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Men's Reproductive Rights: A Legal History

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Abstract

This Article offers the first legal history of men's procreative rights, filling a gap in scholarship on assisted reproduction, constitutional law, and social movements. A rich literature addresses women's procreative rights in contexts from abortion to infertility. By comparison, we know relatively little about the history of the debate about reproductive rights for men. This void is particularly troubling at a time when the law of reproductive rights is increasingly up for grabs, especially in the context of assisted reproduction technologies (ART).

Men's rights advocates—and the abortion-rights supporters responding to them—championed a jurisprudential approach to parenting that casts a long shadow today. Men's rights advocates insisted that procreative rights should depend largely on the individual's reasons for wanting (or not wanting) children rather than on sex, biology, or gestation. Abortion-rights supporters largely countered these arguments by pointing to the emotional challenges, physical discomfort, and medical risk associated with pregnancy—an experience that men could not share. To resolve this conflict, the Court struck a compromise. In cases where gestation

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is not a tiebreaker, judges focus on individuals' reasons for seeking or avoiding parenting. This compromise still influences the law of ART and abortion.

This history helps to make sense of the dual system of reproductive rights that has emerged in recent years. While the courts adjudicate cases on abortion and assisted reproduction, these bodies of law seem to operate largely independently from one another. This Article offers a radically different picture of the relationship between these bodies of law, showing that they have been inextricably linked.

This Article further exposes the dark side of individualized approaches to reproductive rights like the ones taken by courts in ART cases. While these approaches promise to move beyond generalizations about gender, abortion foes championed such a strategy explicitly because it reinforced gender- and class-based assumptions about what counted as a good or bad reason for seeking or avoiding parenthood. In the abortion context, the Court should clarify the variables (and their relative weight) relevant to balancing. In the ART context, states should introduce legislation to encourage parties to contract meaningfully about reproduction.

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I. INTRODUCTION

This Article offers the first legal history of men's procreative rights, filling a gap in scholarship on assisted reproduction, constitutional law, and social movements.[1] A rich literature addresses women's procreative rights in contexts ranging from abortion to infertility.[2] By comparison, there is relatively little scholarship about the history of the debate surrounding reproductive rights for men.[3] This void is particularly troubling at a time when the law of reproductive rights is increasingly up for grabs.[4] With the spread of assisted reproduction technologies (ART), courts and legislatures have begun to rethink when men and women have rights to seek and avoid parenthood.[5]

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1. *See* Sallie Han, *Making Room for Daddy: Men's "Belly Talk" in the Contemporary United States*, *in* RECONCEIVING THE SECOND SEX: MEN, MASCULINITY, AND REPRODUCTION 306 (Marcia C. Inhorn et al. eds., 2009) ("Until recently, there has been no place for men in reproduction—not in the literature on this topic, as scholars note . . . ."); *infra* Parts II–IV.

2. *See, e.g.*, DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1998); CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA (2017); JOHANNA SCHOEN, ABORTION AFTER *ROE* (2015); MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE (2015); Linda Greenhouse & Reva B. Siegel, *Before (And After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

3. For a brief discussion on men's reproduction rights in the men's rights movement, see NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 168–70 (1998). *See also* Preston D. Mitchum, *Male Reproductive Autonomy: Unplanned Fatherhood and the Victory of Child Support*, 7 MOD. AM. 10 (2011) (discussing male reproductive autonomy under the Constitution); Lisa Lucile Owens, *Coerced Parenthood as Family Policy: Feminism, the Moral Agency of Women, and Men's "Right to Choose"*, 5 ALA. C.R. & C.L. L. REV. 1 (2013) (arguing that unequal treatment of men and women's right to reproductive choices led to a "subjugation-through-rights-guarantees" phenomenon for women); Mary A. Totz, *What's Good for the Goose Is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141 (1994) (discussing reproductive rights men may be entitled to under the Constitution). Historians and sociologists have offered more perspectives on the movement for men's rights after divorce. *See, e.g.*, JOCELYN ELISE CROWLEY, DEFIANT DADS: FATHERS' RIGHTS ACTIVISTS IN AMERICA (2008); MICHAEL KIMMEL, ANGRY WHITE MEN: AMERICAN MASCULINITY AT THE END OF AN ERA 135–68 (2013); MICHAEL A. MESSNER, POLITICS OF MASCULINITIES: MEN IN MOVEMENTS 44–45 (1997); Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016).

4. Scholars have noted the various approaches courts have used to determine reproductive rights with the spread of assisted reproductive technologies (ART). *See* Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 624 (2016) ("States vary significantly with respect to who constitutes a donor or a father when individuals or couples use known or anonymous donors to conceive children through alternative reproductive means."); *infra* note 5 and accompanying text.

5. *See* Steve P. Calandrillo & Chryssa V. Deliganis, *In Vitro Fertilization and the Law: How Legal and Regulatory Neglect Compromised a Medical Breakthrough*, 57 ARIZ. L. REV. 311, 329 (2015) (discussing questions that ART has left open and stating, the "law has changed far behind this groundbreaking technology in the United States"); *see also* Cahill, *supra* note 4, 625–38 (examining

This Article recovers an important chapter of this missing history.[6] Starting in the 1970s, abortion foes tried to join a broader father's rights movement.[7] In the next several decades, the movement for men's reproductive rights won and lost allies, including feminists and members of the broader men's rights movement.[8] After experimenting with several alternatives, men's rights advocates insisted that procreative rights should depend largely on the individual's reasons for wanting (or not wanting) children rather than on sex, biology, or gestation.[9] Abortion-rights supporters largely countered these arguments by pointing to the emotional difficulty, physical discomfort, and risk associated with pregnancy—an experience that men cannot share.[10] To resolve this conflict, the U.S. Supreme Court struck a compromise: In cases where gestation is not a tiebreaker, the legacy of the men's rights debate was clear.[11] In those situations, judges should focus on individuals' reasons for seeking or avoiding parenting, just as men's rights proponents requested.[12]

This history helps to make sense of the dual system of reproductive rights that has emerged in recent years.[13] While the courts adjudicate cases on abortion and assisted reproduction, these bodies of law seem to operate largely independently from one another.[14] In the abortion context, men functionally have no constitutional say.[15] In the ART context, men and women stand on relatively equal footing, and most courts resolve disputes by balancing the

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the "reproductive binary" between women and men that drives state paternity determinations of sexual inseminators); Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 151–56 (2017); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2285–316 (2017).

6. *See infra* Part II.
7. *See infra* Section II.B.
8. *See infra* Sections II.B–C.
9. *See infra* pp. 149–54.
10. *See infra* pp. 154–56.
11. *See infra* pp. 126, 154.
12. *See infra* pp. 126, 154.
13. *See infra* Part III.
14. *See infra* Part III.
15. *See, e.g.*, Jean Strout, *Dads and Dicta: The Values of Acknowledging Fathers' Interests*, 21 CARDOZO J.L. & GENDER 135, 139 (2014) (stating that the Supreme Court has emphasized that due to the physical burden of gestation, abortion decisions are typically framed in terms of women's choice, and "[b]ecause men do not gestate, and thus bear no *physical* burden, they are excluded from constitutional protection").

relative interests of the parties in making their specific reproductive decision.[16] This Article offers a radically different picture of the relationship between these bodies of law, showing that they have been inextricably linked.[17]

The Article further exposes the dark side of individualized approaches to reproductive rights like the ones taken by courts in ART cases.[18] While these approaches seemingly promise to move beyond generalizations about gender, abortion foes explicitly championed the strategy because it reinforced gender- and class-based assumptions about what counted as a good or bad reason for seeking or avoiding parenthood.[19] In ART cases, states should do more to ensure that couples write their own preferences into enforceable contracts rather than allowing courts to balance parties' interests after the fact.[20] Even in cases where balancing the parties'interests is necessary, the Court should offer more clarity on precisely which interests judges should value and how much weight each variable deserves.[21]

This Article proceeds in four parts.[22] Part II explores the emergence of a movement for men's procreative rights in the 1970s and early 1980s, focusing on fathers' claims made in the contexts of abortion, sterilization, and presence at the birth of a child.[23] As this Part shows, abortion opponents initially framed men's procreative rights as an extension of the right to marry.[24] Activists explained that giving women unilateral abortion rights increased the odds of divorce and undermined the procreative function of marriage.[25] But by the early 1980s, as abortion opponents borrowed more from the broader men's rights movement that focused on rights after divorce, anti-abortion activists adopted different arguments, such as asking for formal equality between men and women when it came to procreative rights.[26] Part III examines the transformation of the movement for men's reproductive rights in the later

16. *See* Davis v. Davis, 842 S.W.2d 588, 601–04 (Tenn. 1992).
17. *See infra* Section III.B.
18. *See infra* Part IV.
19. *See infra* Section IV.A.
20. *See infra* Section IV.C.
21. *See infra* Section IV.B.
22. *See infra* Parts II–IV.
23. *See infra* Part II.
24. *See infra* Section II.B.
25. *See infra* Section II.B.
26. *See infra* Section II.C.

1980s, as abortion foes focused on the rights of men regardless of marital status or conformity to conventional gender roles.[27] These activists urged the Court to focus not on the stage of pregnancy or the principle of sex equality, but on the individual circumstances of the men and women involved in abortion cases.[28] Part IV examines the legacies of this history in contemporary abortion and ART jurisprudence, and Part V briefly concludes.[29]

II. FORMAL EQUALITY AND THE GESTATION DISTINCTION

Do men have reproductive rights?[30] If so, how far do they reach?[31] These questions seem largely absent from constitutional jurisprudence.[32] It is true that the Supreme Court has explored the relative parental rights of men and women inside and outside of marriage.[33] Its past decisions suggest that the Constitution protects a right to procreate,[34] and precedents like *Griswold v. Connecticut*,[35] *Eisenstadt v. Baird*,[36] and *Roe v. Wade*[37] suggest that the Constitution may also a recognize a right not to procreate. But many of these cases either ignore gender distinctions[38] or focus on how reproduction is different for women.[39] The reproductive rights of men have received relatively little attention.[40]

27. *See infra* Part III.

28. *See infra* Sections III.A–B.

29. *See infra* Parts IV–V.

30. *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 642–47 (1993) (discussing the traditional difference between the mother-child relationship and the father-child relationship).

31. *Id*. at 647–72 (discussing the growth of paternal rights, particularly in cases of unwed fathers).

32. *See supra* note 3 and accompanying text.

33. *See, e.g.*, Dolgin, *supra* note 30, at 661.

34. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (stating that "[m]arriage and procreation" are fundamental rights).

35. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

36. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

37. Roe v. Wade, 410 U.S. 113, 153–54 (1973).

38. *See, e.g.*, *Eisenstadt*, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Griswold*, 381 U.S. at 486 (emphasizing a gender-neutral "right of privacy older than the Bill of Rights").

39. *See Roe*, 410 U.S. at 139–41.

40. *See supra* note 3 and accompanying text.

The legal history of men's reproductive rights is similarly undeveloped.[41] In recent years, historians have begun examining the fathers' rights movement—a subject that has received relatively little attention.[42] However, even these studies focus on the rights of men after childbirth, particularly during divorce.[43]

This Part begins to develop a history of men's reproductive rights.[44] As this Part shows, abortion foes initially tried to benefit from discomfort with the decline of traditional marriage, framing abortion as yet one more threat to men's traditional role as fathers and husbands.[45] However, individual men also went to court to block abortions, sometimes without the support of the anti-abortion movement, and many of these men were unmarried, or younger or poorer than the idealized father painted by pro-lifers.[46] Abortion-rights supporters responded partly by suggesting that the law should not reinforce a form of traditional marriage that often harmed women.[47] Increasingly, however, as feminists viewed divorce reform with more ambivalence, abortion-rights supporters insisted that women should always have paramount abortion rights because of their unique gestational capacity.[48] Next, this Part examines

41. *See* Han, *supra* note 1.

42. *See supra* note 3 and accompanying text.

43. *See* LEVIT, *supra* note 3, at 169–71 (describing the paramount concerns of the various men's rights groups in the 1990s were fathers' rights upon dissolution of the marriage).

44. *See infra* Sections II.A–B.

45. *See, e.g.*, Poe v. Gerstein, 517 F.2d 787, 795–97 (5th Cir. 1975) (noting the father's fundamental right to procreate offspring within the marriage relationship, but ultimately invalidating a state law requiring the husband's consent before an abortion); *Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary H.R.*, 94th Cong. 248–49 (1976) [hereinafter *Proposed Constitutional Amendments on Abortion*] (testimony of J. Jerome Mansmann, Special Assistant Att'y Gen. of Pennsylvania); *Abortion Part IV: Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary*, 94th Cong. 247 (1975) [hereinafter *Abortion Part IV*] (statement of Dennis Horan, Attorney, Americans United for Life and Illinois Right to Life Committee); Motion and Brief, Amicus Curiae of Dr. Eugene Diamond and Americans United for Life, Inc., in Support of Appellees in 74-1151 and Appellants in 74-1419, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419), 1976 WL 178721, at *104 [hereinafter Amicus Curiae of Diamond and AUL]; *Two Enter Appearance for Husband*, DECATUR DAILY REV., Feb. 27, 1974, at 42, https://www.newspapers.com/clip/36604422/the_decatur_daily_review/ (detailing an abortion case where a wife obtained an abortion without the husband's consent).

46. See *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974), and *Jones v. Smith*, 278 So. 2d 339 (Fla. Dist. Ct. App. 1973), for examples of these cases.

47. *See, e.g.*, Linda Mathews, *High Court to Rule on Spouse's Rights*, ANNISTON STAR, Mar. 17, 1974, at 10E.

48. *See* Brief for Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall,

how the Supreme Court intervened in this conflict.[49] In *Planned Parenthood of Central Missouri v. Danforth*, the Justices struck down a spousal-consent law, emphasizing that pregnancy served as a tiebreaker.[50] Finally, this Part examines how men's rights activists adapted after *Danforth*.[51] Rather than spotlighting the importance of traditional marriage, abortion foes began maintaining that equality between the sexes required reproductive rights for some men.[52] Related arguments captured the support of some of those outside of the abortion debate, especially when it came to child-support obligations.[53] Abortion-rights supporters again stressed that equal treatment required no such thing: men and women were not similarly situated because only women could get pregnant.[54] This argument continued to make a difference, and by the later 1980s, even as abortion rights enjoyed less protection, pro-lifers searched for a new way to carve out reproductive rights for men.[55]

A. Men's Reproductive Rights Before Roe

Before 1965, the Court's most famous pronouncement on the right to procreate came in a case involving a man.[56] *Skinner v. Oklahoma* involved an

M.D., and Michael Freiman, M.D., Appellants and Cross-Appellees at 87, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (No. 74-1151, 74-1419), 1975 WL 171451 [hereinafter Brief for Planned Parenthood of Central Missouri] ("The wife's claim for protection equal to that extended to all other unwillingly pregnant women is based on her personal right to privacy in matters relating to the protection of her physical and mental health."); Brief Amicus Curiae on Behalf of the Center for Constitutional Rights and the Women's Law Project at 7, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (No. 74-1151, 74-1419) ("The husband's own right to procreate does not entitle him to use an unwilling spouse's body for that purpose"); Joan Fallon, *Man's Right Pertaining to Abortion*, LOWELL SUN, Jan. 2, 1974, at 2A.

49. *See infra* Section II.B.

50. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70–71 (1976) ("Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.").

51. *See infra* Section II.C.

52. *See, e.g.*, Joan Beck, *Fathers Ask for a Right in Abortion Prevention*, CHI. TRIB., Oct. 13, 1977, at 18; Blair Kamin, *Dad's Lawsuit Comes to End with Abortion*, DES MOINES DAILY REG., Mar. 5, 1985, at 3A.

53. *See* Jack Hovelson, *Action Filed; Woman Agrees to Bear Child*, DES MOINES REG., Mar. 25, 1987, at 3A; David M. Margolick, *An Unlikely Pair Strikes a Blow for Father's Rights*, DETROIT FREE PRESS, Nov. 9, 1981, at 7A; *Frustrated Men Launch Their Own Liberation Movement*, INDEP. REC., June 17, 1981, at 3D.

54. *See infra* Section II.B.

55. *See infra* Part III.

56. Skinner v. Okla. *ex rel*. Williamson, 316 U.S. 535, 537 (1942).

Oklahoma law that required the sterilization of male inmates who had three or more criminal convictions, but exempted those who had committed white-collar crimes.[57] The *Skinner* Court held that the law violated the Equal Protection Clause.[58] "We are dealing here with legislation which involves one of the basic civil rights of man," the Court explained.[59] "Marriage and procreation are fundamental to the very existence and survival of the race."[60] *Skinner* notwithstanding, the idea of reproductive rights was novel before the 1960s, and even after the Court recognized such rights, the discussion most often (and legitimately) centered on the experiences of women.[61]

In the early decades of the twentieth century, state law bore the influence of the eugenics movement.[62] Between 1900 and 1935, more than thirty states required the sterilization of people deemed genetically unfit, including people who were deemed to have questionable moral character.[63] In theory, these laws applied evenly to men and women.[64] In practice, however, states disproportionately sterilized women.[65] In North Carolina, a state with one of the nation's highest sterilization rates, women comprised 85% of those sterilized.[66] Similarly, women made up the vast majority of those sterilized in California in the first part of the twentieth century.[67] This disparity was no

57. *Id*. at 536–37.

