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Cover Page Footnote

This Note is dedicated to my wife, Mindy, and the rest of my family for their patience and support throughout the preparation of this Note. I would also like to thank Professor James E. Fleming and Professor Martin S. Flaherty for their invaluable guidance.

FROZEN LIFE'S DOMINION: EXTENDING REPRODUCTIVE AUTONOMY RIGHTS TO IN VITRO FERTILIZATION

Samuel A. Gunsburg*

Lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution—an interpretation that both unifies these distinct sources, so far as this is possible, and directs future adjudication. They must seek, that is, constitutional *integrity*.¹

INTRODUCTION

Current studies show that fifteen percent of all couples of reproductive age encounter some problems having children.² Ten million out of sixty-seven million reproductively active couples are, in fact, infertile.³ Consequently, many couples seek alternative means of achieving reproduction.⁴ In 1978, a major development in reproductive technology occurred: The birth of the “miracle baby” Louise Brown, the first child conceived through in vitro fertilization (“IVF”),⁵ a process by which an egg is removed from a woman’s body and then fertilized in a petri dish.⁶ IVF opened entirely new reproductive avenues for childless couples. While there are many treatments that aim to bring about fertilization within a woman’s body,⁷ IVF is unique because fertilization occurs outside the body, and then the fertilized egg

* This Note is dedicated to my wife, Mindy, and the rest of my family for their patience and support throughout the preparation of this Note. I would also like to thank Professor James E. Fleming and Professor Martin S. Flaherty for their invaluable guidance.

1. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249, 1249-50 (1997) [hereinafter Dworkin, *Arduous Virtue*].

2. Jennifer L. Carow, *Davis v. Davis: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DePaul L. Rev. 523, 526 (1994) (citations omitted).

3. *Id.*

4. *Id.*

5. *The First Test-Tube Baby*, Time, July 31, 1978, at 58.

6. John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. Cal. L. Rev. 939, 948 (1986) [hereinafter Robertson, *Embryos*]; see *infra* part I (explaining the IVF procedure); see also Lesley Brown & John Brown, *Our Miracle Called Louise: A Parents' Story* (1979) (recounting the story of Louise Brown’s parents in their own words); Robert Edwards & Patrick Steptoe, *A Matter of Life: The Story of a Medical Breakthrough* (1980) (providing the account of Louise Brown’s birth from the doctors’ perspective).

7. Treatments range “from fertility drugs to tubal reconstruction by microsurgery and artificial insemination.” Robertson, *Embryos*, *supra* note 6, at 947.

is placed in the uterus to initiate the pregnancy.⁸ This unique aspect of IVF has been at the center of a constitutional battle in state courts.⁹ In the typical case, one or both spouses in a marriage experience difficulty in conceiving a child. The couple decides to undergo IVF treatment as their only hope of becoming the genetic parents of a child. Often, the couple cryopreserves,¹⁰ or freezes, the fertilized eggs for later implantation. Many IVF clinics require the couple using this procedure to sign cryopreservation agreements prior to treatment.¹¹ These forms stipulate what the clinic should do with the preembryos in the event the couple separates, divorces, or one spouse dies before implantation.¹²

Often, however, the couple fails to sign an agreement if one is not provided and required by the clinic. When this occurs, courts have

8. *Id.*

9. See *Kass v. Kass*, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995) (no docket number); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993); see *AZ v. BZ*, slip op. (Mass. P. Ct. Mar. 25, 1996) (no docket number) (order granting permanent injunction) (on file with the *Fordham Law Review*). Foreign courts also have addressed IVF conflicts. In a case of first impression, the Israeli Supreme Court resolved a frozen embryo disposition dispute. Joel Greenberg, *Israeli Court Gives Wife the Right to Her Embryos*, N.Y. Times, Sept. 13, 1996, at A10. In *Nahmani v. Nahmani*, the Israeli Supreme Court voted 7-4 that although both parents have reproductive rights over the embryo, the mother's right to be a parent prevailed over the father's right not to be a parent. *Id.* The court reasoned that implanting the embryos in the mother, who had previously undergone a hysterectomy, would afford her the only opportunity to become a parent. *Id.*

10. See *infra* part I.A (detailing a description of the cryopreservation process).

11. John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 Ohio St. L.J. 407, 409-10 (1990) [hereinafter Robertson, *Prior Agreements*].

12. One can argue that such agreements are unenforceable on the ground that reproductive rights are inalienable. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the Constitution can make contracts unenforceable even when they are not void *ab initio*); Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987) (discussing rights that are nonwaivable or nonrelinquishable); Robertson, *Prior Agreements*, *supra* note 11, at 418-19 (analogizing preconception agreements to abortion or child rearing agreements that are not binding); William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 Case W. Res. L. Rev. 1, 12 (1990) (arguing that contractual reallocation of procreative resources and parental rights risks the structural breakdown of the American political tradition of respect for human dignity). In addition, contracts relinquishing parental rights through IVF agreements can be analogized to surrogacy contracts, which have been held to be illegal. See *In re Baby M.*, 537 A.2d 1227, 1255 (N.J. 1988) (holding that unpaid surrogacy contracts are unenforceable); Martha A. Field, *Surrogate Motherhood* (1988) (discussing arguments for and against enforcing surrogacy contracts and arguing that if abortion and adoption contracts are unenforceable, the same rule should apply to surrogacy contracts); M. Celeste Schejbal-Vossmeier, Comment, *What Money Cannot Buy: Commercial Surrogacy and the Doctrine of Illegal Contracts*, 32 St. Louis U. L.J. 1171, 1206 (1988) (arguing that "[g]iving a second party the right to control another person's reproductive capacity is contradictory" because it allows a party to waive his or her right so that another party can exercise it). *But see* Richard A. Posner, *Sex and Reason* 420-27 (1992) (applying an economic theory for surrogate contracts and advocating enforcement of cash transactions in the formation of family relationships).

attempted to decide which parent's reproductive autonomy right prevails:¹³ the mother's right to bear and beget or the father's right not to.¹⁴ In 1992, the Tennessee Supreme Court decided this novel issue in *Davis v. Davis*.¹⁵ The *Davis* court constructed a balancing test to determine which parent should prevail.¹⁶ Shortly after the *Davis* decision, a New York trial court¹⁷ addressed the same issue but arrived at a different conclusion, holding that the mother's rights are paramount in a frozen embryo dispute.¹⁸

As evidenced by each court's conclusion, the two courts implicitly interpreted the "right to bear and beget"¹⁹ to include both the right to create a child and the correlative right to choose contraception or abortion.²⁰ Moreover, these courts assumed that the Supreme Court intended this right to apply to both married and unmarried individu-

13. In *Davis*, the court assumed the existence of reproductive autonomy rights, noting that "[f]or the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation. Undoubtedly, both are subject to protections and limitations." *Davis*, 842 S.W.2d at 601 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

14. In most frozen embryo conflicts, the mother seeks to implant the embryo and the father wishes to terminate the embryo. See, e.g., *Kass v. Kass*, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995) (no docket number); see *AZ v. BZ*, slip op. (Mass. P. Ct. Mar. 25, 1996) (no docket number) (order granting permanent injunction) (on file with the *Fordham Law Review*). Although the right to affirmative procreation should apply equally to both the mother and the father, for purposes of simplicity and clarity this Note will refer to the mother as the party seeking to implant the frozen embryo, and the father as the party seeking to terminate it. It is important to note that if the roles were reversed and the man wished to implant the frozen embryo, a court could not force transfer of the frozen embryo to the woman's body over her objections because that would violate her bodily integrity. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976). The only option available to the man would be to have the frozen embryo implanted in a surrogate mother.

