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Towards an Equitable Review of Pre-Embryo and Divorce Disputes for Women

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Towards an Equitable Review of Pre-Embryo and Divorce Disputes for Women

Lilah Kleban*

ABSTRACT

Pre-embryos, procured through in-vitro fertilization (IVF), become a source of dispute when couples divorce or separate before using them. Particularly, couples may fight over who has decision-making power to use or not use the frozen pre-embryos for pregnancy. State courts across jurisdictions typically apply one of three categorical approaches: disposition contracts, contemporaneous mutual consent, or a balancing interests test. Each approach fails to provide courts with structures to fully evaluate each party's interests at the time of dispute and account for inherent sex and gender differences that impact their stakes in the dispute. This Note proposes a modified balancing test that accounts for couples' changing interests over time and provides defined balancing factors to ensure commensurate weight for sex and gender differences between parties.

Keywords: in-vitro fertilization (IVF), disposition contract, contemporaneous mutual consent, balancing test, sex differences, gender differences, divorce

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INTRODUCTION

Mary Sue and Junior Davis married in 1980 and underwent extraordinary measures to try to become parents.¹ Mary Sue had painful tubal pregnancies and fallopian tube ligation, a failed adoption attempt, other prohibitively expensive adoption options, and five rounds of unsuccessful in-vitro fertilization (IVF).² Finally, the couple chose to do one more round of IVF, this time with cryopreservation, which allowed them to freeze extra un-implanted embryos, or pre-embryos, for later use.³ However, before using the remaining pre-embryos, Junior Davis filed for divorce, leaving the future of those cryopreserved pre-embryos unknown.⁴ Mary Sue wanted to use the pre-embryos, initially to become pregnant herself, and later to donate to another couple, while Junior wanted to destroy the pre-embryos.⁵

In *Davis v. Davis*, the Tennessee Supreme Court became the first to address the status of frozen pre-embryos in the wake of divorce.⁶ The court ruled in favor of Junior, holding that his interest in avoiding parenthood outweighed Mary Sue's interest in using the pre-embryos,⁷ but this case set the stage for a slew of legal questions across state jurisdictions. Who owns frozen pre-embryos? Are they in fact property that a party can have an interest in and a right to possess? Are they incipient children subjecting the parties to potential parenthood? Can one party use pre-embryos without the other's consent? Can they use the pre-embryos to become pregnant? To donate to a third party? Can the pre-embryos be destroyed without the consent of one party? There is also a question of changing interests. If a court recognizes a predisposition agreement—a contract made at the outset of IVF procedures about what to do with cryopreserved pre-embryos if circumstances change—should the court also consider whether the interests from the time of agreement to the present have significantly changed?

The question of what to do with frozen pre-embryos in divorce is increasingly important. With divorce rates high⁸ and the availability of long-term cryopreservation,⁹

¹ *Davis v. Davis*, 842 S.W.2d 588, 591 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

² *Id.* at 591–92.

³ *Id.* at 592.

⁴ *Id.*

⁵ *Id.* at 590.

⁶ *Id.* at 589.

⁷ *Id.* at 604.

⁸ In 2019, the Centers for Disease Control and Prevention (CDC) reported 2,015,603 marriages, at a rate of 6.1 per 1,000 of the total population in the United States. By contrast, the CDC, pooling from 45 States and D.C., reported 746,971 divorces and annulments, at rate of 2.7 per 1,000 of the total population of the reporting states. CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL MARRIAGE AND DIVORCE RATE TRENDS (2021), <https://www.cdc.gov/nchs/data/dvs/national-marriage-divorce-rates-00-19.pdf>.

⁹ Mindy Christianson, M.D., *Freezing Embryos*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/freezing-embryos#:~:text=Frozen%20embryos%20are%20stored%20and,10%20years%20and%20even%20longer> (last visited Apr. 23, 2022) (pre-embryos can be cryopreserved for 10 years); Priscila Melantonio, Jessica Attivo, Aleksandra P. Gomes, Tatiana C.S. Bonetti, & Pedro A.A. Monteleone, *Delivering Embryos Following 10 Years of Cryopreservation, Using Unpaired Freeze/Thaw Techniques: A Case Report*, 25(4)

there is a reasonable chance couples will divorce or separate while unused pre-embryos remain frozen in storage. It is therefore imperative to review how courts approach this question and consider the practicability of a bright-line rule to resolve such disputes.

Since the *Davis* decision, state courts have employed three primary categorical analyses to resolve IVF disputes in divorce: disposition contracts for frozen pre-embryos, contemporaneous mutual consent, and a balancing test to weigh each parties' interests against the other.¹⁰ However, these approaches allow courts to overlook important interests they should recognize and account for in resolving IVF disputes: the nature of pre-embryos, changing interests over time, and the implications of sex and gender on IVF.

This Note draws from several frameworks provided by the *Davis* court, including the nature of IVF and divorce disputes and the nature of pre-embryos. Similar to the *Davis* decision and most existing caselaw surrounding IVF and divorce disputes, I focus on scenarios where one party wants to use frozen pre-embryos over the other's objection.¹¹ Additionally, the *Davis* court applied a presumption that pre-embryos are neither property nor children, thus not governed by existing property or family law and warranting special attention.¹² Accordingly, I apply the presumption that pre-embryos occupy a status of quasi-personhood and quasi-property as an acknowledgement of their unique nature and value.

When Mary Sue wanted to use pre-embryos for pregnancy, the pre-embryos represented potential children.¹³ By contrast, for Junior, who did not want the pre-embryos to be used for pregnancy, they may have represented "forced parenthood"¹⁴ or emotional discomfort. A "quasi" distinction allows recognition that pre-embryos are created *intentionally* for procreation and hold personal value beyond marital property, such as

JBRA ASSISTED REPROD., 644–46 (2021) (case report documenting successful pregnancy for 10-year cryopreserved pre-embryo); Donna Dowling-Lacey, M.S., Jacob F. Mayer, Ph.D., Estella Jones, M.S., Silvina Bocca, M.D., Ph.D., Laurel Stadtmauer, M.D., Ph.D., & Sergio Oehninger, M.D., Ph.D., *Live Birth from a Frozen–Thawed Pronuclear Stage Embryo Almost 20 Years After its Cryopreservation*, 95(3) FERTILITY & STERILITY, 1120.e1–1120.e3 (Mar. 1, 2011) (case report documenting successful live birth for 19-year cryopreserved pre-embryo).

¹⁰ See *Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131, 1131 (2012).

¹¹ See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992); see *Reber*, 42 A.3d 1131; *Szafranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. 1st Dist. 2015); see *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

¹² Categorizing pre-embryos as quasi-personhood and quasi-property stems from the *Davis* court findings. The court in *Davis* based their categorization of pre-embryos on The American Fertility Society's ethical standards, outlining "special respect" needed to protect pre-embryos' potential to become a person, without affording treatment as a person, because pre-embryos are not people and "may never realize [their] biologic potential." *Davis*, 842 S.W.2d at 596 (citing *Report of the Ethics Committee of The American Fertility Society*, 53 J. AM. FERTILITY SOC'Y, 34S, 34S–35S (June 1990)). Accordingly, the *Davis* court concluded that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." *Id.*

¹³ See *id.* at 604 ("Refusal to permit donation of the preembryos would impose on [Mary Sue] the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children").

¹⁴ See Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1060 (2004).

furniture subject to distribution upon divorce.¹⁵ Nevertheless, the connection between potential parents and pre-embryos does not inherently give rise to a parent–child relationship. This “quasi” nature merely signals to courts the need to give these disputes special attention: pre-embryos may simply be a collection of cells, but using or destroying them holds the potential to change someone’s world.

Since pre-embryos are quasi in nature and determine whether someone can get pregnant or become a parent, courts should not apply rigid rules that ignore changing circumstances and human indecisiveness. Instead, they should allow people to change their minds. For Mary Sue, the IVF dispute first represented whether she could become pregnant, and later represented whether her invasive medical procedures were for naught.¹⁶ For Junior, they represented whether his ex-wife would use his sperm to create a baby without his present consent.¹⁷ With such high stakes, it is worth considering whether predictable contracting for pre-embryos is the right approach. Instead of applying rigid rules, parties are entitled to good-faith fluctuation in their decisions. Variability and fluctuation are part of the reason I argue private parties, particularly women, should make their own reproductive decisions about pre-embryos. While writing this Note, the Supreme Court issued *Dobbs v. Jackson Women's Health Org.*, overruling *Roe v. Wade* and the constitutional right to abortion for pre-viability fetuses.¹⁸ Abortion is a distinct reproductive issue from IVF. However, in failing to clarify whether conception starts in a womb or a lab, *Dobbs* blurs whether couples have reproductive autonomy to decide the fate of their frozen pre-embryos.¹⁹

While *Dobbs* does not substantively change my argument, it touches on similar themes. Writing for the majority, Justice Alito argued, in part, that variability in factors impacting whether a fetus is considered “viable” is reason to overrule *Roe*.²⁰ IVF disputes present a similar arena for this argument. Because there are too many complicated factors to evaluate, because medical and legal professionals could evaluate interests differently, and because parties’ dispositions fluctuate, courts could cite *Dobbs* to impose a bright-line rule for resolving IVF disputes. However, the “profound moral question[s]”²¹ of a woman’s choice to terminate a pregnancy or to have decision-making power about frozen pre-embryos only bolster the call for a system that responds to fluctuations and variability. Inherent in my argument to resolve decision making for IVF disputes is the power to decide whether to destroy frozen pre-embryos; *Dobbs* allows states to impose a bright-line rule forbidding the disposal of unneeded or unwanted frozen pre-embryos.²² Although this Note focuses on couples in which one party wants to use pre-embryos over the other’s objection,

¹⁵ With this categorization in mind, pure marital property issues in divorce will not apply because I do not consider pre-embryos as mere property. See *Davis*, 842 S.W.2d at 596. Without the marital property issue, references throughout this Note to “divorce” include married couples who formally dissolve their marriage, unmarried couples who separate, and married couples who separate without formally dissolving their marriage.