58. *Id.* at 541.

59. *Id.*

60. *Id.*

61. *See supra* note 2 and accompanying text.

62. See DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 92–94 (1985), WENDY KLINE, BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM 2–3 (2001), STEFAN KÜHL, THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM 44–46 (1994), and MARK A. LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES 1–4 (2008), for further discussion on the history of the eugenic legal reform movement.

63. *See, e.g.*, Mary Ziegler, *Eugenic Feminism: Mental Hygiene, the Women's Movement, and the Campaign for Eugenic Legal Reform, 1900–1935*, 31 HARV. J.L. & GENDER 211, 212, 215–17 (2008).

64. *See id.* at 216–18.

65. *See id*.

66. *See, e.g.*, RANDALL HANSEN & DESMOND KING, STERILIZED BY THE STATE: EUGENICS, RACE, AND THE POPULATION SCARE IN TWENTIETH-CENTURY NORTH AMERICA 242 (2013).

67. *See* Ziegler, *supra* note 63, at 216. Similarly, the proportion of state-sterilized women in California grew during the length of the program, while the proportion of affected men shrank. *See* Joel T. Braslow, *In the Name of Therapeutics: The Practice of Sterilization in a California State Hospital*, 51 J. HIST. MED. & ALLIED SCI. 29, 45 (1996) (discussing sterilization rates at a single California hospital form 1910–1950).

surprise: many of the statutory grounds for sterilization reflected discomfort with female sexuality outside of marriage.[68]

After *Skinner*, when the Court began recognizing the right to avoid procreation, gender played a minor role. For example, in *Griswold v. Connecticut*, the Court struck down a Connecticut law banning the use of contraception by married couples.[69] *Griswold* invalidated the law, reasoning that it violated a right to marital privacy.[70] "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred," the Court reasoned.[71] Similarly, in *Eisenstadt v. Baird*, the Court struck down a Massachusetts contraception law, clarifying that reproductive rights belonged to individuals rather than married couples.[72] Neither *Eisenstadt* nor *Griswold* addressed whether reproductive rights had any relationship to an individual's gender.[73]

B. Men's Rights and the Marriage Bargain

Roe v. Wade gave the first glimpse of the relationship between gender and reproductive rights.[74] In its explanation on whether the Constitution protected reproductive rights, the Court homed in on the detriment imposed on the woman if denied the choice to have an abortion: the "[s]pecific and direct harm" tied to gestation, the "[p]sychological harm," the difficulties of child care, and the "stigma of unwed motherhood."[75] In contrast, *Roe* and its companion case, *Doe v. Bolton*,[76] declined to address whether men had any procreative rights, in the abortion context or otherwise.[77] The Court noted that none of the parties asserted any rights for men in *Roe* or *Doe*, and neither of the challenged statutes raised the issue.[78] Partly because *Roe* avoided the question of men's reproductive rights, abortion foes immediately saw fathers'

68. *See id.*
69. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).
70. *Id.*
71. *Id.* at 486.
72. Eisenstadt v. Baird, 405 U.S. 438, 453–55 (1972).
73. *See id.*; *Griswold*, 381 U.S. at 486.
74. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).
75. *Id.*
76. Doe v. Bolton, 410 U.S. 179, 189 (1973).
77. *See Roe*, 410 U.S. at 165 n.67 (stating that neither *Roe* nor *Doe* discussed the father's right in the abortion decision).
78. *See id.*

rights as a potentially promising path[79]—perhaps, the Court deliberately mentioned men's rights to flag a willingness to uphold a related law.[80]

But the reasons for interest in men's procreational rights went beyond the language of *Roe*.[81] Starting in the 1960s, the fathers' rights movement emerged, which initially challenged welfare laws that treated lovers as "substitute fathers" and participating in discussions on how to reform divorce laws.[82] By the early 1970s, when states turned away from fault requirements for divorce, the fathers' rights movement offered advice and new ideas on how to change alimony, child custody, and child support laws.[83] At the same time, child-bearing patterns and preferences began to shift; while a majority of Americans once said that a four-child family was ideal, in 1971, most preferred only a two-child family.[84] As some people struggled to adapt to the new family preferences, the fathers' rights movement had particular resonance.[85]

Abortion opponents sought to benefit from these trends by bringing cases premised on men's reproductive rights.[86] At first, pro-lifers used sympathy for men's rights as an argument for a constitutional amendment that would overturn *Roe*.[87] By the mid-1970s, an official, secular anti-abortion movement had been active for over a decade.[88] Almost always with the support of local Catholic dioceses, anti-abortion organizations had formed the decade before to oppose laws repealing or reforming restrictions on abortion.[89] These

79. *See infra* Section II.C.

80. *See Roe*, 410 U.S. at 165 n.67 (stating, "We need not now decide whether provisions [that recognize the father's right in the abortion context] are constitutional.").

81. *See* Dinner, *supra* note 3, at 94 (discussing how early fathers' rights activists in the 1960s sought to restore the traditional family structure, and the socioeconomic status men derived from it).

82. *See id.* at 94–97.

83. *See id.*

84. *See, e.g.*, George Gao, *Americans' Ideal Family Size Is Smaller than It Used to Be*, PEW RES. CTR. (May 8, 2015), http://www.pewresearch.org/fact-tank/2015/05/08/ideal-size-of-the-american-family/ [http://pewrsr.ch/1RjXPC4].

85. *See* Totz, *supra* note 3, at 202 (discussing the impact of the women's movement on men's parental rights).

86. *See, e.g.*, Poe v. Gerstein, 517 F.2d 787, 795 (5th Cir. 1975) ("[T]he state contends that the statute is necessary to protect the rights of a husband whose wife desire an abortion.").

87. Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 898–903 (2014) (discussing the constitutional amendment campaign).

88. *See* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 1–2, 6 (2016) (discussing the early years of the anti-abortion movement).

89. *See, e.g.*, *id.* at 39–133.

groups primarily presented themselves as champions of the unborn child's right to life.[90]

Before *Roe*, some abortion opponents had suggested that opposition to abortion reflected the importance of reproductive rights for men as well as women.[91] However, supporters of abortion rights argued that laws like Texas's ban in *Roe* violated the rights of married men, by compromising their happiness and ability to plan their families.[92] For example, in *Roe*, those challenging the law included a married couple who was worried about the effect of an unplanned pregnancy on their union.[93] That couple emphasized that the "spectre of pregnancy [was] having a divisive effect [on their] marriage," and on the marriages of some of the other couples challenging the law.[94] For the most part, however, those on both sides focused on the privacy rights of women and the opposing interest of the government in protecting fetal life.[95] "The right to live is more basic even than the right to procreate," explained Americans United for Life (AUL), a leading anti-abortion group.[96]

But after *Roe*, concerns about the rights of men took on more importance for abortion opponents.[97] Abortion foes recognized that arguments for fetal rights had not convinced the Court or yet established adequate support for a constitutional amendment overturning *Roe*—the pro-life movement's key initiative after 1973.[98] In searching for new arguments against abortion, prolifers tried to rebut arguments that compulsory pregnancies helped to damage

90. *See, e.g.*, Ziegler, *supra* note 87, at 899–904.

91. *See, e.g.*, *Proposed Constitutional Amendments on Abortion*, *supra* note 45, at 65, 70 (statement of John Noonan, Professor of Law, University of California Law School at Berkeley).

92. *See infra* note 93 and accompanying text.

93. *See* Brief for Appellants at 49, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128054.

94. *Id.*

95. *See id.* at 10–57; *see also* Motion for Leave to File Brief Amici Curiae on Behalf of Women's Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae at 6–17, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1972 WL 126045; Brief of Americans United for Life, Amicus Curiae, In Support of Appellee at 4–11, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128055 [hereinafter Brief of Americans United for Life]; Motion for Permission to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition at 8–60, Roe v. Wade, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1971 WL 134283.

96. Brief of Americans United for Life, *supra* note 95, at 8.

97. *See* Totz, *supra* note 3, at 191 (discussing how the Supreme Court dealt with fathers' rights in a case subsequent to *Roe*).

98. *See, e.g.*, Ziegler, *supra* note 87, at 899–904.

nuclear families and undermine traditional marriages.[99] As the divorce rate continued to climb in the 1970s, worries about the traditional family grew widespread.[100] "By 1974, forty-five states had legislated no-fault divorce."[101] Changes to divorce laws came at a time when many families were downwardly mobile and hurt by layoffs, inflation, and a painful recession.[102]

Legal and economic changes convinced commentators that the family was under fire, and abortion opponents framed the denial of men's procreative rights as a threat to the traditional family.[103] Dennis Horan, a nationally prominent pro-life attorney who assumed AUL leadership after *Roe v. Wade*, stressed that the Court's decision in that case "provided one more wedge to separate, undermine and ultimately destroy the nuclear family."[104] Divorce and abortion law had encouraged people to think of families as made up of individuals rather than members of a unit, putting the family at risk.[105] Abortion opponents complained that men had "been reduced to onlooker[s]."[106] Abortion opponent Carol Mansmann similarly concluded that men had lost reproductive rights, and the family had become a collection of "fully autonomous individuals who [had] no binding relationship with each other."[107]

In this account, men's reproductive rights sprang from and reinforced the traditional family.[108] In the traditional family, by entering into marriage, men gained the right to procreate with their wives and surrendered the right to procreate with anyone else.[109] Marriage, by extension, required joint decision-

99. *Cf.* Brief for Appellants, *supra* note 93, at 49 (exemplifying an argument that an abortion statute is having an adverse impact on a traditional marriage).

100. *See, e.g.*, ANDREW CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 45–53 (2009).

101. Dinner, *supra* note 3, at 103.

102. *See, e.g.*, THOMAS BORSTELMANN, THE 1970S: A NEW GLOBAL HISTORY FROM CIVIL RIGHTS TO ECONOMIC INEQUALITY 122 (2012).

103. *See*, *e.g.*, *Abortion Part IV*, *supra* note 45, at 258 ("Certainly no [one] could have anticipated that *Roe v. Wade* would have such an undermining effect on relationship of parents and their children, or one spouse to the other.").

104. *Id.*; *see also History*, AM. UNITED FOR LIFE, https://aul.org/about/history/ (last visited Oct. 30, 2019).

105. *See id.*

106. *Id.*

107. *Proposed Constitutional Amendments on Abortion*, *supra* note 45, at 239 (statement of Prof. Carol Mansmann, School of Law, Duquesne University).

108. *See supra* notes 103–07 and accompanying text.

109. *See supra* notes 103–07 and accompanying text.

making about procreation.[110] By allowing women alone to make abortion decisions, *Roe* deprived men of procreative autonomy inherent in the marriage and intensified marital discord.[111] Abortion opponent John Noonan argued: "The proponents of abortion have . . . been led to challenge the structure of the family itself . . . . The person seeking an abortion has become by federal fiat an anonymous, rootless individual without spouse, parents, or family."[112]

By appealing to tradition and history, abortion opponents also tied men's rights to their traditional roles as providers and sole decision makers in the family.[113] Joseph Witherspoon, a law professor and leading member of National Right to Life Committee (NRLC), argued that men had the responsibility of "bring[ing] the protection of marriage . . . to his family."[114] He argued that the Thirteenth Amendment, a provision abolishing slavery, created the foundation for men's procreative rights.[115] "It seems clear that there is a strong foundation in the Thirteenth Amendment for sustaining the right of a husband or a father of an unborn child to prevent the child's mother from securing an abortion," Witherspoon testified before Congress.[116] "One of the most important purposes its framers had in mind was to bring protection to the family relationship of those who had been or might become slaves and to the personal rights of each member of the family."[117]

Those rights, in turn, reflected men's interest in assuming the traditional masculine role.[118] Men had rights to father children, "claim" them, and protect and provide for them.[119] Abortion denied men the right to procreate and assume their traditional role in marriage.[120] "It seems perfectly clear," With-

110. *See supra* notes 103–07 and accompanying text.

111. *See supra* notes 103–07 and accompanying text.

112. *Proposed Constitutional Amendments on Abortion*, *supra* note 45, at 70 (statement of John T. Noonan, Jr., Professor of Law, University of California Law School at Berkeley).

113. *See id*. at 24–25 (statement of Joseph Witherspoon, Professor, University of Texas Law School) (discussing how one of the purposes of the Thirteenth Amendment was to protect the integrity of the family for those who had been slaves).

114. *Id.* at 25.

115. *See id.*

116. *Abortion Part IV*, *supra* note 45, at 531 (prepared testimony of Joseph P. Witherspoon, Professor of Law, University of Texas School of Law).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 560 (testifying that the Constitution protects a paramount civil right in the father both to

erspoon argued, "that to subject the father of an unborn child to the uncontrolled discretion of its mother with respect to having an abortion is to convert that father into a partial slave."[121]

Abortion opponents introduced restrictions designed to protect men's procreative rights in marriage.[122] Under Dennis Horan's leadership, AUL attorneys helped draft laws to prevent abortions and defended such laws in court.[123] Horan and his attorney wife, Dolores, spearheaded one such defense in a case involving a Florida law that required a woman to have her husband's consent in order to obtain an abortion.[124] In August 1973, the district court overturned the law, but it appeared to suggest it would be open to a revised version of the spousal-consent law.[125] The court suggested that the government might have a compelling interest in protecting men's reproductive rights.[126] "The biological bifurcation of the sexes, which dictates that the female alone carry the procreation of the two sexes, should not necessarily foreclose the active participation of the male in decisions relating to whether their mutual procreation should be aborted or allowed to prosper," the court explained.[127] "The interest which a husband has in seeing his procreation carried full term is, perhaps, at least equal to that of the mother."[128] The problem with the law in that case was that it did not specify *why* men could withhold their consent, the district court reasoned.[129] And although it held that the law was unconstitutional, the district court refused to enjoin it.[130] The Horans hoped that the Supreme Court would hear the Florida case, and that similar efforts to secure reproductive rights for men would spread.[131]

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conceive and raise his own child and to protect it against all who would destroy or hurt it").

121. *Id.*

122. *See*, *e.g.*, Coe v. Gerstein, 376 F. Supp. 695, 698 n.1 (S.D. Fla. 1973) (discussing a Florida regulation that required written parental consent, written spousal consent, or both before getting an abortion).

123. *See History*, *supra* note 104.

124. *See Two Enter Appearance*, *supra* note 45.

125. *See Coe*, 376 F. Supp. at 696–97.

126. *See id.* at 697–98.

127. *Id.* at 698.

128. *Id.*

129. *See id.*

130. *See id.* at 699.

131. *Abortion Part IV*, *supra* note 45, at 248 (discussing the Horans' anti-abortion advocacy and efforts); *Two Enter Appearance*, *supra* note 45, at 42 (discussing the Horans' efforts in asking the Supreme Court to hear *Coe v. Gerstein*).

While pro-life attorneys looked for test cases involving respectable, middle-class married couples, other men tried to establish what they saw as their own reproductive rights by other means.[132] In Florida, with no law backing his claim, an unmarried man tried to stop his ex-girlfriend of six months from terminating her pregnancy, arguing that her abortion decision violated an implicit agreement the two made by having unprotected sex.[133] Similarly, in Massachusetts, a state that did not have spousal-involvement legislation at the time, John Doe, a twenty-seven-year old truck driver who sought to stop his estranged wife from ending her pregnancy, took his case all the way to the state's highest court.[134] No group backed John Doe's case, but the Massachusetts affiliate of the National Organization for Women (NOW), a national women's liberation group, supported Doe's wife.[135]

According to Susan Dunderson of NOW, the women's gestational capacity should be the deciding factor in such cases.[136] "It is a woman's body, and if she does not find a pregnancy tolerable, she should not be made to continue it," Dunderson explained.[137] The Massachusetts Supreme Judicial Court sided with Jane Doe.[138] While recognizing that *Roe* had left the issue of the husband's rights open, the court reasoned that marital privacy militated against the court ordering a woman not to end her pregnancy, at least before fetal viability.[139] Two judges dissented, suggesting that the Constitution and common law may recognize procreative rights for men.[140]

How should the courts balance competing reproductive rights of men and women in cases where gestation was not the tiebreaker?[141] One of the dissenting judges in *Doe* proposed a strategy that would take on importance decades

132. *See* Jones v. Smith, 278 So. 2d 339, 340 (Fla. Dist. Ct. App. 1973) ("The primary question presented is whether a potential putative father has the right to restrain the natural mother form terminating a pregnancy resulting from their cohabitation."); Doe v. Doe, 314 N.E.2d 128 (Mass. 1974) (discussing the right of an unwed father to enjoin his estranged girlfriend from obtaining an abortion).

133. *See Jones*, 278 So. 2d at 340, 342–43.

134. *See Doe*, 314 N.E.2d at 129, 130–31 (an example of a man trying to establish his reproductive rights).