15. 842 S.W.2d 588 (Tenn. 1992), cert. denied, 507 U.S. 911 (1993).

16. See *infra* part I.B.1 (providing a full discussion of *Davis*).

17. *Kass*, 1995 WL 110368. In contrast to *Kass*, a Massachusetts Probate and Family Court in 1996 held that because the mother and father are equal gamete providers, they should be given equal authority in decisions regarding frozen embryos. *AZ v. BZ*, slip op. at 22 (discussing *Kass* and *Davis*).

18. See *infra* part I.B.2 (discussing *Kass* in detail). Only one state, Louisiana, has enacted pertinent legislation regarding custody of frozen embryos by declaring that a dispute between parties over a cryopreserved IVF embryo should be resolved in the "best interest" of the embryo. La. Rev. Stat. Ann. § 9:131 (West 1986).

19. The Supreme Court, invalidating a state statute prohibiting the distribution of birth control to unmarried adults, held that

[i]f . . . the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . 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.

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

20. See *infra* notes 230-44 and accompanying text (outlining the Supreme Court's right to privacy cases establishing rights of reproductive autonomy).

als. As this Note reveals, however, the string of cases that developed the contemporary concept of a constitutionally protected privacy right in sexual matters initially dealt exclusively with the right of affirmative procreation in the context of married, not unmarried, couples.²¹ The Court vested unmarried persons with the right to bear and beget only in the context of contraception or abortion.²² Hence, it is not clear whether the right to affirmative procreation—as established by the Court for married couples—can be expanded to apply in a frozen embryo conflict, which differs from the above cases in several major respects. First, in a frozen embryo conflict, the couple is separated or divorced, rather than married.²³ Further, one of the parents wishes to affirmatively create life,²⁴ whereas the Court's cases recognized reproductive autonomy rights in a contraception context, where the parents wished to not create life.²⁵ Moreover, the frozen embryo is formed by in vitro fertilization, rather than coitally, as in all the Court's privacy cases.

When considering whether a divorced or separated party has a constitutionally guaranteed right of affirmative procreation, both the *Davis* and *Kass* courts concluded that the right to bear and beget is dichotomous: It applies to both contraception and conception.²⁶ The courts were unclear, however, about the specific rationale employed to reach such a determination. Neither court explained how it reached the conclusion that the right to bear and beget applies in a frozen embryo conflict to an unmarried mother who wishes to procreate, rather than prevent a pregnancy.

This Note conducts the analysis absent from the *Davis* and *Kass* decisions, thereby bolstering the courts' conclusion that the right to bear and beget is a two-fold right which applies equally to the mother and father in a frozen embryo dispute. The outcome of this analysis depends on how courts interpret the Constitution's grants of liberty and equality, and on a courts' power to extend the reach of the Four-

21. See *infra* notes 230-44 and accompanying text.

22. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (plurality opinion) (finding that the Constitution places limits on a state's right to interfere with a woman's decision to terminate her pregnancy); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509-10 (1989) (holding that although a woman has a right to choose an abortion, a state may refuse to allow public facilities to be used or public employees to participate in abortions); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686-91 (1977) (striking down a New York statute which limited the distribution of contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (limiting a state's right to regulate abortions); *Eisenstadt*, 405 U.S. at 453 (holding that individuals, whether single or married, have a right to use contraception); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding that married people have a right to use contraceptives).

23. *Kass v. Kass*, 1995 WL 110368, at *2 (N.Y. Sup. Ct. Jan. 18, 1995) (no docket number); *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

24. *Davis*, 842 S.W.2d at 589-90; *Kass*, 1995 WL 110368, at *1.

25. See *infra* notes 230-44 and accompanying text.

26. See *infra* part I.B.

teenth Amendment's Due Process and Equal Protection Clauses.²⁷ This Note suggests that when courts analyze any fundamental rights question, the only faithful method of interpretation is to employ a broad reading which interprets the Constitution as embodying abstract moral principles rather than detailed rules.²⁸ Interpreted this way, autonomy rights—specifically the right to bear and beget—should apply to the right to affirmative procreation in the same way that they apply to the right of contraception. Regardless of whether fertilization takes place in the mother's womb or in a petri dish through IVF, the Constitution grants protections to both parents—the parent wishing to implant the preembryo and the parent wishing to destroy it. Faced with an IVF controversy, a court can conclude that the parent who wishes to implant the frozen embryo has as much of a constitutional right to bear and beget as the other parent has to destroy the embryo. Because a valid constitutional deadlock exists, the court can then decide which gamete provider should prevail based on balancing both parents' interests, considering such factors as whether the frozen embryo represents the last chance for one of the gamete providers to become a parent.

Part I of this Note defines the issues that arise when a couple that has previously cryopreserved one or more embryos decides to separate or divorce. It first explains the process of in vitro fertilization and cryopreservation, and then explores the conflicting judicial decisions regarding the disposition of frozen embryos. This part notes that each court omitted to state the constitutional basis for concluding that both parties have reproductive autonomy rights. In an attempt to discern whether both parties in a frozen embryo conflict do in fact have fundamental rights at issue, Part II contrasts two major theories of constitutional interpretation—originalism and fundamental rights. In addition, this part considers how broadly a court can interpret a right by analyzing the applicable levels of generality. Part III presents the man's and the woman's arguments for applying the right to privacy cases to the frozen embryo conflict. By carefully analyzing how the string of Supreme Court right to privacy decisions implicate reproductive autonomy rights as applied to the present issue, this part proposes a cogent constitutional theory to explain the analysis that the *Davis* and *Kass* courts might have undertaken in reaching the conclusion that both gamete providers have equal rights to the frozen embryo. Ultimately, this Note contends that when courts interpret reproductive autonomy rights, they can show fidelity to the Constitution only by defining the scope of the rights broadly, and applying an abstract moral reading of the text. This analysis leads to the conclusion that

27. U.S. Const. amend. XIV, § 1.

28. For a detailed explanation of this approach to constitutional interpretation, see Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* 122-23, 158-59 (1994) [hereinafter Dworkin, *Life's Dominion*].

both parties in a frozen embryo conflict have equal reproductive autonomy rights. Only in light of this constitutional basis should courts then balance the parties' interests in a manner similar to the *Davis* court's approach, examining factors such as the burden on the party trying to avoid being a parent and whether other avenues for parenthood are available to the party seeking to become a parent.