¹⁶ See *id.* at 590.

¹⁷ See *id.*

¹⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

¹⁹ See Jan Hoffman, *Infertility Patients and Doctors Fear Abortion Bans Could Restrict I.V.F.*, N.Y. TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/05/health/ivf-embryos-roe-dobbs.html?smid=nycore-ios-share>.

²⁰ See *Dobbs*, 142 S. Ct. at 2268–70.

²¹ See *id.* at 2284.

²² See Hoffman, *supra* note 19.

the uncertain scope of *Dobbs* could include parties' general decision making about pre-embryos, including whether to destroy pre-embryos with or without the other's consent.

IVF disputes in divorce are an inherently gendered issue, which courts should not ignore. Sex and gender differences in IVF disputes give rise to women's physical and sociological "sweat equity"—that is, the unique labor, or "sweat," each party contributes to IVF and entitles them to increased interest in prevailing. For example, Mary Sue underwent painful and invasive medical procedures for IVF, while Junior ejaculated into a cup.²³ An equitable review of the sweat equity for physical procedures would give commensurate weight to each party and find Mary Sue has more interest than Junior on this particular issue. Recognizing the sex and gender differences in IVF and divorce disputes encourages courts to use a balancing test that gives commensurate weight to the unique labor each party contributes. Such considerations will inherently give rise to a regime that correctly and increasingly favors women's interests in decision making to use or not use pre-embryos.

For the purposes of this Note, limiting the analytical scope to cis-heterosexual couples allows me to focus on existing caselaw and opposite sex and gender dichotomies. Transgender, nonbinary, and same-sex couples certainly experience many of the same or similar circumstances surrounding IVF and divorce. However, heteronormativity is at the root of many IVF disputes and courts should not minimize its role in considering this issue. For instance, pre-embryos from a cis-heterosexual couple contain gametes from each person, whereas those of a same-sex couple might have a gamete from one person and another provided by a donor. In cis-heterosexual couples, one party is also subject to more invasive medical procedures, and often that same party is subject to a different social burden in parenthood and family life. As such, my discussion focuses on cis-women and cis-men in heterosexual relationships.²⁴

Lastly, the decision to use or not use pre-embryos is inherently connected to parenthood. While I discuss sex and gender implications on parenthood, my focus is neither parenthood itself nor the best interest of a child. Similarly, the court in *Reber v. Reiss* correctly acknowledges that the issue at hand—decision making about pre-embryos—does not guarantee parenthood.²⁵ With this in mind, the court shifted attention away from parenthood and instead towards an interest solely in procreation.²⁶ While a balancing of interests certainly could account for the best interest of a potential child, I do not dedicate a full analysis to potential parenting obligations created by IVF disputes.²⁷ Rather, I use

²³ See *Davis v. Davis*, 842 S.W.2d 588, 591–92 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

²⁴ Although I refer to "women" throughout this Note, any reference to women and pregnancy can easily translate to "people who can become pregnant," regardless of gender identity. Any discussions about social experiences of women and mothers during IVF, pregnancy, and parenthood can easily translate to a genderless construct of "mother." Such a construct includes people who are ultimately burdened by pregnancy, are socially predisposed to be primary caretakers for family and home life, and are socially oppressed because of their sex, gender, and gendered dichotomies in spousal relationships, regardless of gender identity or presentation.

²⁵ *Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131, 1138 (2012).

²⁶ *Id.*

²⁷ Parenting obligations and responsibilities are not necessarily assumed when courts award one party to use disputed pre-embryos for pregnancy. See *id.* at 1140 (court discounted husband's challenge to wife's

parenthood as a vehicle to help explain why sex and gender differences matter as part of interest-balancing in IVF disputes.

Part I of this Note reviews the problems and questions posed by IVF and divorce disputes and lays the groundwork for sex and gender considerations in adjudication. Part II discusses the main categorical approaches courts use to address IVF disputes in divorce, which problematically allow courts to ignore changing interests over time and women's unique sweat equity. Part III proposes a modified balancing test that allows courts to consider parties' changing interests over time, and, subsequently, consider specific balancing factors that account for women's unique sweat equity. This proposal would move courts towards a regime that increasingly and accurately gives commensurate weight to women's interests in family law and related gendered issues. Entangled in a liberal desire to move towards a world beyond gender constructs and confinement, I argue sex and gender differences are already implicitly part of the discussion. Instead of circumventing sex and gender considerations under the color of equality, courts should explicitly address gendered questions to resolve IVF disputes.

I. AN OVERVIEW OF THE PROBLEM

In the *Davis* case, Mary Sue wanted to use the pre-embryos because she did not want her IVF procedures to be for naught, while Junior wanted to destroy the pre-embryos to avoid genetic parenthood.²⁸ However, with inconsistent conceptualizations of what pre-embryos are, what they represent, and how courts should resolve these disputes, there is no obvious resolution for couples litigating over the use or non-use of pre-embryos.

Further, disputes over frozen pre-embryos in divorce are increasingly inevitable. Divorce is not uncommon,²⁹ in-vitro fertilization is popular,³⁰ and cryopreservation availability means couples can store unused pre-embryos for longer.³¹ Women are also having children later in life, increasing the likelihood of using IVF for pregnancy, either because of their age or because they preserved viable eggs when they were younger.³² With 33% of adults in the United States somehow connected to fertility treatments, either for

use of disputed pre-embryos for pregnancy when wife confirmed she neither objected to husband's wish to participate in a future child's life nor expected child support from husband).

²⁸ *Davis*, 842 S.W.2d at 590, 603.

²⁹ See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8.

³⁰ In 2018, 33% of adults in the United States reported they, or someone they know, used fertility treatment to have a baby. "Fertility treatments" refers to a wide range of treatments, including IVF as an "assistive reproductive technology" (ART). Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR. (July 17, 2018), <https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/> [hereinafter Livingston, *A Third of U.S. Adults*].

³¹ See Christianson, *supra* note 9; see Melantonio, Attivo, Gomes, Bonetti, & Monteleone *supra* note 9; see Dowling-Lacey, Mayer, Jones, Bocca, Stadtmauer, & Oehninger, *supra* note 9.

³² A PEW report found "[t]he median age at which women become mothers in the U.S. is 26 [in 2014], compared with 23 in 1994." The report infers increased education opportunities, workforce involvement, and later marriages impacted this shift to later parenthood for women. Furthermore, there has also been an increase in women having babies in their 40s who have never been married, increasing from 31% of women in 1994 to 55% of women in 2014. Gretchen Livingston, *They're Waiting Longer, but U.S. Women Today More Likely to Have Children Than a Decade Ago*, PEW RSCH. CTR. (Jan. 18, 2018), <https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago/>.

themselves or someone they know,³³ and a divorce rate nearly half of the marriage rate,³⁴ it is reasonable to expect overlap between couples who undergo IVF procedures and couples who eventually divorce or separate.

The various approaches state courts use to resolve IVF and divorce disputes overlook two essential issues. First, they allow courts to disregard the high stakes relating to use or non-use of pre-embryos that warrant allowing people to change their minds. Second, they give courts discretion to ignore that women, generally, experience IVF, pregnancy, and parenthood differently from men.

A. The Current Categorical Approaches Do Not Effectively Address Changing Interests Over Time

Contract disputes reveal two sets of interests: what parties wanted at the time of contracting and what they want at the time of dispute. Regardless of which set of interests courts focus on, IVF dispute resolutions carry significant weight. These resolutions determine whether someone becomes a parent, whether someone's medical procedures for IVF were for naught, and whether someone has agency over reproductive autonomy. As such, courts should not ignore new interests—interests at the time of dispute that did not exist at the time of contracting—in favor of maintaining predictability from an original contract.

For instance, imagine, at the start of their IVF procedures, Mary Sue and Junior Davis contracted to destroy any remaining frozen pre-embryos if they got divorced. They made this decision knowing they had fertility issues and IVF was likely necessary to have genetic children. Several years later, suppose Mary Sue gets cancer and undergoes chemotherapy, rendering her unable to produce new eggs for pregnancy or IVF. The circumstances are now very different from where they started; if the parties divorced, Mary Sue would no longer have the option of trying to extract her eggs for IVF with different sperm, whereas Junior's ability to fertilize a different egg remains unchanged.³⁵ Alternatively, imagine Mary Sue and Junior formally contracted to destroy any remaining frozen pre-embryos, but when they divorce, Mary Sue is in her late forties and decides, if she wants to have a child on her own, she needs to become pregnant as soon as possible. In both scenarios, the circumstances changed such that Mary Sue and Junior's initial agreement no longer reflects the present interests of both parties.

