the law regarding the disposition of cryogenically preserved embryos when a couple divorces.²³ First, current legislative enactments concerning reproductive technology and the disposition of cryogenically preserved embryos are reviewed.²⁴ Part II then discusses current case law and the prevailing notion that the right not to procreate ordinarily triumphs over the right to procreate.²⁵ Also explored in Part II is the current status of abortion law in the United States, focusing on the central holding of *Roe* and the manner in which it was modified by *Planned Parenthood of Southern Pennsylvania v. Casey*.²⁶ Finally, Part II hypothesizes how abortion law may be altered.²⁷

Part III focuses on changes that may occur regarding the disposition of cryogenically preserved embryos if the Court overturns or modifies the central

20. See Hallowell, *supra* note 19, at 83-84 (noting woman's right to abortion will erode as technology improves pushing viability to time of conception); see also Adam Nagaourney, *Democrats Weigh De-emphasizing Abortion as an Issue*, N.Y. TIMES, Dec. 24, 2004, at A15 (explaining Democratic leaders desire to de-emphasize abortion issue and attract abortion opponents); Robin Toner, *Abortion Tearing Bush; Battle Looms Over Party's Stand on an Issue That Will Test Ability to Hold Both Sides*, N.Y. TIMES, Nov. 21, 1991, at A22 (discussing likelihood Supreme Court will overturn or severely restrict the right to abortion).

21. See Nagaourney, *supra* note 20, at A15 (quoting Howard Wolfson's statements expressing need for Democrats to downplay abortion issue); see also 2004 REPUBLICAN PARTY PLATFORM 82, available at <http://www.gop.com/media/2004platform.pdf> (Aug. 26, 2004) [hereinafter REPUBLICAN PARTY PLATFORM] (outlining stance of Republicans on abortion issue). The Republican Party Platform for 2004 states,

[T]he unborn child has a fundamental individual right to life which cannot be infringed. We support a human life amendment to the Constitution and we endorse legislation to make it clear that the Fourteenth Amendment's protections apply to unborn children. Our purpose is to have legislative and judicial protection of that right against those who perform abortions We support the appointment of judges who respect traditional family values and the sanctity of innocent human life

REPUBLICAN PARTY PLATFORM, *supra*, at 82.

22. See Adam Liptak, *Privacy Views: Roberts Argued Hard for Others*, N.Y. TIMES, Aug. 8, 2005, at A1 (noting Chief Justice Roberts wrote in opposition to constitutional right to privacy); see also Richard W. Stevenson, *Court in Transition: The Overview; O'Connor to Retire, Touching Off Battle Over Court*, N.Y. TIMES, July 2, 2005, at A1 (explaining O'Connor's role on the Court and impact her replacement will have). While serving as a government attorney, Roberts' name appeared on a brief arguing that the Court wrongly decided *Roe* and that its central holding should be overturned. Liptak, *supra*, at A1.

23. See *infra* Part II.A (explaining current legislation and decisions by various state high courts).

24. See *infra* Part II.A.1 (discussing state laws addressing disposition of frozen embryos).

25. See *infra* Part II.A.2 (examining strength of party wishing to avoid procreation).

26. 505 U.S. 833 (1992); see also *infra* Part II.B (discussing current abortion law in United States).

27. See *infra* Part II.C (noting potential changes to abortion law through Supreme Court decision, constitutional amendment, or legislative action).

holding in *Roe*.²⁸ Part III then evaluates the impact these changes may have on current case law and legislation pertaining to the disposition of frozen embryos.²⁹ It concludes that changes to *Roe* would render current case law regarding the disposition of embryos more complex and unreliable, making IVF treatment and embryo cryo-preservation more uncertain.³⁰ Part III ends with an examination of potential solutions to this problem.³¹

II. HISTORY

A. *Current Status of the Law Regarding the Disposition of Cryogenically Preserved Embryos in Divorce Disputes*

1. *Statutory Law*

Few state legislatures have enacted laws concerning the distribution of embryos when a couple no longer wishes to use them or when a dispute arises between a couple over how the embryos should be used.³² Of those states, only Louisiana has recognized embryos as “juridical person[s],” granting embryos the same rights and protections every other person enjoys.³³ This means that in Louisiana, embryos cannot be owned.³⁴ Additionally, if an IVF patient renounces his or her parental rights over an embryo, that embryo becomes available for “adoptive implantation.”³⁵ When disputes over the disposition of embryos arise in Louisiana, the law requires courts to apply the “best interest of the IVF ovum” standard.³⁶ As a result, it is unlikely the Louisiana high court would rule in favor of a party objecting to the use or donation of an embryo.³⁷ No other state has provided such broad protections to embryos, though other states, such as Florida, have unique laws which try to address this complex

28. See *infra* Part III.A (contemplating potential impact changes in *Roe* will have on embryo disputes).

29. See *infra* Part III.B (illustrating potential implications of overturning *Roe* on disposition of frozen embryos).

30. See *infra* Parts III.B-C (explaining remaining uncertainty until laws regarding status of embryos settled in each state).

31. See *infra* Part III.C (providing potential legislative solutions to embryo disputes).

32. See *Kass v. Kass*, 696 N.E.2d 174, 178 (N.Y. 1998) (citing Florida, New Hampshire, and Louisiana as states with legislation addressing embryo disposition); see also *supra* notes 12-13 (indicating lack of legislation in area of ART and IVF).

33. LA. REV. STAT. ANN. § 9:123 (2000) (mandating embryos be considered “juridical persons”).

34. See LA. REV. STAT. ANN. §§ 9:124, 9:130 (delineating various rights of cryogenically-preserved embryos in Louisiana).

35. LA. REV. STAT. ANN. § 9:130 (indicating IVF patients may renounce rights in favor of married couple willing to receive embryo). The statute does prohibit transfer of money for embryos. *Id.*

36. LA. REV. STAT. ANN. § 9:131 (using same standard applied in child custody disputes to resolve embryo disputes).

37. See LA. REV. STAT. ANN. § 9:122 (limiting use of embryos to complete development as human being); see also § 9:126 (indicating if party renounces rights to embryo physician appointed guardian until adoptive implantation occurs); § 9:127 (holding physician and medical facility responsible for safety of embryo).

issue of embryo disposition.³⁸

Florida law requires IVF patients and their physicians to agree, in writing, how they will allocate embryos in the event of a divorce.³⁹ The statute indicates that absent such an agreement, the provider couple retains the decision-making authority over the embryos.⁴⁰ Unfortunately, the statute does not explain how disputes between a provider couple should be resolved absent a clear contract.⁴¹ Consequently, it is unclear how Florida courts would resolve such disputes.⁴²

New Hampshire has also adopted statutes governing the use of embryos.⁴³ Its statutes merely indicate who may undergo IVF procedures, the medical evaluations and counseling they must receive, and the obligations of a patient's husband.⁴⁴ The statute neither requires an agreement regarding disposition of embryos nor clarifies how courts should decide such disputes.⁴⁵ Other states, including New Jersey, Massachusetts, Connecticut, and California, have similar laws requiring IVF providers give patients "relevant and appropriate information" to allow them to make informed decisions regarding the disposition of embryos in the event of a divorce or other contingencies.⁴⁶ Generally these statutes provide four options to patients: storage, donation to another person, donation to research, or destruction.⁴⁷ None of these statutes

38. See FLA. STAT. § 742.17 (2005) (requiring agreements between parties to avoid conflicts over embryos without calling embryos "persons"); see also N.H. REV. STAT. ANN. §§ 168-B:13 through 168-B:15 (2002) (explaining embryo laws without classifying as "person"); *Kass v. Kass*, 696 N.E.2d 174, 178 (N.Y. 1998) (noting few states have adopted statutes determining disposition of embryo).

39. FLA. STAT. § 742.17 (2005) (outlining requirements of embryo disposition agreements for all IVF patients); Kimberly Berg, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 512 (2006) (asserting Florida only state requiring parties decide fate of embryos in case of divorce).

40. FLA. STAT. § 742.17 (2005) (creating default provision in absence of agreement between couple specifying fate of embryos).

41. See *id.* (avoiding issue of disposition when dispute arises with or without contract); see also Waldman, *supra* note 5, at 936 (noting deficiencies of Florida's statute requiring embryo disposition agreements).

42. See FLA. STAT. § 742.17 (2005) (failing to clarify how courts should decide dispute when no contract exists).

43. N.H. REV. STAT. ANN. §§ 168-B:13 through 168-B:15 (2002) (outlining proper usage and storage of embryos and who may perform procedures).

44. N.H. REV. STAT. ANN. § 168-B:13 (indicating IVF limited to women whose husbands undergo medical evaluation, counseling, and accept legal responsibilities). Women must also undergo a physical examination and counseling prior to receiving IVF treatment. *Id.*

45. N.H. REV. STAT. ANN. 168-B:13 through 168-B:15 (avoiding issue of embryo disposition). The statutes do not indicate how courts, clinics, or patients are to behave if disputes arise over embryos. *Id.*

46. CAL. HEALTH & SAFETY CODE § 125315 (West 2004); CONN. GEN. STAT. § 19a-32d (2003); MASS. GEN. LAWS ch. 111L, § 4 (2003); N.J. STAT. ANN. § 26:2Z-2 (2004) (including options for disposition of excess embryos within informed consent to IVF treatment forms).

47. See, e.g., CAL. HEALTH & SAFETY CODE § 125315 (West 2004); CONN. GEN. STAT. § 19a-32d (2003); MASS. GEN. LAWS ch. 111L, § 4 (2003); N.J. STAT. ANN. § 26:2Z-2 (2004) (outlining options to patients for excess embryos); see also Jill R. Gorny, *The Fate of Surplus Cryopreserved Embryos: What is the Superior Alternative for Their Disposition*, 37 SUFFOLK. U. L. REV. 459, 460 (2004) (discussing common options for excess embryos).

address how disputes between parties should be resolved.⁴⁸ Given the dearth of statutory language, courts have been forced to decide these difficult issues with little legislative assistance.⁴⁹

2. Case Law

Only six state supreme courts have faced the difficult task of determining what happens to cryogenically preserved embryos when a dispute arises between a divorcing couple.⁵⁰ The United States Supreme Court has yet to address this complex issue.⁵¹ Each court has held on different grounds and set varying policies regarding whether the court or the gamete providers have the final say in the distribution of frozen embryos and whether agreements between gamete providers are enforceable.⁵² The only constant is that courts refuse to allow one party to use or donate an embryo if the other party objects.⁵³ Courts have uniformly held that the right not to procreate prevails over the right to procreate when they conflict.⁵⁴ The reasoning behind these holdings is that a party who is denied the use of an embryo does not have his or her reproductive rights *permanently* interfered with, as he or she may still become a parent by other means.⁵⁵ If a court permitted a party to use an embryo over the objection of the other gamete provider, however, this would *permanently* interfere with the objecting gamete provider's reproductive rights.⁵⁶ Such a holding would

48. CAL. HEALTH & SAFETY CODE § 125315 (West 2004); CONN. GEN. STAT. § 19a-32d (2003); MASS. GEN. LAWS ch. 111L, § 4 (2003); N.J. STAT. ANN. § 26:2Z-2 (2004) (failing to address resolution of disputes between gamete providers).

49. Pittman, *supra* note 13, at 231 (affirming legislatures provide little help in these disputes); *see also supra* notes 32-48 and accompanying text (outlining few statutory laws addressing embryo disposition).

50. Falasco, *supra* note 5, at 285-94 (dissecting various high court embryo disposition decisions); Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences From the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 311 (2005) (indicating only six high courts have taken on complex topic of embryo disposition).

51. *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) (noting Supreme Court has yet to address issue of procreation resulting from IVF treatment); Mietling Eget, *The Solomon Decision: A Study of Davis v. Davis*, 42 MERCER L. REV. 1113, 1117 (1991) (indicating United States has yet to decide the legal status of embryos).

52. *See Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (affirming embryo disposition agreements presumed valid and binding upon disputing couple); *see also Davis*, 842 S.W.2d at 602-04 (indicating right not to procreate stronger than right to procreate); Waldman & Herald, *supra* note 50, at 312 (explaining two cases decided on constitutional grounds while four decided on contract principles).

53. *See A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-59 (Mass. 2000) (refusing to enforce contract which forces procreation); *see also J.B. v. M.B.*, 783 A.2d 707, 719-20 (N.J. 2001) (determining disposition agreements not enforceable if one party changes mind); Waldman & Herald, *supra* note 50, at 312 (evaluating cases and finding similar "procreation-avoidance" result in all).

54. *See, e.g., In re Marriage of Witten*, 672 N.W.2d 768, 782-83 (Iowa 2003) (explaining contract enforceable unless one party changes mind then parties must agree to new disposition); *A.Z.*, 725 N.E.2d at 1057-59 (noting forcing procreation on unwilling party violates public policy); *Davis*, 842 S.W.2d at 604 (holding party seeking to avoid procreation prevails absent unambiguous agreement to the contrary).

55. *See Davis*, 842 S.W.2d at 603-04 (maintaining loss of embryos not as burdensome as forced parenthood); *see also J.B.*, 783 A.2d at 717 (noting loss of embryo does not deprive party of right to procreate in future).