I. THE CONFLICT OVER FROZEN EMBRYOS

Along with the advantages that IVF technology offers to childless couples comes the potential conflict between couples with respect to rights to the frozen embryo. Courts have struggled in addressing this issue. This part provides background information about the IVF and cryopreservation process. In addition, this part discusses the two leading court cases that have addressed conflicts regarding disposition of frozen embryos.

A. *In Vitro Fertilization and Cryopreservation*

The IVF process duplicates the natural fertilization process that occurs within a woman's fallopian tube. The primary reason that couples employ IVF for reproduction, rather than coital intercourse, is that one or both of the partners suffer from fertility problems.²⁹ In IVF, a woman's eggs are surgically removed and then fertilized.³⁰ Because the chance of fertilization is very small if only one fertilized egg is transferred to the uterus, the standard IVF treatment requires that the ovaries be stimulated to produce many eggs to increase the chance for a successful fertilization.³¹ Because of this process, usually one or more follicles containing eggs will develop.³² Fertilization is not instantaneous, but occurs over several hours after insemination.³³ After about twenty-four hours, the eggs are examined for signs of fertilization. In the forty-eight to seventy-two hour interval between insemination and transfer to the uterus, the fertilized egg or "preembryo"³⁴

29. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 Va. L. Rev. 405, 423 (1983) [hereinafter Robertson, *Procreative Liberty*].

30. Robertson, *Prior Agreements*, *supra* note 11, at 407.

31. Robertson, *Embryos*, *supra* note 6, at 948.

32. Shortly before the surge of luteinizing hormone indicating ovulation—that the egg has been shed from the follicle—the woman takes another drug to guarantee that the egg matures. Several eggs are then aspirated—removed by suction—from the follicles by laparoscopy. After the eggs are examined for maturity, the mature eggs are mixed in a dish with sperm from the husband that has been examined and prepared for insemination. *Id.*

33. *Id.* at 968.

34. The term "preembryo" is used to describe the fertilized egg at this stage. See, e.g., *AZ v. BZ*, slip op. at 7 (Mass. P. Ct. Mar. 25, 1996) (no docket number) (order granting permanent injunction) (on file with the *Fordham Law Review*); *Davis v. Davis*, 842 S.W.2d 588, 593 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

divides repeatedly into two, four, six, or eight cells.³⁵ Shortly thereafter, the preembryo will be transferred transcervically by a catheter to the uterus.³⁶

An IVF clinic may employ cryopreservation, a process by which preembryos are frozen in liquid nitrogen at sub-zero temperatures, to preserve and store preembryos that it does not immediately transfer to a woman's uterus.³⁷ A great advantage of cryopreservation is that all of the eggs retrieved in one laparoscopy³⁸ can be fertilized, and the remaining preembryos can be preserved for implantation at a later date.³⁹ Couples choose to cryopreserve the preembryos for various reasons. First, because IVF is a costly procedure, as well as being physically and mentally trying, cryopreservation reduces the woman's need for multiple IVF procedures by fertilizing the extra eggs for transfer during later cycles.⁴⁰ Second, cryopreservation reduces the risk of multiple pregnancies because only one frozen embryo needs to be implanted at one time.⁴¹ Third, cryopreservation can increase a woman's chances of becoming pregnant. It does so by placing the frozen embryos in her body during a later, normal menstrual cycle, when her body is free from the stimulating drugs and surgical intrusion of the normal IVF procedure.⁴² Finally, cryopreservation delays ethical and moral considerations that arise when parties wish to dispose of the extra frozen embryos, because a couple does not have to immediately decide whether to destroy the surplus embryos.⁴³

Legal conflicts arise, however, because the time lapse between fertilization and implantation, facilitated by the cryopreservation process, allows biological donors an opportunity to change their positions about both implantation and their marital relationship. For example, after fertilization, but prior to implantation, the donors may decide to end their relationship. Such changes of status have led to court battles that focus on the legal status of the frozen embryo and the reproductive autonomy rights of the parties.

35. Robertson, *Embryos*, *supra* note 6, at 968.

36. *Id.* at 948. The transfer of multiple fertilized eggs increases the chance of multiple gestation. It is optimal, however, to transfer no more than three or four eggs. Most programs, however, will transfer as many eggs as have been fertilized; as a result, they may aspirate or fertilize fewer eggs than are available to avoid transferring all the eggs. *Id.* at 948-49.

37. Carow, *supra* note 2, at 529 & n.40.

38. Laparoscopy, or peritoneoscopy, is the method by which the clinician examines the contents of the lining of the abdominal cavity. The clinician does this by passing an electrically lighted tubular instrument through the abdominal wall. Stedman's Medical Dictionary 1059 (23d ed. 1976) [hereinafter Stedman].

39. Carow, *supra* note 2, at 529.

40. *Id.*

41. *Id.*

42. Robertson, *Prior Agreements*, *supra* note 11, at 408.

43. Carow, *supra* note 2, at 529-30.

B. *The Court Cases*

This section summarizes two conflicting decisions that have addressed the dispute over frozen embryo disposition in the wake of marital dissolution. In *Davis v. Davis*,⁴⁴ the Supreme Court of Tennessee balanced the parties' various interests and ultimately permitted the father to destroy the embryos.⁴⁵ The *Davis* balancing test implies that the court believed that both parties possessed constitutional rights. The *Davis* court, however, did not explain how it analyzed the right to bear and beget to find that it applied to the mother who wished to bring the frozen embryos to life. In contrast, in *Kass v. Kass*,⁴⁶ a New York trial court concluded that the mother is the only party with rights in a frozen embryo conflict;⁴⁷ it too, however, refrained from disclosing its analysis concerning either parties' constitutional right to bear and beget.

1. *Davis v. Davis*

Mary Sue and Junior Davis were married in 1980.⁴⁸ Shortly thereafter, Mary Sue suffered numerous tubal pregnancies.⁴⁹ The couple underwent an IVF procedure during their marriage with the hope of producing their own biological child.⁵⁰ The couple produced nine embryos, some of which were cryogenically frozen for later transfer.⁵¹ Custody of these embryos became an issue when Junior subsequently filed for divorce.⁵²

The Tennessee trial court began by addressing a foundational question: "When does human life begin?"⁵³ Mary Sue argued that the preembryos were human, and, accordingly, that she should have the right to bring them to term.⁵⁴ Junior, in contrast, argued that the preembryos were joint property with only the "potential for life."⁵⁵ The trial court favored Mary Sue's interpretation in holding that em-

44. 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

45. *Id.* at 601, 603-04.

46. 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995) (no docket number).

47. *Id.* at *4.

48. *Davis*, 842 S.W.2d at 591.

49. *Id.* A tubal pregnancy occurs when the fertilized ovum implants in an area other than the endometrium, often in the fallopian tube. Carow, *supra* note 2, at 544 n.155 (citing 1 *The Oxford Companion to Medicine* 331 (John Walton et al. eds. 1986)).