Of the three categorical approaches used by state courts,³⁶ the contract approach appears the most straightforward because it allows couples to decide what they anticipate wanting to do with frozen pre-embryos. Nevertheless, if the Davises' circumstances significantly changed over time, the contract approach would preclude a court from reviewing whether the terms equitably represented their current interests. Similar to

³³ Livingston, *A Third of U.S. Adults*, *supra* note 30.

³⁴ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8 (the divorce rate of 2.7 per 1,000 adults in the United States is compared to a marriage rate of 6.1 per 1,000 adults).

³⁵ The same reasoning follows if the roles were reversed, where Junior became sterile while Mary Sue continued to have viable eggs for pregnancy.

³⁶ Courts typically use one of three categorical approaches: “the contractual approach, the contemporaneous mutual consent approach, and the balancing approach.” *Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131, 1134 (2012).

prenuptial agreements,³⁷ disposition contracts allow couples to discuss and negotiate their private interests before IVF, with the hope that their desired use for pre-embryos will be reflected if they ever divorce. However, individuals and couples change their minds. Susan Klock, for the *New England Journal of Medicine*, found that, after a three-year storage period, 71% of couples changed their pre-embryo disposition preferences from what they initially decided.³⁸ This change in disposition preferences reflects a very human experience of changing interests—people get older or undergo medical procedures that impact their fertility, people change their minds about having children, couples break up, couples become incompatible co-parents, or people change their mind for any myriad of reasons.

For a dispute determining whether someone can get pregnant or become a parent, courts should not apply rigid rules that ignore changing circumstances and human indecisiveness about intimate issues. Rather, courts should account for these changing interests in their determinations.

B. Resolving IVF Disputes Should Not Ignore Sex and Gender Differences

The right to have or not have children, particularly in the context of IVF, is deeply a women's issue because their sweat equities are vastly different from men's. As such, courts should account for sex and gender differences in resolving IVF disputes, including differences in IVF procedures and social experiences of parents and potential parents. IVF procedures, pregnancy, and parenthood are distinct experiences that further parse out sex and gender differences: IVF procedures are the medical and laboratory procedures used to achieve pregnancy; pregnancy is the physical experience of carrying an embryo-turned-fetus, which may also lead to birth and breastfeeding; and parenthood is the social and familial experience of raising a child. These distinct terms may similarly contribute to sex and gender-based sweat equities, but they create unique experiences that should be afforded their own consideration and weight. Resolving IVF disputes should therefore compare and balance factors impacted by sex and gender to accurately reflect sweat equities. Such a balance will, in most scenarios, afford more weight to women's interests than men's.

First, IVF is a complicated and invasive medical procedure that places a far higher burden on women. Typically, IVF procedures can be distilled to five steps.³⁹ The procedure begins by stimulating the woman's ovaries to produce eggs with fertility drugs, often with a series of injections.⁴⁰ During this stage, the woman also undergoes transvaginal ultrasounds and regular blood tests.⁴¹ Next, the woman undergoes a surgical procedure to remove eggs from her body.⁴² This procedure requires a follicular aspiration, in which an

³⁷ *Prenuptial Agreement*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An agreement made before marriage usu. to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse.").

³⁸ Susan C. Klock, Sandra Sheinin, & Ralph Kazer, *The Disposition of Unused Frozen Embryos*, 345 *NEW ENG. J. MED.* 69, 69 (2001).

³⁹ John D. Jacobson, David Zieve, & Brenda Conaway, *In Vitro Fertilization (IVF)*, MEDLINE PLUS, <https://medlineplus.gov/ency/article/007279.htm> (last visited Nov. 7, 2022).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

ultrasound-directed needle is used to remove eggs,⁴³ and may also require a laparoscopy.⁴⁴ The next two stages are conducted in a lab: the eggs are placed in a petri-dish along with sperm for insemination and fertilization, and then the fertilized gamete cells are observed to see whether they divide and become pre-embryos.⁴⁵ Once the cells become pre-embryos, they are either frozen (i.e., cryogenically preserved) for later use or transplanted into a womb via catheter.⁴⁶ By contrast, men’s physical involvement in creating pre-embryos is minimal: “All that is required is a private room, an empty jar and, perhaps, a Playboy magazine or video.”⁴⁷ An undeniable takeaway is that the physical procedures related to IVF are far more physically invasive and demanding for women than men.

Second, parenthood is a gendered issue. Generally, women have a different social experience in home and family life. For example, Arlie Hochschild, a professor of sociology at the University of California, Berkeley, reviewed how families managed the “second shift,” the shift of family care needed outside of the labor-force workday.⁴⁸ Hochschild observed the assumption that the mother’s role in the family was more important than the father’s, whereas the father’s role in the workforce was more important than the mother’s.⁴⁹ A Census Bureau report in 2021 reaffirmed this gendered division: for stay-at-home parents in heterosexual marriages with children under 15 years old, there were 14.8 million stay-at-home mothers, compared to 204,000 stay-at-home fathers.⁵⁰ Moreover, the physical constraints imposed by pregnancy and breastfeeding on female-bodied mothers creates a chain of dependent relationships.⁵¹ Mothers experience a sense of both vulnerability and responsibility as the baby depends on the mother for care, and the mother depends on others to take care of her while she is occupied with the baby.⁵² Generally, these constructions place higher burdens of pregnancy and parenthood on women, putting more at stake for them in decision making about becoming pregnant and becoming parents.

Professor Ruth Colker argues that considering differences between women’s and men’s experiences is imperative to weighing their interests: “By recognizing the ways in which women and men are not similarly situated with respect to reproduction, courts can

⁴³ See *id* (follicular aspiration is a surgery that “inserts a thin needle through the vagina into the ovary and sacs (follicles) containing the eggs” and uses a suction device to “pull[] the eggs and fluid out of each follicle, one at a time.”).

⁴⁴ *Laparoscopy*, MEDLINE PLUS, <https://medlineplus.gov/lab-tests/laparoscopy/#:~:text=A%20laparoscopy%20is%20a%20type,through%20the%20skin%20during%20surgery> (last visited Jul. 6, 2022) (laparoscopy is a surgery that inserts a camera into the abdomen through a small incision via a thin tube, or laparoscope, allowing surgeons to see inside without major trauma or larger incisions.).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Waldman, *supra* note 14, at 1053.

⁴⁸ The second shift includes physical, emotional, and social labor needed to take care of the family unit, childrearing, and the home. ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* 7–10 (3d ed. 1989).

⁴⁹ *Id.* at 38–40.

⁵⁰ CENSUS BUREAU, *AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2021* (Nov. 29, 2021), <https://www2.census.gov/programs-surveys/demo/tables/families/2021/cps-2021/tabfg8-all.xls>.

⁵¹ Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 210 (2000).

⁵² *Id.*

begin to correct this imbalance by presumptively awarding frozen embryos to women who desire to use them to enhance their reproductive capacity following divorce.”⁵³ In advocating for a default rule, Colker seeks to imbed women’s unique sweat equity into courts’ review of IVF disputes. However, her argument expounds beyond IVF sweat equity. Rather, Colker argues, courts should have a default rule for women to make amends for the ways that women are generally disadvantaged to men, particularly in the wake of divorce: “Just as men are frequently more economically stable and wealthier than women after divorce, so too are men often reproductively richer after divorce.”⁵⁴

Although Colker’s reasoning is descriptive of women’s experiences with IVF and divorce, it is important to consider how giving deference to women would impact men. Professor Ellen Waldman similarly advocates for greater judicial deference in favor of women who want to use disputed pre-embryos to become pregnant.⁵⁵ In her work, she reviews paternal disengagement and sperm donors’ attitudes towards offspring to find “men in general suffer little detriment by use of their embryos.”⁵⁶ Moreover, Waldman examined whether there is an inherent psychological burden in “forced parenthood” for men and found “psychological parenthood does not necessarily flow from a biological connection.”⁵⁷ This gendered difference in attachment to gametes, Forman argues, warrants that “women should be afforded more control over the use of their gametes and the embryos created from them.”⁵⁸

Waldman reviewed “psychological burdens” of unwanted use of pre-embryos on sperm donors.⁵⁹ Her research did not necessarily include emotional discomfort of men when women use pre-embryos for pregnancy without their ex-husbands’ consent.⁶⁰ There is a different emotional discomfort between sperm donors and former spouses because former spouses know each other and formally had a relationship that ended, leaving the

⁵³ Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1066 (1996). Melissa Herrera similarly suggests courts’ decisions in IVF disputes should favor women, regardless of what they want for the pre-embryos, by situating them as property. See Melissa B. Herrera, *Arizona Gamete Donor Law: A Call for Recognizing Women’s Asymmetrical Property Interest in Pre-Embryo Disposition Disputes*, 30 HASTINGS WOMEN’S L.J. 119, 129, 140 (2019). She argues that because of reproductive limitations on women and invasive IVF procedures, a woman should prevail if she wants to use disputed pre-embryos to become pregnant. See *id.* at 129. Alternatively, if a woman wants to prevent the other party from using the pre-embryos, she should still prevail because the same reproductive limitations and invasive IVF procedures give her a greater property interest. See *id.* However, I do not propose situating pre-embryos as property in which parties can have a lesser or greater interest because such review would subject pre-embryos to marital property limitations. *But see id.* at 140. For example, if eight frozen pre-embryos created by a couple are considered mere marital property, each party could be entitled to 50%, or four pre-embryos each, upon dissolution of marriage. As the court in *Davis* concludes, frozen pre-embryos are best considered to be neither children, subject to family law, nor property, subject to equitable distribution upon divorce. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *on reh’g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992). Rather, pre-embryos “occupy an interim category that entitles them to special respect because of their potential for human life,” or a status of quasi-personhood and quasi-property. Colker, *supra* note 53, at 1066.