135. *See, e.g.*, Fallon, *supra* note 48.

136. *See id.*

137. *Id.*

138. *See Doe*, 314 N.E.2d at 132–33.

139. *See id*. at 132.

140. *Id.* at 133–39 (Hennessey, J., dissenting; Reardon, J., dissenting).

141. *See id.* at 137–38 (Reardon, J., dissenting) (stating, "As in the case of the mother, the period of gestation is for the father one of anxiety, anticipation, and growth in feeling for the unborn child,"

later: judges should look at the individual circumstances of the parties in the case.[142] The judge noted that John Doe had offered to assume the responsibility and care of the child after birth, and to defray the medical costs of the delivery and pregnancy.[143] Whereas Jane Doe's interests, the judge reasoned, were temporary—avoiding the physical discomforts and health risks of pregnancy—John Doe stood to permanently lose his child.[144]

Still, in the aftermath of *Doe v. Doe*, abortion opponents mostly tried to highlight anxiety about the transformation of traditional marriage.[145] Women's rights activists responded partly that if women were forced to seek abortions without their husbands' permission, a marriage might not be worth saving.[146] "[T]hat's not an intact marriage," said Jan Liebman of NOW about unions where the parties disagreed about reproduction.[147] "That's a war."[148] Women's rights groups continued to emphasize that a woman's gestational capacity should decide the question of who had procreative rights.[149] "The woman is the one who carries the fetus[] and gives birth to it, so she should be the only one who decides to carry it to term," explained Liebman.[150]

Nevertheless, arguments focused on the husband's prerogatives took center stage when the Supreme Court agreed to hear a challenge to a multi-restriction Missouri abortion statute.[151] The law required doctors to have a husband's written consent unless the woman's life was at risk.[152] Missouri Attorney General John Danforth justified the law as an attempt to preserve traditional marriage.[153] He reasoned that to safeguard marriage, the state

and discussing the complexity of balancing competing reproductive rights where gestation does not pose a health risk to the mother).

142. *Id.* (Reardon, J., dissenting) ("The balance of these two rights, each of such a sensitive and personal nature, is, as I see it, the real task confronting the court.").

143. *See id.* at 138.

144. *See id.* at 138–39.

145. *See, e.g.*, Editorial, *Father's Rights Unanswered*, DECATUR HERALD, Feb. 27, 1974, at 6; *see also* Mary Ziegler, *Abortion and the Right (Not) to Procreate*, 48 U. RICH. L. REV. 1263, 1270–75 (2014).

146. *See* Mathews, *supra* note 47, at 10E.

147. *Id.*

148. *Id.*

149. *See id.*

150. *Id.*

151. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 68–72 (1976).

152. *See id.* at 58.

153. *See* Brief of John C. Danforth, Attorney General of Missouri at 34–41, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (No. 74-1151, 74-1419), 1976 WL 1787280, at *21.

could proscribe "activities which are deleterious to marriage."[154] Guided by its belief that marriage was an institution requiring joint decisions, Missouri required both spouses to agree about decisions about everything from adoption and sterilization to the disposition of property.[155] Allowing women to make unilateral decisions about abortion, Missouri argued, put marriages at risk.[156]

AUL filed an amicus curiae brief in support of Missouri's law and similarly argued for government protection of traditional marriages, centered on procreation.[157] It urged that at a time when divorce was increasingly common, the government should seek "to protect and strengthen family life."[158] As AUL saw it, the fact that divorce had become readily accessible did not change the government's interest in maximizing the chances that traditional marriage would survive.[159]

AUL described marriage partly as a companionate union designed for the parties' happiness: "The relational integrity of marriage is protected by the mutual knowledge, consent and consultation of the parties in the important matter of child-bearing and procreation."[160] However, AUL also stressed that traditionally, men entered into marriage to procreate, and could see "the purpose[] and meaning of the marital relation" destroyed if a woman terminated her pregnancy.[161]

AUL appealed to the Court's interest in maintaining a traditional, procreation-centered vision of marriage, but the group also suggested that men's procreative rights made sense in the context of more egalitarian relationships.[162] AUL started with the position that the Constitution protected men's as well as women's rights to procreate.[163] "The *affirmative* right of the male, 'married or unmarried', to decide to beget and raise children is hollow indeed if the state may not, in some circumstance, act to secure his interests," AUL

154. *Id.* at 15.
155. *See id.* at 35–37.
156. *See id.* at 38.
157. *See* Amicus Curiae of Diamond and AUL, *supra* note 45, at 98–101.
158. *Id.* at 99.
159. *See id.* at 98–100.
160. *Id.* at 101.
161. *Id.* at 100.
162. *See id.* at 103–13.
163. *See id.* at 102.

argued.[164] But men's reproductive rights did not simply arise from the tradition and history surrounding the traditional family.[165] Fathers' roles had changed, as AUL saw it, and as a result, formally equal treatment required recognizing abortion rights for men:

> Either or both marriage partners may suffer the legal, economic, social or psychological "detriments" which, as this Court has observed, may result from pregnancy and subsequent parenthood; either or both may suffer social, economic, legal or psychological detriments as the result of an abortion. Legally enforceable duties are incurred by the husband if the child is brought to term; legally enforceable duties may be incurred if the wife chooses to abort—for example, economic liability for the medical procedure and whatever complications which result in the woman or subsequent children of the marriage. Here, the joint interests and responsibilities of the parties to marriage create obligations and liabilities in the husband. Yet, if he is denied a joint interest in the disposition of unborn children to his marriage, he is burdened with all the liabilities and none of the prerogatives of decisions to bring children to term or not.[166]

Men, as AUL put it, shared emotional bonds with their unborn children.[167] Equally important, AUL suggested, men shared the financial responsibility for raising children regardless of whether a marriage lasted.[168] And as men took on more child-care responsibilities, some men would share the day-to-day burden of child-rearing.[169] For these married men, as AUL saw it, pregnancy, childbirth, and child-rearing created burdens similar to those experienced by their wives, and equal treatment required the recognition of reproductive rights for both men and women.[170]

Planned Parenthood's supporters responded that the government could not and should not save a form of traditional marriage that often oppressed

164. *Id.* at 103–04 (footnote omitted).
165. *See id.* at 103–13.
166. *Id.* at 104–05 (footnote omitted).
167. *See id.*
168. *See id.*
169. *See id.*
170. *See id.*

women.[171] For example, in its amicus curiae brief, the Center for Constitutional Rights stressed that "the assertion of state power to guarantee the husband's control must be viewed as insufficient, irrational and, indeed, as a reprehensible and impermissible extension of the common law subjugation of the married woman to her husband's will."[172] Other amicus curiae briefs insisted that because of the woman's role in gestating a pregnancy, any rights enjoyed by men had to come second to a woman's abortion decision.[173] "A spouse has no right to father children by any particular woman," Planned Parenthood of Central Missouri reasoned.[174]

The Supreme Court handed down a decision in *Planned Parenthood of Central Missouri v. Danforth* in 1976, encouraging abortion opponents and their allies to find a different way to define reproductive rights for men.[175] The Court held that Missouri could not delegate to a spouse veto power that the state itself did not possess, at least during the first trimester of pregnancy.[176]

Danforth recognized that a woman's abortion decision could jeopardize her marriage.[177] Nevertheless, as *Danforth* reasoned, it was "difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all."[178] When men and women disagreed, moreover, the Court adopted the abortion-rights supporters' position that gestation should be the tiebreaker.[179] "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor," *Danforth* concluded.[180]

Danforth did not diminish abortion opponents' interests in men's repro-

171. *See infra* notes 172, 174 and accompanying text.
172. Brief Amicus Curiae on Behalf of the Center for Constitutional Rights and the Women's Law Project, *supra* note 48, at 19.
173. *See* Brief for Planned Parenthood of Central Missouri, *supra* note 48, at 15.
174. *Id.*
175. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 53, 68–71 (1976).
176. *Id.* at 69.
177. *See id.* at 70.
178. *Id.* at 71.
179. *See id.* at 70–71.
180. *Id.* at 71.

ductive rights. Men continued seeking to stop women from ending their pregnancies, with many of them seeking to differentiate their cases from *Danforth*.[181] Increasingly, many of these men fit a profile: men who were young, white, relatively low-income, unmarried, and uneducated, who claimed that their girlfriends would have married and relied on them for child-rearing and financial support but for the interference of the woman's parents.[182] "She has a lot to lose—a family to lose, a college education. She has just me to gain," explained one litigant.[183]

These men asserted that the Court had not fully resolved the issue of men's rights in *Danforth*.[184] Some, like twenty-four-year-old James Priebe, argued that *Danforth* applied only to abortions early in pregnancy; according to Priebe, men had fundamental reproductive rights as a pregnancy progressed.[185] Some of these men tried to organize; for example, in Illinois, fifty men formed the group Fathers United Against Abortion, which brought together men who had unsuccessfully tried to stop an abortion.[186] While investment in men's rights did not diminish, the outcome of these cases seemed similar: *Danforth* notwithstanding, men often succeeded in convincing trial judges to issue restraining orders, but women often terminated their pregnancies notwithstanding any order.[187]

By the early 1980s, however, the arguments for men's reproductive rights had shifted: rather than framing men's rights as an extension of the right to marry, pro-life activists and their allies emphasized the importance of formally equal treatment for men's and women's reproduction. The next Section turns to this debate.[188]

181. *See, e.g.*, Beck, *supra* note 52; William Canterbury, *Abortion Trial to Focus on Stage of Pregnancy*, AKRON BEACON J., Sep. 15, 1977, at 13B; *Boyfriend's Plea of Father Rights Checks Abortion*, ARIZ. DAILY STAR, Apr. 22, 1977, at 7B.

182. *See supra* note 181 and accompanying text.

183. *Boyfriend's Plea of Father Rights Checks Abortion*, *supra* note 181.

184. *See supra* note 181.

185. *See* Canterbury, *supra* note 181.

186. *See* Beck, *supra* note 181.

187. *See, e.g.*, *Order Too Late on Abortion*, SAN MATEO TIMES, Apr. 23, 1977, at 3.

188. *See infra* Section II.C.

C. Child Support, Procreation, and Formal Equality

In the early 1980s, as a nationwide recession deepened, the politics of men's reproductive rights again got caught up in changes to the traditional conception of family and to family law. Divorce rates peaked at 5.3 divorces per 1,000 people in 1981,[189] and marriage rates began a steady decline.[190] As more children lived with only one parent, federal and state lawmakers stepped up efforts to collect delinquent child support payments.[191] Starting in the early 1980s, states and cities began developing more effective techniques for collecting child support, such as the garnishment of child support payments from a man's paycheck or federal income tax returns.[192] Pressure for similar laws seemed likely as the number of single mothers grew, especially in major urban areas: In New York City, authorities reported that more than one in three children would be born to a single mother; nationally, the rate was one in six—more than doubling over the course of the previous decade.[193]

Changing custody arrangements shaped the debate about men's reproductive rights. In 1980, California became the first state to adopt a law allowing for joint legal and physical custody, and other states soon followed suit.[194] Legal changes suggested that after childbirth, men might have more childrearing responsibilities than had once been the case, convincing some that men should have more control over childrearing responsibilities in the first place.[195]

Cultural attitudes about fatherhood reinforced demands for new reproductive rights for men. In the early 1980s, images of fatherhood in the media changed; sociologists and advertisers highlighted the "new father," a man who

189. *See Divorce Rate Down, But What Does It Mean?*, CBS NEWS (May 11, 2007, 9:01 AM), https://www.cbsnews.com/news/divorce-rate-down-but-what-does-it-mean/.

190. *See* Ana Swanson, *144 Years of Marriage and Divorce, in One Chart*, WASH. POST (June 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/23/144-years-of-marriage-and-divorce-in-the-united-states-in-one-chart/.

191. *See* Dinner, *supra* note 3, at 135–39 (showing efforts to improve the collection of child support).

192. *See, e.g.*, Elizabeth Mehren, *Child Support Via Payroll Deduction?*, L.A. TIMES, Apr. 8, 1980, at F1, https://www.newspapers.com/clip/38290220/mehren_la_times/; Burt Schorr, *States Cracking Down on Fathers Dodging Child Support Payments*, WALL ST. J., Jan. 26, 1983, at 33; *Child-Support Action Prudent*, ATL. J. CONST., Sep. 25, 1982, at 2B; *Florida Waves Stick at Dads Who Don't Pay Child Support*, ORLANDO SENTINEL, Oct. 6, 1985, at B2.

193. *See* Beck, *supra* note 181.

194. *See* Dinner, *supra* note 3, at 123–30.

195. *Id.* at 125–26.

was present at the delivery of his children and more hands-on after birth.[196] While more modest, there were also changes to the amount of childcare men performed.[197]

As more men assumed childcare responsibilities, or could imagine doing so, proponents of men's reproductive rights described their demands in different terms. First, it made less sense to connect men's reproductive rights to traditional marriage when men were less likely to be or remain married. As important, men's rights activists increasingly took issue with what they saw as the disconnect between reproductive rights and responsibilities.[198] Some men's rights activists argued that if men had to support their children financially, they should have more control over when and how they had children.[199] Others asserted that men who were willing to assume sole caretaking responsibility for a child should have the exclusive decision-making authority over the child's birth.[200]

Debate about child support and abortion increased the attention on reproductive rights within the fathers' rights movement. Men's rights activists had long focused on the reform of divorce laws, but by the early 1980s, groups like Men's Equality Now International (MEN International) and the National Congress for Men (NCM) spoke out on behalf of men seeking to block abortion.[201] Formed in 1977, MEN International primarily lobbied against what members saw as discrimination against men after divorce.[202] Founded in the early 1980s, NCM appealed to members of local and state father's rights groups looking for a cohesive national organization.[203]

Groups like NCM initially prioritized changes to divorce laws, but began seeing men's reproductive rights as a related issue.[204] The Men's Rights Association, a forerunner of MEN International, explained, "Without taking an official position for or against abortion per se, we maintain that the father,

196. *See* STEPHANIE A. SHIELDS, SPEAKING FROM THE HEART: GENDER AND THE SOCIAL MEANING OF EMOTION 130–35 (2002) (discussing the emergence of the "New Fatherhood" in the 1980s, where the father took on a more nurturing role).

197. *See id.*

198. *See supra* notes 196–197 and accompanying text.

199. *See infra* note 210 and accompanying text.

200. *See infra* notes 206–207 and accompanying text.

201. *See infra* notes 205, 207 and accompanying text.

202. *See, e.g.*, JUDITH LOWDER NEWTON, FROM PANTHERS TO PROMISE KEEPERS: RETHINKING THE MEN'S MOVEMENT 190 (2005) (discussing MEN International).

203. *Id.*

204. *See infra* note 206 and accompanying text.

married or unmarried, has an equal right to determine the fate of his offspring, born or unborn, Supreme Court to the contrary notwithstanding."[205] NCM took a similar stand at its 1981 Houston national conference.[206] NCM contended that abortion rights "trample[d] on the legitimate rights of the father-to-be."[207]

As the fathers' rights movement embraced men's abortion rights, abortion foes borrowed from increasingly visible fathers' rights claims based on formal equality between the sexes.[208] As Deborah Dinner has shown, men's rights activists initially resisted child support obligations as an attack on traditional marriage.[209] But over the course of the 1980s, these advocates framed their arguments differently, demanding sex-neutral, equal rules governing child support and child custody—and insisting that men who had financial responsibility for their children should also have some right to custody and care of those children.[210]

In the context of men's reproductive rights, similar arguments spread in the early 1980s in the abortion and child support contexts. One example, which AUL was involved in, was *Scheinberg v. Smith*, a case involving a Florida spousal-notification law.[211] The district court had struck it down, but the Fifth Circuit reversed, emphasizing the state's interest in protecting the integrity and procreative potential of marriage.[212] The Fifth Circuit reasoned that because notification involved a less onerous burden on women's reproductive rights, the law was constitutional.[213] AUL lawyers took hope from *Scheinberg* that the courts might uphold spousal-notification laws.[214]

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205. R.F. Doyle, *Men's Rights Association Philosophy*, MEN'S RIGHTS ASS'N (Nov. 1, 1972), http://www.mensdefense.org/Downloads/Archives%20of%20Mens-Fathers%20Movement.pdf.

206. *See* William K. Stevens, *A Congress of Men Asks Equality for Both Sexes*, N.Y. TIMES, June 15, 1981, at B9.

207. *Id.*

208. *See* Dinner, *supra* note 3, at 87–121.

209. *See id.* at 121.

210. *See id.* at 87–121.

211. *See* Scheinberg v. Smith, 659 F.2d 476, 479 (5th Cir. 1981).

212. *See id.* at 482–85.