50. *Davis*, 842 S.W.2d at 591.

51. *Id.* at 592.

52. *Id.*

53. *Davis v. Davis*, No. E-14496, 1989 WL 140495, at *3 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 WL 130807 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993). The court also analyzed whether the embryos were "beings" or "property that may become human beings." *Id.*

54. *Davis*, 1989 WL 140495, at *25.

55. *Id.* at *20.

bryos are human beings from the moment of fertilization, and that it serves "the best interest of the child[ren]" to be implanted.⁵⁶ Accordingly, the court awarded custody of the embryos to Mary Sue.⁵⁷

By the time the case reached the appellate court, Mary Sue had decided to donate the embryos to a childless couple. The issue on appeal, however, was still custody over the embryos.⁵⁸ The court found that awarding the preembryos to Mary Sue against Junior's will was an "impermissible state action in violation of Junior's constitutionally protected right not to beget a child where no pregnancy has taken place."⁵⁹ Accordingly, the appellate court rejected the trial court's findings and held that "[t]here are significant scientific distinctions between [four to eight celled] fertilized ova that have not been implanted and an embryo in the mother's womb."⁶⁰ Further, the court noted that frozen embryos are less likely to develop than natural embryos because IVF results in fewer successful pregnancies than embryos that were fertilized through intercourse.⁶¹ Finally, the court considered both Tennessee's wrongful death statute, which does not recognize a wrongful death claim before a fetus is born,⁶² and Tennessee's abortion statute, which affords the embryo legal status as it develops but does not afford the embryo the status of personhood under the law.⁶³ Under these statutes, embryos are not entitled to the same protection as persons. On this basis, the Tennessee appeals court held that the preembryos should not be recognized as persons. Instead, the court held that preembryos warranted status somewhere between property and a "person already born."⁶⁴ Citing *York v. Jones*,⁶⁵ a decision that characterized frozen embryos as property, the appellate court held that although the right to procreate may be a basic right, an individual also has a basic right to prevent procreation.⁶⁶ Thus, Junior had a constitutionally protected right not to beget a child when no

56. *Id.* at *11 (applying the doctrine of *parens patriae*, which attempts to protect the best interests of the child).

57. *Id.*

58. *Davis v. Davis*, No. 180, 1990 WL 130807, at *1 (Tenn. Ct. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

59. *Id.* at *2 (footnote omitted).

60. *Id.* at *1 (footnote omitted).

61. *See id.*

62. *Id.* at *2 (citing Tenn. Code Ann. § 20-5-106 (1980)).

63. *Id.* (citing Tenn. Code Ann. § 39-15-201 (1989)).

64. *Id.*

65. 717 F. Supp. 421 (E.D. Va. 1989). The *York* court held that a Virginia clinic was obligated to return a frozen embryo to parents who wished to transfer the frozen embryo to a clinic in California. *Id.* at 425. The court's rationale was that a bailor-bailee relationship existed between the Virginia clinic and the parents, and that once the bailment ceased, the clinic was under an obligation to return the "property" to the parents. *Id.*

66. *See Davis*, 1990 WL 130807, at *2 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

pregnancy had taken place, and only a compelling state interest could justify ordering implantation against the will of either party.⁶⁷ The court awarded both parties joint control of the embryos with equal decision-making authority.⁶⁸ The decision thus created a stalemate for the parents because each party sought a different outcome. Because the embryos were in essence untouchable until the impasse was settled, the Supreme Court of Tennessee granted review.⁶⁹

The Supreme Court of Tennessee first considered the issue of the preembryos' status and agreed with the appellate court's finding that the frozen embryos were not "persons" under either Supreme Court case law⁷⁰ or Tennessee statutory law.⁷¹ The supreme court, however, disagreed with the appellate court's application of *York v. Jones*⁷² and limited *York* to its facts. In *York*, property status was conferred on the frozen embryos solely because the couple had previously signed an agreement categorizing the frozen embryos as property.⁷³ In the *Davis* case, however, where there was no such agreement, there was no basis for the appellate court to categorize the Davises' frozen embryos as property. The Tennessee Supreme Court, relying on the Ethics Committee of the American Fertility Society's debate over this very issue,⁷⁴ concluded that the preembryos were neither persons nor property;⁷⁵ rather, the preembryos were in an interim category of "potential for human life."⁷⁶

The *Davis* court then examined the two gamete providers' constitutional rights to privacy. Looking to Supreme Court cases from *Meyer v. Nebraska*⁷⁷ and *Skinner v. Oklahoma*⁷⁸ through *Roe v. Wade*,⁷⁹ the *Davis* court reached the conclusion that the "right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."⁸⁰ Curiously, this finding was based on two cases that make no reference to an affirma-

67. *See id.*

68. *Id.* at *3.

69. *See Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

70. *Id.* at 594-95 (citing *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Roe v. Wade*, 410 U.S. 113 (1973)).

71. *Id.* (applying Tenn. Code Ann. § 39-15-201 (1989); Tenn. Code Ann. § 39-13-107 (1989); Tenn. Code Ann. § 39-13-210 (1989)).

72. 717 F. Supp. 421 (E.D. Va. 1989).

73. *Davis*, 842 S.W.2d at 596 (citing *York v. York*, 717 F. Supp. 421, 424-25 (E.D. Va. 1989)).

74. *Id.* at 596-97 (citation omitted).

75. *Id.* at 597.

76. *Id.* (citing American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 53 *Fertility & Sterility* 34S-35S (Supp. 1990)).

77. 262 U.S. 390 (1923).

78. 316 U.S. 535 (1942).

79. 410 U.S. 113 (1973).

80. *Davis*, 842 S.W.2d at 601.

tive right to procreation: *Prince v. Massachusetts*,⁸¹ which dealt with parental control over the education or health care of their children, and *Roe v. Wade*,⁸² which dealt with the right to avoid procreation through abortion. The *Davis* court admitted that "the extent to which procreational autonomy is protected by the United States Constitution is no longer entirely clear."⁸³ Because both parents in an IVF procedure are entirely equivalent gamete providers, however, the court constructed a six-step balancing test to decide the disposition of the frozen embryos.⁸⁴ First, the court should clearly identify the preference of both gamete providers.⁸⁵ Second, if there is a conflict, any prior contractual agreement should be enforced.⁸⁶ Third, in the absence of a contract, the interests of each party should be weighed against the interests of the other party.⁸⁷ Fourth, the party wishing to avoid procreation should prevail if the other party has an alternative method of achieving parenthood.⁸⁸ Fifth, if there is no viable alternative, the party wishing embryo implantation should prevail unless, sixth, that party wishes to donate the embryo, in which case, the party objecting to implantation should prevail.⁸⁹ Applying the test to the case before it, the *Davis* court found that the burden of forcing fatherhood on Junior Davis, who suffered psychological damage resulting from his parents' divorce, was greater than the burden on Mary Sue Davis who planned to donate the embryos to a childless couple.⁹⁰ The court therefore awarded the embryos to Junior,⁹¹ who destroyed them.⁹²

Although the *Davis* court arrived at a just conclusion,⁹³ it neither specified the theory that supported its decision nor explained what procedure it used to analyze the parties' respective rights. Specifically, the *Davis* court did not provide the theoretical justification for the assumption that the right to bear and beget includes a constitu-

81. 321 U.S. 158 (1944).