⁵⁴ Colker, *supra* note 53, at 1066.

⁵⁵ Waldman, *supra* note 14, at 1061.

⁵⁶ Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 403 (2013) (citing Waldman, *supra* note 14, at 1040–52).

⁵⁷ Waldman, *supra* note 14, at 1060.

⁵⁸ Forman, *supra* note 56, at 412.

⁵⁹ See *id.* at 403 (citing Waldman, *supra* note 14, at 1060).

⁶⁰ See *id.*

couple sour enough to end up in litigation. For example, if Mary Sue Davis used the disputed pre-embryos to become pregnant and have a baby, Junior Davis would know he biologically fathered a child with his ex-wife, now out of his care. Sperm donors, who Waldman finds can more easily emotionally detach themselves, remain anonymous.

However, emotional discomfort is not enough to outweigh Waldman's argument to favor women's decision making based on paternal detachment or Colker's argument based on sex and gender differences. If Junior wanted to use the pre-embryos to have a baby with another person, Mary Sue's emotional discomfort, combined with her physical IVF sweat equity, should outweigh Junior's interest. Conversely, if Mary Sue wanted to use the pre-embryos to become pregnant, and the pre-embryos were her only viable option to become a parent, her interest in having a baby combined with her IVF sweat equity should still outweigh Junior's emotional discomfort.⁶¹ Unease or distress is certainly significant, but should not dramatically change how courts account for sex and gender differences to give commensurate weight to women's interests.

Conversely, Deborah Forman reviews that male and female gamete donors may experience similar attitudes towards their donated specimens, challenging that any gender-based differences in attitudes are mere social constructions.⁶² Forman further argues that the generalization that "men as a group more easily disengage from their offspring than women" fails to account for a specific man who disputes the fate of pre-embryos because he does not foresee easy disengagement.⁶³ However, I do not challenge that a specific couple might have particular emotional attachments to pre-embryos. Rather, courts should give commensurate attention to sex and gender differences because of the broad social constructions.

While Forman cautions against making sex-difference-based claims,⁶⁴ I view sex differences as impossible to ignore because women and men have profoundly different experiences with IVF, pregnancy, and parenthood. The Court in *Dobbs* effectively disposed of women's Fourteenth Amendment rights and wrestled away their ability to decide whether to remain pregnant,⁶⁵ a substantive right they did not correspondingly restrict for men. *Dobbs* signals that it is time for courts to acknowledge and address their different treatment of women and men and to review those differences in a court of equity. Courts should acknowledge and give due weight to the unique sweat equities that position women to have higher stakes in IVF disputes. If we are to adopt a specific approach to resolve IVF disputes, whether by judicial standard or statute,⁶⁶ sex and gender differences must be part of the calculation to represent the holistic impact of IVF and divorce disputes on women.

⁶¹ See Waldman, *supra* note 14, at 1060.

⁶² See Forman, *supra* note 56, at 413.

⁶³ *Id.* at 412.

⁶⁴ See *id.* at 413.

⁶⁵ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2317 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

⁶⁶ See Alexandra Faver, *Whose Embryo Is It Anyway?: The Need for A Federal Statute Enforcing Frozen Embryo Disposition Contracts*, 55 FAM. CT. REV. 633 (Oct. 23, 2017) (discussing the need for federal legislation).

II. CATEGORICAL APPROACHES TO RESOLVING IVF DISPUTES ARE INCOMPATIBLE WITH CHANGING INTERESTS

Since *Davis* in 1992, courts across state jurisdictions have generally recognized and employed one of three categorical approaches to IVF disputes: disposition contracts, contemporaneous mutual consent, and a balancing interests test.⁶⁷ However, the structures of these approaches are incompatible and impractical for addressing parties' changing interests over time. Disposition contracts could bind the Davises to a decision that no longer reflects their interests several years later. Contemporaneous mutual consent would attempt to let the Davises decide in real time what they want but would be impractical for a couple in litigation. Finally, the current balancing interests test fails to define the factors considered; in an attempt to account for changing interests, this framework allows judges to overlook and ignore implications of sex and gender differences. The following subparts discuss case examples that use the different categorical approaches, outlining each approach's flawed ability to confront and account for changing interests over time.

A. *Disposition Contracts*

Some courts resolve IVF disputes by upholding disposition contracts, or agreements couples made at the beginning of the IVF process to provide for potential contingencies, including divorce.⁶⁸ However, disposition contracts allow courts to hold couples to an original agreement that no longer reflects the interests of both parties. In doing so, courts subvert their stated goal of keeping "quintessentially personal" decisions in the hands of the parties.⁶⁹

At the beginning of their IVF procedures, balancing the Davises' interests might have favored neither party using the frozen embryos if they divorced. However, after five years and a round of chemotherapy for Mary Sue, a new balancing might favor her interest in using the pre-embryos.⁷⁰ Generally, contract disputes reveal two sets of interests. The first is what the parties wanted at the time of contracting. The second set of interests is what the parties want at the time of dispute. If those interests are significantly different, the question is whether courts should favor one set of interests over the other.

Courts that use the disposition contract approach may do so under the color of keeping "quintessentially personal" decisions in the hands of a couple.⁷¹ However, when interests change over time, the contract approach becomes an implicit balancing test that favors predictability over reflecting a person's current interests about pre-embryos. In other words, courts want parties to balance their own interests, but if their interests change by the time of dispute, the courts will uphold the initial agreements instead of allowing parties to review their personal decisions; decisions courts asserted should remain with the parties. Legal commentators argue that parties need to make decisions, even in the face of

⁶⁷ See *Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131, 1134 (2012).

⁶⁸ See *Kass v. Kass*, 696 N.E.2d 174, 179 (N.Y. 1998).

⁶⁹ See *id.* at 180.

⁷⁰ See *Reber*, 42 A.3d at 1132.

⁷¹ See *Kass*, 696 N.E.2d at 179.

uncertainties, to ensure effective and predictable contracting.⁷² However, for quintessentially personal matters about pre-embryos, which have quasi-property and quasi-personhood status and can determine whether someone becomes a genetic parent, courts should not hold people to such steadfast accountability. Instead, courts should include human indecisiveness as a legitimate legal consideration.

In *Kass v. Kass*, Maureen and Steven Kass disputed during their divorce proceedings about the disposition of five cryopreserved pre-embryos procured through IVF five years earlier.⁷³ Before the IVF procedures, they signed a series of consent forms including provisions stipulating that a property settlement would determine legal ownership of the pre-embryos in the event of divorce, and that, if they no longer wished to become pregnant, the IVF program would use the pre-embryos for research and then dispose of them.⁷⁴ By the time of dispute, Maureen wanted to use the pre-embryos and claimed it was “her only chance for genetic motherhood.”⁷⁵ Steven, by contrast, wanted to abide by the prior disposition agreement imbedded within the consent form.⁷⁶

The court upheld the prior agreement as a contract, favoring reliance on contracts to encourage parties to consider contingencies in writing, avoid costly litigation, and “minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a *quintessentially personal, private decision*.”⁷⁷ Recognizing the deeply personal nature of IVF disputes, the court reasoned couples should make disposition decisions, not the legislature or judiciary, and emphasized the importance of “joint decision” for pre-embryo transplantation.⁷⁸ It is uncertain how long this notion of keeping intimate decisions in the hands of the parties will remain a goal for many state courts. As *Dobbs* usurped women’s constitutional right to choose abortion, a similarly intimate reproductive issue, state legislatures may increasingly make quintessentially personal decisions in women’s stead.⁷⁹ However, until *Dobbs*

⁷² See Diane K. Yang, *What's Mine is Mine, But What's Yours Should Also Be Mine: An Analysis of State Statutes That Mandate The Implantation of Frozen Preembryos*, 10 J.L. & POL'Y 587, 627 (2002) (“Although the individual's circumstances and state of mind prior to and after IVF may drastically change, human indecisiveness and uncertainty are variables in any contract”) (citing Susan B. Apel, Esq., *Disposition of Frozen Embryos: Are Contracts the Solution?*, 27 VT. B.J. 29, 32 (Mar. 2001).

⁷³ *Kass*, 696 N.E.2d at 177.

⁷⁴ *Id.* at 176–78.

⁷⁵ *Id.* at 175.

⁷⁶ *Id.*

⁷⁷ *Id.* at 180 (emphasis added).

⁷⁸ *Id.* at 180–81.

⁷⁹ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022) (claiming *Roe v. Wade* wrongly “usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people,” thereby vesting in states the power to govern abortion issues. *Dobbs*, instead of protecting the right to choose at a federal level, allows elected officials, not individuals, to make intimate decisions).

definitively expands to other reproductive issues,⁸⁰ the *Kass* court's reasoning remains valid to support disposition contracts.⁸¹

However, the *Kass* court failed to acknowledge that its decision to uphold the original agreement subverted its stated goal to keep the decision in the Kassess' hands. When Maureen changed her mind because she wanted to have a baby despite the divorce, the court usurped her ability to reflect that interest in a resolution. Instead, the court implicitly used a balancing test that gave more weight to Steven's interest in a predictable outcome than Maureen's interest in becoming a parent.⁸² The court said it did not want to make these quintessentially personal decisions, and yet here it did so anyway.