56. *See In re Marriage of Witten*, 672 N.W.2d at 780-82 (agreeing public policy requires parties to decide

force parenthood on the objecting party, with all its mental, emotional, and economic repercussions.⁵⁷ This is a step courts have been unwilling to take.⁵⁸

The Tennessee Supreme Court, in *Davis v. Davis*,⁵⁹ was the first high court in the United States to address this issue.⁶⁰ In *Davis*, the female gamete provider wanted to donate the couple's embryos to another infertile couple, while the male gamete provider wanted the embryos destroyed.⁶¹ The court reasoned that if the embryos were children, the state, through the "doctrine of parens patriae," would have to act in the "best interest of the child" and grant permission to donate the embryos.⁶² Since neither the State of Tennessee nor the United States Supreme Court has ever recognized an organism prior to birth as a "person," the court reasoned that the embryos were not children and the "best interest" standard did not apply.⁶³ Instead, the court determined embryos occupy an intermediate position: they are neither persons nor property, but are entitled to "special respect because of their potential for human life."⁶⁴ The *Davis* Court noted that in the event that an unambiguous contract exists between providers indicating what should happen to the embryos, the court would presume the contract valid and enforceable.⁶⁵ The court noted that parties may mutually amend such contracts, but if they cannot agree, the

whether or not to procreate); see also *J.B.*, 783 A.2d at 718-19 (holding forcing parenthood on unwilling party violates public policy); Falasco, *supra* note 5, at 278 (agreeing only one way to avoid parenthood but many ways to become parent). The party wishing to use the embryo may attain parenthood by traditional procreation, use of other gametes, or adoption. Falasco, *supra* note 5, at 278.

57. See *Davis v. Davis*, 842 S.W.2d 588, 603-04 (Tenn. 1992) (noting obligations attached to parenthood); see also Waldman & Herald, *supra* note 50, at 313-14 (mentioning various obligations of gamete provider if child born). Since courts do not allow parents to waive parental obligations, agreements to do so are not enforceable. Waldman & Herald, *supra* note 50, at 313. Consequently, gamete providers retain their parental responsibilities regardless of agreements between the parties, thus parenthood cannot be avoided once the embryo is implanted. *Id.*

58. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 836 (2005); Waldman & Herald, *supra* note 50, at 314 (explaining courts' reluctance to force parenthood on parties).

59. 842 S.W.2d 588 (Tenn. 1992).

60. *Id.* at 590 (addressing fact no case law exists to guide court in decision).

61. *Id.* at 590 (examining litigants and their positions on issue of embryo disposition). The father reasoned that he had entered into the IVF process with the intention of having a family and raising any resulting children with his wife. *Id.* at 604. The male provider in *Davis* had a difficult childhood in which he was separated from his father at an early age; he did not want his biological child to have a similar upbringing. *Id.* at 603-04. If the court ordered the parties to donate the embryos, the father could not ensure that would not happen. *Id.* As a result, he objected to the female provider donating the embryo. *Id.*

62. See *id.* at 594-95 (reasoning chance of life in best interest of embryo over destruction).

63. See *Davis*, 842 S.W.2d at 595-97 (citing *Roe* among cases which have failed to call fetuses or embryos "persons").

64. *Id.* at 597 (creating "intermediate" status for embryos which other courts followed). After determining that embryos are not property, the court further reasoned that a gamete provider's only property interest in an embryo is his or her authority to determine its disposition. *Id.*

65. See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (holding under procreational autonomy theory gamete providers alone should choose fate of embryos). The court reasoned that the disposition of the embryos affected only the providers and therefore neither the state nor the court should interfere with the decision. *Id.* at 602.

original agreement prevails.⁶⁶

In *Davis*, there was no such agreement; consequently the court was forced to weigh the competing interests of each party.⁶⁷ The court noted that the right to reproductive autonomy consists of two opposing rights, the right to procreate and the right not to procreate.⁶⁸ The court further indicated, as has each subsequent court to decide this issue, that a woman's right to bodily integrity is irrelevant in resolving these disputes.⁶⁹ This is because a woman's right to bodily integrity, which was invoked in *Roe* to protect a woman's right to terminate a pregnancy without the consent of the father, does not exist in embryo disposition cases where the embryo has not yet been implanted and thus a woman's body is not yet involved in the process.⁷⁰ As a result, neither gamete provider receives any preferential treatment.⁷¹

The *Davis* Court also reasoned that a state's interest in preserving embryos could not overcome the interests of the gamete providers.⁷² This was based on the notion that a state's interest in a non-viable fetus is not sufficiently compelling to allow it to interfere with a person's procreational autonomy; and therefore, the state's interest in a lesser developed embryo cannot be paramount.⁷³ As a result, the court was left to balance the interests of each provider, and in so doing, the court held that unwanted parenthood, with the financial and psychological costs attendant to it, outweighed the burden of knowing one underwent IVF treatment in vain and that one's embryos will not

66. *See id.* (protecting interest of parties and allowing them to modify agreement as circumstances change). In noting that it would enforce the original agreement if parties could not agree to modifications, the court left the door open to forced parenthood. *Id.*

67. *See id.* at 590 (noting case law or statutory law govern in absence of consent form or prior agreement).

68. *Id.* at 601 (examining competing interests involved in embryo disposition cases).

69. *Davis*, 842 S.W.2d at 601 (clarifying right to bodily integrity does not arise until implantation of embryo). The court recognized that women undergo far more during IVF treatment than men, but the court did not find this a sufficient reason to give women preferential treatment in these disputes. *Id.*

70. *Id.* at 601 (noting concerns of women's bodily integrity not involved); *see also* Planned Parenthood of S. Pa. v. Casey, 505 U.S. 833, 852 (1992) (O'Connor, J., concurring) (reasoning pregnancy has greater impact on mother); *Roe v. Wade*, 410 U.S. 113, 152-54 (1973) (evaluating how pregnancy uniquely affects women); Hyun Jee Son, Note, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability's Doctrinal Ambiguity*, 14 UCLA WOMEN'S L.J. 213, 228-29 (2005) (explaining proper to evaluate both providers' rights when embryos are outside the woman's body).

71. *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) (reasoning women's suffering during IVF less significant than lifetime burden of unwanted parenthood). The court held that it need not follow abortion case law and preclude men from having an equal say in the decision. *Id.* at 601-602.

72. *Id.* at 602 (holding state's interest insufficient to overcome procreational autonomy).

73. *See Roe*, 410 U.S. at 154-56 (indicating when state interest in protecting fetus and women's health is paramount and restrictions permitted); *see also Davis*, 842 S.W.2d at 602 (reasoning if no compelling interest in abortion context until viability, no interest to protect embryos). The *Davis* Court based its decision on *Roe*, which held that a state's interest in potential life does not become sufficiently compelling in the context of abortion until the end of the first trimester, when significant developmental stages occur. *Davis*, 842 S.W.2d at 602; *see also Roe*, 410 U.S. at 163. In *Roe*, the Court indicated that medical technology recognized that protecting a mother's health becomes compelling after the first trimester and that viability is the time when protecting the fetus becomes compelling. *Roe*, 410 U.S. at 163.

develop.⁷⁴ Thus, the court indicated that when no agreement exists, the interests of the parties must be weighed, and under ordinary circumstances, the party wishing to avoid parenthood should prevail.⁷⁵

Following this decision, the New York Court of Appeals settled a similar dispute in *Kass v. Kass*.⁷⁶ In *Kass*, the female gamete provider wanted the embryos implanted, claiming they were her only chance at genetic motherhood, while the male provider sought to have the embryos donated for research.⁷⁷ The couple previously signed consent forms indicating that in the event of a divorce, a property settlement or a court would determine control of the embryos.⁷⁸ The New York Court of Appeals, like the Tennessee Court before it, held that agreements between providers regarding the disposition of embryos are presumed valid, binding, and enforceable when disputes arise between providers.⁷⁹ The court reasoned that enforcing private agreements creates maximum procreational liberty because the donors, not the court or state, make the critical decisions.⁸⁰ The court held that the consent forms constituted an agreement between the providers that indicated their mutual intention to have the embryos donated for research in the event they divorced.⁸¹

The Massachusetts Supreme Judicial Court (SJC) was the next high court to resolve a dispute regarding the disposition of embryos in *A.Z. v. B.Z.*⁸² Here, unlike in previous cases, the court did not attempt to enforce the consent forms signed by the parties, which would have resulted in unwanted parenthood.⁸³

74. See *Davis*, 842 S.W.2d at 603-04 (emphasizing permanent nature of parental relationship once created). The court found that genetic parenthood was enough to trigger concerns of unwanted parenthood. *Id.* at 603. Even if the court did not force a party to raise a child, that party would still be a "parent" and thus responsible for all the duties and obligations that come with it, including the emotional baggage of knowing one has a child in the world. *Id.*

75. *Id.* at 604 (holding right not to procreate prevails over right to procreate when weighed against one another).

76. 696 N.E.2d 174 (N.Y. 1998) (resolving embryo disposition dispute).

77. *Id.* at 175 (evaluating litigants' position on embryo disposition).

78. *Id.* at 176 (indicating agreement existed providing for disposition of embryos in event of divorce). The parties drafted a divorce settlement that stated neither party would lay claim to the embryos and that the consent forms dictated their proper disposition. *Id.* at 177. The draft agreement, however, was never formally adopted and the female provider later informed the clinic that she objected to the distribution as indicated in the consent form. *Id.*

79. See *id.* at 180 (citing *Davis* decision).

80. *Kass*, 696 N.E.2d at 180 (determining under procreational liberty theory parties should control embryo disposition rather than court or state).

81. See *id.* at 181 (holding for party objecting to implantation). The court noted that unless both parties agreed to implantation, the embryos should go to research, as donation was the procreational avoidance alternative here. *Id.*

82. See generally, *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000) (resolving dispute between gamete providers over whether to destroy embryos or permit implantation). Here, the female donor wished to use the frozen embryos, while the male donor requested destruction. *Id.* at 1053.

83. See *id.* at 1057-59 (refusing to enforce contracts regarding familial relationships). The consent forms here indicated that if the parties separated, the clinic should release the embryos to the wife. *Id.* at 1054. The court, however, found it important that the husband signed blank forms with the wife subsequently filling in the key language; thus, the court doubted the forms represented the true intentions of the husband. *Id.* at 1057.

The SJC noted that even if an unambiguous agreement existed, the court would not enforce an agreement that compelled a party, against his or her will, to become a parent; noting such a contract would violate Massachusetts public policy.⁸⁴ In order to respect the liberty and privacy interests of individuals, the court determined that parties must have the freedom to decide whether or not to enter into these types of relationships; therefore, they cannot be bound by such agreements.⁸⁵ Consequently, the court refused to permit the woman to implant the embryos, protecting the male donor from becoming a father against his will.⁸⁶

The New Jersey Supreme Court in *J.B. v. M.B.*⁸⁷ did not go as far as the Massachusetts SJC in finding that all agreements compelling implantation violate public policy.⁸⁸ Instead, the New Jersey Supreme Court agreed with the court in *Davis* that ordinarily parties should be permitted to enter into contracts concerning the disposition of embryos and the court should enforce such contracts.⁸⁹ In order to prevent contracts that force parenthood, and thus violate public policy, the New Jersey Court held that contracts entered into at the beginning of IVF treatment are presumed valid, subject to the right of either party to change his or her mind concerning the disposition of the embryos up to the time they are destroyed or implanted.⁹⁰ The court further determined that when one party changes his or her mind, the court should weigh the conflicting interests of each party, and normally the party wishing to avoid parenthood will

Additionally, the court reasoned that the forms were intended as an agreement between the couple and the clinic, and were therefore not a binding indication of the providers' intentions if a dispute arose between them. *Id.* at 1056. Finally, the parties had filed for divorce, which the court indicated has a separate and distinct legal definition from separation; since the form only provided for contingencies in the event of a separation, the court determined the forms did not apply. *Id.* at 1057.

84. *Id.* at 1057-58 (indicating reluctance to uphold contracts forcing parenthood because they violate public policy). The court was unclear whether it would enforce agreements between gamete providers that would not result in unwanted parenthood, such as donation or giving the embryos to the party advocating destruction. *Id.* at 1058 n.22. The court did indicate in past cases it had refused to enforce surrogacy contracts or adoption agreements made prior to birth, as such contracts governing "familial relationships" violate public policy when the contract does not provide a "reasonable" waiting period for parties to change their minds. *Id.* at 1058-59.

85. *Id.* at 1059 (reasoning parties must have freedom to change their minds to fully exercise reproductive rights).

86. *See A.Z.*, 725 N.E.2d at 1059 (refusing to force parenthood on unwilling party on public policy grounds).

87. 783 A.2d 707 (N.J. 2001).

88. *Compare A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-59 (Mass. 2000) (refusing to enforce agreements forcing parenthood on public policy grounds), *with J.B.*, 783 A.2d at 719-20 (permitting enforcement of some agreements). The New Jersey Court reasoned that by allowing parties to change their minds, such contracts would not violate public policy, as there would be no forced parenthood. *J.B.*, 783 A.2d at 719-20.

89. *See J.B.*, 783 A.2d at 719 (establishing policy of enforcement of agreements subject to either party changing mind).

90. *See id.* at 719 (reconciling divergent court decisions to form its own policy). The court protected parties from forced parenthood while establishing a policy of enforcing disposition agreements. *Id.*

prevail.⁹¹

In *J.B.*, the parties signed a consent form stating they would relinquish control of their embryos to the IVF clinic if their marriage dissolved, unless a court specified that one of them retain control.⁹² The male donor alleged that prior to beginning IVF treatment the couple orally agreed they would use or donate all the embryos because he was Catholic and objected to their destruction.⁹³ The court noted that because the right to procreate is a fundamental right, the decision regarding embryo disposition should be that of the donors, not the courts.⁹⁴ Since there was no contract other than the consent forms and the court did not want to re-write the consent forms, it refused to find an oral agreement for donation or use.⁹⁵ Subsequently, the court ordered the remaining embryos destroyed.⁹⁶

A recent Washington case presented an even more complex issue.⁹⁷ In *Litowitz v. Litowitz*,⁹⁸ the male gamete provider and his former wife used donated eggs to produce the disputed embryos.⁹⁹ After the couple divorced, the “Intended Mother” wanted to use the embryos to create a child, but the male provider objected.¹⁰⁰ There was no prior agreement between the couple regarding the resolution of such a dispute, instead the consent form required the couple go to court to resolve any disagreement.¹⁰¹ The Washington Court recognized that the “Intended Mother’s” rights only existed as a result of a contract between the egg donor and the male provider.¹⁰² Nevertheless, the

91. *See id.* at 719 (indicating how court will rule when contract becomes unenforceable due to change of mind). The court noted that if a party has no other means of becoming a parent, the presumption of procreation-avoidance might not prevail. *Id.* at 719-20.