82. 410 U.S. 113 (1973).

83. *Davis*, 842 S.W.2d at 601 (using *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), as a reference point for understanding procreative rights).

84. *Id.* at 603-04 (citing *Frisby v. Schultz*, 487 U.S. 474 (1988), in which the Court weighed the two parties' conflicting interests in reaching a conclusion).

85. *Id.* at 604.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 603-04.

91. *Id.* at 604.

92. Mark Curriden, *Embryo Fight Yields Few Answers: Disposal Disclosed: Embryos Are Discarded in a Tennessee Case, but Legal and Ethical Questions Remain*, *Atlanta J. & Const.*, June 14, 1993, at A1.

93. See *AZ v. BZ*, slip op. at 21 (Mass. P. Ct. Mar. 25, 1996) (no docket number) (order granting permanent injunction) (on file with the *Fordham Law Review*); Kristine E. Luongo, Comment, *The Big Chill: Davis v. Davis and the Protection of "Potential Life"?*, 29 *New Eng. L. Rev.* 1011 (1995).

tional protection for contraception and affirmative procreation for both married and unmarried or separated couples. This Note agrees with the conclusion reached in *Davis* and seeks to bolster the basis for that decision by offering a framework to analyze the relevant constitutional rights and examine how far a court can expand these rights when deciding a frozen embryo dispute.

2. *Kass v. Kass*

The *Davis* court's balancing test was rejected by a New York trial court in the case of *Kass v. Kass*.⁹⁴ In *Kass*, the couple, Maureen and Steven Kass, were married in July of 1988.⁹⁵ Unable to conceive, they underwent six unsuccessful attempts at IVF.⁹⁶ Subsequently, the couple attempted to implant a fertilized egg in a surrogate, but that too ended in failure.⁹⁷ The couple signed informed consent forms stipulating that in case of divorce, the embryos would be distributed in accordance with the directives of a divorce court.⁹⁸ Five of the original fertilized ova remained in the IVF Clinic.⁹⁹ In July of 1993, the wife instituted a divorce action.¹⁰⁰ In contrast to *Davis*, where the mother sought to have the embryos donated, Maureen Kass demanded to recover the frozen embryos to have them implanted in herself.¹⁰¹

Although acknowledging *Davis* as the sole precedent on this issue, the *Kass* court rejected *Davis*' conclusion.¹⁰² The *Kass* court found that biological life begins at fertilization¹⁰³ and compared terminating frozen embryos with abortion,¹⁰⁴ where a husband can neither force

94. *Kass v. Kass*, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995) (no docket number). Obviously, the New York court was not bound by *Davis*, which was decided in Tennessee.

95. *Id.* at *1.

96. *Id.*

97. *Id.*

98. *Id.* at *3.

99. *Id.* at *1.

100. *Id.* at *1.

101. *Id.*

102. *Id.* at *1, *4. Like *Davis*, however, *Kass* determined that the constitutional guarantee of the right to privacy encompasses the right to procreate by referring to Supreme Court cases which have nothing to do with any affirmative procreative rights. *Id.* at *2 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

103. *Id.* at *3. Beginning with an analysis of the preembryos' status, the judge concluded that while they were not persons, the preembryos were certainly not property within the ordinary sense of the term. *Id.* at *2. Because preembryos possess a unique status as "potential" life, the court refused to equate them with chattel such as "washing machines and jewelry." *Id.*

104. See *infra* part III.B.1 (suggesting why it is a crucial and determining factor to the outcome of a frozen embryo conflict whether the court compares the termination of frozen embryos to abortion or contraception).

conception, nor compel or prevent an abortion.¹⁰⁵ Because, according to the court, the present dispute was analogous to an abortion dispute, it held that until the preembryos reach the stage of development that triggers the state's interest in potential life, the preembryos' fate rests with the mother, to the exclusion of all others.¹⁰⁶ Refusing to recognize any significant difference between IVF and coital reproduction, the court held that "it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish."¹⁰⁷ Because there is no difference between *in vivo*¹⁰⁸ and *in vitro* fertilization, the "husband's rights and control

105. See *Planned Parenthood v. Casey*, 505 U.S. 833, 896 (1992) (plurality opinion); *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976).

106. *Kass*, 1995 WL 110368, at *2. The court reasoned that where a husband realizes that there might be a delay in implanting the embryos, his initial consent to the implantation should not be abolished *nunc pro tunc* merely because of a change in circumstances which could and should have been anticipated. *Id.* at *3; see also *Casey*, 505 U.S. at 896-97 (striking down spousal notification as a condition to an abortion).

107. *Kass*, 1995 WL 110368, at *3.

108. *In vivo* means "[w]ithin a living organism." Webster's II New Riverside University Dictionary 642 (1st ed. 1994) [hereinafter Webster's].

over the procreative process ends with ejaculation.”¹⁰⁹ The judge ruled, therefore, in favor of Maureen Kass.¹¹⁰

Although the *Kass* and *Davis* courts reached different conclusions, one similarity between the two courts' approach to a frozen embryo disposition dispute is that neither court fully analyzed the constitutional issues involved with the right to bear and beget. In order to provide such an analysis, a court must first determine a method for interpreting the constitutional provisions underlying the rights involved, specifically in an IVF context.

II. INTERPRETING RIGHTS

A primary point of contention among scholars and judges is how to interpret the Constitution faithfully when its meaning is unclear. Two

109. *Kass*, 1995 WL 110368, at *2. In contrast to *Kass*, a Massachusetts Probate and Family Court judge addressing a frozen embryo dispute held that because men and women are equal gamete providers, they should be given equal authority in decisions regarding frozen embryo disposition. *AZ v. BZ*, slip op. at 22 (Mass. P. Ct. Mar. 25, 1996) (no docket number) (order granting permanent injunction) (on file with the *Fordham Law Review*). Like the *Kass* and *Davis* courts, however, the Massachusetts court did not clearly explain its method of analyzing the reproductive autonomy rights of the two parties in a frozen embryo dispute. In *AZ v. BZ*, a couple who began treatment at an IVF clinic signed seven different consent forms stipulating that, should the couple separate, the embryos would be returned to the mother for implantation. *Id.* at 7-11. As a result of an embryo transfer, the mother became pregnant and eventually gave birth to twin daughters. *Id.* at 14. Two vials of embryos remained frozen at the clinic. *Id.* Later, without informing her husband, the wife went to the clinic to have one of the two vials thawed and implanted in her body in an attempt to become pregnant again. *Id.* at 14-15. She did not, however, become pregnant from this procedure. *Id.* The couple separated and the husband filed for divorce, seeking an order enjoining his wife from using the remaining vial of frozen embryos. *Id.* at 15, 28.