The contract approach is flawed because "quintessentially personal" feelings can change. In *Kass*, although the literal circumstances did not change from the disposition agreement, the circumstances of personal decisions did.⁸³ Maureen signed a consent form to acknowledge she might not successfully become pregnant and she might one day get divorced. However, when a couple is happily married and trying difficult procedures to become pregnant, it may seem unimaginable that both the IVF procedures and the marriage would sour. Faced with the reality of divorce and her last chance at genetic motherhood slipping away, Maureen changed her mind.

While courts might favor enforcing disposition agreements for pre-embryos,⁸⁴ ignoring the emotional and physical harms incurred by the person whose interests significantly changed is difficult. With this in mind, the *Kass* court, without addressing the changing interests issue head on, alluded to the potential scenario where "significantly

⁸⁰ Formally, the *Dobbs* opinion only applies to abortion. *Id.* at 2277–78 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."). However, Justice Thomas, in his concurrence, claims the Due Process Clause in the Fourteenth Amendment only secures process rights, not substantive rights, expressing his intention to expand the *Dobbs* reasoning to additional substantive due process cases. *Id.* at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*"). The dissent recognizes the majority's assurance that *Dobbs* applies only to abortion as deeply unreliable. *Id.* at 2319 (Breyer, Sotomayor, & Kagan, JJJ., dissenting) ("the right to terminate a pregnancy arose straight out of the right to purchase and use contraception . . . led . . . to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decision making over the most personal of life decisions. The majority . . . is eager to tell us today that nothing it does 'cast[s] doubt on precedents that do not concern abortion.' But how could that be?" (internal citations omitted)).

⁸¹ See *Kass*, 696 N.E.2d at 180.

⁸² Forman argues disposition agreements should be enforceable, but only if the contract includes safeguards that account for the "vulnerability of patients undergoing treatment, the difficulty of forecasting future views about disposition, and the myriad legal issues that stem from the decision." Forman, *supra* note 56, at 442. Forman advocates for assurance that pre-determined expectations about pre-embryos will be fulfilled. *Id.* at 433 ("One person's freedom to change his or her mind comes at the expense of another's freedom to rely on a promised disposition or to choose a particular option An embryo disposition contract may provide assurance to parties undergoing in vitro fertilization that their expectations regarding use of their embryos (and thus their right to procreate or not) will in fact be fulfilled in the future"). Although attempting to incorporate sensitivities into the contract approach, Forman's modified contract approach similarly disregards that doing so inherently employs a balancing test that favors smooth procedure over extreme emotional disposition.

⁸³ See generally *Kass*, 696 N.E.2d 174.

⁸⁴ See Forman, *supra* note 56, at 392 ("Our society and our legal system presume that contracts are an appropriate and desirable way to order human relations and transactions, so valid contracts should be enforced unless there is a good reason not to do so") (citing Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2313–15 (1995)).

changed circumstances” might “preclude contract enforcement.”⁸⁵ However, by enforcing the disposition agreement as a binding contract, despite Maureen’s changed interest, the court failed to keep a quintessentially personal decision in the hands of both parties. As such, the contract approach subverts both the court’s stated goal and the autonomy couples should have regarding intimate pre-embryo matters.

B. Contemporaneous Mutual Consent

Some courts attempt to address changing interests by favoring contemporaneous mutual consent, where couples must agree at the time of litigation to use or not use the disputed pre-embryos.⁸⁶ However, this approach is potentially impractical, particularly for couples unable to resolve divorce disputes outside of litigation.

In *In re Marriage of Witten*, Arthur Witten III and Tamera Witten disputed the use of seventeen cryopreserved pre-embryos.⁸⁷ The couple previously signed a disposition agreement requiring joint approval for pre-embryo use and providing several contingencies for pre-embryo disposal.⁸⁸ In the divorce proceedings, Tamera challenged the disposition agreement because she wanted to use the pre-embryos to have a genetic child, claiming Arthur changed his mind about becoming a parent.⁸⁹

The court considered several questions about changing interests over time. First, it reviewed whether it can permit the use of pre-embryos over one party’s objection.⁹⁰ Next, the court reviewed whether the disposition agreement is enforceable when one of the parties is no longer comfortable with the decision.⁹¹ The court held that, “*absent a change of heart by one of the partners,*” pre-embryo disposition agreements do not violate public policy.⁹² However, in the event a party does have a change of heart, neither party can use or dispose of the pre-embryos without the other’s consent.⁹³

In *In re Marriage of Witten*, the decision hinged on whether the contract’s contingency terms covered divorce.⁹⁴ In a contrasting case, *A.Z. v. B.Z.*, the actual prior agreement carried minimal weight.⁹⁵ Instead, the court reasoned that changed circumstances were sufficient to override the couple’s disposition agreement.⁹⁶ Thus, the court held it would not force an individual to become a genetic parent over their contemporaneous objection.⁹⁷ Importantly, this case reviewed “forced parenthood” in the

⁸⁵ *Kass*, 696 N.E.2d at 182 n.4.

⁸⁶ *See In re Marriage of Witten*, 672 N.W.2d 768, 781 (Iowa 2003).

⁸⁷ *See id.* at 772.

⁸⁸ *Id.*

⁸⁹ *Id.* at 772–73, 780.

⁹⁰ *Id.* at 780.

⁹¹ *Id.*

⁹² *Id.* at 782–83 (emphasis in original).

⁹³ *Id.* at 780–81.

⁹⁴ *Id.* at 772.

⁹⁵ *See A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000) (“[E]ven had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen [pre-embryos], we would not enforce an agreement that would compel one donor to become a parent against his or her will.”).

⁹⁶ Faver, *supra* note 66, at 641 (citing *A.Z.*, 725 N.E.2d at 1051).

⁹⁷ *A.Z.*, 725 N.E.2d at 1059.

context of IVF,⁹⁸ a potentially moot discussion after the *Dobbs* decision.⁹⁹ *Dobbs* could invalidate the A.Z. court's reasoning for contemporaneous mutual consent if certain states expand their abortion bans to include destroying embryos created in a lab, thus requiring forced parenthood in some scenarios.¹⁰⁰

The contemporaneous mutual consent approach directly addresses the concern of fraught interests in using or not using pre-embryos. However, this approach leaves the chance that pre-embryos will remain in indefinite cryopreservation purgatory. Under contemporaneous mutual consent, if Mary Sue and Junior Davis could not agree to use or destroy the frozen pre-embryos, they would remain frozen. This is not a neutral outcome because Junior would achieve his goal of preventing Mary Sue from using the pre-embryos. Additionally, this approach is impractical. If a couple agrees contemporaneously on the use or non-use of pre-embryos to become pregnant, with or without a decision for the non-using party to exercise or terminate parenting responsibilities, why would this issue be in court?

Once again, courts implicitly employ a balancing test favoring non-use of pre-embryos over use. For both *In re Marriage of Witten* and *A.Z. v. B.Z.*, the court's use of contemporaneous mutual consent implicitly held the man's interest in challenging the woman's use of pre-embryos outweighed the woman's interest in becoming pregnant.¹⁰¹ Couples attempting to resolve divorce disputes in court are likely doing so because they could not come to an agreement outside of litigation. Thus, enforcing an approach requiring parties to come to mutual consent will either resolve nothing for the parties or inherently rule in favor of the party objecting to pre-embryo use.

C. Balancing Interests

The final categorical approach is a balancing test in which courts weigh the interests of each party to determine who should prevail in an IVF dispute. The court in *Reber v. Reiss* used a balancing approach to decide who has control over pre-embryos.¹⁰² Upon learning of her cancer diagnosis, Andrea Lynn Reiss and Bret Howard Reber decided to begin IVF procedures to preserve their chance of having children after Andrea's cancer treatments.¹⁰³ After "eight rounds of chemotherapy and 37 rounds of radiation" and initiated divorce proceedings, Andrea was 44 years old, infertile from the cancer treatments, and wanted control of the pre-embryos to attempt pregnancy.¹⁰⁴ Bret, on the other hand, found a new partner with whom he intentionally conceived a genetic child.¹⁰⁵

The court used a balancing test to weigh each party's interest and found that Andrea's interest in using the pre-embryos, when she had no other options to have a genetic child,

⁹⁸ *See id.*

⁹⁹ *See generally* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁰⁰ *See generally id.*

¹⁰¹ *See In re Marriage of Witten*, 672 N.W.2d 768, 768 (Iowa 2003); *see A.Z.*, 725 N.E.2d at 1051.

¹⁰² Although parties and the *Reber* court considered the pre-embryos to be marital property, this Note's analysis maintains the position that frozen pre-embryos occupy a status of quasi-personhood and quasi-property. *Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131, 1136 (2012); *see Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

¹⁰³ *Reber*, 42 A.3d at 1132–33.

¹⁰⁴ *Id.* at 1133.