213. *See id.*

214. *See, e.g.*, Pamela Black, *Abortion Affects Men, Too*, N.Y. TIMES, Mar. 28, 1982, at SM76, https://www.nytimes.com/1982/03/28/magazine/abortion-affects-men-too.html [https://nyti.ms/29QAZp5] (acknowledging that AUL was "instrumental" in the court's decision to uphold Florida's notification law, and quoting an AUL attorney that "their interest in the notification requirement is . . . 'the assumption that any kind of notification will hinder women from getting aboritons'"); *Husband Challenges Wife's Right to Abortion*, 12 OFF OUR BACKS 13 (1982),

Often, however, men demanded rights without any statute supporting their cause, framing their cause as an extension of formally equal treatment for men and women. James E. Koerber, a twenty-three-year-old man from Tennessee, insisted that sex equality required abortion rights for men.[215] "I will nurture, take care of and protect my child," Koerber explained, in his suit to stop his former lover's abortion.[216] Koerber emphasized that he deserved reproductive rights because of his willingness to assume care of his child.[217]

In Iowa, men also made sex-equality arguments. In one case, a fathers' rights group backed a Boonesville man who had proposed to his girlfriend after she learned she was pregnant.[218] The man emphasized that because men had responsibilities both before and after childbirth, it was discriminatory to deny men say over an abortion.[219] A few years later, the Iowa Fathers' Rights Council bankrolled a similar suit.[220] In both cases, the men tried to distinguish their suits from *Danforth*, insisting that the Court had settled disputes only between women and the state, and not between two private parties.[221] But these men often highlighted what they described as equality between the sexes—arguing that men's willingness to assume responsibilities or child-support obligations required the recognition of equal reproductive rights.[222]

In the 1980s, similar arguments for men's reproductive rights emerged when men sought to avoid child support obligations.[223] Perhaps the most prominent of these cases involved Frank Serpico, a former New York Police Department officer who was known for blowing the whistle on corruption in the department.[224] In the early 1980s, a flight attendant known only as "L.

https://www.jstor.org/stable/25774681 (discussing AUL's involvement in spousal-notification cases).

215. *See Father, Court Stops Woman's Abortion,* PANTAGRAPH, Apr. 19, 1981, at D7, https://www.newspapers.com/clip/38176800/james_koerber_pantagraph/ (reporting on Koerber's suit to stop his ex-lover's abortion, which he stated violated their legally enforceable verbal agreement prior to conception that he would assume "total responsibility" for any resulting pregnancies).

216. *Id.*

217. *See id.*

218. *See* Kamin, *supra* note 52.

219. *See id.*

220. *See* Hovelson, *supra* note 53.

221. *See* Kamin, *supra* note 52; Hovelson, *supra* note 53.

222. *See*, *e.g.*, Kamin, *supra* note 52.

223. Editorial, *Fathers' Rights Being Ignored*, UKIAH DAILY J., Dec. 7, 1988, at 4, https://www.newspapers.com/clip/38177605/fathers_rights_ukiah_daily_j/ (quoting a NOW official stating that the laws were unequal in that "you can't have a unilateral decision in the hands of the woman and then say [the father has] got to pay child support").

224. *See* Margolick, *supra* note 53.

Pamela P." established that Serpico was the father of her child and sued him for child support.[225]

Serpico claimed that he had unprotected sex with L. Pamela P. only because she told him that she was taking birth control pills and could not get pregnant.[226] Strikingly, Serpico's attorney, Karen DeCrow, was a feminist who had formerly served as the president of NOW.[227] DeCrow insisted that sex equality required some form of reproductive rights for men.[228] In her view, the right to avoid parenthood applied equally to both men and women.[229] "Just as the Supreme Court . . . said [in 1973] that women have the right to choose whether or not to be parents, men should all have that right," DeCrow told the media.[230]

In court, men like Serpico made both state law and constitutional arguments.[231] For example, Serpico maintained that under New York law, men and women had equal financial responsibility for a child because they had an equal say in creating the child.[232] In his view, a woman who unilaterally decided to have a child should have sole financial responsibility for it.[233]

DeCrow also made constitutional arguments on Serpico's behalf. She maintained that judicial enforcement of a child support action counted as state action for the purpose of Serpico's argument.[234] And she asserted that because reproductive rights belonged equally to men and women, L. Pamela P. had tried to deny Serpico's right by lying to him about the possibility of conceiving.[235]

These arguments worked in the trial court, but the New York appellate court responded that Serpico could not have constitutional interests because he did not seek to vindicate his right to avoid procreation, but instead asked to "have his choice regarding procreation fully respected by other individuals

225. *See* Pamela P. v. Frank S., 443 N.Y.S.2d 343, 344–45 (N.Y. Fam. Ct. 1981).
226. *See* Margolick, *supra* note 53.
227. *See id.*
228. *See id.*
229. *See id.*
230. *Id.*
231. *See id.*
232. *See* Pamela P. v. Frank S., 443 N.Y.S.2d 343, 344–45 (N.Y. Fam. Ct. 1981) (stating Serpico's argument that New York courts applied precepts to the father and mother's reciprocal rights and duties).
233. *See id.*
234. *See id.*
235. *See id.*

and effectuated to the extent that he should be relieved of his obligation to support a child that he did not voluntarily choose to have."[236] Notwithstanding the outcome of *L. Pamela P.*, men continued to make similar arguments about reproductive rights.[237] Almost uniformly, state courts rejected these arguments, reasoning that any rights men may have did not exempt them from child support obligations.[238]

L. Pamela P. and other child-support cases suggested that the politics of men's reproductive rights could be complex. Outside of the abortion context, DeCrow, a feminist, thought that awarding men reproductive rights would increase the odds of men taking on more responsibility for their children and the home. But, as Part III contends, men's reproductive rights increasingly became identified with the abortion battle.[239]

III. THE BALANCING COMPROMISE

In the later 1980s, men's reproductive rights became a central issue in the law and politics of both abortion and assisted reproduction. This Part begins by examining the reinvigorated campaign for men's abortion rights in the late 1980s.[240] This campaign emerged partly because of the remaking of the Supreme Court during the administrations of Ronald Reagan and George H.W. Bush.[241] Abortion opponents believed that previously futile strategies could pay dividends with different Justices on the Court. The cultural and political climate surrounding men's reproductive rights had also changed. As this Part shows, abortion foes changed their demands; rather than arguing that all men had reproductive rights, anti-abortion attorneys asserted that reproductive authority should turn on the individual circumstances of men and women.[242]

236. L. Pamela P. v. Frank S., 449 N.E.2d 713, 716 (N.Y. 1983).

237. *See, e.g.*, Linda D. v. Fritz C., 687 P.2d 223. 227–28 (Wash. Ct. App. 1984).

238. *See id.* at 228.

239. *See infra* Part III.

240. *See infra* Section III.A.

241. For the transformation of the Supreme Court, see LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 18–20 (1992). *See also* Henry J. Reske, *A Flap Over Flip-Flops*, 80 A.B.A. J. 12, 12 (1994) (discussing the Justice Department's shift during the Reagan-Bush administration that questioned the right to abortion and to overturn *Roe v. Wade*).

242. *See infra* Sections III.A–B.

This Part next examines how these arguments failed in court, but also influenced litigation about both abortion and assisted reproduction.[243]

A. Contingent Reproductive Rights

When abortion foes again took up the issue of reproductive rights for men in the late 1980s, they responded to a different political, cultural, and constitutional climate.[244] The most important of these, from the standpoint of abortion opponents, was the change in the Supreme Court.[245] Following the retirement of Lewis Powell, Ronald Reagan selected Anthony Kennedy as his replacement, following the failed nomination of Robert Bork.[246] Within a matter of a few years, George H.W. Bush had selected two more nominees, and the reconfigured Court seemed to be more promising for abortion opponents.[247]

The cultural climate surrounding men's reproductive rights also seemed different. Women's workforce participation continued to climb over the course of the decade, peaking in the late 1990s.[248] Rates of college enrollment increased for both men and women.[249] The 1990 census showed that women had surpassed men in choosing to enter college and achieved parity with men in completing four years of study.[250] At the start of the 1990s, the increasing average of educational attainment carried more weight: the earnings of men

243. *See infra* Sections III.A–B.

244. *See* EPSTEIN & KOBYLKA, *supra* note 241.

245. *See supra* note 241 and text accompanying.

246. *See* EPSTEIN & KOBYLKA *supra* note 241, at 19.

247. *See id*.

248. *See* Lane Kenworthy & Timothy Smeeding, *The United States: High and Rapidly-Rising Inequality*, *in* CHANGING INEQUALITIES AND SOCIAL IMPACTS IN RICH COUNTRIES 695, 704 (Brian Nolan et al. eds., 2014); POPULATION REFERENCE BUREAU, WHAT THE 1990 CENSUS TELLS US ABOUT WOMEN: A STATE FACTBOOK 9 (1993) [hereinafter WHAT THE 1990 CENSUS TELL US] (discussing the shrinking gap between men and women's rates of college attendance); PAUL RYSCAVAGE, INCOME INEQUALITY IN AMERICA: AN ANALYSIS OF TRENDS 12–18 (1999) (discussing the increase in income inequality and its relationship to marriage rates and college graduation); WOMEN'S BUREAU, U.S. DEP'T OF LABOR, LEAFLET NO. 90-3, FACTS ON WORKING WOMEN 1 (1990), https://ia802609.us.archive.org/18/items/ERIC_ED331992/ERIC_ED331992.pdf [hereinafter FACTS ON WORKING WOMEN] (discussing the shrinking wage gap between men and women over the course of the 1980s).

249. *See* WHAT THE 1990 CENSUS TELLS US, *supra* note 248.

250. *See id.*

and women with college degrees rose significantly, while those of men without a high-school degree began a steady decline.[251] College-educated women even began to narrow the gender wage gap.[252] While marriage rates continued to decline, women who were married and worked found themselves on the right side of a growing economic gap.[253] As the correlation between education, marriage, career, and financial well-being grew more pronounced, the stakes of reproductive decision-making seemed different for men and women, and the costs of unwanted or premature parenthood for women (and men) seemed higher.

Pro-lifers adopted a strategy that reflected broader changes to the family. James Bopp Jr., the General Counsel for NRLC, began experimenting with men's rights in 1988, when he represented John Smith (a pseudonym) in his suit to block his estranged girlfriend's abortion.[254] Smith, aged twenty-four, had started dating eighteen-year-old Jane Doe on New Year's Eve.[255] Less than a year into their relationship, Jane Doe became pregnant.[256] In some ways, Bopp relied on the traditional narrative forged by abortion foes, casting John Smith as a defender of a conventional family.[257] Bopp and his law partner, Richard Coleson, explained that Smith, a truck driver, saw Doe as the love of his life and wanted to marry her.[258]

However, Bopp and Coleson's argument also recognized changes to the structure of the family and the public's attitude about it.[259] As more women

251. *See* Kenworthy & Smeeding, *supra* note 248.

252. *See* FACTS ON WORKING WOMEN, *supra* note 248.

253. *See* RYSCAVAGE, *supra* note 248.

254. *See James Bopp*, Curriculum Vitae, POLICY EXPERTS, at 26 (Aug. 1, 2007), http://www.policyexperts.org/cv/BoppJames.pdf.

255. *See Abortion Dispute Sent to Indiana Lower Court*, CHI. TRIB., Apr. 15, 1988, at 3, https://www.newspapers.com/clip/38188375/abortion_dispute_chicago_tribune/; Martha Brannigan, *Suits Argue Fathers' Rights in Abortion*, WALL ST. J., Aug. 23, 1988, at 1; Tamar Lewin, *Woman Has Abortion, Violating Court's Order on Parental Rights*, N.Y. TIMES, Apr. 14, 1988, at A26, https://www.nytimes.com/1988/04/14/us/woman-has-abortion-violating-court-s-order-on-paternal-rights.html [https://nyti.ms/29z7qZh].

256. *See* Lewin, *supra* note 255.

257. *See* In the Matter of the Unborn Child H., No. 84C01-8804-JP-185, Order (Vigo Cir. Ct. Apr. 8, 1988), *rev'd sub nom.* Doe v. Smith, No. 84A01-8804-CV-00112, slip op. (Ind. Ct. App. Oct. 24, 1988) (on file with the author).

258. Petition for Writ of Certiorari at 15, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837) (on file with the author).

259. *See* Kenneth Jost, *Do Pregnant Women Lose Legal Rights?*, *in* 2 EDITORIAL RESEARCH REPORTS 413–28 (1989), http://library.cqpress.com/cqresearcher/cqresrre1989072800, *9 (debate between the opposing counsels in *Smith v. Doe* on their respective arguments).

joined the workforce or pursued a college education, it was easier for abortion opponents to argue that unwanted parenthood would cost women vital economic opportunities.[260] Bopp and Coleson factored this into their argument, insisting that Jane Doe had "expressed no interest in further schooling or employment."[261] The two attorneys framed Jane Doe's reasons as "frivolous," emphasizing her "desire . . . to look nice in a bathing suit," her wish to preserve her existing relationship with John Smith, and her fear of childbirth.[262] Even if Jane Doe, like some women, were to change her mind about childbirth, Bopp and Coleson stressed that she could do so without impediment because of John Smith's willingness to care for their child.[263] The two even emphasized that the stigma surrounding unwed parenthood had diminished, reducing the social cost of having a child without marrying.[264]

Rather than emphasizing the importance of the traditional family or conventional gender roles, Bopp and Coleson's new approach to men's reproductive rights conceded the popular belief that women had sound reasons for postponing or rejecting parenthood.[265] They maintained that *Danforth* had simply rejected state laws awarding a veto to men and argued that the courts should balance the reasons that each party had for making a particular procreative choice.[266] Rather than contending that men always had reproductive rights, Bopp and Coleson asserted that reproductive rights should always depend on an individual's reasons for seeking or avoiding parenthood.[267]

Bopp and Coleson asked the family court judge to enjoin Jane Doe from seeking an abortion, and he agreed that John Smith's desire to become a parent trumped any of Jane Doe's reasons for seeking an abortion.[268] While pursuing

260. *See* Dawn E. Johnsen, *Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 625 (1986) (arguing against the expansion of fetal rights by warning, "Fetal rights could be used to restrict pregnant women's autonomy in both their personal and professional lives, in decisions ranging from nutrition to employment . . . .").

261. Petition for Writ of Certiorari, *supra* note 258, at 16.

262. *Id.*

263. *See id.*

264. *See id.* at 17.

265. *See id.* at 16–17.

266. *See id.* at 10–13, 17.

267. *See id.* at 10–13.

268. *See* In the Matter of the Unborn Child H., No. 84C01-8804-JP-185, Order (Vigo Cir. Ct. Apr. 8, 1988), *rev'd sub nom.* Doe v. Smith, No. 84A01-8804-CV-00112, slip op. (Ind. Ct. App. Oct. 24, 1988) (on file with the author).

review in the Indiana Supreme Court, Jane Doe ended her pregnancy in violation of the trial court's order, and the appellate court in Indiana reversed the trial court's decision.[269]

Bopp and Coleson's efforts attracted media attention, and more men requested their help in bringing cases of their own.[270] Bopp and Coleson assembled a how-to guide for lawyers seeking to bring cases like John Smith's.[271] "The right to an abortion is not an absolute one, and the courts have never said that it is," Bopp stated.[272] "We're asking the court to find that there should be a balancing of the interests of the father against those of the mother on a case-by-case basis."[273] Some men pursued this strategy in the hope of discouraging a woman from ending a pregnancy, making a decision more public or emotionally traumatic.[274] Others recognized that proceedings could delay an abortion until more regulations kicked in or until a woman felt more reluctant to terminate a pregnancy.[275] Bopp and Coleson, however, primarily looked for a way to chip away at *Roe*.

To be sure, Bopp and Coleson experimented with different arguments. For example, when representing married men, Bopp and Coleson initially fell back on defenses of the traditional, patriarchal family. But Bopp and Coleson increasingly relied on an individual balancing approach, as exemplified in the case of Erin Conn, a young father of one whose marriage was failing.[276] Jennifer, Conn's estranged wife, learned she was pregnant and wanted an abortion, and Bopp and Coleson tried to stop Jennifer from seeking an abortion.[277]

The two highlighted that Jennifer had not expressed interest in pursuing education or a career.[278] Conn, they suggested, would soon complete his bachelor's degree and take on a better-paying managerial position at the toy store that employed him, which would allow him to provide for a child and wife in the way expected of men.[279] The two attorneys cast aspersions on Jennifer's

269. *See* Lewin, *supra* note 255.
270. *See id.;* Brannigan, *supra* note 255.
271. *See* Brannigan, *supra* note 255.
272. *Id.*
273. *Id.*
274. *See id.*
275. *See id.*
276. *See id.* at 4.
277. *See id.* at 9–10.
278. *See id.* at 4.
279. *See id.* at 4–5.

reasons for not wanting a child, saying that she primarily wanted to stop Conn from having custody if a child was born.[280] An Indiana trial court granted an injunction to stop Jennifer from ending her pregnancy, which she successfully appealed before Bopp and Coleson asked the Supreme Court to grant certiorari.[281]

The two began by arguing that the Constitution recognized fundamental rights for men seeking procreation, including the right to have offspring.[282] Bopp and Coleson also compared Erin Conn to unwed fathers who were awarded parental rights in the Court's jurisprudence.[283] Under the Court's precedents, unwed fathers gained constitutional rights by having a genetic connection and demonstrating concrete interest in a child.[284] According to Bopp and Coleson, Erin Conn had a genetic connection and demonstrated concrete interest when he married his wife and implicitly consented to raise any children resulting from the marriage.[285] Finally, Bopp and Coleson claimed that Conn's status as a father gave him the right to have children born as the result of his marriage.[286]

The Supreme Court refused to hear *Conn v. Conn*, but Bopp and Coleson continued taking cases, as did a network of anti-abortion lawyers across the country.[287] Bopp and Coleson modified their approach in their later cases, especially when representing unmarried men.[288] The two lawyers not only promoted the balancing test, but also used changing attitudes and facts about the family to their advantage.[289] Bopp and Coleson suggested that at least some men deserved reproductive rights—and at least some women functionally waived abortion rights by virtue of their reasons for making a choice:

280. *See id.*
281. *See id.* at 3–7.
282. *See id.* at 9–14.
283. *See id.* at 19.
284. *See id.*
285. *See id.*
286. *See id.* at 20.
287. *See, e.g.*, Glen Elssaser, *Court Won't Hear Father's Abortion Appeal*, CHI. TRIB. (Nov. 15, 1988), http://articles.chicagotribune.com/1988-11-15/news/8802160348_1_abortion-decision-abortion-dispute-fetal-rights; Al Kamen, *Court: Husband Can't Veto Abortions*, WASH. POST (Nov. 15, 1988), https://www.washingtonpost.com/archive/politics/1988/11/15/court-husband-cant-veto-abortion/a61f1003-2c64-4b1f-a728-064dc5ef675c.
288. *See infra* note 289 and accompanying text.
289. *See* Petition for Writ of Certiorari, *supra* note 258, at 6.