The Massachusetts court first analyzed the legal status of preembryos and held that it would not consider the embryos persons or property, but would instead accord them a special status. *Id.* at 17-19. As the court explained, this “interim category provides the gamete-providers the primary decision-making authority regarding the preembryo [and] recognizes the dual characteristics of the preembryos and will therefore be applied to the preembryos at issue.” *Id.* at 19. In reaching its decision, the court refused to enforce the previous disposition agreement between the couple that stated that the wife would receive the frozen embryos in the event the couple separated. The court reasoned that although the woman has to endure significantly more intrusive and physically trying procedures during the IVF process, the couple should nonetheless be given equal authority in preembryo disposition decisions because the man and woman are equal gamete providers. *Id.* at 22. Although agreements are usually enforceable, the court held that because of the change in circumstances between the parties, “[w]ere the wife to use the preembryos, [the husband] would face unwanted parenthood encompassing all of the financial, psychological, and legal responsibilities and consequences.” *Id.* at 27. The court held that “[t]his would not only be unfair to the parent but also unfair to a child who would enter the world unwanted by one of his or her parents.” *Id.* at 28. The court therefore refused to enforce the agreement and applied a balancing test instead, weighing the husband's interest in avoiding procreation against the wife's interest in procreating. *Id.* at 26-28.

110. *Kass*, 1995 WL 110368, at *4.

principal theories of constitutional interpretation¹¹¹ are originalism¹¹² and fundamental rights.¹¹³ This part examines the work of Robert Bork and Ronald Dworkin, who, respectively, exemplify these two approaches. Then, this part presents these two theories of constitutional interpretation and applies them to understand the right to bear and beget. The remainder of this part explains how some of the Supreme Court Justices identify the level of generality at which to define a given right. Part III concludes by arguing that the fundamental rights theory is a more faithful method of interpreting the Constitution. In the context of a frozen embryo conflict in particular, interpreting rights using an abstract and broad framework results in guarantees of liberties for both gamete providers. Only when rights are construed in this manner can each individual be guaranteed basic freedoms and liberties.

A. *The Debate over Originalism Versus Fundamental Rights*

Ever since Chief Justice Marshall's famous dictum in *McCulloch v. Maryland*,¹¹⁴ "we must never forget that it is a *constitution* we are expounding,"¹¹⁵ jurists and scholars have argued over how to interpret the constitutional faithfully. Two theories predominate¹¹⁶—original-

111. See *infra* notes 116-18 and accompanying text.

112. See Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977); Hugo LaFayette Black, *A Constitutional Faith* (1969); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226 (1988); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

113. See Alexander Bickel, *The Least Dangerous Branch* (1962); Laurence H. Tribe, *Constitutional Choices* (1985); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L.J. 433 (1986); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. Chi. L. Rev. 381 (1992) [hereinafter Dworkin, *Unenumerated Rights*]; James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. 211 (1993).

114. 17 U.S. (4 Wheat) 316 (1819).

115. *Id.* at 407.

116. See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St. L.J. 1085 (1989); James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1 (1995) [hereinafter Fleming, *Securing Autonomy*]; Willard C. Shih, Note, *Assisted Suicide, The Due Process Clause and "Fidelity in Translation"*, 63 Fordham L. Rev. 1245 (1995); see also David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia over Unenumerated Fundamental Rights*, 61 Fordham L. Rev. 895, 897 (1993) (discussing originalism and fundamental rights as two major theories of constitutional interpretation). Anders points out that many Supreme Court Justices have adopted one of these two theories in interpreting the Due Process Clause of the Fourteenth Amendment. *Id.* Clear originalists include: Justice White, see *Bowers v. Hardwick*, 478 U.S. 186 (1986) (White, J., dissenting); Justice Scalia, see Scalia, *supra* note 112; and Chief Justice Rehnquist, see William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976). Fundamental rights theorists include: Justices Blackmun, see *Planned Parenthood v. Casey*, 505 U.S. 833, 922 (1992) (Blackmun, J., concurring in part, dissenting in part); and Justice Stevens, see *Casey*, 505 U.S. at 911 (Stevens, J., concurring in part, dissenting in part). Anders, *supra*, at 897 n.15.

ism¹¹⁷ and fundamental rights.¹¹⁸ This subpart outlines the two theories and applies both of them in an attempt to understand the reproductive autonomy rights of both parties in a frozen embryo conflict.

1. Originalism

Scholars who follow the originalist school believe that the Constitution protects only those rights specifically enumerated in the Constitution's text or those rights that the Framers intended to protect.¹¹⁹ Originalists believe that judges must derive neutral principles and values in their decision making, and that this can only be accomplished by relying on the Constitution's text as originally understood.¹²⁰ According to originalists, when judges create rights not specifically enumerated in the text, they exceed their legitimate authority.¹²¹ Recognized supporters of this theory include somewhat moderate originalists like Supreme Court Justice Antonin Scalia¹²² and more extreme originalists like former Judge Robert Bork.¹²³ Originalist judges evaluate historical evidence to ascertain how the ratifiers would have resolved the present issue.¹²⁴ Judge Bork indicates that originalism's application involves the application of three axioms.¹²⁵ First, a court must accept the ratifiers' definition of the constitutional right.¹²⁶ Second, the court must investigate what the public, at the time the document was adopted, interpreted the clause to mean.¹²⁷ Third, a court must apply this principle in all cases before it, regardless of the judge's individual sympathies.¹²⁸ According to Judge Bork, when judges do not follow an original understanding approach to the Constitution, they revise the Constitution and wrongly usurp power that belongs to the legislature.¹²⁹ Ultimately, originalists argue that

117. See *supra* note 112.

118. See *supra* note 113; see also Dworkin, *Life's Dominion*, *supra* note 28, at 122-23, 158-59 (explaining this approach to constitutional interpretation).

119. See Bork, *supra* note 112, at 144-46.

120. *Id.* at 146.

121. *Id.* at 147; see Rehnquist, *supra* note 116, at 704-05.

122. See Scalia, *supra* note 112, at 862 (referring to himself as a "faint-hearted" originalist).

123. See Bork, *supra* note 112.

124. See *id.* at 143-46.

125. *Id.* at 146-53; Shih, *supra* note 116, at 1264.