¹⁰⁵ *Id.*

outweighed Bret’s desire to avoid procreation.¹⁰⁶ For Andrea, the court considered the unique and meaningful value of “be[ing] pregnant”¹⁰⁷ and her “compelling interests in using the pre-embryos,” which represented “what is likely her only chance at genetic parenthood” or parenthood at all.¹⁰⁸ For Bret, the court considered his interest in avoiding forced procreation and parenthood.¹⁰⁹ With these factors in mind, the court held the balancing test tipped in Andrea’s favor.¹¹⁰

Any balancing test allows courts to exercise discretion, which warrants asking what tools courts use to make such rulings. Without a clearly defined test, courts currently have overly broad discretion to both select interests for review and balance those interests accordingly. To hone in on this discretion, courts should define balancing factors that consider sex and gender to give commensurate weight to women’s interests.

III. TOWARDS AN EQUITABLE REVIEW FOR WOMEN

A. *In Lieu of Bright-Line Rules, Courts Should Apply a Modified Balancing Test*

Neither courts nor legislatures should impose a bright-line rule that comes directly from one of the current categorical approaches. In the absence of a federal statute governing pre-embryo disposition disputes,¹¹¹ jurisdictions have developed inconsistent methods and resolutions,¹¹² precluding broad predictability. However, as the court in *Davis* described, pre-embryos “occupy an interim category that entitles them to special respect because of their potential for human life,”¹¹³ or a status of quasi-personhood and quasi-property. As such, courts should not wield any of the current categorical approaches as a rigid rule because they fail to account for changing interests over time and allow courts to ignore sex and gender differences. A new rule should allow couples to both analyze how sex and

¹⁰⁶ *Id.* at 1134–36.

¹⁰⁷ *Id.* at 1138–39 (“There is no question that the ability to have a biological child and/or be pregnant is a distinct experience from adoption. Thus, simply because adoption or foster parenting may be available to Wife, it does not mean that such options should be given equal weight in a balancing test. Adoption is a laudable, wonderful, and fulfilling experience for those wishing to experience parenthood, but there is no question that it occupies a different place for a woman than the opportunity to be pregnant and/or have a biological child. As a matter of science, traditional adoption does not provide a woman with the opportunity to be pregnant.”).

¹⁰⁸ *Id.* at 1140.

¹⁰⁹ *Id.* at 1140–41.

¹¹⁰ *Id.* at 1142.

¹¹¹ The Uniform Parenting Act, proposed in 2017 to support the American Bar Association’s Model Act Government Assisted Reproductive Technology (February 2008) to determine children’s legal parentage, is not widely adopted by States. Faver, *supra* 66, at 641; *see generally* AM. BAR ASS’N SECTION OF FAM. L.’S COMM. ON REPROD. & GENETIC TECH., AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (Feb. 2008), https://www.lcc.mn.gov/lcs/meetings/10112016/artmodelact_snyder.pdf (last visited Mar. 14, 2022); *see generally* NAT’L CONF. OF COMM’RS ON UNIF. STATE LS., UNIFORM PARENTAGE ACT (2017) (Sept. 22, 2017),

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e4a82c2a-f7cc-b33e-ed68-47ba88c36d92&forceDialog=0>.

¹¹² Herrera, *supra* note 53, at 128.

¹¹³ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *on reh’g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

gender differences impact their interests and afford them the human experience of good faith fluctuation in their decisions.

Several states use statutes to govern the disposition of pre-embryos in divorce, but primarily limit their focus to parenthood. Minnesota law, for example, provides that a child born from IVF performed after a couple divorces is not the legal child of the former spouse, unless the former spouse consented to treating the child as their child.¹¹⁴ A Texas law requires similar consent, but also stipulates that a party may withdraw consent before implantation.¹¹⁵ While these laws resolve who is a legal parent to a child born through IVF after divorce, they do not resolve whether one party can use or destroy pre-embryos over the other's objection. By contrast, Arizona law awards disposition of disputed pre-embryos to the spouse most likely to successfully use the pre-embryos for the birth of a child,¹¹⁶ establishing a clear default rule for use over non-use of pre-embryos.

Courts should be wary of a bright-line rule's effect on women because each of the current approaches imposes an implicit or explicit balancing test. A balancing test alone imposes "a notion of formal equality on a situation in which the parties were not in a formally equal position."¹¹⁷ Specifically applied to women, the current categorical approaches bind women to decisions that no longer reflect their interests or circumstances, allow courts to leave pre-embryos in indefinite purgatory, and allow courts to discount the physical and emotional harms found in women's unique sweat equity. As such, even if courts wanted to establish a uniform rule, they do not currently have the tools to equitably do so.

As an alternative, Alexandra Faver proposes a federal statute uniformly protecting against and resolving IVF disputes.¹¹⁸ Faver proposes a statute that requires (1) informed consent and unambiguous drafting, (2) mandatory psychological counseling and a waiting period, (3) independent legal representation, (4) individual gamete freezing,¹¹⁹ (5) limiting the term of the agreement, (6) liability of the professional and facility performing the IVF, and (7) default rules if the agreement is found unconscionable.¹²⁰ Faver's proposal unusually calls for a default rule to thaw-out and destroy pre-embryos if the dispute remains unresolved.¹²¹ Her proposal gives rise to many of the same concerns discussed for the current categorical approaches, such as her default rule to thaw pre-embryos that favors non-use over use.¹²²

¹¹⁴ MINN. STAT. ANN. § 524.2-120.

¹¹⁵ TEX. FAM. CODE ANN. § 160.706.

¹¹⁶ ARIZ. REV. STAT. ANN. § 25-318.03.

¹¹⁷ Colker, *supra* note 53, at 1073.

¹¹⁸ Faver, *supra* note 66, at 639–40.

¹¹⁹ *Id.* at 640 (“[W]omen can freeze their eggs as well [T]he process for egg freezing is quite similar to cryopreserving embryos. The sole difference is eggs are cryopreserved the same day as retrieval, while embryos are cryopreserved five to seven days after retrieval because they must be fertilized. Therefore, because it can be done in the same extraction, couples should freeze individual eggs and sperm the same way they freeze embryos with minimal additional costs” (internal citations omitted)).

¹²⁰ *Id.* (“This statute prescribes that in the event of divorce if there is no agreement about disposition the pre-embryos will be thawed out These default rules must be made known to the participants to further ensure that they are aware of what happens if their agreement is found to be invalid so they can contract differently, if they so choose.”).

¹²¹ *Id.*

¹²² *Id.*

Although Faver correctly recognizes that a default rule may be required to resolve intimate issues that parties may never agree on,¹²³ her proposal falls short of applying a feminist analysis that equitably reviews each parties' interests. A feminist statutory construction would also fall short in efficacy: If Mary Sue Davis underwent invasive IVF procedures, a feminist analysis would say she should either be allowed to benefit from those procedures or decide whether someone else should benefit from her sweat equity. However, implementing a statute that says, "the woman prevails in IVF disputes, no matter what," would be a clear Equal Protection violation, unless the statute substantially relates to government interests.¹²⁴ Alternatively, statutory provisions could outline steps to resolve IVF disputes and employ balancing steps as a statutory construction. Nevertheless, the prescriptive nature of statutes might preclude courts from evaluating IVF disputes case-by-case, which, despite my argument for across-the-board increased weight for women, is necessary to ensure each parties' interests are reflected accurately.

With this in mind, IVF and divorce disputes should remain within common law purview. Under common law, a modified balancing test, as described in the next subpart, can define specific balancing factors, but leaves courts to interpret on a case-by-case manner whether certain factors are missing from the test or if certain included factors are irrelevant. Further, instead of encoding a statute limited to IVF disputes, a modified balancing test would establish a foundation that considers women's unique sweat equities throughout family law and related gendered areas of the law. This method is particularly important in the wake of *Dobbs*, which grants decisions about women's reproductive choices to the states.¹²⁵ If such decisions are under states' purview, courts should wield a common law modified balancing test to give commensurate weight to women's interests and evaluate IVF disputes on a case-by-case basis.

B. A Modified Balancing Test Gives Commensurate Weight to Women's Interests

The current balancing test affords courts overly broad discretion to decide which interests to balance and how to balance them in IVF disputes. As such, I propose modifying the balancing test to define factors that account for changing interests over time, as well as implications of sex and gender differences.

Many courts prioritize disposition agreements for pre-embryos or employ a balancing test to weigh each party's interest in the pre-embryos.¹²⁶ For example, the court in *Szafranski v. Dunston* found that, without a private disposition agreement, the woman's infertility due to chemotherapy created a greater interest in using pre-embryos than the man's interest in preventing their use.¹²⁷ Synthesizing the contract and balancing test approaches simply applies two flawed methods in a sequential fashion because a binding contract does not allow for changing interests and human indecisiveness, and the current balancing test is too undefined. My proposed framework attempts to let couples make their own decisions, or, alternatively, balance their interests equitably. However, equitably

¹²³ *But see id.*

¹²⁴ U.S. CONST. amend. XIV; *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹²⁵ *See Dobbs Jackson Women's Health Org.*, 142 S. Ct. 2228, 2259 (2022).

¹²⁶ *See Reber v. Reiss*, 2012 PA Super 86, 42 A.3d 1131 (2012); *see Szafranski v. Dunston*, 34 N.E.3d 1132 (Ill. App. 1st Dist. 2015); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

¹²⁷ *Szafranski*, 34 N.E.3d at 1162.

balancing their interests requires modifying both the contract and the balancing interests approaches.