> Regardless of the mother's motivation, whether it be gender selection of her child, revenge or blackmail against the father, or some immature and near-frivolous reason—as in the case at bar—she may obtain an abortion without any consideration of the father's interests. It matters not what pledges she has made to him concerning the child, nor the degree of bonding already occurring between the father and child, nor his resources for providing for the child when born, nor the length of time she has carried the child, nor any other reason. . . . Even in a situation where an unborn child is the only child that the father had ever procreated and would be able to procreate and where the interests of the mother in aborting the child are comparatively much weaker, the Indiana appellate courts, relying on *Roe* and *Danforth*, have declared that her right is absolute as against the father.[290]

While urging the Court to apply rational basis review or a less demanding standard to abortion laws, Bopp and Coleson argued that men's interests in controlling reproduction became compelling under certain circumstances, especially when women did not have good reasons for wanting an abortion.[291]

How did abortion-rights supporters respond to Bopp and Coleson's claims? Jane Doe's attorney insisted that gestation, not a woman's reasoning or circumstances, always served as a constitutional tiebreaker.[292] The ACLU spotlighted other problems with an individualized balancing, such as the unnecessary medical risks that delays entailed, the embarrassing trials women were forced to go through, and the workload created for trial courts charged with emotional, personal disputes.[293] But for the most part, the ACLU focused on gestation as a key distinction.[294] The ACLU contended that because of gestation, "every adult woman ha[d] the right to decide to have an abortion and to effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons."[295]

In the political arena, abortion-rights supporters made similar arguments. Richard Waples, one of the attorneys defending Jane Doe, argued that men's

290. *Id.*
291. *See id.*
292. *See* Respondent's Brief in Opposition at 4–8, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837) (on file with the author).
293. *See id.* at 6–11.
294. *Id.* at 8.
295. *Id.*

rights were nothing more than a sneaky way "to cut back a woman's rights to abortion."[296] Gloria Feldt, the new leader of Planned Parenthood, played up the gestation distinction.[297] "When [men and women] have a difference of opinion, we must accept the reality that it is only the woman who is pregnant; it is only her body which is at risk, and so, therefore, the woman must ultimately be able to make that decision," Feldt said.[298] Suzanne Jacobs of NOW made the same point, suggesting that a man seeking fatherhood would "have to find himself another incubator."[299]

Arguments like Jacob's and Feldt's carried weight, and Bopp's strategy failed.[300] Citing the importance of gestation in distinguishing men and women's positions, the Court never agreed to hear any men's rights arguments, and pro-life lawyers eventually turned to spousal-notification laws as an alternative.[301] However, a focus on the parties' individual circumstances—the key move made by Bopp—lasted well beyond cases like *Smith* and *Conn*, both inside and outside the abortion context. This Part next considers this history.[302]

B. Abortion and Assisted Reproduction

In 1989, a new abortion decision changed the course of debate about abortion. *Webster v. Reproductive Health Services* involved a constitutional challenge to a multi-restriction Missouri law.[303] None of the challenged regulations addressed men's rights, but the Court nonetheless upheld the law in its entirety.[304] As important, a plurality of the Court seemed ready to overturn

296. Joanne Lynch, *Man Loses Final Appeal to Stop Wife's Abortion*, INDIANAPOLIS STAR, July 22, 1988, at 2.

297. *See 66 Percent in State Favor Abortion Rights, Study Finds*, ARIZ. REP., Jan. 3, 1989, at B1.

298. *Id.*

299. Jac Wilder Versteeg, *Sorry, Fathers Don't Get a Choice*, PALM BEACH POST, June 21, 1991, at 12A.

300. *See generally* Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & FAM. 41, 41 (1989) (explaining that stakeholders in the legal community have focused attention to the issue of spousal notification laws).

301. *See* Conn v. Conn, 525 N.E.2d 612 (Ind. Ct. App. 1988), *cert. denied*, 488 U.S. 955 (1988) (showing how the Supreme Court refused to hear a case where the main argument against an abortion was men's rights).

302. *See infra* Section III.B.

303. Webster v. Reprod. Health Servs., 492 U.S. 490, 490 (1989).

304. *See id.* at 504–22.

Roe.[305] In an earlier case, *City of Akron v. Akron Center for Reproductive Health*, Justice O'Connor had suggested that *Roe*'s trimester framework was "on a collision course with itself," and she had championed a less protective standard, the undue-burden test.[306] Four other Justices expressed skepticism about *Roe*, hinting that time had shown the trimester framework to be "unsound in principle and unworkable in practice."[307] Although finding no reason in the case at bar to overturn *Roe*, *Webster* energized abortion opponents who were looking to more aggressively restrict abortion.[308]

Webster encouraged abortion foes to experiment with different tactics, especially because the Court had not been receptive to the arguments made in *Smith* and *Conn*.[309] Nevertheless, pro-life lawyers believed that it made sense to home in on women's individual circumstances and reasons for terminating a pregnancy.[310] NRLC responded to *Webster* with a model law centered on a woman's reasons for having an abortion.[311] The statute permitted abortion only in cases involving rape, incest, severe fetal abnormality, and threats of "severe and long-lasting health damage" to a woman's health.[312] Building on the work done in cases like *Smith* and *Conn*, abortion foes argued that such a law would enjoy public support—polls showed that Americans supported legal abortion only when women terminated pregnancies for certain reasons.[313]

How did abortion-rights supporters respond to *Webster* and the new laws drafted in its aftermath? Most of those in groups like the National Abortion Rights Action League (NARAL) and Planned Parenthood believed that *Webster* proved that the Court would inevitably overturn *Roe*, and hoped to benefit

305. *See id.*

306. City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 452–75 (1983) (O'Connor, J., dissenting).

307. *Webster*, 492 U.S. at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

308. *See id.*

309. *See id.* (indicating that the Court was beginning to change its view on *Roe*).

310. *See infra* note 312 and accompanying text.

311. *See* Paul Houston, *Abortion Opponents to Press States to Legislate Wide-Ranging Curbs*, L.A. TIMES (Oct. 3, 1989), https://www.latimes.com/archives/la-xpm-1989-10-03-mn-579-story.html.

312. *Id.* (discussing new legislation being drafted in Missouri and California); *see also Idaho's Strict Abortion Bill Advances*, L.A. TIMES (Mar. 17, 1990), https://www.latimes.com/archives/la-xpm-1990-03-17-mn-210-story.html; Tamar Lewin, *States Testing the Limits on Abortion*, N.Y. TIMES (Apr. 2, 1990), https://www.nytimes.com/1990/04/02/us/states-testing-the-limits-on-abortion.html [https://nyti.ms/29woPiT].

313. *See* Houston, *supra* note 311; *see also* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 49 (2007).

politically from such a reversal.[314] These abortion-rights supporters pointed to post-*Webster* polls that suggested that the Court's retreat from abortion rights had not gone over well with voters.[315] Leaders of groups like NARAL and the Center for Reproductive Rights believed that the best outcome might be a clear decision overruling *Roe*—a result that might help abortion-rights supporters on election day.[316] If pro-choice politicians took control of Congress and the White House, NARAL members hoped that politicians would pass a law codifying abortion rights.[317] However, when challenging individual restrictions, abortion-rights supporters focused on their impact on individual women.[318]

Consider the litigation of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the next abortion case that reached the Supreme Court.[319] *Casey* involved a multi-restriction Pennsylvania law that mandated requirements such as counseling, spousal notification, and parental involvement before a woman could obtain an abortion.[320] Feeling as though it was inevitable that the Court would overturn *Roe*, Kathryn Kolbert and Linda Wharton, the lawyers challenging the law, believed that a clear decision would mobilize supporters of abortion rights, and deliver the White House and Congress into pro-choice hands.[321] By contrast, an ambiguous decision might gut *Roe* without alerting voters to what had happened.[322]

Kolbert and Wharton asserted that "the 'undue-burden' test provide[d] wholly inadequate protection for women seeking abortions."[323] The test—or

314. *See id.*

315. See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 325 (2009), for the public's reaction to *Webster*.

316. *See, e.g.*, TOOBIN, *supra* note 313, at 45–50.

317. *See* WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 222–25 (2003); Sue Thomas, *NARAL PAC: Battling for Women's Reproductive Rights*, *in* AFTER THE REVOLUTION: PACS, LOBBIES, AND THE REPUBLICAN CONGRESS (Robert Biersack et al. eds., 1999).

318. *See infra* notes 329–333 and accompanying text.

319. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

320. *See* Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3203–3220 (1990).

321. *See, e.g.*, TOOBIN, *supra* note 313. at 49.

322. *See id.*

323. *See* Brief for Petitioners and Cross-Respondents at 34–38, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006398.

any alternative to strict scrutiny—would generate "arbitrary and discriminatory" results.[324] Kolbert and Wharton expected the Court to uphold the law, but they invested most in their challenge to the spousal-notification requirement.[325] Rather than focusing on abstract constitutional harms created by the law, Wharton and Kolbert contended that the record demonstrated that the requirement would have "potentially disastrous consequences, including subjecting the woman to physical abuse."[326]

How did the threat of domestic violence matter?[327] The Third Circuit Court of Appeals had upheld most of Pennsylvania's law, but struck down the spousal-notification provision.[328] Pennsylvania argued in its brief that the Third Circuit had applied the wrong analysis by evaluating the effect of the law on women harmed by it rather than the law's impact on women across the state.[329] "To establish that a law imposes an undue burden, it surely is not enough . . . to show that it may deter or inhibit *some* women from getting an abortion."[330] Kolbert and Wharton conceded that most women in Pennsylvania were not in an abusive relationship.[331] In their view, what mattered was the effect on individual women—the threat of physical violence, retaliation "in future child custody or divorce proceedings," and "psychological intimidation or emotional harm."[332] Kolbert and Wharton maintained that individual circumstances should be dispositive because Fourteenth Amendment rights were "personal ones" that did not "depend on the number of persons who may be discriminated against."[333] The two also reiterated the importance of gestation as a tiebreaker in the abortion context.[334]

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324. *Id.* at 36.

325. *See id.* at 40–48.

326. *Id.* at 44.

327. *See id.* at 42.

328. *See* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 719 (3d Cir. 1991).

329. *See* Brief for Respondents at 83, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 551421.

330. *Id.*

331. *See* Reply Brief for Petitioners and Cross-Respondents at 15–16, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 551420 [hereinafter Reply Brief].

332. Brief for Petitioners and Cross-Respondents, *supra* note 323, at 43.

333. Reply Brief, *supra* note 331, at 16 (quoting McCabe v. Atchison, Topeka, & Santa Fe Ry. Co., 235 U.S. 151, 161 (1914)).

334. *Id.* at 11 (arguing that the nature of the right to privacy from *Roe* included "personal decisions that profoundly affect bodily integrity and destiny," and not "a recognition of the importance of the family"); *see also* Brief for Petitioner and Cross-Respondent, *supra* note 323, at 44 ("That decision, however, must remain with the pregnant woman, 'who physically bears the child and who is the more

Casey defied the expectations of many by declining to overturn *Roe*'s "essential holding" that the Constitution protected abortion.[335] The decision further solidified an emerging compromise in abortion law: Because of gestation, men would have no say in abortion; but generally, in the context of reproduction, individual circumstances made a tremendous difference.[336]

Like *Danforth*, *Casey* rejected a law mandating spousal involvement.[337] The Court reinforced that gestation was a key distinction in the context of abortion.[338] "It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's," *Casey* reasoned.[339] "The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman."[340]

While reiterating the importance of gestation, *Casey* concluded that a woman's individual circumstances were constitutionally relevant.[341] "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant," *Casey* reasoned.[342] Furthermore, the Court jettisoned *Roe*'s trimester framework and adopted the undue-burden standard as an alternative, making the effect of the law on individual women more constitutionally relevant.[343]

In the lead-up to and aftermath of *Casey*, the issue of men's rights came up in another context: the rise of assisted reproductive technology (ART).

directly and immediately affected by the pregnancy.'" (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976))).

335. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

336. *See infra* Section III.B (discussing various individual circumstances and its impact on paternal rights).

337. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976) (holding that the decision to remain pregnant is solely the woman's choice and rejecting mandating spousal involvement); *see also Casey*, 505 U.S. at 893–96.

338. *See Casey*, 505 U.S. at 896.

339. *Id.*

340. *Id.*

341. *See id.* at 893 (describing circumstances where it would be dangerous for a woman to have to ask her husband for an abortion).

342. *See id.* at 894.

343. *Id.* at 877–83.

Some techniques, like artificial insemination, had been available for centuries.[344] In vitro fertilization (IVF) became more widespread by the 1990s.[345] As politicians and courts hashed out what rights applied in the context of assisted reproduction, the idea of focusing on parties' individual circumstances soon took on outsized importance.[346] And to a greater extent than many realized at the time, the histories of abortion and ART jurisprudence were inextricably linked.

These connections came into view during the litigation of the first major embryo disposition case to capture the nation's attention.[347] During her marriage to Junior Davis, a refrigerator technician, Mary Sue, a secretary, experienced five tubal pregnancies before turning to IVF.[348] Efforts to implant the resulting pre-embryos in Mary Sue's uterus were unsuccessful, and when the couple's marriage ended, the two fought about what should happen to the embryos.[349] Initially, Mary Sue wanted to implant the embryos, but she openly questioned whether she could afford to raise children or emotionally endure the potential of losing another pregnancy.[350] Junior opposed her implanting the embryos.[351]

From the beginning, commentators asked whether abortion and ART law should differ. One columnist asked whether Junior had a "greater right to determine [what happens to] the pre-embryos than a man who has fertilized . . . egg[s] in . . . the more traditional way"—or whether Mary Sue had a "greater right to bear her ex-husband's child than another divorced woman."[352] Junior

344. For a history of artificial insemination, see I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS 378 (2015).

345. *See* J. BENJAMIN HURLBUT, EXPERIMENTS IN DEMOCRACY: HUMAN EMBRYO RESEARCH AND THE POLITICS OF BIOETHICS 107 (2017) (discussing in vitro fertilization).

346. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992) (balancing the parties' individual circumstances to determine rights where gestation had begun). *See generally* Bruce L. Wilder, *Assisted Reproduction: Preserving Families and Protecting the Rights of Individuals*, 36 HUM. RTS. 21, 21–24 (2009).

347. *See* David Treadwell, *Future Meets the Past in an Unusual Custody Battle*, L.A. TIMES (Mar. 14, 1989), https://www.latimes.com/archives/la-xpm-1989-03-14-vw-704-story.html.

348. *See Man in Divorce Wants to Keep Embryos Frozen*, INDEX-J., Mar. 24, 1989, at 10 [hereinafter *Man in Divorce*]; Treadwell, *supra* note 347.

349. *See* Treadwell, *supra* note 347.