92. *Id.* at 710 (discussing existing agreement requiring court intervention to grant retention of embryos).

93. *J.B. v. M.B.*, 783 A.2d 707, 710-11 (N.J. 2001) (referencing dispute between parties over existence of oral agreement providing for use of all embryos). Unlike previous cases, the male provider in *J.B.* wanted to preserve the embryos for use by another couple, while the female provider wanted the embryos destroyed. *Id.* at 710. He argued that before beginning IVF treatment, he and his wife agreed that they would not destroy any of the resulting embryos. *Id.* If any embryos remained after they completed treatment, he alleged that they agreed to donate them to other couples. *Id.*

94. *See id.* at 715 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)) (holding forced sterilization unconstitutional). The Court in *Skinner* noted that procreation is a fundamental right “[which goes] to the very existence and survival of the race.” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

95. *J.B.*, 783 A.2d at 710-14 (discussing alleged oral agreement and refusing to bind parties without documentation).

96. *Id.* at 720 (ordering embryos destroyed in accordance with appellate court’s decision).

97. *See Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002) (discussing courts’ role when only one disputing party is biologically “related” to embryo).

98. 48 P.3d 261 (Wash. 2002).

99. *See id.* at 262 (discussing unique character of case). The couple also intended to use a surrogate to gestate the embryos. *Id.* At all times during the IVF process, however, the male donor’s wife was the “Intended Mother” of any child produced, as indicated in the agreement between the husband and the egg donor. *Id.* at 263.

100. *Id.* at 264 (delineating position of each party to dispute).

101. *Id.* (explaining disposition section of consent form).

102. *Litowitz*, 48 P.3d at 267-68 (indicating “Intended Mother’s” rights to embryos did not exist genetically or biologically). The egg donor and the male provider, or husband, had a contract providing that the “Intended

Litowitz Court found the rights of both the “Intended Mother” and the male progenitor equal.¹⁰³ The absence of a contract forced the court to look to the intentions of the parties.¹⁰⁴ By examining the consent form, the court determined that the parties intended that the embryos be thawed if stored for over five years.¹⁰⁵ Thus, the court found the intentions of the parties clear, given that the embryos had been stored for over five years, and ordered them destroyed.¹⁰⁶

In the most recent case, *In re Marriage of Witten*,¹⁰⁷ the Iowa Supreme Court, like the New Jersey Court before it, refused to allow an agreement to control where one of the parties had subsequently changed his or her mind.¹⁰⁸ The court held that it was against *current* public policy to enforce agreements between parties in such a “highly personal area” when one party changes his or her mind.¹⁰⁹ The court further noted that the ever-changing nature of public policy might lead to a different result in the future.¹¹⁰ Thus, as in *J.B.*, the Iowa Court held that agreements entered into at the inception of IVF treatment are binding, but that either party is entitled to change his or her mind, making the contract unenforceable.¹¹¹ The court further held that if a party does have a change of mind, it is best to require “contemporaneous mutual consent” of the parties, rather than allow the court to make the final decision.¹¹² Consequently,

Mother” would adopt any resulting child. *Id.*

103. *Id.* (maintaining neither party receives preferential treatment even where one party not genetically related to embryo). The court also indicated that the egg donor could not lay claim to the embryo as she only had a relationship to the egg, not the embryo which resulted from the fertilization of her egg. *Id.* at 268.

104. *See Litowitz v. Litowitz*, 48 P.3d 261, 268 (Wash. 2002) (indicating failure of parties to reach decision requires court to look to cryopreservation clinic contract).

105. *See id.* (determining intentions of the parties before undergoing IVF govern disposition).

106. *See id.* at 271 (enforcing portion of consent form calling for thawing of embryos). In a concurring opinion, Justice Sanders found that the agreement requiring destruction after five years should not govern, as the embryos only remained in storage over five years because of the ongoing lawsuit. *Id.* at 274 (Sanders, J., concurring). He indicated that the parties brought the suit prior to the five year expiration and that the clinic was merely storing the embryos until the court entered a judgment. *Id.* Sanders noted he would affirm the trial court’s “best interest” approach as it attempted to follow the purpose and objective of the contract. *Id.*

107. 672 N.W.2d 768 (Iowa 2003).

108. *Id.* at 782 (agreeing enforcement of contracts when party changes mind violates public policy). Here, the consent form indicated that the parties agreed the embryos would not be donated, implanted, or destroyed without the signed consent of both providers. *Id.* at 772-773. The Iowa Court, like the Tennessee Court in *Davis*, held that there was no authority to decide the dispute using the “best interest” standard because embryos are not “persons” within the meaning of the law; the term “person” only includes “those born alive.” *Id.* at 775 (quoting, *McKillip v. Zimmerman*, 191 N.W.2d 706, 709 (Iowa 1971)). The court concluded the issue before the court was not what was in the “best interest” of the child, but whether a child would even exist. *Id.* at 775.

109. *See id.* at 781 (noting court tries to remain out of “intimate questions inherent in personal relationships”). In *Witten*, the female provider again wished to use the embryos, and the male provider objected, though he did not want them destroyed. *Id.* at 772-73. Unlike in previous cases, the mother was willing to permit the father to exercise or terminate his parental rights to any resulting child. *Id.* at 772.

110. *Id.* at 779 (implying as public policy changes so might the enforceability of such agreements).

111. *Witten*, 672 N.W.2d at 782 (quoting *J.B. v M.B.*, 783 A.2d 707, 719 (N.J. 2001)) (permitting parties to change mind).

112. *See id.* at 783 (altering *J.B.* decision where court held right not to procreate prevailed when party

the court ordered the embryos stored until the parties reached a new agreement.¹¹³

Although the courts have differing opinions on how to resolve disputes over embryos, one clear principle has emerged: a court will not force parenthood on an unwilling party.¹¹⁴ While some courts have enforced agreements, they have done so only when enforcement would not result in the implantation of embryos over the objection of the other party.¹¹⁵ This refusal to force parenthood is based on the theory that the right not to procreate should prevail when it conflicts with the right to procreate and the notion that current public policy does not give states a strong enough interest in protecting “potential life” to force parenthood.¹¹⁶ If *Roe* is overturned, or further modified, these principles might drastically change.¹¹⁷

B. Current Abortion Law

Prior to *Roe v. Wade*,¹¹⁸ the groundbreaking case which provided the foundation for current abortion law in the United States, each state enacted its own abortion laws according to the public policy of that state.¹¹⁹ In determining what was best for its citizens, states allowed political discourse regarding such laws and compromise occurred.¹²⁰ Constitutional law, however,

changed mind). In *Witten*, the court determined that if the parties did change their minds, the court would not impose its own decision regarding disposition. *Id.* Instead, the court would maintain the status quo, allowing the embryos to remain preserved until the parties could agree on the disposition of the embryos. *Id.*

113. *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003) (noting status quo maintained until mutual decision achieved); see also Pittman, *supra* note 13, at 232 (discussing avoiding party may merely refuse to agree). An objecting party may refuse to agree, thus preventing implantation and effectively prevailing under such a situation. Pittman, *supra* note 13, at 232.

114. See *supra* notes 50-113 and accompanying text (evaluating court decisions and reasoning).

115. See *Kass v Kass*, 696 N.E.2d 174, 180-82 (N.Y. 1998) (enforcing agreement where parties agreed on donation instead of implantation); see also *supra* notes 50-113 (revealing courts have only upheld agreements which result in procreation avoidance). In *Kass*, the party opposing implantation did not want the embryos destroyed, thus donation was the “anti-procreational” option there. *Kass*, 696 N.E.2d at 175.

116. See *supra* notes 50-113 and accompanying text (explaining courts’ unwillingness to allow use of embryos when one party objects).

117. See Hollowell, *supra* note 19, at 84-85 (indicating developing technology will enable courts to decide when life begins); see also *infra* notes 199-221 and accompanying text (indicating how change in *Roe* may affect embryo disposition cases). According to Hollowell, if technology can determine when life begins, the Supreme Court will have to re-examine *Roe* and *Casey*, as it was previously unable to answer that question. Hollowell, *supra* note 19, at 84-85. Further, Hollowell argues that the only requirements for Fourteenth Amendment protections are “biological life” and “being genetically human.” *Id.* at 77. Accordingly, because embryos are both biologically alive and genetically human, they are technically entitled to the full protections of the Constitution. *Id.*

118. 410 U.S. 113 (1973).

119. See *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 995, 1001 (1992) (Scalia, J., concurring/dissenting) (indicating legislatures and citizens should decide issue rather than courts); see also Cynthia Gorney, *Imagine a Nation Without Roe v. Wade*, N.Y. TIMES, Feb. 27, 2005, at 45 (indicating twelve states still have pre-*Roe* statutes on the books).

120. *Casey*, 505 U.S. at 1001-02 (revealing abortion issue more divisive on national scale than at state level). At the state level, there is room for debate and compromise, and each state’s legislature can respond to

removes certain fundamental rights from the democratic process; such rights are neither subject to political debate nor the whim of the majority.¹²¹ The right to privacy, which under certain circumstances includes reproductive decisions, falls within this category of constitutionally protected rights.¹²²

The right to privacy was held to exist in the United States as early as 1891 and has continually been expanded and modified.¹²³ This right is derived from what the Supreme Court termed the “penumbra” of implied rights created by the Bill of Rights and the Fourteenth Amendment’s protection of due process of law.¹²⁴ The Court has continually respected “the private realm of family life” and has determined that the state may not enter this area without just cause.¹²⁵ One of the rights protected by the penumbra of privacy is the right to “bear and beget children.”¹²⁶ Conversely, this guarantee includes the right *not* to “bear and beget children.”¹²⁷ The Court has determined these rights are among the most fundamental and personal and applies the strictest of scrutiny to any state action restricting them.¹²⁸

The Court in *Roe* held that this “zone of privacy” extends to the right of a woman to terminate her pregnancy.¹²⁹ The Court in *Roe* refused to recognize a fetus as a person under the Constitution.¹³⁰ Additionally, the Court determined

its citizens accordingly. *Id.*

121. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (requiring compelling state interest before states may interfere with fundamental rights); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (indicating certain fundamental rights upon which the state cannot trample); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (recognizing respect for individual fundamental rights); *see also* Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2796 (2005) (citing case law prohibiting government from interfering with fundamental rights).

122. *Griswold*, 381 U.S. at 487 (noting right to privacy among fundamental rights rooted in tradition of nation).

123. *See, e.g.*, *Roe*, 410 U.S. at 152 (citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)) (establishing right to privacy); *Griswold*, 381 U.S. at 485-86 (holding right not to procreate exists); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (declaring right to procreate fundamental).

124. *See Griswold*, 381 U.S. at 482-85 (determining Bill of Rights not exhaustive list of all rights reserved to individuals). In *Griswold*, the Court indicated that “without [these] peripheral rights the specific rights would be less secure.” *Id.* at 482-83.

125. *See, e.g.*, *Griswold*, 381 U.S. at 496-97 (noting relationship between husband and wife as most private); *Prince*, 321 U.S. at 166 (affirming issues concerning “custody, care, and nurture of the child” rests with parents); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (confirming parents at liberty to direct upbringing and education of own children).

126. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (affirming decision whether to have a child is a fundamental right); *see also Skinner*, 316 U.S. at 541 (indicating procreation fundamental to human existence).

127. *See Eisenstadt*, 405 U.S. at 453 (extending right of privacy to individuals in making decision whether to have children); *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding interference with marital couple’s bedroom “repulsive” to concept of privacy).

128. *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 942 (1992) (Stevens, J., concurring and dissenting) (citing more than rational basis review needed when determining whether state may interfere with fundamental rights); *see also Griswold*, 381 U.S. at 487 (indicating liberties fundamental when “rooted in the traditions and conscience of our people”) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

129. *Roe v. Wade*, 410 U.S. 113, 162-63 (1973) (finding statute criminalizing abortion unconstitutional interference with woman’s privacy rights).

130. *Id.* at 157-62 (discussing why fetus not person under Constitution).

that the state has a legitimate and compelling interest in protecting the health of women and preserving “potential life.”¹³¹ In order to balance these competing interests, the Court created a trimester framework in which states were permitted to limit abortion access as pregnancies progressed beyond the third trimester.¹³² Prior to the third trimester, however, states could interfere only to regulate the quality of medical care, not to prevent abortions or access to them.¹³³ *Roe* is still fundamentally good law, but the Court in *Planned Parenthood of Southern Pennsylvania v. Casey*¹³⁴ modified its holding.¹³⁵

In *Casey*, the Court found it necessary to review *Roe*, the principles governing a woman’s right to terminate a pregnancy, and the authority of the state in protecting “potential life.”¹³⁶ While the Court retained *Roe*’s central holding, it rejected the trimester framework, allowing greater governmental interference in a woman’s right to terminate a pregnancy by permitting states to place restrictions on abortions throughout a pregnancy, even prior to viability.¹³⁷ States may implement such restrictions provided they do not create an “undue burden” on a woman deciding whether to terminate her pregnancy prior to viability.¹³⁸

Currently, laws must fit within the “undue burden” test established by *Casey*.¹³⁹ The Court has interpreted this to mean that a state may maintain a preference for birth over abortion, may encourage women to carry pregnancies to term, and may create limitations on abortions throughout pregnancy, such as

131. *Id.* at 162-63 (delineating when state’s interest in protecting “potential life” becomes compelling).