126. See Bork, *supra* note 112, at 146-47; see Shih, *supra* note 116, at 1264.

127. See Bork, *supra* note 112, at 144; see Shih, *supra* note 116, at 1264.

128. See Bork, *supra* note 112, at 151; see Shih, *supra* note 116, at 1264.

129. See Bork, *supra* note 112, at 178. For example, Judge Bork criticizes the Court's creation of substantive due process in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)—the foundation cases for privacy rights. See *infra* notes 230-44 and accompanying text (discussing the line of Court cases that developed the modern right of privacy). He fears that substantive due process is "wholly without limits, as well as without legitimacy" and provides "a warrant for later Courts to legislate at will" with no limiting principle. Bork, *supra* note 112, at 49. Judge Bork castigates the Court for its right to privacy decisions, and

the Court can only preserve the liberties of the people by adhering to the original understanding of the Constitution.¹³⁰

2. Fundamental Rights

The predominant method of constitutional interpretation competing with originalism is the fundamental rights approach.¹³¹ The central premise of this theory is that certain rights are so fundamental to liberty and equality that they must confine the legislative process.¹³² A well-known advocate of this approach is Professor Ronald Dworkin. Professor Dworkin argues that the Constitution is one of abstract moral principles rather than a Constitution of detailed rules.¹³³ According to Professor Dworkin, the ratifier's intent was to use abstract terms to protect general principles, rather than specific rights.¹³⁴ Professor Dworkin contends that a democratic government is required to treat individual citizens as equals and respect their fundamental liberties.¹³⁵ A constitution of principle enforced by judges is a precondition of legitimate democracy.¹³⁶ In such a democracy, "people have the moral right—and the moral responsibility—to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions."¹³⁷ Professor Dworkin finds that the Fourteenth Amendment, which incorporates the First Amendment, guarantees the right to reproductive autonomy,¹³⁸ a right fundamental to the concept of ordered liberty and thus protected by both the Due Process and the Equal Protection Clauses.¹³⁹

Again, relying on abstract principles in the Constitution, Professor Mark Tushnet states:

specifically argues that "the Court had no business undertaking to give a substantive answer to the claim[s]" in *Griswold* and *Roe. Id.* at 225 (referring to *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973)); see also Bork, *supra* note 112, at 95 (referring to the *Griswold* decision as the construction of a "Constitutional Time Bomb").

130. Bork, *supra* note 112, at 159-60.

131. See Fleming, *Securing Autonomy*, *supra* note 116, at 60; Anders, *supra* note 116, at 899; Shih, *supra* note 116, at 1263.

132. For various commentators advocating this approach, see *supra* note 113.

133. Dworkin, *Life's Dominion*, *supra* note 28, at 122.

134. See Dworkin, *Unenumerated Rights*, *supra* note 113, at 386.

135. Dworkin, *Life's Dominion*, *supra* note 28, at 123.

136. *Id.*

137. *Id.* at 166.

138. *Id.* at 160.

139. *Id.* at 166 (referring to U.S. Const. amend. XIV, § 1). For other advocates of a fundamental rights approach to procreative rights, see Laurence H. Tribe, *Abortion: The Clash of Absolutes* (1990) [hereinafter Tribe, *Abortion*]; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *Stan. L. Rev.* 261 (1992); and Fleming, *Securing Autonomy*, *supra* note 116.

[w]e can gain an interpretive understanding of the past by working from commonalities in the use of large abstractions to reach the unfamiliar particulars of what those abstractions really meant in the past. The commonalities are what make the past *our* past; they are the links between two segments of a single community that extends over time.¹⁴⁰

The thread that ties fundamental rights theorists is the understanding that in order to make the best sense of what the ratifiers meant, one must look at the language of the text and draw out abstract principles, rather than dated commands and prohibitions.¹⁴¹

B. *From Theory to Practice: Interpreting the Level of Generality*

When scholars argue over the merits of fundamental rights or originalism as the proper approach to constitutional interpretation, the debate centers on the intricacies of constitutional doctrine from a theoretical perspective. Perhaps because it is too restrictive to have to choose to belong to one "camp," the Supreme Court has not explicitly addressed constitutional interpretation issues in this theoretical manner. Rather, some Justices have addressed the debate in a different form that does not require a bright-line indication of rights. These Justices have phrased the quandary of constitutional interpretation as a "level of generality" dilemma.¹⁴² At issue is the level of generality that a court should frame a controverted right.¹⁴³ Justice Scalia, often included among the originalists,¹⁴⁴ strongly supports a narrow framing of rights and claims that controverted rights should be analyzed at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."¹⁴⁵ Justice Brennan takes what is in essence a fundamental rights approach and argues that rights should be determined broadly; that is, a court

140. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 804 (1983). Professor Tushnet points out that fundamental rights (or as he calls it interpretivism) "goes wrong in thinking that the commonalities are greater than they really are, but we would go equally wrong if we denied that they exist." *Id.*

141. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (Brennan, J., dissenting); Dworkin, *Arduous Virtue*, *supra* note 1, at 1253.

142. *Michael H.*, 491 U.S. at 127-28 n.6.

143. Professors Tribe and Dorf explain that "[a]lthough we have described the enterprise of designating fundamental rights as a question of how abstractly to portray rights, we do not posit a single dimension along which abstraction must be measured. A right may be broad along one dimension, while narrow along another." Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1067 (1990).

144. See *supra* note 116; Anthony C. Cicia, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 Fordham L. Rev. 2241, 2250 (1996).

145. *Michael H.*, 491 U.S. at 127-28 n.6.

should recognize a right that is not fairly distinguishable from a previously decided one in the same way as the first was recognized.¹⁴⁶

The dilemma of how the Court should determine a value-neutral method to find the level of generality was the central issue in the 1989 Supreme Court case of *Michael H. v. Gerald D.*¹⁴⁷ In *Michael H.*, the plurality declined to recognize under the Due Process Clause a biological father's fundamental right to a relationship with his child when the child's mother was married to another man at the time the child was conceived. Justice Scalia joined Chief Justice Rehnquist and argued that the Fourteenth Amendment did not protect relationships that have not been historically protected.¹⁴⁸ The plurality contended that

[i]n an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁴⁹

Justice Scalia argued that the judiciary comes nearest to illegitimacy when it deals with "judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."¹⁵⁰ The plurality, applying such a standard, was willing to recognize liberty interests only in the traditional unitary family.¹⁵¹

In *Michael H.*, Justices Scalia and Brennan engaged in a dialogue on the appropriate level of generality at which to interpret liberty within the meaning of the Due Process Clause, specifically in the context of tradition.¹⁵² Justice Scalia suggested that he had discovered a value-neutral method of selecting the appropriate level of generality—ex-

146. *Id.* at 136-157 (Brennan, J., dissenting). Similarly, Justice Harlan has argued that constitutional rights should not be viewed as "a series of isolated points," protecting specific narrow liberties, but rather as "a rational continuum which, broadly speaking, includes [substantial] freedom[s]." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

147. 491 U.S. 110 (1989) (plurality opinion).

148. *Id.* at 122-30.