350. *See, e.g.*, *id.*

351. *See, e.g.*, *id.*

352. *See* Ellen Goodman, *Pre-Embryos Present Custody Struggle*, PALLADIUM-ITEM, Mar. 15, 1989, at A6.

explained that he strongly opposed abortion but saw ART as different.[353] "I'm very anti-abortion. But [it is] still my right to decide whether to be a father," Junior said.[354] And he seized on the gestation distinction central to abortion law. "Once (a fertilized egg) is in the womb, [it] is a woman's right," Junior said.[355] "But this is not the woman's womb."[356] *Davis v. Davis* took place not long after the Court issued a decision in *Webster*.[357] Mary Sue put on testimony that people bonded with pre-embryos and experienced parental emotions even in the context of a fertility clinic.[358] Junior responded that allowing Mary Sue to implant the embryos would make him feel "raped of [his] reproductive rights."[359]

Aligning herself with the pro-life movement, Mary Sue took the position that the embryos were "pre-born children" and that refusing to implant them was murder.[360] She further tried to address Junior's arguments about the gestation distinction.[361] First, she contended that as a woman, she went through more pain as part of the IVF process and surgery than Junior.[362] Her emotional and physical investment, she explained, should give her the power to make the decision.[363] Second, she contended that in the IVF context, men gave more informed consent to the creation of a child than they did with in vivo fertilization and should have less decisional power, not more.[364] As part of her case, Mary Sue put forth testimony from Dr. Jerome Lejeune, a prominent geneticist and veteran anti-abortion witness, to establish that life began at conception.[365]

353. *See Man in Divorce*, *supra* note 348.
354. *Id.*
355. *Id.*
356. *Id.*
357. *See, e.g.*, *French Geneticist Called for Embryo Custody Fight*, REPUBLIC, Aug. 10, 1989, at A2, https://www.newspapers.com/clip/38297577/.
358. *See Husband Urges Court to Prevent Wife from Using Frozen Embryos*, RENO GAZETTE-J., Aug. 9, 1989, at 10A.
359. *Id.*
360. *See* Mark Curriden, *Plea of Divorcing Wife: Don't 'Murder' Embryos By Denying Try at Life*, ATLANTA J.-CONST., Aug. 9, 1989, at A6.
361. *See id.*
362. *See id.*
363. *See id.*
364. *See id.*
365. *See Geneticist Is Expected to Be Last Witness in Embryo Case*, AKRON BEACON-J., Aug. 10, 1989, at A14.

As the judge pondered the *Davis* case, commentators asked how to reconcile abortion and ART cases. Abortion opponents and abortion-rights advocates were divided on the case. Some abortion-rights supporters believed that defending Junior's right to avoid reproduction would shore up women's rights to end a pregnancy.[366] Others believed that awarding Junior rights would create a precedent for giving men rights to block an abortion.[367]

In September 1989, the trial judge ruled that the embryos were persons and that it was in their best interests to be implanted in Mary Sue.[368] The ruling prompted the ACLU to speak out on the case, expressing concern that the court's ruling conflicted with *Roe*.[369] In 1990, the intermediate appellate court reversed, awarding custody of the embryos to both Junior and Mary Sue.[370] By that time, Mary Sue had remarried and given up on the idea of keeping the embryos herself, and instead requested that they be donated to another couple.[371] The court suggested that the Constitution recognized a right to both seek and avoid procreation.[372] Without much explanation, the court reasoned that Junior's interest in avoiding procreation trumped Mary Sue's interest in procreating.[373] "Awarding the fertilized ova to Mary Sue for implantation against Junior's will, in our view, constitutes impermissible state action in violation of Junior's constitutionally protected right not to beget a child where no pregnancy has taken place," the court explained.[374]

With the Supreme Court's composition up for grabs, Mary Sue appealed to the Tennessee Supreme Court and modified her arguments.[375] At oral argument, both sides focused partly on the status of the pre-embryos.[376] Mary Sue's attorney argued that in disputed cases, the tiebreaker should go to the

366. *See* Barbara Roessener, *Abortion Battle Puts Adversaries on Equal Ground*, HARTFORD COURANT, Aug. 12, 1989, at B1.

367. *See id.*

368. *See* Davis v. Davis, No. E-14496, 1989 WL 140495, at *9–11 (Tenn. Cir. Ct. Sept. 21, 1989) (ruling the pre-embryos were persons at the culmination of the trial).

369. *See* Lacrisha Butler, *Embryo Case Hits at Issue of Abortion*, TENNESSEAN, Sept. 22, 1989, at 1.

370. *See* Davis v. Davis, No. 180, 1990 WL 130807, at *2–3 (Tenn. Ct. App. Sept. 13,1990).

371. *See id.*

372. *See id.*

373. *See id.*

374. *Id.* at 2.

375. *See Frozen Embryos' Fate Left with State High Court Today*, TENNESSEAN, May 9, 1991, at 4B [hereinafter *Frozen Embryos' Fate*].

376. *See* Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992).

party who was seeking to bring a life into the world.[377] "When the creators . . . of potential life are unable to agree on its disposition, the creator who seeks to protect that potential life should prevail," her attorney asserted.[378]

Shortly before the Supreme Court issued a decision in *Casey*, the Tennessee Supreme Court handed down a ruling in *Davis*—one that bore the influence of the compromise forged in abortion law.[379] The parties clearly had no written contract.[380] The court declined to treat the decision to use IVF as a binding agreement.[381] Nor did the court think that the state's interest in preserving fetal life should receive serious consideration.[382] *Davis* looked to state statutes and to *Roe*, suggesting that the state's interest in life grew as pregnancy progressed.[383] Given that the pre-embryos had undergone much less development than a fetus even earlier in pregnancy, the court reasoned that the government had no interest that could outweigh those of individual gamete providers.[384]

The court then recognized two rights at stake in the case: the right to seek and the right to avoid procreation.[385] *Davis* described these rights as holding "equal significance."[386] What, then, served as a tiebreaker? The court again fell back on gestation as a distinction.[387] Indeed, the court acknowledged that IVF demanded more of women.[388] "None of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions [are] applicable here," *Davis* explained.[389] *Davis* boiled down the complex logic of procreative rights in *Roe* and its progeny to a single idea: "genetic parenthood."[390]

377. *See Frozen Embryos' Fate*, *supra* note 375, at 4B.
378. *Id.*
379. *See Davis*, 842 S.W.2d at 595, 604–05.
380. *See id.* at 595–98.
381. *See id.*
382. *See id.* at 602–03.
383. *See id.*
384. *See id.*
385. *See id.* at 601 (explaining how the right to procreate and right to avoid procreation each have significance in this case).
386. *Id.*
387. *See id.* at 600–02.
388. *See id.* at 601.
389. *Id.*
390. *Id.* at 603.

When the gestational tiebreaker was not in place, how should courts proceed? Rather than considering the right to seek or avoid procreation in the abstract, *Davis* centered on each parties' "particular circumstances, as revealed in the record."[391] In addition to the "financial and psychological consequences" of unwanted parenthood, the court emphasized Junior's experiences of being raised in a group home, enduring estrangement from his father, and missing additional time from his mother.[392] The court further noted that Mary Sue no longer sought to procreate at all, which made her circumstances less compelling.[393] Mary Sue's circumstances also factored into the court's analysis.[394] Because she could theoretically adopt or seek to become a genetic parent through IVF, her loss of prospective parenthood was less permanent than would be Junior's becoming a parent against his will.[395]

Davis established that the compromise forged in abortion doctrine would influence ART jurisprudence as well.[396] The court reduced a series of complex questions about gender, autonomy, and the relative weight of seeking and avoiding procreation asked in the abortion context to a single idea: gestational parenthood.[397] In abortion cases, the court suggested, the parent who gestated a pregnancy gained the ability to make reproductive decisions. Without understanding the unintended consequences of doing so, abortion-rights supporters had urged the courts to use gestation as a reason to give women sole control over the abortion decision even when men tried to intervene.[398] Although rejecting gestation as a deciding factor, abortion foes often said less about the importance of gestation, instead asking the courts to focus on the parties' individual circumstances.[399] *Casey* and other abortion cases adopted a middle-ground position: using gestation as a tiebreaker in the abortion context, but also underlining the importance of individual circumstances in determining the contours of reproductive rights.[400] Part IV explores the extent to which

391. *Id.* at 603.
392. *See id.* at 603–04.
393. *See id.* at 604.
394. *See id.*
395. *See id.*
396. *See id.* at 603 (summarizing abortion law as it applies to ART in gestational parenthood).
397. *See id.* at 600–04.
398. *See supra* Part II and accompanying text.
399. *See supra* Part II and accompanying text.
400. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (discussing undue burden test).

this compromise still informs the law on both abortion and ART and examines the unexpected costs that a balancing approach has exacted.[401]

IV. GENERALIZING INDIVIDUAL CIRCUMSTANCES

What are the legacies of this compromise in the laws of both abortion and ART?[402] This Part begins by exploring post-*Davis* embryo disposition cases.[403] Next, this Part evaluates the legacy of the gestation compromise in the abortion context.[404] Finally, this Part proposes ways of resolving questions of men's reproductive rights that go beyond the gestation distinction.[405]

A. The Gestation Compromise in ART

Some courts rejected the approach taken in *Davis*. For example, in *A.Z. v. B.Z.*, the Massachusetts Supreme Judicial Court held that the right to avoid genetic parenthood always trumps countervailing interests.[406] "[P]rior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions," *A.Z.* reasoned.[407] "This enhances the 'freedom of personal choice in matters of marriage and family life.'"[408] Three years later, the Iowa Supreme Court likewise refused to adopt *Davis*'s approach.[409] In *In re Marriage of Witten*, the court concluded that either party could change her mind at any time about procreation regardless of any prior agreement on the subject.[410] Under *Witten*, if the parties could not agree, the status quo would prevail, and neither could use or dispose of the embryos.[411]

But for the most part, after *Davis*, courts followed a similar strategy of enforcing a valid agreement if one could be found, and then balancing the

401. *See infra* Part IV.
402. *See infra* Section IV.A.
403. *See infra* Section IV.A.
404. *See infra* Section IV.B.
405. *See infra* Part IV.C.
406. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1058–59 (Mass. 2000).
407. *Id.* at 1059.
408. *Id.* (citing Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (quoting Cleveland Bd. of Educ. V. LaFleur, 414 U.S. 632, 639–40 (1974))).
409. *See In re* Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).
410. *See id.* at 775–84.
411. *Id.* at 778.

parties' individual circumstances when it was hard to identify an adequate agreement. In *J.B. v. M.B.*, for example, a woman sought to have pre-embryos destroyed while her estranged husband asked that the embryos be donated or implanted.[412] Although the parties had signed a consent form before beginning IVF, the court found that it evinced no clear intent about what should happen to the embryos in the event of divorce.[413] The court then balanced the parties' individualized circumstances, emphasizing that M.B. already had children and that there were no signs that he was infertile or unable to have more.[414] Although J.B. suggested that the right to avoid procreation usually carries more weight, J.B.'s personal situation heavily influenced the court's decision.[415]

A similar scenario arose in *Reber v. Reiss*.[416] In that case, the court also found no enforceable agreement and balanced the parties' competing interests.[417] The court stressed that the woman seeking procreation was over forty and had undergone chemotherapy for breast cancer, making it likely that she could only achieve genetic parenthood through the implantation of the disputed embryos.[418] The court emphasized the woman's desire to experience pregnancy.[419] Moreover, as the court saw it, her past health troubles and age made it less likely that she could successfully adopt a child.[420] For his part, her former partner resented the idea of a genetic child growing up without him and did not want the financial responsibility that would accompany the birth of a child.[421] The court downplayed these concerns, emphasizing that the man's wife would allow him to have a relationship with his child if he wished, and ruled that the woman was allowed to implant the embryos if she wished.[422]

The unpredictability of the balancing test was on display again in *Szafranski v. Dunston*.[423] In that case, an unmarried man sought to stop his ex-

412. *See* J.B. v. M.B., 783 A.2d 707, 710 (N.J. 2001).
413. *See id.* at 713.
414. *See id.* at 716–17.
415. *See id.*
416. *See* Reber v. Reiss, 42 A.3d 1131 (Pa. 2012).
417. *See id.* at 1136.
418. *See id.* at 1138–40.
419. *See id.*
420. *See id.*
421. *See id.* at 1140–42.
422. *See id.*
423. *See* Szafranski v. Dunston, 2015 IL App (1st) 122975-B, 34 N.E.3d 1132.

girlfriend from implanting embryos against his will.[424] The court found no enforceable agreement and turned to the parties' individual interests.[425] Karla, the woman, had suffered ovarian failure as the result of chemotherapy, and she desperately wanted a genetic child who might remind her of her father, who died when she was five years old.[426] Jacob, by contrast, cited his loss of a love interest, the stigma he felt in fathering a child he did not love, and the difficulty he would have in attracting a future partner.[427] While recognizing the potential costs of unwanted genetic parenthood, the court stressed that Jacob might have no trouble attracting a partner, and thus concluded that Karla's interests should prevail.[428]

What could be wrong with paying so much attention to the parties' individual circumstances? The history of efforts to determine reproductive rights by looking at the parties' individual circumstances offers reason for caution. Abortion foes turned to a balancing strategy partly because they believed that judges would denigrate certain reasons for seeking (or avoiding) parenthood. While a judge may sympathize with a woman's desire to pursue an education or a career, for example, pro-life attorneys bet that women seeking a clean break with an ex-lover or women afraid of the pain of childbirth would receive a more negative response.[429] These attorneys played to mainstream generalizations about what the family should look like and what counted as a good enough reason to swear off a traditional relationship.[430]

In the ART context today, focusing on individual circumstances can create similar problems. In *Szafranski*, for example, the court attached far less significance to a man's concern about his ability to find a romantic partner than it did a woman's desire to bear a child who was genetically related to her.[431] While the number of people without children has declined in recent years, the percentage of those who voluntarily remain childfree has increased.[432] Decisions like *Szafranski* disproportionately affect those who do

424. *See id.* ¶ 2.
425. *See id.* ¶ 5.
426. *See id.* ¶ 8.
427. *See id.* ¶ 22.
428. *See id.* ¶ 5.
429. *See supra* Part III.
430. *See supra* Part III.
431. Szafranski v. Dunston, 2015 IL App (1st) 122975-B, ¶¶ 124–32, 34 N.E.3d 1132, 1162–63.
432. *See, e.g.*, Joseph Chamie & Barry Mirkin, *Childless by Choice*, YALE U.: YALEGLOBAL

not wish to have children or view their ability to find or keep a romantic partner as more important.

Courts also tend to assume that the emotional payoff of procreation depends on the number of children a person already has—a conclusion that penalizes the increasingly small number of people with large families.[433] African-Americans and Latinos are far more likely to have large families than are those of other races: according to recent Pew Research Center data, significantly more African-Americans and Latinos had three or four or more children than did parents in other groups.[434] By suggesting that the decision to become a genetic parent carries more weight than does the decision to have an additional genetic child, courts tend to advantage those in racial groups that conform to the trend of shrinking family size.[435]

Courts also make assumptions about a party's ability to have future children through IVF or adoption that may be unrealistic for many people with reduced financial means.[436] In 2018, the average IVF cycle cost $12,000, not including fertility drugs, which can add an extra $3,000 to $5,000.[437] Many patients report spending more than $60,000 on IVF, and states often provide incomplete insurance coverage or none at all.[438] Even middle-class couples and individuals routinely take out private loans, loans against their retirement funds, or drain their savings accounts.[439] For low-income consumers, IVF will often be financially out of reach.

And courts have been more convinced that unwanted genetic parenthood

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ONLINE (Mar. 2, 2012), https://yaleglobal.yale.edu/content/childless-choice; *see also* Claire Cain Miller, *The U.S. Fertility Rate Is Down, Yet More Women Are Mothers*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/upshot/the-us-fertility-rate-is-down-yet-more-women-are-mothers.html [https://nyti.ms/2FRAQxC] (discussing the decrease in the number of women who had no children by forty-five).

433. *See, e.g.*, J.B. v. M.B., 783 A.2d 707, 716–17 (N.J. 2001); Reber v. Reiss, 42 A.3d 1131, 1140–42 (Pa. 2012).

434. GRETCHEN LIVINGSTON, PEW RES. CTR., CHILDLESSNESS FALLS, FAMILY SIZE GROWS AMONG HIGHLY EDUCATED WOMEN 10 (2015), https://www.pewresearch.org/wp-content/uploads/sites/3/2015/05/2015-05-07_children-ever-born_FINAL.pdf.

435. *See, e.g.*, *J.B.*, 783 A.2d at 717 ("M.B.'s right to procreate is not lost if he is denied an opportunity to use or donate the pre-embryos. M.B. is already a father and is able to become a father to additional children, whether through natural procreation or further in vitro fertilization.").

436. *See, e.g.*, *id.* at 716–17; *Reber*, 42 A.3d at 1140–42.

437. *See* Nina Bahadur, *The Cost of Infertility*, SELF (Jan. 8, 2018), https://www.self.com/story/the-cost-of-infertility.

438. *See, e.g.*, *id.*

439. *See id.*

will be traumatic when a party can point to childhood experiences of divorce or abandonment, undervaluing the potential harms suffered by people who have different reasons for refusing or postponing genetic parenthood.[440] Surveys of millennials, for example, show that some wish not to have children because of the feared impact of overpopulation and the strain more people put on the environment.[441] Others report their lacking maternal or paternal instincts.[442] Still others wish to prioritize their careers or lead a lifestyle that seems incompatible with children.[443] Some have no clearly articulable reason beyond simply wanting to remain childfree.[444] Courts have shown sympathy to parties who have had traumatic childhoods and who, as a result, wish to avoid parenthood or to have a genetic child raised in a certain setting.[445] However, in the ART setting, parties have a harder time justifying their wish not to become genetic parents.[446]

Moreover, it is hard to reconcile the idea of forcing someone to justify a decision to seek or avoid procreation with the idea that one has a right to do either one. To the extent that the Constitution protects a right to seek or avoid procreation, a person may have deeply personal, even idiosyncratic reasons for making a choice.[447] The Court has suggested that reproductive decisions enjoy protection regardless of a person's reasons for choosing a certain option.[448] Conditioning the availability of a right on the existence of an appealing story undermines the very idea that the Constitution protects reproductive liberty.