First, courts should look to any disposition agreements couples previously signed to review if any interests have changed over time. If Mary Sue and Junior Davis made a pre-embryo disposition agreement and their interests and circumstances remain substantially the same, courts should honor that. Nevertheless, changed circumstances, as seen in *In re Marriage of Witten*, include a person changing their mind about their previous decision.¹²⁸ Under the guidance of *Witten*, what constitutes sufficiently changed circumstances or interests to warrant throwing out the contract is a low standard. Thus, pre-embryo disposition agreements ought rarely to be enforced in court because if there are no substantial changes, including interests, circumstances, and feelings, there is likely little need for any judicial intervention. Alternatively, if Mary Sue originally agreed to destroy pre-embryos, but later decided she wanted to try and have a baby on her own, that should be enough to discard the agreement and proceed to the balancing test.

Next, in the absence of a sustained pre-embryo disposition agreement, the court should proceed with a modified balancing that uses defined factors to consider sex and gender differences. This balancing test should appropriately give more weight to the woman's interests: the person who underwent invasive medical procedures, the person who could become pregnant, and the person who is sociologically predisposed to becoming a primary parent if a child is conceived and born to the couple.

The balancing factors fit into two general categories: physical harms and social harms. For physical harms, courts should balance factors implicated by sex differences. Primarily, courts should consider the sweat equity each person contributed to create pre-embryos, including invasive medical procedures for IVF, related medical procedures, and side effects from these procedures. Courts should also consider the number of procedures, the length of time for these procedures, and the length of time for side effects. Related medical procedures can include alternative fertility treatments, assistive reproductive technologies, and prior pregnancies.

Courts should also balance each person's ability to procreate genetic children without the disputed pre-embryos. For example, courts can ask whether both parties are able to produce viable gametes, whether their ages significantly hinder their ability to procreate, and whether they conceived genetic children in the past. If both parties are still medically able to have genetic children, courts can ask if they can do so without IVF or related assistive reproductive technologies. If they are unable or unlikely to have genetic children without IVF, courts can ask if they can afford the cost of more rounds of IVF and whether they are willing and able to go through the medical procedures again.

Although more abstract, courts should also balance factors for social harms, including many factors implicated by gender differences. Courts should evaluate whether parties have emotional attachments to the disputed pre-embryos, whether parties conceptualize the pre-embryos as potential children, and whether parties can disengage from such attachments. For the party who wants to use the pre-embryos, courts should consider whether that person wants the other person to serve as a co-parent or as a gamete donor. If a couple were to become co-parents, courts should consider which person is likely to become the primary caretaker. Courts should evaluate whether the party proposing to

¹²⁸ See *In re Marriage of Witten*, 672 N.W.2d 768, 781 (Iowa 2003).

use pre-embryos has a good faith intention to become a parent, and not a malicious intent to entrap the other party in emotional and financial liabilities.

The scale should, predictably, tip heavily in favor of women's decision making for pre-embryos. For example, if Junior wanted to destroy pre-embryos and Mary Sue wanted to use them, the physical harms would weigh in favor of Mary Sue: her contributed sweat equities, including all procedures in pursuit of extracting eggs for IVF, were far more invasive and demanding than the procedures required of Junior (ejaculating into a cup). If either party became infertile and unable to produce genetic children without the disputed pre-embryos, the infertility would afford the respective party more weight, regardless of sex or gender.

The social harms would also weigh in favor of Mary Sue: she wanted to use the pre-embryos to become pregnant, outweighing Junior's emotional discomfort. All else even, the physical harms incurred through IVF procedures, the general disposition that women are less likely to experience pre-embryo detachment, or the woman's infertility should weigh in her favor. If Mary Sue was able to have a genetic child without the pre-embryos and was not emotionally attached, the balance would still weigh in her favor due to the physical harms incurred from the initial procedures. In this scenario, unless Mary Sue exhibited no hesitations or interest in whether Junior had decision making over the pre-embryos, the circumstances would weigh in her favor.

Under this modified balancing test, Junior would likely only prevail if his interest overwhelmingly outweighed Mary Sue's, such as if he was completely sterile, and Mary Sue was able to easily become pregnant without the pre-embryos and had no emotional attachment to the pre-embryos. If Junior wanted to use the pre-embryos with a new partner and Mary Sue wanted to preserve them for future use, the balancing test might more likely weigh in Junior's favor if he was sterile and the pre-embryos were his only chance at genetic parenthood. However, the court would have to balance Junior's infertility with Mary Sue's contributed sweat equity, emotional attachment to the pre-embryos, and her ability to become pregnant without the pre-embryos. Applying the factors of the modified balancing test reveals that sex and gender differences are deeply ingrained in IVF disputes. These factors will force courts to consider dichotomies in cis-heterosexual couples and ultimately come to a more accurate balance of each couple's interests.

This modified balancing test is not a new concept. As previously discussed, courts already apply a balancing test, whether implicit or explicit, often inherently favoring one position over the other.¹²⁹ However, courts do not always acknowledge these balancing tests. Instead, courts should make their balancing explicit and focus on specific interests, thereby mitigating broad discretion to weigh any factors they see fit. As discussed in Part I, sex and gender difference matters. Women contribute substantial physical sweat equity

¹²⁹ On top of the inherent biases within the balancing test structures, some courts also exhibit a general preference to avoid procreation: "Several courts have plainly assumed that not only would such harm ensue, but that it can automatically trump the interests of the party desiring to use the embryos to procreate, virtually ignoring the much greater physical burdens and contributions of the progenitor providing the eggs." Forman, *supra* note 56, at 403–04 (citing *Witten*, 672 N.W.2d at 768; *A.Z.*, 725 N.E.2d at 1051; *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *on reh'g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992). Other courts have not openly adopted this principle but have reached a result favoring the procreation-avoider. *See Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998); *see Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006)).

that far outweighs any physical burden men undergo as part of the IVF process.¹³⁰ Women have fewer years of fertility than men,¹³¹ and lose precious time during unsuccessful IVF procedures. Further, women by and large have a different relationship to parenthood—women have a harder time disengaging from parenthood,¹³² women have different physical constraints due to pregnancy and breastfeeding that create a dependency relationship,¹³³ and women, generally, are sociologically predisposed or expected to be the primary caretaker.¹³⁴ The circumstances relating to IVF procedures, pregnancy, and relational parenting create disparate experiences for women and men. Thus, courts should reflect these disparities by affording significant and due weight to women’s interest in resolving IVF disputes. In practice, I predict this method will favor women’s interests in such disputes across the board.

C. *Towards a Regime We Have Already Seen*

Recognition of women’s special interest in family law issues is not a novel concept. In fact, several examples recognize inherent sex and gender differences in establishing rules. For instance, Illinois law establishes: “In the absence of an explicit order or judgment for the allocation of parental responsibilities, the establishment of a child support obligation or the allocation of parenting time to one parent shall be construed as an order or judgment allocating all parental responsibilities to the other parent.”¹³⁵ In the absence of parenting provisions in such an order or judgment, “all parental responsibilities shall be presumed to be allocated to the mother” unless the child primarily resided with the other parent for the prior six months.¹³⁶

In *Lehr v. Robertson*, a putative father claimed that the adoption of his biological child without his consent violated his constitutional due process rights.¹³⁷ The Supreme Court wrote that mere biological connection between a child and a man does not establish a constitutional right that automatically compels the state to listen to his opinion on the child’s best interest.¹³⁸ Rather, “[m]en need to have developed an actual relationship with a child, in addition to a biological connection, before their constitutional right to parent

¹³⁰ See Jacobson, Zieve, & Conaway, *supra* note 39.

¹³¹ The American Society for Reproductive Medicine reports “a healthy, fertile 30-year-old woman has a 20% chance of getting pregnant By age 40, a woman’s chance is less than 5% per cycle[.]” AM. SOC’Y FOR REPROD. MED., AGE AND FERTILITY: A GUIDE FOR PATIENTS 4 (2012), https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/Age_and_Fertility.pdf. Although men experience changes in their fertility as they age, men generally do not have fertility issues until they are in their 60s. *Id.* at 5. Even with sperm quality deterioration, there is no maximum age for men to father a child. *Id.*

¹³² See Waldman, *supra* note 14, at 1040–52.

¹³³ See West, *supra* note 51, at 210.

¹³⁴ See HOCHSCHILD & MACHUNG, *supra* note 48, at 38–40.

¹³⁵ 750 ILL. COMP. STAT. 46/802.

¹³⁶ *Id.*

¹³⁷ *Lehr v. Robertson*, 103 S. Ct. 2985, 2987 (1983).

¹³⁸ *Id.* at 2994.

ripens.”¹³⁹ By contrast, Forman observed, “women’s full constitutional parental identity and rights attach upon giving birth.”¹⁴⁰

These rules are important because they recognize times when the law requires evaluating different sex and gender-based experiences to provide equitable solutions. Even so, my proposal is not nearly as stringent as providing a bright-line default rule. Rather, I propose a framework that more accurately reflects sex and gender differences. With this in mind, a modified balancing test that considers interests and gives particular weight to one gender over another is not in fact radical, but achievable and noteworthy for equitable treatment in family law.