132. *Id.* at 162-66 (explaining trimester framework). The Court held that prior to the first trimester a woman and her doctor were free to make whatever decisions they wanted regarding termination of a pregnancy. *Id.* at 164. Upon completion of the first trimester, the state could develop regulations aimed at protecting the woman’s health. *Id.* At the beginning of the final trimester, however, the state’s interest in protecting potential life becomes compelling and the state may proscribe abortions due to fetal viability. *Id.* at 164-65.

133. *See Roe*, 410 U.S. at 163-66 (explaining why and when interference permitted after first trimester). The Court held that states could regulate abortion procedures to the “extent . . . regulation reasonably relates to the preservation and protection of maternal health” but nothing more. *Id.* at 163.

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

135. *Id.* at 846 (restating and reaffirming central holding of *Roe*).

136. *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 844-45 (1992) (stating reason for reviewing *Roe* after nineteen years of established trimester framework). The Court acknowledged that its decision in *Roe* created confusion regarding the standards to follow in determining whether an abortion restriction is constitutional. *Id.* at 844. As a result, the Court found it necessary, in order to clarify the legitimate authority of states and the rights of women in regards to abortion, to review its prior decision. *Id.* at 845.

137. *Id.* at 846, 870 (holding state’s interest in protecting potential life compelling at time fetus becomes viable). The Court upheld the central holding of *Roe*, but changed the point at when a state may go as far as proscribing abortion to the time when a fetus becomes viable. *Id.* at 870. The Court, however, did not establish a clear line as to when viability occurs. *Id.* In addition, the *Casey* Court determined that the Court in *Roe* gave insufficient weight to the states’ interest in protecting “potential life” throughout the pregnancy. *Id.* at 846.

138. *Id.* at 873-74 (creating new “undue burden” test for abortion regulations). The Court explained that an undue burden exists if a provision is enacted for the purpose of or has the effect of placing substantial “obstacles in the path of a woman seeking an abortion . . .” *Id.* at 837.

139. *See Casey*, 505 U.S. at 874 (confirming state action unconstitutional when creates “undue interference” with right to terminate).

waiting periods and mandatory counseling.¹⁴⁰ Prior to viability, however, such restrictions cannot create a “substantial obstacle” in a woman’s decision whether or not to have an abortion.¹⁴¹ The Court has found spousal consent to an abortion to be an example of an undue obstacle.¹⁴² After viability, however, the state’s interest becomes paramount and any regulation is permissible, including outright prohibition, provided there is an exception in cases where a woman’s health or life is in danger.¹⁴³

The Supreme Court has yet to define precisely when viability occurs, beyond the notion that it is the point at which a fetus may live outside the womb.¹⁴⁴ In deciding *Roe*, the Court stated it could not determine when life begins.¹⁴⁵ As a result of advances in medical technology, however, it is possible viability will advance closer and closer to conception.¹⁴⁶ These advances have led some scholars to believe at some point in the near future, the precise point at which life begins will be determinable.¹⁴⁷ This would require a re-evaluation of *Roe* and *Casey*.¹⁴⁸

140. *See id.* at 872 (explaining new holding and state’s right to pass reasonable regulations).

141. *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (stating such regulations permissible unless they create undue burden on woman’s ability to make decision).

142. *See id.* at 898 (affirming husband does not have control over wife’s decision like parents over child). The Court determined that a state could not require spousal notification of abortion because it is the woman who bears the child and suffers the most immediate and direct effects of pregnancy. *Id.* at 896-98. In addition, the Court affirmed the notion that a husband does not have a right to control his wife’s liberty and that all women, married or single, have the same right to personal liberty. *Id.*

143. *Id.* at 879 (allowing complete ban on abortions provided exceptions exist when woman’s life in danger).

144. *Id.* at 870 (describing viability as point fetus has “realistic possibility” of survival outside womb); *see also* Hollowell, *supra* note 19, at 83 (indicating viability occurs when fetal life may continue indefinitely outside mother’s womb).

145. *Roe v. Wade*, 410 U.S. 113, 159-62 (1973) (stating Court could not and did not have to determine when life begins).

146. *See* Fay Sliger, *Since Roe: Access to Abortion in the United States and Policy Lessons from Western Europe*, 10 *NEW ENG. J. INT’L & COMP. L. ANN.* 229, 233 (2004) (arguing as science progresses, viability will occur sooner, allowing greater governmental interference earlier in pregnancies); *see also* Hollowell, *supra* note 19, at 83-84 (confirming advances in technology changes viability timeframe outlined in *Roe*); Kathryn L. Miehle, *Pre Embryos: The Tiniest Speck of Potential Life Carrying the Seeds for Sweeping Change*, 6 *U. PITT. J. TECH. L. & POL’Y* 1, 1-2, 26 (2003) (hypothesizing advances could afford embryos protection inside and outside mother’s womb); Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus, Another Foundation for the Right to an Abortion*, 63 *BROOK. L. REV.* 1051, 1059 (1997) (explaining medical technology could eventually push viability back to conception). Hollowell indicates that at the time *Roe* was decided, a fetus was only viable after twenty-eight weeks, whereas now, some children are born and live after only twenty-three weeks of gestation. Hollowell, *supra* note 19, at 83-84.

147. Hollowell, *supra* note 19, at 85 (holding scientific advances may allow Court to determine what it could not in *Roe*).

148. Hollowell, *supra* note 19, at 84-85 (asserting if Court can determine when life begins, it must re-examine decisions in *Roe* and *Casey*); *see also* Son, *supra* note 70, at 215-18 (revealing weaknesses in viability as basis for determination of when state’s interest becomes paramount). Son argues that the rationale of *Roe* will be undermined as technology advances and permits embryos and fetuses to be developed outside of women. Son, *supra* note 70, at 215-18. As a result, a new foundation for determining when state’s interest become paramount will have to be determined in order to protect women and allow them sufficient time to make a decision whether to have a child or not. *Id.* at 218-26.

Although principles of privacy appear well-established, some abortion opponents believe that the right to reproductive choice does not exist in our Constitution and that the Court went too far in deciding *Roe* and concluding that a fetus is not a person.¹⁴⁹ Consequently, the determination of whether a fetus, or even an embryo, is entitled to constitutional protections may not be definitively settled.¹⁵⁰ Since the decision in *Roe*, courts have held the right to an abortion is inherently different than other privacy rights, such as educational decisions, marriage, contraception, and the right to avoid procreation.¹⁵¹ This is because a woman deciding whether to have an abortion is not “isolated in her privacy”; her decision impacts others, including the biological father and the fetus.¹⁵² As such, it is possible that *Roe* will be revisited and further modified or even overturned in the future.¹⁵³

C. Potential Changes to Abortion Law

There are several manners in which the Supreme Court could potentially alter abortion jurisprudence.¹⁵⁴ One of the more extreme possibilities is that the Supreme Court could hold that a fetus is a human being entitled to the same constitutional protections and guarantees as every other human being.¹⁵⁵ Thus, under the Fifth and Fourteenth Amendments, one could not “kill” a fetus without first providing it due process of law.¹⁵⁶ Under this theory, abortion could be outlawed in all circumstances.¹⁵⁷ Such a decision would provide a fetus—an unborn organism—with greater constitutional protections than a pregnant woman because, if the Court granted full constitutional protections to

149. *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 982 (1992) (Rehnquist, C.J., dissenting) (indicating *Roe* wrongly decided); *Roe*, 410 U.S. at 168 n.2 (Stewart, J., concurring) (finding no “general right to privacy” in Constitution or any case prior to majority’s decision); Liptak, *supra* note 22, at A1 (revealing recent nominees to Supreme Court oppose central holding of *Roe*).

150. *See supra* notes 17-22 and accompanying text (indicating chance of overturning *Roe* greater now than in previous decades).

151. *Casey*, 505 U.S. at 952 (indicating abortion unique because woman not isolated in decision); *Roe v. Wade*, 410 U.S. 113, 159 (1973) (proclaiming rights to abortion different than other privacy and reproductive rights).

152. *Casey*, 505 U.S. at 952-53 (reaffirming woman’s decision impacts other besides herself); *Roe*, 410 U.S. at 159 (noting impact decision to have abortion has on others).

153. *See supra* notes 17-22 and 144-152 and accompanying text (stating *Roe* possibly vulnerable to modification); *see also infra* notes 154-173 and accompanying text (revealing potential manners *Roe* may be altered).

154. *See infra* accompanying text to notes 155-170 (discussing various potential court abortion reforms).

155. *See Hollowell, supra* note 19, at 72-95 (arguing for protection of fetuses from moment of conception forward). Hollowell contends that the only requirements for Fourteenth Amendment protections are biological life and being of the human species. *Id.* at 76-77. As a result, since fetuses and embryos meet these requirements they are entitled to such protections. *Id.* at 77, 88, 90-95.

156. *See Roe*, 410 U.S. at 157 (noting if fetus guaranteed protections of Constitution, then it has right to life); *see also Hollowell, supra* note 19, at 72-74 (explaining due process requirements for all persons within United States).

157. *See Hollowell, supra* note 19, at 93-94 (alleging Supreme Court mistaken when held abortion part of right to privacy). Hollowell asserts fetuses deserve the full protection of the laws. *Id.*

a fetus, abortions might be prohibited even in cases where a woman's health is at risk.¹⁵⁸

One of the more plausible alterations to abortion law is that the Court will interpret a state's interest in protecting "potential life" to be greater throughout pregnancy, rather than just after viability.¹⁵⁹ The Court began to move in this direction in *Casey*.¹⁶⁰ In addition, since the decision in *Casey*, courts have upheld the constitutionality of various restrictions and regulations on abortions throughout pregnancy.¹⁶¹ As a result, it is possible that the present, more conservative Court, will interpret states' interests as stronger from the time of conception onward and allow further restrictions.¹⁶² This could potentially lead to a total ban on abortions, except where the woman's life or health is in grave danger.¹⁶³ Some states, including Ohio, Indiana, Georgia, Tennessee, and Kentucky, have already enacted legislation challenging current abortion jurisprudence.¹⁶⁴

Another likely change is that the Court could overturn *Roe*.¹⁶⁵ Several of the current Justices believe *Roe* was wrongly decided and that the right to privacy was extended beyond anything intended by the Framers of our Constitution.¹⁶⁶ If this occurs, abortion law would return to its pre-*Roe* status, leaving states to decide their own abortion laws.¹⁶⁷ Many states still have pre-*Roe* abortion statutes on their books; these laws would become effective immediately upon the overturning of *Roe*.¹⁶⁸ Although some states might repeal or alter their

158. *Roe v. Wade*, 410 U.S. 113, 157 n.54 (1973) (explaining medical exception to abortion prohibition cannot exist if fetus given status of person); *see also* Eget, *supra* note 51, at 1126 (indicating even under current abortion law, woman's health comes before viable fetus); Richard W. Momeyer, *Embryos, Stem Cells, Morality and Public Policy: Difficult Connections*, 31 CAP. U. L. REV. 93, 97 (2003) (asserting if embryos exist as moral beings after conception, no reason to save women's lives over fetus').

159. *See* Judith Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 457 (1999) [hereinafter *Equality Model*] (noting reproductive liberty set aside for states' interests).

160. *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 871-76 (1992) (holding state has stronger interest in protecting unborn child than indicated in *Roe*).

161. Julia Lichtman, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 GEO. J. ON POVERTY L. & POL'Y. 345, 345-46 (2003) (examining various restrictions upheld since *Roe*).

162. *See Casey*, 505 U.S. at 875 (affirming state has interest in protecting "potential life" throughout pregnancy).

163. Miehle, *supra* note 146, at 21 (discussing potential ban on all abortions except those "medically necessary").

164. *See* Nieves, *supra* note 18, at A1 (listing states poised to challenge *Roe*'s central holding).

165. *Supra* notes 17-22 and accompanying text (addressing strong potential for overturning *Roe*).

166. *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (stating *Roe* "plainly wrong"); Liptak, *supra* note 22, at A1 (discussing Chief Justice Roberts' opposition to *Roe* decision).

167. *See* Gorney, *supra* note 119, at 45 (explaining various state laws prior to *Roe* decision).

168. Gorney, *supra* note 119, at 45 (hypothesizing if *Roe* overturned, states may reinstate old laws). Seventeen states still have pre-*Roe* abortion statutes on their books. *Id.* Of the thirty-three states which do not have pre-*Roe* statutes, eighteen do not have laws protecting abortion, thus laws prohibiting abortion could be put in place if *Roe* were overturned. *Id.*

statutes, existing laws would be enforceable in the meantime.¹⁶⁹ The remaining states would pass new laws consistent with the legislative or popular will of the state.¹⁷⁰

Another approach to changing abortion law is to pass a constitutional amendment banning abortions or granting fetuses the status of persons.¹⁷¹ Such an amendment would leave the Court powerless to interpret the Constitution as protecting the right to abortion and end national debate over whether this right is protected by the Constitution.¹⁷² This is not an outrageous notion given the strength of the right-to-life movement and the Republican Party's strong opposition to abortion.¹⁷³

D. Other "Reproductive" Issues

Disputes involving the disposition of cryogenically-preserved embryos raise issues that closely resemble those that arise in the context of abortion.¹⁷⁴ In both situations it is not merely the mother, or even the potential parent, who is affected, but a "potential life."¹⁷⁵ There is a significant moral debate in our society that both fetuses and embryos, because of their potential for human life, deserve legal protections.¹⁷⁶ Consequently, some advocates believe adoption of cryogenically preserved embryos is the best solution to embryo disposition disputes.¹⁷⁷ Many argue that destruction is unnecessary when other "potential

169. See Gorney, *supra* note 119, at 45 (revealing likely response by states without pre-*Roe* laws on their books).

170. See *Casey*, 505 U.S. at 979-80 (Scalia, J., concurring in part, dissenting in part) (indicating political area proper place for abortion decisions); see also Gorney, *supra* note 119, at 45 (noting legal and political debates similar to *Roe* decision likely to begin again). Abortion opponents believe that such important policy decisions should be left to the majority, rather than a few influential members of our nation's high court. Gorney, *supra* note 119, at 45.