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440. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992).

441. *See, e.g.*, Nicolas DiDomizio, *11 Brutally Honest Reasons Millennials Don't Want Kids*, MIC (July 30, 2015), https://mic.com/articles/123051/why-millennials-dont-want-kids#.A5Y4CQqMF; Jillian Kramer, *One-Third of Millennials Don't Want Kids*, GLAMOUR (Oct. 22, 2015), https://www.glamour.com/story/millennials-dont-want-kids.

442. *See* DiDimozio, *supra* note 441.

443. *See id.*

444. *See id.*

445. *See Davis*, 842 S.W.2d at 603–04 (holding that appellants' "severe problems caused by separation from parents" outweighed appellees' interest in donating embryos).

446. *See* Szafranski v. Dunston, 2015 IL App (1st) 122975-B, ¶¶ 126–32, 34 N.E.3d 1132, 1161–63 (holding that a man's loss of love interest, interest in not wanting the stigma of fathering a child he did not love, and difficulty in finding a future partner were outweighed by the woman's interest in implanting embryos).

447. *See* DiDimozio, *supra* note 441.

448. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

Abortion opponents fully understood the tension between an individualized balancing approach and the recognition of a fundamental right to abortion.[449] By suggesting that some women did not have a good enough reason to make an abortion decision, abortion foes hoped to establish that women had no right to terminate a pregnancy.[450] And pro-lifers hoped that if some men could tell a moving story, then the courts would recognize a compelling interest that would trump any abortion right women retained.[451]

A similar issue exists in the ART context.[452] What does it mean to have a right to avoid genetic parenthood if that right depends on a person's reasons for making a choice? As technologies evolve, the dimensions of reproductive rights have been increasingly uncertain. Balancing analyses send a contradictory message about what rights anyone has when it comes to genetic parenthood.

Focusing on individual circumstances also tends to create bad law. In cases like *Smith* and *Conn*, abortion opponents hoped that courts would generalize about men's reproductive rights based on the compelling story of a single litigant.[453] For example, in *Smith*, Smith's attorneys pointed to Jane Doe's interest in her appearance and her intimate relationship to establish that some women (and perhaps many women) lacked a justification for ending a pregnancy.[454]

Courts in contemporary ART cases have similarly drawn broad conclusions based partly on the facts of individual cases. In *Davis*, for example, the court paid considerable attention to Junior's extremely painful childhood and the fact that Mary Sue no longer wanted to implant the embryos herself.[455] Then, with little explanation, the court held that the right to avoid procreation usually trumps the right to seek it.[456] This may well be the right conclusion,

449. *See supra* Part III.

450. *See supra* Part III.

451. *See supra* Part III.

452. *See generally* Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992) (weighing the husband's interest in not having children raised in a one parent home because of his past traumatic childhood experience with the divorce of his parents as greater than the wife's interests in donating the embryos). *But see* Szafranski v. Dunston, 2015 IL App (1st) 122975-B, ¶¶ 126–32, 34 N.E.3d 1132, 1161–63 (weighing the husband's interest in future romantic relationships as less than the wife's interest in having children).

453. *See supra* Section III.A.

454. *See* Petition for Writ of Certiorari, *supra* note 258, at 16.

455. *Davis*, 842 S.W.2d at 600–04.

456. *See id.*

but it is far from obvious, and *Davis* at most suggested that the right to avoid procreation was weightier because any violation of it would be permanent (whereas a party seeking children could theoretically have them in other ways).[457] But *Davis* did not do much to theorize the harms of having an unwanted genetic child in the world—a task with which courts have struggled with other contexts, such as tort cases for wrongful birth and wrongful life, in which judges have had a notoriously hard time pinpointing how (and how badly) a party is injured by the birth of a genetically related child.[458]

Consider the question of damages. Courts are most willing to recognize a tort for wrongful birth when a parent can show unique medical expenses that accompany the birth of a child with unusual needs.[459] But in the context of wrongful birth or wrongful life, courts have had a harder time explaining the harm suffered by a healthy (but unplanned) child by virtue of being born or the injuries suffered by someone who does not want to become a parent.[460] Dov Fox has convincingly shown that the difficulty of putting a number on these injuries does not make them any less real or worthy of recognition.[461] But the laws of wrongful birth and wrongful life show that courts have their work cut out for them in theorizing the harms inherent in unwanted genetic parenthood (or an unfulfilled desire for genetic parenthood).[462] Starting from the facts of the individual cases tends to blind the courts to the many key questions that should be answered rather than pointing the way to a better

457. *See id.*

458. *See id.* For more on the challenges that courts have faced in addressing wrongful life and wrongful birth cases, see Alan B. Handler, *Individual Worth*, 17 HOFSTRA L. REV. 493, 500 (1989), which notes that all jurisdictions faced with wrongful birth and/or wrongful life claims "have struggled mightily with its perplexing legal and moral issues." *See also* Wendy Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 144 (2005); Michael B. Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 HASTINGS L.J. 505, 507–08, 589 (1991).

459. *See* Daniel W. Whitney & Kenneth N. Rosenbaum, *Recovery of Damages for Wrongful Birth*, 32 J. LEGAL MED. 167, 190–97 (2011) (summarizing the majority rule among courts that recognize wrongful birth that the action permits, at a minimum, damages measured by the extraordinary cost, at least through minority, of supporting the child with severe birth defects) (quotation omitted).

460. *See* Michael T. Murtaugh, *Wrongful Birth: The Courts' Dilemma in Determining a Remedy for a "Blessed Event*,*"* 27 PACE L. REV. 241, 248 (2007) (stating that in wrongful birth causes of action, courts have focused on the health of the unplanned child to determine the extent of the parents' injury).

461. *See* Fox, *supra* note 5, at 224.

462. *Id.* at 211–13 (explaining the many considerations and benefits of more regulatory oversight of procreation rights).

answer.[463]

In generalizing from the parties' individual circumstances, courts consistently grapple with the specific harms of having an unwanted genetic child (or the harms of being unable to have a wanted genetic child).[464] In defining the rights of unwed fathers, the Supreme Court has at times said that a genetic connection matters because it creates an opportunity for parents to bond with their children.[465] But the importance of genetic parenthood remains poorly explained, especially as genetic science advances.[466] Does genetic parenthood matter because of the cultural expectations many hold about the connection someone shares with genetic parents? Or because of medical, personal, or cultural information known to a genetic parent? Or because of a person's ambivalence about parenting? Because, as in Junior Davis's case, a party has strong preferences about how a genetic child is raised? The contours and power of a fundamental right could differ significantly depending on the answers to these questions.

And what about the right to seek genetic parenthood? In generalizing from the stories of a specific party, the courts have sometimes suggested that there is a right to seek genetic parenthood as opposed to some other kind of parental relationship. There is no doubt that genetic parenthood is unique, just as adoptive parenthood is unique. It is less obvious why one form of parenthood should be more valued than others. The answer to this question requires full briefing and argument, not a simple extrapolation from the facts of a specific case.

Moreover, the unpredictability involved in individualized balancing can have the kind of chilling effect sought out by abortion opponents in the 1980s.[467] Without knowing in advance how moving a judge will find a person's story, a party will feel far from confident that she will have a right to seek or avoid procreation. This uncertainty is more troubling in the context

463. *See id.* at 153–57 (explaining the types of cases courts have attempted to handle and the pitfalls of an individualized case approach).

464. *Id.* at 159–61 (describing the author's proposal for court treatment of parents' inability to reproduce with specific genetic traits).

465. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262 (1983).

466. *See* Fox, *supra* note 5, at 160; *see also* Robert VerBruggen, *The Genetics of Parenting*, INS. FOR FAM. STUD. (July 25, 2018), https://ifstudies.org/blog/the-genetics-of-parenting (summarizing recent studies researching the impact of genetic connection on parent and child interactions).

467. *See supra* Section III.B.

of ART. When using ART, parties account for the uncertainty that a pregnancy will come to term. Nevertheless, ART holds out the promise of increased legal or practical control for those who use it. An unpredictable balancing standard undermines these expectations.

The history of the gestation compromise should give pause to those happy with a balancing approach. To be sure, gestation matters. Pregnancy is a unique experience for women that carries its own psychological and physical risks. But in the 1980s, as *Roe* seemed increasingly under threat, abortion-rights supporters used gestation as a way out of a more complicated conversation about why women should have abortion rights. While trying to move beyond the gestation distinction, abortion opponents proposed an alternative distinction: the individuals' reasons for making a reproductive decision. The Court struck a compromise between the two, treating gestation as decisive in the abortion context but suggesting that individual circumstances generally took on paramount importance.

The difficulties with pregnancy and childbirth always did—and should—play a role in the debate about abortion rights.[468] Pregnancy and childbirth remain more dangerous for women in the United States than for those in other countries.[469] The threat of harm to women of color is even higher.[470] And the laws protecting against pregnancy discrimination still has real gaps in the protection it provides.[471] In 2015, the Supreme Court made it easier for women to challenge accommodation policies that systematically disadvantage pregnant women.[472] But the federal Pregnancy Discrimination Act still does not require employers to accommodate pregnant women in any way.[473] Pregnancy carries career risks as well as the possibility of physical injury.

But before and after the 1980s, the reasons for recognizing abortion rights

468. *See, e.g.*, Kate Womersley, *Why Giving Birth Is Safer in Britain Than in the U.S.*, PROPUBLICA (Aug. 31, 2017, 8:00 AM), https://www.propublica.org/article/why-giving-birth-is-safer-in-britain-than-in-the-u-s.

469. *See id.*

470. *See* Nina Martin & Renee Montagne, *Nothing Protects Black Women from Dying in Pregnancy and Childbirth*, PROPUBLICA (Dec. 7, 2017, 8:00 AM), https://www.propublica.org/article/nothing-protects-black-women-from-dying-in-pregnancy-and-childbirth.

471. *See* 42 U.S.C. § 2000e(k) (2012) (Pregnancy Discrimination Act of 1978).

472. *See* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1343–44 (2015) (requiring courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats non-pregnant workers).

473. *See id.* at 1349–50 (holding only that employers cannot deny pregnant workers accommodations that are being offered to other workers who have a similar inability to work).

went well beyond bodily integrity. Some of those reasons involved potential problems with the justifications for abortion laws, including those that may have been based on sex stereotypes or on religious beliefs.[474] Reva Siegel and other scholars have studied the extent to which assumptions about motherhood animate abortion regulations.[475] Moreover, while the Supreme Court has rejected challenges to abortion regulations under the Free Exercise or Establishment Clause of the First Amendment, arguments linking religion to pro-life sentiment have taken on new importance.[476] In recent years, women have looked to state equivalents of the Religious Freedom Restoration Act in asserting that abortion laws infringe on their own deeply held faith-based convictions.[477] By focusing so much on gestation, abortion-rights supporters inadvertently helped to obscure how these important considerations influenced the debate on men's reproductive rights.

The emphasis on gestation also draws attention away from the post-pregnancy consequences of carrying a child to term, for both men and women. At a minimum, carrying a pregnancy to term would involve unwanted genetic parenthood for a man, a woman, or both. And for many women, given the frequency of single-parent homes and the share of childcare performed by women, giving birth to a child will entail child-rearing commitments.[478] These consequences fall unevenly on Americans of different races and educational backgrounds.[479] Even among those in two-parent households, research

474. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); *see also* Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 410–16 (2013); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions,* 2007 U. ILL. L. REV. 991, 999 (2007).

475. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

476. *See* Harris v. McRae, 448 U.S. 297, 318–22 (1980) (showing the Court's skepticism of religion-based arguments).

477. *See* Cristina Maza, *Satanic Temple Says Abortion Laws Violate Its Religious Rights by Promoting Christian Beliefs*, NEWSWEEK (Jan. 23, 2018, 11:51 AM), http://www.newsweek.com/satanic-temple-says-abortion-laws-violate-its-religious-rights-promoting-788269; Mary Papenfuss, *Satanic Temple Religious Challenge to Missouri Abortion Law Heads to Court*, HUFFPOST (Jan. 22, 2018, 11:47 PM), https://www.huffingtonpost.com/entry/satanic-temple-missouri-abortion-challenge_us_5a6674b3e4b0e5630072cdc7.

478. *See* Maria Cohut, *Women 'Spend More Time on Housework, Childcare Than Men,'* MED. NEWS TODAY (Oct. 10, 2017), https://www.medicalnewstoday.com/articles/319687.php.

479. *See* Elizabeth Wildsmith et al., *Dramatic Increase in Proportion of Births Outside of Marriage*

suggests that women still perform more childcare than men.[480] During the 1970s and 1980s, those on both sides of the abortion debate asked important questions about the extent to which reproductive decisions should have any relationship to subsequent childrearing duties, but because the courts adopted the gestation distinction, these questions largely remained unanswered.[481] The relationship between childbirth and subsequent childcare responsibilities deserves more exploration.

And conversations about men's reproductive rights went beyond the abortion context—addressing whether child support obligations should carry any related rights, whether child-rearing tasks should match authority to make reproductive decisions, whether men's interest in having a genetic child (or a genetic child within marriage, or with a specific woman) should be constitutionally significant.[482] For the most part, case law on these subjects seems distinct and unrelated. In the abortion context, disputes between men and women came down to women's gestational capacity.[483] In child support cases, courts often looked at the statutory purpose of child support laws and the lack of state action undermining any constitutional protection.[484] For some litigants, this failure to harmonize related bodies of law creates a sense that the law is incoherent or unjust.

Often, abortion-rights supporters navigated these complicated questions by directing attention to the simplest distinction between men and women: gestation.[485] This strategy had obvious advantages. Gestation obviously differentiates men and women. The difference in gestational capacity does not require thoughtful analysis or open the door to unpredictable results. And the gestation distinction seemed likely to shore up abortion rights: whenever there was a conflict between men and women, women's gestational capacity meant

in the United States from 1990 to 2016, CHILD TRENDS (Aug. 8, 2018), https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels.

480. *See* Cohut, *supra* note 478.

481. *See supra* Sections III.B–C (discussing the history of the questions asked by each side of the abortion debate that were not given answers).

482. *See supra* Section II.C.

483. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 53, 71 (1976).

484. *See* L. Pamela P. v. Frank S., 449 N.E.2d 713, 716 (N.Y. 1983).

485. *See supra* text accompanying note 48 (describing the preference for women's rights due to gestational capacity).

that abortion rights would be safe.[486] But the court increasingly viewed reproductive rights, but for the fact of gestation, as a matter of individual motives and circumstances.[487] This move has made ART jurisprudence less principled, less transparent, and less well-explained than it ought to have been.[488]

What legacy has the gestation compromise had in abortion law? Most obviously, the Court has struck down spousal-involvement laws, while performing an individualized balancing in other contexts.[489] To be sure, balancing to some extent reflects the Court's approach to abortion.[490] Because *Casey* treats the government's interest in protecting life as important, the Court gives weight to both women's reproductive liberty and the government's interest in fetal life.[491] However, the nature of this balancing test—and the Court's fact-intensive, individualized, case-by-case focus—has created problems, many of them connected to the original gestation compromise.[492] The next section studies these issues.[493]

B. Individualized Balancing and Abortion

In *Casey* and a subsequent decision, *Whole Woman's Health v. Hellerstedt*, in 2016, the Court has evaluated abortion regulations by looking at their impact on individual women.[494] Abortion and ART law are certainly different in salient ways. In ART cases, courts tend to balance the constitutional interests of specific men and women making reproductive decisions.[495] By contrast, for the most part, in abortion cases, the Court balances the government's interests against the burden a law places on specific individuals.[496] But the costs of individualized balancing are similar across either domain.

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486. *See supra* note 295 and accompanying text.
487. *See supra* Part III.
488. *See supra* notes 425–428, 432 and accompanying text.
489. *See supra* Section III.B.
490. *See infra* Section IV.B.
491. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310–18 (2016); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877–902 (1992).
492. *See infra* Section IV.B (explaining the balance between men and women's rights with regard to abortion).
493. *See infra* Section IV.B.
494. *See Whole Woman's Health*, 136 S. Ct. at 2318.
495. *Id.*; *see supra* Part III.B (discussing abortion and assisted reproduction).
496. *See Casey*, 505 U.S. at 877.