D. Constitutional Considerations for IVF Disputes and Considering Sex and Gender Differences

This Note implicates two primary constitutional concerns. First, critics may argue the proposed balancing test violates Equal Protection because it has a disparate impact on men. However, the test circumvents Equal Protection requirements because the disparate impact therein does not stem from discriminatory intent. Alternatively, critics may argue that a constitutional analysis framing IVF as a fundamental right jeopardizes abortion rights because the right to use pre-embryos and the right to abortion have conflicting stances on forced genetic parenthood. This argument is substantively null after the *Dobbs* decision, which terminated abortion as a fundamental right protected by the Fourteenth Amendment.¹⁴¹ However, even in states that choose not to terminate the right to abortion, IVF disputes and abortion are fundamentally distinct, and are treated as such in the law.

At first glance, asking courts to consider sex and gender seems to run afoul of the Equal Protection Clause. However, this concern is without merit because the test favors women based on legitimate interests, not discriminatory intent. That this test may have a disparate impact to increase favorable outcomes for women does not invalidate the test on Equal Protection grounds alone.¹⁴² For a disparate impact claim to prevail under Equal Protection, the challenged practice must stem from a discriminatory intent.¹⁴³ Whereas some feminist legal scholars support judicial deference for women¹⁴⁴—and might similarly support such deference in a statute—I do not propose a default rule for women to prevail.

¹³⁹ *Id.* (“[T]he existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child”); Forman, *supra* note 56, at 411 (citing *Lehr*, 103 S. Ct. at 2993).

¹⁴⁰ Forman, *supra* note 56, at 411 (citing *Lehr*, 103 S. Ct. at 2993).

¹⁴¹ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2257 (2022).

¹⁴² *Washington v. Davis*, 96 S. Ct. 2040, 2048–49 (1976) (holding disparate impact of facially neutral hiring practices alone do not trigger strict scrutiny requirements for Equal Protection claims, but the practice must trace back to a discriminatory purpose); *Pers. Adm’r of Mass. v. Feeney*, 99 S. Ct. 2282, 2293 (1979) (A gender neutral statute with a disproportionate adverse effect on women leads to an inquiry of whether the statutory classification is actually gender-neutral and whether the “adverse effect reflects invidious gender-based discrimination” (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 97 S. Ct. 555, 564 (1977)). However, the Court continued that “invidious discrimination” is merely a starting point because “purposeful discrimination is ‘the condition that offends the Constitution.’” *Feeney*, 99 S. Ct. at 2293 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 91 S. Ct. 1267, 1276 (1971)).

¹⁴³ See *Washington*, 96 S. Ct. at 2048.

¹⁴⁴ See *Colker*, *supra* note 53, at 1066; see *Waldman*, *supra* note 14, at 1061.

The modified balancing test neither directs courts to rule in favor of women nor does it ask courts to be searching in making their determinations. By its nature, a balancing test weighs differences between parties to evaluate who should prevail. Up until this point, however, courts have been permitted to ignore related interests in their balancing, such as crucial differences stemming from sex and gender, that dramatically change each person's experience with IVF. This proposed test acknowledges sex and gender as part of IVF disputes and accordingly incorporates these concomitant interests in judicial consideration. Consequently, this test does not favor women because of discriminatory intent, but because it pushes courts to give commensurate weight to relevant interests in IVF disputes.

Although *Dobbs* changes the constitutional analysis, abortion and IVF are distinct issues. Abortion primarily implicates a person already pregnant choosing either to terminate or continue the pregnancy. IVF, on the other hand, implicates someone who wants to use pre-embryos for pregnancy and frequently involves at least one person who has fertility issues. Notwithstanding important differences that should preclude applying across-the-board analyses for these reproductive issues, *Dobbs* blurs the distinctions between decision making for IVF and abortion.

Before *Dobbs*, a constitutional analysis that supported a "right to procreate, . . . include[d] the right *not* to procreate."¹⁴⁵ Post-*Dobbs*, instead of balancing "whether one party's fundamental right to procreate is more or less significant than the other party's right not to procreate,"¹⁴⁶ courts may find the constitutional question of fundamental rights irrelevant. In fact, *Dobbs* may strengthen parties' arguments that advocate to use pre-embryos over the other's objection in state courts. If abortion, IVF, and reproductive rights are no longer protected as fundamental rights,¹⁴⁷ those issues are no longer subject to constitutional considerations.

If, for argument's sake, abortion was still considered a federal fundamental right, the constitutional analyses for abortion and IVF could mirror each other. Both issues, proscribing abortion and using pre-embryos over someone's objection, concern making someone a genetic parent without consent.¹⁴⁸ Assuming Junior Davis's ability to father a genetic child remains unchanged, situating Mary Sue's right to procreate as a fundamental right would give her significant weight to use the pre-embryos if they were her last chance at genetic parenthood. This analysis would similarly afford her significant weight in preventing Junior from using the pre-embryos with a different woman.

However, since abortion is not a federal fundamental right,¹⁴⁹ any challenge to pre-embryo use on the grounds that forced genetic parenthood is manifestly against public policy holds little weight. Important to the *Reber* court's decision, Sarah Holman Loy

¹⁴⁵ *Apel*, *supra* note 72, at 31 (emphasis in original) (citing *Griswold v. Connecticut*, 85 S. Ct. 1678 (1965); *Roe v. Wade*, 93 S. Ct. 705 (1973), *overruled by Dobbs*, 142 S. Ct. 2228, and *holding modified by Planned Parenthood of Se. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992); *Planned Parenthood*, 112 S. Ct. 2791, *overruled by Dobbs*, 142 S. Ct. 2228); *see also Colker*, *supra* note 53, at 1070 ("To the extent that *Roe* protects the decision to bear or beget children, it protects women from involuntary sterilization, mandatory abortion, and compulsory pregnancy. It equally protects the right to terminate a pregnancy and the right to bring a pregnancy to term.").

¹⁴⁶ Elizabeth A. Trainor, J.D., Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R. 5th § 2[b] (2001).

¹⁴⁷ *See Dobbs*, 142 S. Ct. at 2257.

¹⁴⁸ Although significantly related, using pre-embryos is not concomitant with forced pregnancy.

¹⁴⁹ *See Dobbs*, 142 S. Ct. at 2257.

wrote, “forced [genetic] parenthood, at least when a spouse cannot procreate through other means, is not against public policy,”¹⁵⁰ a position supported by *Dobbs*.¹⁵¹ In the absence of a universal public policy against forced parenthood in the specific context of pre-embryo implantation over a party’s objection,¹⁵² such reasoning should not factor into IVF dispute resolution.

Finally, a constitutional analysis for IVF and abortion providing a “right to procreate, . . . [which] includes the right *not* to procreate”¹⁵³ centers on the people who could become parents, not on the pre-embryos or fetuses. Previously, the Supreme Court determined that “fetuses, which are more developed than . . . embryos, have no constitutional protections as persons, so why would the embryos?”¹⁵⁴ However, post-*Dobbs*, states may very well afford fundamental rights to pre-embryos or fetuses themselves. With a precarious future in federal courts and across state jurisdictions, there are not yet universal rulings either reconciling *Dobbs* and IVF or defining “persons” with a Fourteenth Amendment right to life to include frozen, undeveloped, un-transplanted pre-embryos.¹⁵⁵ Until it becomes clear whether pre-embryos have such protections, discussions about pre-embryos should continue to center on the people who could become parents.

CONCLUSION

Courts recognize IVF disputes are quintessentially personal issues and yet make these intimate decisions for couples anyway. Courts should not hold unfettered discretion to choose which factors determine whether someone is entitled to decision-making authority over their pre-embryos. Since courts already apply balancing tests to resolve IVF disputes, whether implicitly or explicitly, they should do so explicitly and should do so in a manner that fairly and commensurately gives weight to women’s interests. Establishing a regime that gives commensurate weight to women’s sex and gender differences sets a foundation for considering women’s unique experiences throughout family law and related gendered areas of the law.

For cis-heterosexual couples, sex and gender are impossible to separate from IVF procedures, pregnancy, and parenthood. Rather than focusing on a gender-neutral framework, we should acknowledge that sex and gender are part of the conversation and make their roles explicit, thereby pushing courts to equitably address those imbalances head on.

IVF disputes can dramatically change someone’s life: they are the difference between becoming a parent and not becoming a parent, between utility and futility for invasive medical procedures, and determine agency for certain reproductive autonomy. As a deeply gendered issue, IVF disputes present an opportunity for family law to make

¹⁵⁰ See Sarah Holman Loy, *Responding to Reber: The Disposition of Pre-Embryos Following Divorce in Pennsylvania*, 122 PA. ST. L. REV. 545, 567 (2018) (discussing couples having trouble becoming pregnant). Distinguished from IVF, a person seeking an abortion is already pregnant and does not have inherent fertility issues.

¹⁵¹ See generally *Dobbs*, 142 S. Ct. 2228.

¹⁵² Loy, *supra* note 150, at 566.

¹⁵³ Apel, *supra* note 72, at 31 (internal citations omitted).

¹⁵⁴ Faver, *supra* note 66, at 636 (citing *Roe v. Wade*, 93 S. Ct. 705 (1973), *overruled by Dobbs*, 142 S. Ct. 2228, and *holding modified by* *Planned Parenthood of Se. Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992)).

¹⁵⁵ See *id.* (citing *Roe*, 93 S. Ct. 705).

amends for social harms perpetuating gender inequity. Making amends requires defining weights for balancing gendered interests in IVF to establish a regime that accurately and effectively reflects women's interests in these disputes.