171. See REPUBLICAN PARTY PLATFORM, *supra* note 21, at 84 (establishing support for extension of constitutional protections to "unborn children").

172. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding right to abortion found within penumbra of rights created by the Bill of Rights). Critics allege that no such right to privacy exists. See Hollowell, *supra* note 19, at 94 (asserting Supreme Court wrong in due process analysis of *Roe*).

173. See REPUBLICAN PARTY PLATFORM, *supra* note 21, at 84 (supporting "human life amendment" to Constitution); see also *supra* notes 17-22 and accompanying text (highlighting recent strengthening of anti-abortion movement).

174. Compare *Roe*, 410 U.S. at 150 (indicating state's interest in potential life of fetus), with *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (discussing interim category for embryos entitling them to special respect because of "potential for human life").

175. See *Davis*, 842 S.W.2d at 598 (noting interest in "potential life" insufficient to prevent destruction of embryos based on *Roe* decision).

176. Hollowell, *supra* note 19, at 95 (discussing right of both embryos and fetuses to full protections of Constitution); see also Miehle, *supra* note 146, at 32 (discussing right to life movement's push to have embryos recognized as humans); Nagaourney, *supra* note 20, at A15 (illustrating Democratic Party's concern with remaining pro-choice).

177. See Falasco, *supra* note 5, at 294 (listing adoption among options for disposition of frozen embryos); see also Miehle, *supra* note 146, at 2-7 (discussing Bush Administration's plans to increase awareness of potential to adopt embryos). Miehle states that the Vatican has called upon all married Italian women to adopt

parents” are available to adopt and implant these embryos.¹⁷⁸ It is therefore important to explore how adoption law and the law surrounding surrogacy agreements may relate to embryos.¹⁷⁹

1. Adoption

Adoption is a state statutory matter.¹⁸⁰ Although each state’s adoption laws and procedures differ, all require the termination of the biological parents’ rights prior to adoption.¹⁸¹ Further, statutes generally require a waiting period after a child is born before an adoption can be finalized.¹⁸² Courts use these safeguards to protect, and possibly strengthen, the bond between the biological parents and child.¹⁸³ Legislatures would struggle in developing “embryo adoption” statutes because embryos are not yet born, therefore parental rights cannot be terminated under current law.¹⁸⁴ In addition, since most courts have refused to recognize embryos as “persons,” it would be difficult to apply the current adoption standard of the “best interest of the child.”¹⁸⁵ This means that

abandoned frozen embryos and carry them to term. Miehle, *supra* note 146, at 22.

178. See Miehle, *supra* note 146, at 7-8 (indicating next stage in HHS grant program might require mandatory adoption of unused embryos). Embryo adoptions are generally treated like open adoptions of children. *Id.* at 6-7. The Snowflake Embryo Adoption Program allows gamete providers who “relinquish” their embryos to pick from potential “adoptive parents.” *Id.* Those potential parents undergo home screening and background checks for both credit and criminal problems, and receive counseling on parental responsibilities. *Id.* As of 2003 the Program had matched thirty-six embryos with families, resulting in the birth of eight children and seven additional pregnancies. *Id.* The program’s ultimate goal is to have all embryos adopted so that none are destroyed. *Id.*

179. See Lauren N. Makar, Casenote, *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001) *Fourteenth Amendment—Procreational Autonomy as a Fundamental Attribute of the Privacy Rights—Where the Right to Procreate and the Right Not to procreate are in Direct Conflict Over the Disposition of Frozen Embryos, Ordinarily, the Party Wishing to Avoid Procreation Should Prevail*, 12 SETON HALL CONST. L.J. 681, 704 (2002) (discussing similar concerns of public policy in procreational and surrogacy contracts).

180. See Kindregan & McBrien, *supra* note 12, at 175 n.30 (indicating various states restrict consent until designated time after birth).

181. See Kindregan & McBrien, *supra* note 12, at 174-76 (discussing fact courts refuse to recognize adoption until after birth).

182. Kindregan & McBrien, *supra* note 12, at 174-76 (indicating pre-birth agreements usually unenforceable because parent cannot surrender rights until after birth of child); Waldman, *supra* note 5, at 933 (explaining grace period exists before adoption of child permitted).

183. See Waldman, *supra* note 5, at 932 (explaining need for “voluntary, informed and deliberate” termination of parental rights). The courts impose stringent regulations to try and preserve parent-child relationships. *Id.*

184. See Kindregan & McBrien, *supra* note 12, at 175 (questioning adoption statutes applicability to embryos). Courts have refused to recognize embryos as children, consequently it is unlikely adoption statutes can govern embryo “adoptions.” *Id.* No court to date, however, has resolved this matter. *Id.* at 174; see also Waldman & Herald, *supra* note 50, at 313 (discussing courts refusal to enforce agreements where one parent waives parental obligations of other).

185. See Kindregan & McBrien, *supra* note 12, at 188-89 (explaining difficulties with allowing embryo adoption to go forward). Courts have refused to apply the “best interest of the child” standard to embryos precisely because embryos are not humans under United States law. See *In re Marriage of Witten*, 672 N.W.2d 768, 774-75 (Iowa 2003) (addressing and rejecting best interest standard); see also *Davis v. Davis*, 842 S.W.2d 588, 594-95 (Tenn. 1992) (refusing to apply “best interest of the child” standard to embryos). Louisiana is the

parties who enter into “adoptions” of embryos may not be legally protected and could face courtroom battles.¹⁸⁶ Many may believe, or be led to believe, that entering into contracts similar to those used in surrogacy agreements might avoid these legal problems; however, a contract may not provide a sufficient solution.¹⁸⁷

2. Surrogacy

Surrogacy contracts are agreements between a party wishing to have a child and a woman who will carry a pregnancy to term in order to deliver a baby for that person.¹⁸⁸ These agreements generally provide for the adoption of a child by the “intended parents,” however, this contravenes current public policy, which forbids adoption prior to birth.¹⁸⁹ States are reluctant to enforce these contracts, just as they are reluctant to enforce contracts regarding the disposition of cryogenically preserved embryos.¹⁹⁰ These contracts are generally found to undermine statutory norms.¹⁹¹ Courts have found such contracts also offend public policy, as they do not provide for the best interest of the child and require waivers of fundamental parental rights prior to birth.¹⁹² It is difficult to imagine how courts could interpret surrogacy contracts differently from “embryo adoption” contracts and, as a result, parties entering

only state to date that has enacted laws treating embryos as persons. See LA. REV. STAT. ANN. § 9:130 (2000).

186. See Kindregan & McBrien, *supra* note 12, at 174-75 (addressing uncertainty of embryo adoptions). Because of uncertainty surrounding the adoption of embryos, gamete providers may still be responsible for their parental obligations because parental rights cannot legally be terminated until after birth. *Id.* at 174.

187. Kindregan & McBrien, *supra* note 12, at 174-75 (noting agreements to “adopt” embryos may be misleading). Without clear legal standards, it is unclear whether “adoption agreements” are enforceable and whether they terminate all parental obligations and responsibilities. *Id.* at 175-76.

188. Kindregan & McBrien, *supra* note 12, at 178 (discussing surrogacy agreement and intention of pregnant woman to relinquish child after birth); see also Barbara K. Kopytoff, *Surrogate Motherhood: Questions of Law and Values*, 22 U.S.F. L. REV. 205, 214 (1988) (discussing means of achieving surrogacy).

189. See *In re Matter of Baby M.*, 537 A.2d 1227, 1244-45 (N.J. 1988) (confirming parent cannot irrevocably terminate parental rights until after child’s birth). Parents are not permitted to contract away their rights and obligations. *Id.* at 1245. Even in the event of divorce, courts must approve any agreement between parents regarding child support and/or custody to ensure the children receive adequate care. *Id.*

190. See *R.R. v. M.H.*, 689 N.E.2d 790, 793-94 (Mass. 1998) (discussing various state policies toward surrogacy contracts). Only a few states recognize surrogacy contracts as enforceable. *Id.* Of those that do, some limit enforceability to contracts which do not involve payment in exchange for gestation. *Id.*

191. See *id.* at 794 (noting some states that enforce surrogacy contracts must exempt them from “baby selling” statutes); Daar, *Equality Model*, *supra* note 159, at 474-75 (explaining monetary compensation is among reasons courts refuse to uphold surrogacy contracts). It is unlawful to surrender a child for money or require a parent to give up his or her parental rights prior to the child’s birth. *R.R.*, 689 N.E.2d at 796. The New Jersey Court, in *Baby M.*, questioned whether it would enforce surrogacy contracts even if money was not involved. *Baby M.*, 537 A.2d at 1248. Courts and legislatures either do not recognize such agreements or require that procedural safeguards be followed to “ensure such waivers are known and thoughtful.” Waldman, *supra* note 5, at 900.

192. See *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057-58 (Mass. 2000) (refusing to uphold contract regarding disposition of embryos as against public policy); see also *Baby M.*, 537 A.2d at 1246-47 (indicating such contracts fail to provide for best interest of child); Waldman, *supra* note 5, at 900 (indicating enforcement of surrogacy agreements requires parties to waive important reproductive rights).

into either should be informed that legal problems may arise, potentially frustrating the intentions of both parties.¹⁹³

III. ANALYSIS

Given that disputes over embryos most closely resemble the issues surrounding abortion, it is likely that if *Roe* is modified or overturned, courts will resolve disputes over the disposition of embryos differently.¹⁹⁴ If the Supreme Court holds that states have a greater interest in protecting “potential life” or it finds fetuses are entitled to greater protections, it is possible that the balance between parties in embryo disputes could shift, providing the party wishing to procreate a better chance at prevailing.¹⁹⁵ As noted, public sentiment is already moving in a more conservative direction.¹⁹⁶ Further, as science advances and viability approaches conception, it is possible that the destruction of embryos could be prohibited even without altering the framework of *Roe* or *Casey*.¹⁹⁷ If this shift favoring procreation over avoidance occurs, it could have dramatic implications for clinics, doctors, and those seeking IVF treatment.¹⁹⁸

A. *Impact Potential Changes to Abortion Law Could Have on Embryo Disposition Cases*

If the unlikely occurs, and fetuses are granted the status and protections of human beings, either by the Court or by a constitutional amendment, embryos are likely to receive similar treatment.¹⁹⁹ Embryos would be entitled to all the

193. See Daar, *Disputes Revisited*, *supra* note 11, at 201 (explaining couples’ insecurity in proper interpretation and enforcement of written preconception agreements under current law); see also Daar, *Equality Model*, *supra* note 159, at 458 (questioning enforceability of contracts regarding embryos when surrogacy and parenting contracts not always enforced).

194. See Eget, *supra* note 51, at 1123 (indicating embryos similar to fetuses in womb). Embryos may be entitled to the same protections as fetuses. *Id.* at 1127.

195. See Falasco, *supra* note 5, at 279-81 (discussing current status of fetuses under *Roe* and *Casey*). Currently, because of their unique potential for life, fetuses occupy an intermediate position between human life and human tissue. *Id.* at 279-80. Embryos hold a similar position. *Id.* The interest of gamete providers, however, is stronger than the states’ in protecting embryos under current law. *Id.* at 281.

196. See Jason A. Adkins, *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 MINN. L. REV. 500, 525 (2005) (asserting statistics show public against broad abortion protections); see also Miehler, *supra* note 146, at 18 (indicating public support great for Bush Administration’s protections of unborn).

197. See *supra* notes 146-147, and accompanying text; see also *infra* notes 217-218 and accompanying text (discussing impact technology has had on moving viability closer to conception). If fetuses are protected from conception onward, there is a chance that embryos, once created, would be entitled to the same protections. *Infra* notes 217-218.

198. See Miehler, *supra* note 146, at 23-26 (addressing potential restrictions on research and treatment if IVF law changes); see also *infra* Part III(B)(2) (discussing potential changes to IVF law and impact on those seeking, providing, and using treatment).

199. See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (establishing embryo has “potential for human life”). The *Roe* Court referred to this same potential in establishing states’ interests in protecting fetuses and

rights and protections that come with personhood, thus destruction of embryos would be prohibited.²⁰⁰ Consequently, parties wishing to procreate would prevail in embryo disputes.²⁰¹ Additionally, courts could require all embryos either be implanted or donated to other couples for implantation.²⁰²

If *Roe* and *Casey* are merely modified, giving states' interests greater recognition and weight earlier in a pregnancy, states will likely have a parallel interest in protecting embryos.²⁰³ Up to now, courts have not held that a state's interest in protecting embryos is sufficiently strong to interfere with the rights of gamete providers.²⁰⁴ If abortion is further restricted and fetuses are provided greater protections from conception onward, it would follow that a state's interest in protecting embryos would also be given greater weight and thus parties wishing to procreate may prevail.²⁰⁵ Even if courts continue to find forced parenthood impermissible, they might require donation of unused embryos over the objection of gamete providers in order to protect embryos.²⁰⁶ If courts do force donation, they will also have to address the issues of embryo "adoption" and pass laws to govern such transactions.²⁰⁷

limiting a woman's right to terminate a pregnancy. *Roe v. Wade*, 410 U.S. 113, 154-55 (1973).

200. See U.S. CONST. amend. XIV, § 1 (establishing right to due process); see also Hollowell, *supra* note 19, at 72-74 (explaining Constitution prohibits denial of life without due process of law).

201. See Hollowell, *supra* note 19, at 75-77, 85-86, 92-95 (advocating fetuses and embryos "biologically alive" so entitled to same rights and protections as every person).