Casey and its progeny emphasized that abortion rights belong to individual women—and depend on their specific circumstances.[497] This conclusion has spawned ongoing uncertainty about precisely what is being balanced—or what weight should be attached to specific variables.[498] Ever since *Casey* came down, for example, the lower courts have battled about how many women a law must affect before a law is unduly burdensome.[499] *Casey* seemed to answer this question: the relevant group was those "for whom the law is a restriction, not the group for whom the law is irrelevant."[500]

But the Court's decision left many questions unanswered. Consider the debate that preceded *Whole Woman's Health*.[501] That case concerned two Texas laws.[502] One required a doctor performing abortions to have admitting privileges at a hospital within thirty miles.[503] A second mandated that abortion clinics comply with the regulations governing ambulatory surgical centers.[504] The parties agreed that if the law went into effect that all but a handful of clinics would close.[505] Texas argued that the best way to measure a burden was to look at the number of women affected in the entire state.[506] Those challenging the law insisted that the relevant group was women who did not live near one of the remaining clinics.[507]

Whole Woman's Health repeated *Casey*'s conclusion that judges should ask whether a law mattered to "a large fraction of cases in which [the provision at issue] is *relevant*."[508] What did this mean? *Whole Woman's Health* stated that this group was a "class narrower than 'all women,' 'pregnant women,' or

497. *See id.* at 875–78.

498. *See* Leah Libresco, *The Supreme Court's Test for Abortion Laws Is a Poorly Defined Math Problem*, FIVETHIRTYEIGHT (Mar. 3, 2016), https://fivethirtyeight.com/features/the-supreme-courts-test-for-abortion-laws-is-a-poorly-defined-math-problem/ (parsing the variables at play in abortion debates).

499. *See id.*

500. *Casey*, 505 U.S. at 894.

501. *See generally Due Process Clause—Undue Burden:* Whole Woman's Health v. Hellerstedt, 130 HARV. L. REV. 397 (2016).

502. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

503. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1)(A) (West Supp. 2015), *invalidated by* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

504. *See id.* § 245.010(a), *invalidated by Whole Woman's Health*, 136 S. Ct. 2292.

505. *See Whole Woman's Health*, 136 S. Ct. at 2301–04.

506. *See, e.g.*, Libresco, *supra* note 498.

507. *See id.*

508. *Whole Woman's Health*, 136 S. Ct. at 2320 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992)).

even 'the class of *women seeking abortions* identified by the State.'"[509] But the meaning of this large fraction remains up for grabs. Writing in dissent, Justice Alito suggested that if a law impacted any women, it would satisfy *Whole Woman's Health*'s definition of a large fraction.[510] Is Alito correct?

And what must be shown to demonstrate that a large fraction of individual women face a burden? In *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, the Eighth Circuit considered a law requiring, among other things, that doctors performing medication abortions have hospital admitting privileges and a contract with a physician who could help in cases of medical emergencies.[511] Relying on *Whole Woman's Health*, the district court had enjoined the law, concluding that it was likely unconstitutional.[512] The Eighth Circuit reversed, suggesting that the district court had not made adequate findings about the number of women affected.[513] What number counts as a large fraction? How much proof must those challenging a regulation have to show that they have done the math correctly? *Casey*'s individualized balancing invites this kind of uncertainty.

Casey's individualized balancing also has created confusion about what judges should weigh and how important each variable is. In *Whole Woman's Health*, the Court found that Texas's HB2 delivered no benefits while creating a significant burden.[514] But what should happen if a law *does* have a benefit but is significantly burdensome? Or how should courts evaluate a law that has no benefit but is only minimally burdensome? And does the balancing analysis detailed in *Whole Woman's Health* apply to all abortion regulations, or only a subset, such as those involving statutes claimed to protect women's health?

Nor has the Court clarified whether the individualized impact of a law should include consideration of how a woman experiences a particular regulation in isolation versus as part of an overarching statutory scheme. *Whole Woman's Health* suggested that the latter was true: the Court evaluated the combined effect of both challenged parts of HB2.[515] But does this approach

509. *Id.* (quoting *Casey*, 505 U.S. at 895).
510. *See id.* at 2342–42 (Alito, J., dissenting).
511. *See* 864 F.3d 953 (8th Cir. 2017).
512. *See* Planned Parenthood of Ark. & E. Okla. v. Jegley, No. 4:15-cv-00784-KGB, 2016 WL 6211310, *10–32 (E.D. Ark. Mar. 4, 2016).
513. *See Jegley*, 864 F.3d at 957–60.
514. *See Whole Woman's Health*, 136 S. Ct. at 2310–17.
515. *See id.*

extend only to regulations challenged in a given case? Or does it make more sense to consider all abortion restrictions on the books in a state or even all laws that impact abortion access, such as laws regulating the disposal of fetal remains?

C. Alternatives

What alternative to individualized balancing should the courts adopt? In embryo-disposition cases, courts already prefer to honor contracts or informed-consent agreements detailing what should happen in the event of a separation or divorce.[516] To be sure, some have expressed skepticism about a contract-based approach, suggesting that it may be unconstitutional or at least unwise to bind someone to a past reproductive decision even after she changes her mind.[517] This is a valid concern, but for some time, the law has bound people to past reproductive decisions. After the point of fetal viability, for example, a woman may no longer terminate a pregnancy regardless of her current views on the matter.[518] In the context of in vivo reproduction, men have a right to access contraception but cannot force a woman to end or continue a pregnancy.[519] In general, the Court has suggested that reproductive rights require an ability to make informed decisions, not the power to change one's mind at any time for any reason.[520]

And alternatives, like the mutual contemporaneous consent approach outlined in *In re Marriage of Witten*, create problems of their own.[521] *Witten* functionally allows the party who favors the status quo to prevail.[522] Signifi-

516. *See* Szafranski v. Dunston, 2015 IL App (1st) 122975-B, ¶ 117, 34 N.E.3d 1142, 1157–58 (Ill. App. Ct. 2015).

517. *See, e.g.*, *In re* Marriage of Rooks, 429 P.3d 579, 595 (Colo. 2018); Davis v. Davis, 842 S.W.2d 588, 598–605 (Tenn. 1992); Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998); *In re* Marriage of Dahl, 194 P.3d 834, 840 (Or. Ct. App. 2009); Roman v. Roman, 193 S.W.3d 40, 53–55 (Tex. App. 2006).

518. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877–82 (1992).

519. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976) ("The obvious facts is that when the wife and husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.").

520. *See, e.g.*, *Casey*, 505 U.S. at 877–82.

521. *See In re* Marriage of Witten, 672 N.W.2d 768, 775–84 (Iowa 2003).

522. *See id.*

cantly, when a couple is divorcing or separating, *Witten* could allow one partner to effectively hold embryos hostage in exchange for a more favorable financial settlement.[523] At the point that a relationship is ending, a partner might be inclined to punish an ex regardless of her views about reproduction.[524]

A contract-based approach could encourage people to make more thoughtful decisions about genetic parenthood.[525] States should pass laws governing the formation and enforcement of embryo disposition agreements. In other ART contexts, state laws already provide clear requirements for those seeking to enter into an enforceable contract.[526] For example, statutes on surrogacy contracts set age limits, restrict who may enter into a binding surrogacy agreement, and regulate the terms that such contracts must include.[527] And in family law more broadly, states set limits governing marital agreements.[528] There is no reason that states could not encourage similarly responsible contracting around the idea of embryo disposition.

What might such a model law look like? Perhaps the closest analogy is to prenuptial agreements. Just as couples enter into embryo disposition agreements before beginning IVF, couples sign prenuptial agreements before a marriage begins.[529] In both contexts, people may suffer from optimism bias, underestimating the chances of conflict down the line.[530] And just as those

523. *See, e.g.*, Mark P. Strasser, *You Take the Embryos but I Get the House (and the Business): Recent Trends in Awards Involving Embryos upon Divorce*, 57 BUFF. L. REV. 1159, 1210 (2009).

524. *See, e.g.*, *id.* at 1225.

525. *Id.* at 1224; *c.f.* Deborah L. Forman, *Embryo Disposition, Divorce, and Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 422 (2013).

526. *See infra* note 527–528 and accompanying text.

527. *See, e.g.*, CAL. FAM. CODE § 7962 (West 2019); TENN. CODE ANN. § 68-11-1806 (2019); 750 ILL. COMP. STAT. ANN. § 47/25 (LexisNexis 2019); VA. CODE ANN. § 20-160 (2019); FLA. STAT. ANN. § 742.15 (LexisNexis 2019).

528. *See, e.g.*, CONN. GEN. STAT. § 46b-36g (2019); NH REV. STAT. ANN. § 460:2-a (2019); TENN. CODE ANN. § 36-3-501 (2019).

529. *See Prenuptial Agreements: Who Needs It and How Do I Make One?*, NOLO, https://www.nolo.com/legal-encyclopedia/prenuptial-agreements-overview-29569.html (last visited Oct. 18, 2019).

530. Forman, *supra* note 525, at 421; Ian Smith, *The Law and Economics of Marriage Contracts*, 17 J. ECON. SURVS. 208 (2003), https://ssrn.com/abstract=416650 (describing the significance of optimism bias in the entry to premarital agreements).

soon to be wed may not adequately protect their interests, most couples beginning IVF will not bargain at arms' length.[531] Although states take considerably different approaches to regulating prenuptial agreements, and although prenuptial and embryo-disposition agreements differ in salient ways, the Uniform Premarital Agreements Act (UPAA) may provide a helpful starting point.[532]

The UPAA has both procedural and substantive requirements.[533] Procedurally, the UPAA requires that an agreement be voluntary, that both parties have had the chance to consult independent legal counsel or clearly waived their rights, and that both parties had a full disclosure of the assets and liabilities of the other.[534] Substantively, the UPAA allows courts to require additional support payments to avoid making one partner eligible for public assistance.[535] Courts also have the power to refuse enforcement of an agreement that is unconscionable at the time of signing or if substantial hardship would arise because of a material change in circumstances following the signing of the agreement.[536]

In the embryo-disposition context, it makes sense to require that couples have access to independent counsel and the financial means of obtaining it. In a legal field with many complex, unsettled questions, those beginning IVF could use legal guidance and help understanding how to protect themselves.[537] Few embryo disposition agreements may be involuntary, and financial disclosure may be less relevant in the IVF context because disputes tend to involve the achievement or avoidance of genetic parenthood rather than financial matters. However, a model statute should address the financial consequences of bringing a pregnancy to term, especially in cases in which one of the parties no longer intends to play a role in a child's life.

What about substantive requirements? States could consider limiting the enforcement of embryo disposition agreements under circumstances that

531. *Cf.* Friedlander v. Friedlander, 494 P.2d 208, 213 (Wash. 1972) (making this point in the context of prenuptial agreements).

532. *See* UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT (UNIF. LAW COMM'N 2012).

533. *See id.* § 9.

534. *See id.*

535. *See id.*

536. *See id.*

537. *See* Anna El-Zein, *Embry-Uh-Oh: An Alternative Approach to Frozen Embryo Disputes*, 82 MO. L. REV. 881, 901–04 (2017) (discussing a requirement of independent counsel before a cryopreservation agreement is presumed to be enforceable).

might seem unconscionable, allowing lawmakers and voters to weigh in on what would make unwanted genetic parenthood untenable.[538] Regardless of the details of such a statute, putting in place requirements for such a contract would encourage contracting parties to take embryo disposition decisions more seriously and to enter into agreements that better reflect their intentions.

What about the balancing required in abortion law? There are reasons for preserving some form of balancing analysis in the abortion context: *Casey* recognized that abortion cases involve both a constitutionally protected liberty and an important governmental interest in fetal life.[539] Nevertheless, the Court can still clarify dimensions of a balancing analysis to eliminate some of the confusion in the lower courts.

First, if a law severely burdens abortion access, as was the case in *Whole Woman's Health*, courts should invalidate it, even if the government can show that it has some benefit.[540] After all, *Casey* recognized that the government has an important interest throughout pregnancy in protecting fetal life.[541] Attaching too much importance to the benefit created by an abortion law could undermine the careful balance struck by *Casey* and encourage courts to uphold most (if not all abortion regulations).[542]

If laws create a minimal burden but have little benefit, what approach should the Court take? Here, voting-rights jurisprudence provides a helpful analogy. Under the Fourteenth Amendment, the Court applies a balancing test established in *Anderson v. Celebrezze*.[543] To determine whether a law unduly burdens the right to vote,

> a court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff

538. *C.f.* UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT, *supra* note 532 (noting a similar power of invalidating a contract on the grounds of unconscionability for premarital agreements).

539. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

540. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–10 (2016) ("The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer . . . [and] consider whether any burden imposed on abortion access is 'undue.'").

541. *See Casey*, 505 U.S. at 877.

542. *Id.* at 876 ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue.").

543. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

> seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[544]

The Court has insisted that even the most modest burdens require proof that the government addresses a real problem.[545] "However slight that burden may appear," the Court recently explained, "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[546] If a law impacts a constitutionally protected liberty, the government should show that it advances some concrete goal.[547] Both in the context of voting and abortion, the Court must strike a balance between important governmental concerns and constitutionally significant liberties. To do so, the state should show that a law delivers some benefit.

The Court should also clarify that *Casey*'s balancing requires consideration of the impact of an entire statutory scheme on a woman's access to abortion rather than the effect of an isolated regulation.[548] *Casey* and *Whole Woman's Health* clarify that the real-world effect of abortion regulations matters, and women's ability to access abortion will depend on all the laws that a state implements.[549] Taking an entire statutory scheme into account may also help to illuminate the purpose of a law, providing evidence of where a law fits into a broader legislative agenda.

What about the definition of the large-fraction test? The Court should establish that the undue-burden standard does not require the kind of numerical precision demanded by the Eighth Circuit in *Jegley*.[550] Again, consider a comparison to voting rights.[551] In *Anderson*, the Court addressed an Ohio law that required presidential candidates to meet a March filing deadline for those seeking to appear on the ballot in November.[552] Those challenging the law

544. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 789).

545. *See* Crawford v. Marion County Election Board, 553 U.S. 181, 191 (2008).

546. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)).

547. *Id.*

548. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310–17 (2016); *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

549. *See Whole Woman's Health*, 136 S. Ct. at 2292; *Casey*, 505 U.S. at 833.

550. Planned Parenthood of Ark. & E. Okla. V. Jegley, 864 F.3d 953, 960 (8th Cir. 2017).

551. *See generally* Anderson v. Celebrezze, 460 U.S. 780 (1983) (challenging an early filing deadline for Presidential candidates).

552. *Anderson*, 460 U.S. at 782–83.

argued that it would unduly burden the right of independent-minded voters who would more likely favor a candidate emerging later in a race, perhaps in response to a specific issue or event.[553] The Court found that the early filing deadline unconstitutionally burdened the right to vote without specifying a number of independent-minded voters who would be impacted by the restriction.[554] Indeed, to the extent that the Court described the size of the affected population, *Anderson* expressed particular concern about laws that harmed a small but well-defined group with "a particular viewpoint, associational preference, or economic status."[555] At times, parties in voting rights cases have put a number on the burden created by a law,[556] but the Justices have never imposed such a requirement.

Nor should the Court require a specific number in the abortion context. Just as in voting-rights case, many abortion regulations will often impact a specific, if sometimes small, group, such as domestic violence victims, poorer women, or those living in relatively isolated areas.[557] Before a law goes into effect, it may be impossible to identify a specific number of affected women. And even after a law is implemented, those challenging an abortion regulation may have insurmountable obstacles in proving that those who have lost access to abortion can trace their problem to a law rather than to other issues, such as the market for abortion care or personal financial issues. As *Whole Woman's Health* suggested, a law that eliminates abortion access for some women creates constitutional problems even if many in a state would be unaffected.

Although the nature of men's reproductive rights remains unclear, the compromise struck in the late 1980s cast a long shadow on the law affecting both ART and abortion. The Court should more carefully consider whether to apply a balancing approach when dealing with reproductive rights and should more carefully tailor any such test it applies.

V. CONCLUSION

In legal history and constitutional law, reproductive rights have become synonymous with women. Largely missing has been the history of the law

553. *See id.* at 790.
554. *Id.* at 792–94.
555. *Id.* at 793.
556. *See, e.g.*, Norman v. Reed, 502 U.S. 279, 288–89 (1992).
557. *See Anderson*, 460 U.S. at 793; *supra* Section IV.A–B.

governing reproductive rights for men. In some way, this gap makes sense: the Court has generally identified gender-neutral reproductive rights (such as those involving contraception or sterilization) or rejected the claims of men when they conflict with women.

But recovering the history of men's reproductive rights illuminates how the law governing both ART and abortion took its current shape. Abortion foes seeking reproductive rights for men urged the Court to look at the parties' individual circumstances in determining who should have the final say about procreation. Abortion-rights supporters generally responded that gestation alone should break any tie between men and women in abortion cases. The Court settled on a compromise between the two: treating gestation as dispositive in abortion cases but otherwise making individual circumstances paramount.

By focusing so much on gestation, we have lost sight of the distinctions between ART and abortion law—and of other considerations that should matter in defining a person's reproductive rights. When gestation cannot determine the outcome of reproductive disputes, we have more reason to worry about individualized balancing approaches than we might have expected. Too often, courts applying both rules risk turning reproductive decision-making into a meritocracy, awarding rights to those who convince a judge that their view of childbearing and child-rearing is the most deserving. As the history of debates about men and reproduction suggests, we deserve better.

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