202. See Fenton, *supra* note 19, at 73 (indicating Italian law requires simultaneous implantation of all embryos created); see also Hollowell, *supra* note 19, at 92 (advocating limits on procedures involving embryos). Fenton indicates that the Italian law could require implantation even over a woman's objection. Fenton, *supra* note 19, at 94. Hollowell would limit procedures performed on embryos to those that provide protection or treatment, prohibiting damaging research or destruction. Hollowell, *supra* note 19, at 92.

203. See Daar, *Equality Model*, *supra* note 159, at 457 (indicating reproductive liberties often subordinated to state interests). It may actually be easier for the Court to hold in favor of states' interest in protecting "potential life" in disposition cases than in abortion cases because a woman's right to bodily integrity is not part of the analysis. See *Davis*, 842 S.W.2d at 601-02 (establishing woman's bodily integrity not part of analysis so progenitors equal in analysis). See generally *Kass v. Kass* 696 N.E.2d 174 (N.Y. 1998) (affirming no concern over bodily integrity in disposition cases); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (establishing intended parents equal even when one party not biologically related to embryo).

204. Eget, *supra* note 51, at 1122 (quoting *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992)) (noting courts have not found state interest sufficient to compel implantation).

205. See Daar, *Disputes Revisited*, *supra* note 11, at 199-200 (stating consenting to IVF treatment means consenting to parenthood). Courts would not be forcing parenthood on progenitors because they already consented to being a parent by participating in IVF process. *Id.*

206. See Daar, *Equality Model*, *supra* note 159, at 463-65, 468, 476 (reasoning undergoing IVF process implies consent to procreation). In the natural process, when a man releases his sperm, he loses any right to avoid procreation. *Id.* at 463. Likewise, in undergoing IVF, parties consent to procreate by donating their gametes. *Id.* at 468. Consequently, no change in circumstances can truly be said to occur, so parties should not be permitted to avoid responsibilities that follow. *Id.* at 476; see also Daar, *Disputes Revisited*, *supra* note 11, at 199-200. Parties undergoing IVF treatment have expressly consented to having a child and therefore have less of a right to change their minds than do those who have naturally conceived, possibly without intending to. Daar, *Disputes Revisited*, *supra* note 11, at 199.

207. See Kindregan & McBrien, *supra* note 12, at 177 (revealing without laws governing embryo adoption, parties vulnerable). Until the states pass laws governing embryo adoption procedures, parties would not be protected and thus could be held liable for child support and other parental obligations. *Id.*

If instead the Court overturns *Roe* and states return to their pre-*Roe* statutes or enact new laws consistent with the will of the majority of each state, it is likely new policies will also develop regarding the disposition of cryogenically preserved embryos.²⁰⁸ Each state's political climate would likely determine whether the party wishing to procreate or the party wishing to avoid procreation prevails.²⁰⁹ States where the pro-life movement is strong and in which restrictive abortion laws exist will likely have a public policy which favors procreation, thus parties wishing to implant or donate embryos will likely prevail.²¹⁰ Protection of embryos and a party's right to use an embryo to produce a life will be interpreted as superior to a party's right to avoid procreation and the unwanted burdens of parenthood.²¹¹ In addition, it is possible that these states will pass laws similar to Louisiana, forcing donation and use of all unimplanted embryos.²¹²

Conversely, states where the pro-choice movement prevails will likely maintain the status quo, finding the right not to procreate superior to the right to procreate.²¹³ It is possible, however, that courts in the more restrictive of these states could enforce contracts regarding the disposition of embryos, regardless of whether or not they force parenthood.²¹⁴ Courts could interpret agreements to enter into IVF treatment as agreements to procreate, thus precluding parties from changing their minds after embryos are produced, as procreation has

208. See Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action*, 1 VA. J. SOC. POL'Y & L. 309, 312 (1994) (stating if abortion not protected states will reform laws). When the Court does make a mistake, it has the power and duty to remedy its mistake. Hollowell, *supra* note 19, at 75-76. It follows then, if *Roe* was wrongly decided, as Hollowell contends, then it must be overturned. *Id.* at 76, 85.

209. See Gorney, *supra* note 119, at 45 (presuming political debate of "epic proportions" to follow overruling of *Roe*).

210. See Miehl, *supra* note 146, at 20-21 (indicating popular support of laws protecting unborn and restricting abortion); see also Gorney, *supra* note 119, at 45 (confirming states would try enforcing pre-*Roe* statutes prohibiting abortion).

211. See Waldman & Herald, *supra* note 50, at 312-13 (noting Constitution does not say right not to procreate is stronger than right to procreate). The psychological burden of forced parenthood might not be considered strong enough to prevail over a party's desire to bring an embryo to life. See Miehl, *supra* note 146, at 20-21 (indicating ban on harming unborn could result). This concept is diametrically opposed to the current policy of procreational avoidance. Waldman & Herald, *supra* note 50, at 312.

212. LA. REV. STAT. ANN. § 9:130 (1986) (forcing parties to donate embryos if not implanted); see also Kindregan & McBrien, *supra* note 12, at 177 (explaining unique provision of Louisiana statute permitting adoption of embryos); Miehl, *supra* note 146, at 19 (discussing compulsion requirement of Louisiana statute).

213. See Gorney, *supra* note 119, at 45 (speculating abortion would remain legal in at least twenty-two states including California and New York). Public policy in these states will likely continue to disfavor forced parenthood and allow for the destruction of embryos when parties dispute. *Cf. id.* (indicating what political leanings in states could mean for abortion law).

214. See, e.g., Eget, *supra* note 51, at 1125 (explaining once consent to procreate through IVF given, party cannot withdraw consent); Andrea Fischer, *Solomon and In Vitro Fertilization: Characterization and Division of Embryos in the Case of Divorce*, 11 J. CONTEMP. LEGAL ISSUES 262, 268 (1997) (noting by undergoing IVF party waives right to avoid procreation); Avery W. Gardiner, *Reproductive Health: Massachusetts Court Holds Contracts Forcing Parenthood Violate Public Policy*, 28 J.L. MED. & ETHICS 198, 199 (2000) (implying consent to procreate exists by undergoing IVF treatment).

already occurred at that point.²¹⁵ If these alterations occur and states continue to maintain their slow pace in passing laws regarding reproductive technology, individuals wishing to reproduce using IVF treatment will be left with even more uncertainty than currently exists, as laws could be altered with a change in government or public policy.²¹⁶

Finally, as science continues to advance, *Roe* and *Casey* could remain unchanged and viability kept as the cornerstone of abortion law.²¹⁷ As science brings viability closer to conception, courts may consider embryos viable once developed, and find it illegal to destroy them.²¹⁸ Under this theory, consenting to IVF treatment would effectively equal consenting to procreate and gamete providers would be responsible for any resulting children.²¹⁹ The only potential option providers might have to avoid parenthood would be to terminate their parental rights after birth through normal adoption procedures.²²⁰ This, however, would allow the litigant wishing to use the embryo to prevail because he or she could refuse to terminate his or her parental rights, making adoption impossible and requiring the objecting party to support any resulting child.²²¹

215. See Kaplan, *supra* note 8, at 1114 (examining notion that party seeking to procreate should prevail). Kaplan explains that once a party participates in IVF treatment, they should be estopped from asserting their right not to procreate. *Id.*; see also Gail A. Katz, Note, *Protecting Intent in Reproductive Technology*, 11 HARV. J.L. & TECH. 683, 691 (1998) (arguing consenting to IVF equivalent to consenting to have a child). Once a couple creates an embryo they cannot rescind that consent. Katz, *supra*, at 696.

216. Pittman, *supra* note 13, at 228-31 (indicating confusion without clear legislative enactment); *infra* Part III(C) (addressing potential uncertainties to follow without clear legislative and judicial guidance).

217. See *Planned Parenthood of S. Pa. v. Casey*, 505 U.S. 833, 870 (1992) (affirming viability point at which state can prohibit abortion); see also *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding state interest in protecting potential life compelling after viability).

218. See Eget, *supra* note 51, at 1127 (indicating viability exists even when artificial means needed to keep fetus alive outside womb); see also Hollowell, *supra* note 19, at 88-92 (arguing biological life begins at conception). See generally Son, *supra* note 70, (addressing problems with using viability as cornerstone of abortion jurisprudence). Embryos are viable as they can be maintained indefinitely outside of a womb. Eget, *supra* note 51, at 1127. Cryopreservation merely suspends the development of embryos, it does not end their development. *Id.* Currently, researchers are attempting to develop "artificial wombs." *Id.* Such wombs could be used for embryo implantation and to carry a developing embryo or fetus to term. *Id.* Under this notion, embryos and fetuses deserve full protection of the law from conception onward as they can continue to live outside the womb. See Hollowell, *supra* note 19, at 94.

219. See A. Conti & P. Delbon, *Medically-Assisted Procreation in Italy*, 24 MED. & L. 163, 169-70 (2005) (indicating new Italian IVF law equates consenting to IVF treatment with consenting to procreate); Daar, *Disputes Revisited*, *supra* note 11, at 199 (asserting parties expressly consent to parenthood in undergoing IVF treatment).

220. See Kindregan & McBrien, *supra* note 12, at 174-75 (explaining adoption law procedures and concerns with embryo "adoptions").

221. See Waldman, *supra* note 5, at 932-33 (requiring voluntary termination of parental rights). Without the consent of both parents, an adoption cannot go forward unless the unwilling parent is found unfit by a court. *Id.* If adoption is not permitted and parental rights not terminated, then parties retain parental obligations, duties, and responsibilities. See *supra* Part II(D)(1) (examining adoption laws).

B. Potential Positive and Negative Impact Changes Could Have

1. "Positive" Implications

There are potential benefits to making the destruction of embryos more difficult. Such alterations may make it easier for those morally opposed to the destruction of embryos to undergo IVF treatment.²²² Currently, an infertile person contemplating IVF treatment must consider the possibility that, in the event the other gamete provider no longer wants to produce a child, a court will order the destruction of any cryogenically preserved embryos.²²³ If courts prohibit the destruction of embryos over the objections of a progenitor, these parties could enter into IVF treatment without the fear that their embryos will later be destroyed.²²⁴ Additionally, if courts regularly enforce embryo disposition contracts, even when they force parenthood, these parties could enter into such agreements confident they will avoid future disputes and uncertainties.²²⁵ Thus, IVF treatment would become a viable option for these individuals.²²⁶

Many feminists argue women should have greater control over the disposition of embryos.²²⁷ They cite the fact that women sacrifice more of their time and personal autonomy in producing cryogenically preserved embryos.²²⁸

222. See Recent Cases, *Supreme Court of New Jersey Holds that Preembryo Disposition Agreements are Not Binding when One Party Later Objects*—J.B. v. M.B., 115 HARV. L. REV. 701, 706 (2001) (noting unavailability of IVF treatment to those who oppose destroying embryos). Many do not want to enter IVF treatment with the knowledge that their embryos may later be destroyed. *Id.*

223. See, e.g., *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003) (refusing to enforce contracts forcing parenthood on unwilling party as against public policy); A.Z. v. B.Z., 725 N.E.2d 1051, 1058 (Mass. 2000) (holding public policy prevents forcing parenthood); J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001) (holding contract enforcement does not violate public policy because not enforced if party changes mind).

224. See Recent Cases, *supra* note 222, at 704-05 (criticizing current system for not enforcing embryo disposition agreements like real contractual agreements). In order to have a true contract, both parties must be bound by the language of the contract. *Id.* at 705. In embryo cases, parties are not bound if one party changes his or her mind, thus there is not a *real* contract. *Id.* at 704. Courts, like the Iowa Supreme Court, that favor enforcement of contracts but require new agreements when one progenitor changes his or her mind, in effect allow the party wishing to avoid procreation to prevail because that party may simply refuse to agree to any other disposition, causing the embryos to remain undeveloped. *Id.* at 704-06; Pittman, *supra* note 13, at 232 (affirming party wishing to avoid may do so by refusing to agree to modification).

225. See Recent Cases, *supra* note 222, at 704-06 (explaining impact of non-enforcement of contracts on couples contemplating IVF treatment); see also Daar, *Disputes Revisited*, *supra* note 11, at 201 (finding patient choice currently illusory). Patients do not control the fate of their embryos if courts do not enforce contracts when one party changes his or her mind. Daar, *Disputes Revisited*, *supra* note 11, at 201-02.

226. See *supra* notes 223-225 and accompanying text (revealing benefits to parties who oppose destruction of embryos).

227. See Daar, *Equality Model*, *supra* note 159, at 466 (proposing all women have equal control over their embryos and fetuses).

228. See Fenton, *supra* note 19, at 80-83 (arguing decisions and choices mainly effect women, women's bodies, and a woman's choice whether to reproduce); see also Waldman, *supra* note 5, at 902-04 (explaining IVF procedure). Women face serious health risks as well as multiple procedures in order to remove eggs. Waldman, *supra* note 5, at 903-04. Additionally, women currently undergo a great deal more in producing

Also, in most instances, it is the female who is infertile or unable to reproduce naturally.²²⁹ Thus, the male, who in most cases is the party wishing to avoid reproduction, and who usually has a lifetime to have children and can usually do so naturally, prevails over the objecting woman, who is limited by time and biology in her ability to conceive naturally.²³⁰ As a result, courts favoring destruction over procreation, which often state they are taking into consideration *other* means of attaining parenthood, are ignoring the potential inability of women to reproduce by other means.²³¹ Considered in this light, balancing the interests of progenitors has a disparate impact on women.²³² If case law and statutory law change, women wishing to use preserved embryos would be more likely to prevail, thus their extra discomfort and contribution would not be in vain, and they would not be denied their only *real* means of having a biological child.²³³

2. "Negative" Implications

Conversely, changes in embryo disposition law could make using IVF treatment more difficult, if not impossible.²³⁴ Many people will not enter into IVF treatment knowing they could be forced to use all the embryos created or

embryos for IVF treatment than their male counterparts. *Id.*

229. Falasco, *supra* note 5, at 274 (explaining postponement of reproduction until later in life decreases chance women will conceive naturally); AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, PATIENT FACT SHEET, PREDICTION OF INFERTILITY POTENTIAL IN OLDER FEMALE PATIENTS I (2005), available at http://www.asrm.org/Patients/FactSheets/Older_Female_Fact.pdf (revealing decline in fertility as women age).

230. Waldman & Herald, *supra* note 50, at 320-23 (revealing impact on women greater than men). The limited number of ova biologically constrain a woman's reproductive abilities, while men with healthy reproductive systems can reproduce until very late in life. Kaplan, *supra* note 8, at 1095. Additionally, female gamete providers are often the party that wishes to use or donate the embryos. See, e.g., *In re Marriage of Witten*, 672 N.W.2d 768, 777, 781-83 (Iowa 2003); *Kass v. Kass*, 696 N.E.2d. 174, 175 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (indicating female providers desired use of embryo).

231. See Makar, *supra* note 179, at 705-08 (arguing alternative means of procreation inappropriate consideration when infertile). If the party seeking to use the embryo has no other natural opportunity to conceive, the court should not weigh other options of parenthood, such as adoption, in determining which party prevails. *Id.* See generally David L. Theyssen, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?*, 74 IND. L.J. 711 (1999) (asserting adoption is not a real alternative to biological reproduction).

232. See Daar, *Equality Model*, *supra* note 159, at 463-66 (explaining difference in treatment of fertile and infertile women). Once conception occurs naturally, the law allows the woman to control whether a child will develop or not. *Id.* at 465. Women who undergo IVF, however, are not given this same right; instead, the law gives both male and female providers equal rights in deciding whether or not an embryo will develop. *Id.*

233. See, e.g., Daar, *Disputes Revisited*, *supra* note 11, at 200-02 (arguing forced procreation permissible in other contexts); see also Daar, *Equality Model*, *supra* note 159, at 466 (advocating women should have control over embryos); Eget, *supra* note 51, at 1125 (noting embryo disposition cases give men "post conception rights" for the first time). Daar asserts that parenthood is forced on men who naturally conceive against their wishes, so there is no reason not to force it on those who conceive through IVF. Daar, *Disputes Revisited*, *supra* note 11, at 201.

234. See Miehle, *supra* note 146, at 26-36 (outlining impact changes in embryo disposition laws could have on IVF treatment). Some researchers specializing in fertility are already hesitant to apply for federal funding because of increasing restrictions concerning embryos. *Id.* at 32.

donate their remaining embryos.²³⁵ Some people are morally opposed to giving their gametes to strangers.²³⁶ Others are unwilling to allow the other provider to use the embryos if the couple is no longer married and will not raise the resulting children in a family setting.²³⁷ Additionally, it is impractical to expect parents who successfully conceive through IVF treatment to implant, develop, and raise all embryos created to adulthood.²³⁸ If current laws change, forcing donation or use of all embryos, these individuals could be inhibited from reproducing using IVF treatment.²³⁹

It would be impossible to implant and bring to life all the embryos produced through IVF.²⁴⁰ Many of the resulting children would have to be given up for adoption.²⁴¹ The government does not have the resources to implant, develop, or raise the massive number of embryos produced through IVF procedures.²⁴² With the current nature of our nation's public services, it is unlikely there would be enough homes for all of these children or enough resources to support their development to adulthood.²⁴³ Consequently, the government might restrict the number of embryos produced in a given IVF procedure so that no embryos are wasted.²⁴⁴ This would, however, make IVF more difficult because couples would have to undergo repeated IVF treatments, resulting in the

235. See *supra* Part II(A)(2) (outlining objections when former spouse wants to implant embryos).

236. See *supra* note 61 (discussing gamete provider's refusal to have "stranger" raise his "child").

237. *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998) (resolving dispute where male provider objected to female provider implanting embryo). In *Kass* the male donor was not opposed to donating the embryo, but did not want his former spouse to give birth to and raise his child on her own or with another man. *Id.*

238. See Momeyer, *supra* note 158, at 95-96 (indicating one-third to one-quarter of all naturally occurring pregnancies do not result in implantation); see also Mary B. Mahowald, Letter to the Editor, *Frozen Embryos Weren't Destroyed*, N.Y. TIMES, Aug. 9, 1996, at 26 (stressing not all embryos will implant, gestate, or develop to live birth even if require implantation).

239. See *supra* Part II(A)(2) notes (outlining objections of parties concerning use of embryos when no longer married and raising together).

240. See Heidi Forster, *The Legal and Ethical Debate Surrounding the Storage and Destruction of Frozen Human Embryos: A Reaction to the Mass Disposal in Britain and the Lack of Law in the United States*, 76 WASH. U. L.Q. 759, 760-65 (1998) (discussing number of embryos in storage and inability to keep stored indefinitely).

241. See *id.* at 765 (revealing not enough people willing to "buy" embryos to avoid destruction in Britain).

242. Cf. *id.* at 765 (indicating Vatican unable to find enough couples to "buy" embryos in Britain before destroyed). There were not enough people to adopt all of the embryos that were set to be destroyed in England, as a result, 904 embryos were destroyed at one time. *Id.* Additionally, Forster discusses the prohibitive cost of allowing embryos to remain frozen indefinitely. *Id.* at 761.

243. Lichtman, *supra* note 161, at 358-59 (discussing increasing restrictions on public assistance in United States); Walen, *supra* note 146, at 1059 (indicating inability to support all children developed through IVF treatment).

244. Nathan A. Adams, IV, *Creating Clones, Kids & Chimera: Liberal Democratic Compromise at the Crossroads*, 20 ISSUES L. & MED. 3, 57 (2004) (indicating government may have compelling interest to restrict reproductive technology uses); see also Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 196-97 (2006) (exposing use of welfare caps to control reproduction of poor and minority women). Smith discusses how the government already controls who can and cannot have children through its current welfare reform programs. Smith, *supra*, at 196-97.

regression of infertility treatment.²⁴⁵ As a result, IVF treatment might not only become an unfavorable solution to infertile couples, but the government might have a legitimate interest in restricting its use and determining who may undergo the procedure.²⁴⁶ This leaves the government in the position of controlling who will and will not have children, an undesirable outcome for individual freedom and autonomy.²⁴⁷

Another problem that may result from changes to embryo disposition law is that doctors and clinics may no longer agree to perform these procedures or store embryos.²⁴⁸ Under such drastic changes in the law, doctors and clinics could be civilly and even criminally responsible for the intentional or accidental destruction of cryogenically preserved embryos.²⁴⁹ Some would fear producing embryos for couples who might later refuse to donate or implant the

245. See V. Fineschi, et al., *The New Italian Law On Assisted Reproduction Technology (Law 40/2004)*, 31 JOURNAL OF MEDICAL ETHICS 536-39 (2005), available at <http://jme.bmj.com/cgi/content/full/31/9/536?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&author=1=Fineschi&andorexactfulltext=and&searchid=1&FIRSTINDEX=0&sortspec=relevance&resourcetype=HWCIT> (addressing recent Italian legislation limiting number embryos produced and requiring implantation of all embryos); see also Waldman, *supra* note 5, at 928 (recognizing prohibition on cryogenic preservation ends chance of procreation for women who cannot produce eggs). Italian law 40/2004 limits the number of embryos produced in each cycle of IVF to three. Fineschi, *supra*, at 536-39. It further requires all these embryos be immediately implanted. *Id.* This very restrictive law results in women having to undergo multiple cycles of ovarian stimulation and extraction, does not allow the body to recover from the prior ovarian hyperstimulation before implanting, and increases the risk of multiple pregnancies. *Id.* The authors indicate that by not allowing cryopreservation, success rates are reduced by two-thirds. *Id.* Scientific development, including advances in the area of ART, have been curtailed in Italy by this new more restrictive IVF law. Fenton, *supra* note 19, at 74.

246. See Charles P. Kindregan, et al., 1 MASS. PRAC., FAMILY LAW & PRACTICE § 24:1 (3d ed.) (asserting government will challenge reproductive rights). Kindregan argues that the government may try to manipulate reproductive choices and rights of individuals and points to countries like China and India where the government has already tried to control reproduction. *Id.*; see, e.g., Adams, *supra* note 244, at 56-58 (addressing concern government may control use of reproductive and genetic technology); Miehler, *supra* note 146, at 23-26 (discussing current and potential limitations on uses of embryos); Smith, *supra* note 244, at 196-97 (revealing government already tries to restrict reproduction of poor and minority women). The government may be able to limit IVF to couples who can afford and are willing to raise all the embryos produced in such treatment. Miehler, *supra* note 146, at 25-26.

247. Compare *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding state cannot sterilize individuals against their will since right to procreate held fundamental, thus outside government's control), with Charles P. Kindregan, et al., 1 MASS. PRAC., FAMILY LAW & PRACTICE § 24:1 (3d ed.) (worrying government could force sterilization, abortions, and require licensing of parents); see also Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 404-10 (2000) (revealing government forced poor and minority women to use Norplant to prevent reproduction). Bridgewater discusses how in the past, elite members of society controlled the reproduction of slaves. Bridgewater, *supra*, at 410-15. She further argues this government and elite control over the reproductive capacities of poor and minority women is likely to occur again in the future. *Id.* at 422.

248. Miehler, *supra* note 146, at 19 (affirming doctors may avoid assisting in IVF treatment).

249. *C.f.* *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1261-64 (Ariz. Ct. App. 2005) (affirming lower court's decision embryo not within meaning of person for wrongful death statute); see also Miehler, *supra* note 146, at 19 (noting potential liability of doctors). In *Jeter* the court noted it is the duty of the legislature, not the courts, to define or expand the definition of a person. *Jeter*, 121 P.3d at 1261. If this were to occur, a future clinic or physician, like the one in *Jeter*, might be liable for wrongful death of an embryo. *Id.*

embryos.²⁵⁰ Also, doctors and clinics would fear civil suits and criminal sanctions for embryos accidentally destroyed in the thawing, implantation, or storage process.²⁵¹ Consequently, many doctors and clinics might simply refuse to offer these services, finding that the risks of performing them far outweigh the desire to provide them.²⁵² Additionally, insurance coverage for medical professionals providing IVF treatment might be so costly as to make IVF itself prohibitively expensive.²⁵³ This would leave infertile couples with no real alternative, effectively outlawing IVF treatment.²⁵⁴ If states are given the power to regulate IVF without restriction and states' interests are held sufficient to interfere with gamete providers' decisions, couples will likely shop for states with laws consistent with their own moral beliefs and where IVF treatment is still available.²⁵⁵ Couples wishing to procreate using IVF treatment would have to move or travel to states where one can receive IVF treatment and the laws comport with their moral beliefs.²⁵⁶ This would be very

250. Compare Miehler, *supra* note 146, at 19 (indicating potential liability of doctors if all embryos not implanted), with Eget, *supra* note 51, at 1116 (analogizing removing embryo from cryopreservation equivalent to removing life support). The Australian Committee to Consider Social, Ethical, and Legal Issues Arising from In Vitro Fertilization notes that in states with restrictive embryo laws, doctors would face a grave moral and ethical dilemma. Miehler, *supra* note 146, at 19. They would have to choose whether to force patients against their wishes to implant or donate their embryos, violate state law by destroying the embryos, or allow the embryos to remain frozen indefinitely, effectively destroying them. *Id.* Eget, however, suggests that removing embryos from cryopreservation is not destruction but a "passive death." Eget, *supra* note 51, at 1116. Thus when a doctor merely removes embryos from cryopreservation he/she is not actively destroying the embryo, but instead, merely removing the support system keeping the embryo "alive." *Id.* This is analogous to removing the life support system from a brain dead patient. *Id.*

251. See *Jeter*, 121 P.3d at 1261 (refusing to apply wrongful death statute to embryos because of uncertainty of human status); see also Miehler, *supra* note 146, at 19 (noting doctors concerns). Though the court in *Jeter* refused to apply the wrongful death statute, it was willing to allow the plaintiffs' "negligent loss or destruction" of embryos claims to go forward. *Jeter*, 121 P.3d at 1261 (opening door to other torts in embryo destruction case).

252. See Miehler, *supra* note 146, at 7-8, 18-21 (indicating results of limitations on IVF treatment and embryo destruction).

253. See Carrie Lynn Vine, Comment, *Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps*, 26 N. ILL. U. L. REV. 413, 413-14 (2006) (revealing insurance premiums so high doctors unable to perform certain procedures). Vine indicates that insurance companies do not require those doctors who have malpractice claims against them pay increased premiums, instead increased premiums are spread out among doctors within specialty practices that have riskier procedures and/or are more likely to be sued. *Id.* at 419. Thus, doctors performing higher risk procedures pay higher premiums, passing these additional costs onto patients. *Id.* at 414.

254. See *id.* (asserting increased premiums lead to decrease in patient access to procedures and increased costs); see also Fenton, *supra* note 19, at 107 (affirming Italian law 40/2004 is regressive legislation moving IVF backward); Note, *supra* note 121, at 2792 (indicating Bush Administration advocating for restriction of IVF procedures).

255. Lisa Hird Chung, *Free Trade in Human Reproductive Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 MINN. J. INT'L. L. 263, 265-70 (2006) (discussing "procreative tourism" industry); Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 299-301 (2005) (revealing global fertility market exists allowing individuals to obtain reproductive services unable obtain at home).

256. See Jennifer Templeton Schirmer, *Physician Assistant as Abortion Provider: Lessons from Vermont, New York, and Montana*, 49 HASTINGS L.J. 253, 270 (1997) (indicating nine percent of abortion-seekers travel

costly given that IVF treatment is a long, extensive process.²⁵⁷ As a result, such treatment would be restricted to those who could afford such travel and whose employers allow them to take off the required time.²⁵⁸ Additionally, couples would have to be concerned that after undergoing IVF treatment and having their embryos cryogenically preserved, the laws of the state may change and all of their searching and efforts would have been in vain.²⁵⁹ Doctors performing these procedures would also face this same concern in that a simple majority vote could alter their liability.²⁶⁰

Finally, legislatures and the courts would have to address choice-of-law issues.²⁶¹ They will have to be decided whether the law at the time of cryopreservation or the law at the time the dispute arose controls. If parties are only traveling to a state for the procedure, it must be determined whether their domicile state's laws or the laws of the state in which they are receiving treatment should prevail.²⁶² Also, a decision would have to be made regarding whether parties can move embryos from one state to another in order to dispose of them if it is illegal to dispose of them where they are currently stored.²⁶³ These issues have to be statutorily addressed in order for couples to be adequately informed of the legal issues that exist and may exist in the near future.²⁶⁴

Society, the states, the federal government, and the judicial system must determine if an embryo—an eight to sixteen cell organism that may never fully develop—is so worth preserving that it should destroy the opportunity to access

over one hundred miles to provider and eighteen percent travel fifty miles); *see also* Storrow, *supra* note 255, at 301 (listing legal reasons among those given by couples traveling for reproductive treatment).

257. *See* Fenton, *supra* note 19, at 106-07 (discussing restrictive procreation laws lead to procreational tourism); *see also* Storrow, *supra* note 255, 327-29 (revealing increased cost when couples must travel to destination to receive treatment). Fenton additionally notes that black markets are likely to arise when laws are so restrictive on ART. Fenton, *supra* note 19, 106-07.

258. *Cf.* Lichtman, *supra* note 161, at 347 (indicating restrictive laws regarding reproduction have greatest impact on poor women).

259. *See In re Marriage of Witten*, 672 N.W.2d 768, 779 (Iowa 2003) (indicating public policy is “indefinite and uncertain” and therefore changeable); *see also supra* notes 208-216 and accompanying text (arguing preferences of majority will control embryo disposition law if abortion regulation returned to states).

260. *Supra* notes 248-254 (discussing possibility for increased liability of IVF providers).

261. *See generally* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992) (addressing restrictions on states controlling citizens beyond their borders). Kreimer discusses that states cannot restrict their own citizens behavior in other states, nor punish returning citizens for participating in legally sanctioned activities in another state. *Id.* at 451, 469-73. Consequently, if state laws vary, individuals will have the freedom to travel among the several states in order to receive the treatment they desire. *Id.* at 500-09.

262. *See Kreimer, supra* note 261, at 462-64 (discussing citizens generally do not carry “home-state laws” with them when traveling).

263. *See Kreimer, supra* note 261, at 464-87 (explaining history of extra-territorial jurisdiction when state tries to impose moral laws outside boundaries).

264. Miehl, *supra* note 146, at 32-36 (advocating legislative response to clarify reproductive technology rights).

the very procedure that produces them.²⁶⁵ One must keep in mind the probability that implantation will be successful and that the embryo will develop and be born alive.²⁶⁶ It is important that as science advances, legislatures work to clarify the laws surrounding new medical techniques in light of these medical probabilities.²⁶⁷ To date, the states and federal government, with few exceptions, have not done this.²⁶⁸ Consequently, courts have been left to make difficult decisions with little scientific guidance, and individuals using IVF treatment have been left with an uncertain future.²⁶⁹

C. Potential Solutions

A potential solution is to develop federal legislation requiring that couples entering IVF treatment create contracts, separate from informed consent forms, that address the issue of embryo disposition and that require these contracts be enforced, just as all other contracts are enforced.²⁷⁰ The legislation should emphasize the difference between embryos and fetuses, so that if *Roe* is overturned, it does not result in a similar change to embryo disposition law.²⁷¹

265. See Miehler, *supra* note 146, at 18-21 (suggesting increased federal regulations could restrict research and infertility treatments).

266. See Forster, *supra* note 240, at 768 (providing statistics regarding success of implantation); see also Jim Galloway, *Stem Cell Impasse: Isakson Believes He Has a Solution*, ATLANTA JOURNAL-CONSTITUTION, Oct. 22, 2006 (highlighting even naturally half of all fertilized embryos do not develop to live births); Mahowald, *supra* note 238, at 26 (revealing majority of embryos will not implant, gestate, and develop to birth even if implanted); Roberta Friedman, *Picturing the Fertile Genome New Imaging Technologies are Predicting and Improving the Success of In Vitro Fertilization*, GENOME NEWS NETWORK, Dec. 15, 2000, http://www.genomenewsnetwork.org/articles/12_00/fertile_genome.shtml (revealing scientists increasingly discovering embryos not suitable for implantation and development). Forster indicates only sixty-five percent of embryos will survive the thawing process. See Forster, *supra* note 240, at 78. Out of those only ten percent will successfully implant into a woman's uterus. *Id.* Only five to eight percent of those will result in a live birth. *Id.* Further, as embryos are stored longer they become less viable. *Id.*

267. See, e.g., Forster, *supra* note 240, at 776 (arguing government must pass legislation regulating disposition of embryos); Miehler, *supra* note 146, at 32-36 (outlining need for legislature to act with care); Pittman, *supra* note 13, at 228 (emphasizing need for state legislatures to provide courts with guidelines). Gorny discusses that forced implantation or donation would favor embryos over gamete providers, which she finds impermissible. Gorny, *supra* note 47, at 474-76 (arguing should not allow rights of "eight cell organism" override living person's).

268. *Supra* notes 32-49 and accompanying text (discussing lack of state and federal regulations regarding disposition of embryos).

269. *Cf. supra* text accompanying notes 49-58 (revealing courts faced with difficult task when no guidance provided by legislatures).

270. Berg, *supra* note 39, at 514-15 (supporting contract enforcement as means to enhance procreational liberty and attain certainty); Pittman, *supra* note 13, at 233 (advocating and presenting potential legislative solution to embryo disposition issue). Though no solution will be perfect, Berg argues, by enforcing the contract, parties will be encouraged to seriously consider what they would want to happen and they would have the certainty of what will happen in the future. Berg, *supra* note 39, at 514-15. On the other hand, Berg further asserts that by requiring mutual assent courts would be removed from deciding intimate details of family life. *Id.* at 523. She points out that there is no constitutional right to have biological children. *Id.* at 524; see also Waldman, *supra* note 5, at 918-26 (indicating patients not adequately protected because dispositional decision included in consent to treatment forms).

271. See *supra* note 245 (explaining success rate reduced when all embryos simultaneously implanted

The probability of embryos attaining personhood should be considered in creating this legislation.²⁷² Doctors should be consulted.²⁷³ Doctors should also be required to inform patients of their right and need to create such an agreement, and advise them to seek counsel.²⁷⁴ Lawyers should require that their clients adequately contemplate potentially difficult situations which may arise in order to determine what they would want done.²⁷⁵ Courts should enforce this legislation in order to provide parties entering into IVF treatment with the certainty they deserve and to protect their procreational autonomy.²⁷⁶ Then parties entering IVF treatment would know their rights prior to any dispute.²⁷⁷

Parties could modify these agreements like any other contract.²⁷⁸ By entering into such a contract, however, one should be viewed as consenting to procreate and the contract should be enforced unless mutually amended; otherwise uncertainty and indefiniteness will continue in perpetuity.²⁷⁹ If mutual assent were required, the party wishing to avoid procreation would prevail under current case law.²⁸⁰ There is no constitutional right to conceive through IVF treatment and both gamete providers are asserting equally fundamental rights; it seems unfair, therefore, to permit one party to always prevail.²⁸¹ Instead, parties should be permitted to make their own decisions

without cryopreservation); *supra* note 266 (revealing unlikelihood of development of embryos). Fetuses are closer to their potential human life than embryos, as they have already implanted. *Cf. supra* notes 245, 266.

272. *See* Mahowald, *supra* note 238, at 26 (stressing not all embryos will implant, gestate, or develop to live birth even if require implantation); *see also supra* note 266 (discussing unlikelihood of success).

273. *See* Miehler, *supra* note 146, at 32-36 (revealing concern with legislatures deciding issues on strictly political basis).

274. *See* Pittman, *supra* note 13, at 233 (advocating each gamete provider have separate representation when drafting embryo disposition agreement).

275. Pittman, *supra* note 13, at 233 (requiring careful and thorough consideration of alternatives); Waldman, *supra* note 5, at 918-26 (discussing need for serious consideration and current lack of truly informed consent).

276. *See* Pittman, *supra* note 13, at 233 (outlining way to ensure certainty for couples).

277. *See* Pittman, *supra* note 13, at 233 (stating only way to insure consistency and uniformity is through legislation and valid, enforceable contracts).

278. Pittman, *supra* note 13, at 233 (advocating prior agreement prevails when parties cannot agree to subsequent amendments). Pittman also believes contracts should be valid for a limited number of years. *Id.* At the expiration of such time the contract could be renewed if the couple agrees, or become unenforceable if they do not agree. *Id.* This would prevent parties from being held to contracts they entered into decades earlier. *Id.*

279. *See* Pittman, *supra* note 13, at 233 (asserting purpose of such contract is to produce a child).

280. *See In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003) (requiring mutual agreement where party to agreement changed mind); *see also* Recent Cases, *supra* note 222, at 704-06 (arguing party avoiding procreation refuses new agreement preventing implantation when contemporaneous mutual consent required); Forster, *supra* note 240, at 760-65 (revealing perpetual embryo storage not possible).

281. *See* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992) (stating two competing rights involved in embryo disposition cases); *see also* Theyssen, *supra* note 231, at 734 (asserting party wishing to procreate has as much right to procreate as party wishing to avoid has not to); *supra* notes 126-128 and accompanying text (indicating fundamental nature of right to decide whether or not to procreate).

through enforceable contracts prior to treatment.²⁸² Though this does not resolve all the issues and concerns raised, it provides certainty for couples entering IVF treatment.²⁸³ Additionally, it places parties using IVF in a similar position to those who conceive naturally; once fertilization occurs, absent an agreement to amend, procreation continues.²⁸⁴

Additionally, the opportunity to donate embryos for scientific and medical research should be given greater prominence.²⁸⁵ Some scientists currently believe that embryonic stem-cell research may provide the key to treatments and cures for many illnesses.²⁸⁶ Those who have benefited, or hoped to benefit, from the scientific breakthroughs of IVF should understand just how important research and medical advances are, and should be encouraged to consider donation over destruction.²⁸⁷

IV. CONCLUSION

When the first “test-tube baby” was born, people hailed the birth as a scientific miracle. It was believed this technology could help those who wished to have a biological child, but were incapable of conceiving naturally. Some in the right-to-life movement, however, are working to restrict the use of this procedure. Others, possibly without meaning to, are advocating for limitations. Such limitations could frighten clinics and doctors out of performing IVF treatment and embryo cryopreservation.

Alterations in current abortion law will likely have a dramatic impact on current statutory and case law regarding embryo disputes. This impact could affect the very procedure that produces the embryos at issue. Consequently, legislatures must act quickly to establish clear laws governing embryo disputes.

282. See *Davis*, 842 S.W.2d at 597 (asserting liberty interests require gamete providers decide fate of embryos).

283. Cf. *Gorny*, *supra* note 47, at 473 (asserting no perfect solution exists to resolve this complex issue).

284. *Fenton*, *supra* note 19, at 101-02 (explaining Italian law requiring implantation makes IVF similar to natural conception). *Fenton* states that those who support the law believe that by requiring implantation after fertilization of egg IVF is made similar to natural conception where parties cannot control what happens after in utero fertilization. *Id.*

285. See *Miehl*, *supra* note 146, at 8 (indicating donation to science alternative disposition for embryos); see also *Momeyer*, *supra* note 158, at 98-103 (arguing when donation available no reason to destroy); *Galloway*, *supra* note 266, (asserting embryos' inevitable disposal lends credence to their use for research). Of the 400,000 embryos currently cryogenically preserved, 88.2 percent are intended for implantation in patients; only a small percentage are available for research, donation, destruction, quality assurance, or other uses. *Hoffman*, *Hoffman Study*, *supra* note 9, at 1066. *Momeyer* further argues if one is going to oppose embryonic research should also oppose IVF treatment because embryos will inevitably be “wasted” in treatment. *Momeyer*, *supra* note 158, at 99.

286. *Galloway*, *supra* note 266, (listing illnesses scientists believe embryonic stem cell research may cure). *Galloway* lists diabetes, Alzheimer's, Parkinson's disease, and spinal cord injuries as ailments that may be cured or treated through scientific development as a result of embryonic stem cell research. *Id.*

287. See *James Glicek*, *The Vatican on Birth Science; Reproductive Help: Widespread and Unregulated*, N.Y. TIMES, Mar. 11, 1987, at A16 (indicating influence of right to life groups are slowing spread of technology and research).

To avoid state-by-state confusion and make treatment possible for all citizens, national legislation would be best. In passing such laws, those who are morally opposed to the destruction of embryos should consider the realistic chance each embryo has to develop into a living human being, even if implanted.

The decision whether or not to have a child is a very personal one. If *Roe* is overturned or modified to the point where abortion is greatly restricted, courts and the legislatures must remember that cryogenically-preserved embryos are even further removed from the "potential life" they hold than are *in utero* fetuses. It makes little sense to require the implantation of *all* embryos or their donation over parties' objections. Doing so could undermine the very procedure that produced them and destroy the possibility of using IVF treatment to create new life. This would undermine the Right's desire to protect family values and promote reproduction, as many who wish to reproduce but cannot do so naturally would be left with no alternative. Individuals who use IVF treatment should be left to make critical decisions such as donation to science, implantation, or destruction, on their own without governmental interference. These decisions should be made in valid, enforceable contracts and protected by legislation and courts which honor them.

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