149. *Id.* at 122 (citing Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

150. *Id.* (citing *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

151. Justice Scalia found that liberty interests rest upon "historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Id.* at 123. His rationale in reaching this conclusion was that "[previous] decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 124 (citing plurality opinion of Justice Powell in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

152. *Id.* at 122 n.2, 124 n.4, 127 n.6, 130; *id.* at 143 n.2, 144 n.3 (Brennan, J., dissenting).

aming “the most specific level at which a relevant tradition protecting or denying protection to the asserted right can be identified.”¹⁵³ Justice Scalia intimated that any other method is arbitrary.¹⁵⁴ Justice Brennan disagreed with Justice Scalia’s methodology, stating that even if the Court could agree on the content and significance of particular traditions, “we still would be forced to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer.”¹⁵⁵

Justice Brennan, however, did agree that traditions were relevant in prior decisions protecting basic fundamental rights.¹⁵⁶ Although recognizing that parenthood has been protected historically,¹⁵⁷ Justice Brennan, in contrast to Justice Scalia, concluded that the Court should protect a liberty interest in the broad context of a parent-child relationship.¹⁵⁸ Justice Brennan attacked Justice Scalia’s method of looking for the most specific tradition in defining a liberty interest. Rather, Justice Brennan defined the issue as whether the Court must protect a natural father’s relationship with a child whose mother is married to another man.¹⁵⁹ Had the Court always looked to tradition with the specificity that Justice Scalia required, “many a decision would have reached a different result.”¹⁶⁰

Understanding Justice Brennan’s method of interpreting rights is of vital importance for a court when it attempts to define the fundamental rights of both parties in a frozen embryo dispute. Perhaps of most importance, a court must examine the level of generality to apply to both parties’ rights in order to understand how broadly or narrowly the right to reproductive autonomy—the right applicable to IVF—should be interpreted. A court can take an approach like Justice Scalia and view IVF in a very narrow context—as a form of reproduction having no applicable tradition, or, a court can take a broader approach to IVF reproduction, viewing it as a natural extension of other forms of reproduction.

When analyzing reproductive autonomy rights, a court must interpret what Justice Brennan meant when he wrote for the Court that an

153. *Id.* at 127-28 n.6.

154. *Id.* at 127 n.6.

155. *Id.* at 138 (Brennan, J., dissenting).

156. “It is not that tradition has been irrelevant to our prior decisions. Throughout our decisionmaking . . . runs the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of ‘liberty.’” *Id.* at 139.

157. *Id.* at 141-42 (Brennan, J., dissenting).

158. *Id.* at 142-43.

159. *Id.*

160. *Id.* at 139 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), as two of the decisions that would have come out differently).

individual has the right to "bear and beget,"¹⁶¹ in order to understand how far the Court intended to expand the breadth of reproductive rights. Did the Court intend the non-marital right to bear and beget to also include a right of affirmative procreation, or was the right limited to contraception? The difficulty with privacy rights, indeed with constitutional rights generally, is gauging their scope and determining a value-neutral method to decide the exact scope of included rights. Although some courts construe autonomy rights broadly,¹⁶² this does not necessarily mean that the right to procreate is a double right containing an affirmative right to conceive as well as a right of contraception. Can courts presume the existence of a right to affirmative procreation, and possibly deny the other parent his or her fundamental right to choose contraception? Such a presumption will inevitably infringe on one party's constitutional rights, resulting in one parent being forced into parenthood against his or her will. This is especially true in the IVF context where both individuals have constitutional rights at stake. The next Part analyzes the IVF dispute in constitutional terms, suggesting that both parties have equal constitutional rights and that given this situation, a balancing test should be utilized to determine the ultimate resolution of an IVF dispute.

III. THE FROZEN EMBRYO CONFLICT

Two disparate, but valid, arguments can be made on whether the breadth of reproductive autonomy rights reaches a separated or divorced couple in a frozen embryo conflict. After analyzing these two arguments and briefly discussing the Court's right to privacy cases, this Part contends that in order for the Constitution to protect every individual's fundamental liberties, reproductive autonomy rights must be interpreted through a fundamental rights analysis, as granting fundamental rights to both the man and the woman. Hence, in a frozen embryo conflict, the woman who wishes to implant the frozen embryo and the man who wishes to terminate the embryo will both be protected by constitutional guarantees.

A. *The Better Interpretive Method*

When faced with a conflict involving modern reproductive technology, courts must find a method of interpretation that allows them to define the meaning and the parameters of the right to reproductive autonomy while still remaining faithful to the Constitution. As discussed above, there are two major theories of constitutional interpre-

161. *Eisenstadt*, 405 U.S. at 453.

162. *AZ v. BZ*, slip op. (Mass. P. Ct. Mar. 25, 1996) (no docket number) (order granting permanent injunction) (on file with the *Fordham Law Review*); *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

tation: originalism and fundamental rights.¹⁶³ Given the unique nature of the IVF conflict, this section argues that courts should utilize a fundamental rights approach when addressing frozen embryo conflicts. This Note contends that fundamental rights is a more faithful approach to constitutional interpretation, particularly in light of modern reproductive technology and the new constitutional issues that evolve from it.

Many scholars criticize Judge Bork and the originalist approach to constitutional interpretation, arguing that originalism has many critical flaws.¹⁶⁴ For example, Professor Ronald Dworkin argues that the ratifiers created a constitution of abstract principles, not a rigid, specific document.¹⁶⁵ As evidence, Professor Dworkin illustrates that the text does not use concepts that refer to legal terms of art, economics, or other social science terms.¹⁶⁶ Rather, the Constitution uses abstract, ordinary moral terms like "liberty," "freedom," "cruel," and "equal."¹⁶⁷ Therefore, even originalists must determine how to interpret these abstract terms. Similarly, Professor Daniel Farber argues:

[S]ome fact-patterns will involve situations that the framers could not directly consider. For example, the framers had no occasion to consider whether the fourth amendment applied to electronic eavesdropping, whether electrocution was cruel and unusual punishment, or whether the manufacture of computer chips is part of interstate commerce. If we seek to address these issues in terms of original intent, we will have to define our inquiry at a higher level of generality.¹⁶⁸

Moreover, Professor Farber identifies another of originalism's flaws: How do judges determine which intent to look for?¹⁶⁹ Do judges "look for the framers' philosophical theory of equality, their general views of racial discrimination, their (possibly non-existent) specific views about affirmative action, or the views they would have had about affirmative action if they had thought about it then or if they were alive today?"¹⁷⁰

163. See *supra* part II.A.

164. Professor Dworkin has referred to Judge Bork, a well known advocate of the originalist approach, as being a "constitutional radical" who "uses original intention as alchemists once used phlogiston, to hide the fact that he has no theory at all." Ronald M. Dworkin, *The Bork Nomination*, 9 *Cardozo L. Rev.* 101, 101, 112 (1987). Likewise, original intent has been called "not a formula or a theory but only a slogan pursuant to which old decisions can be replaced by new ones." Philip B. Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, 9 *Cardozo L. Rev.* 127, 128 (1987); see Shih, *supra* note 116, at 1265-67 (discussing the shortcomings of originalism).

165. Dworkin, *Life's Dominion*, *supra* note 28, at 127-29; Dworkin, *Arduous Virtue*, *supra* note 1, at 1253.

166. Dworkin, *Life's Dominion*, *supra* note 28, at 127.

167. *Id.* at 127-28.

168. Farber, *supra* note 116, at 1093.

169. *Id.* at 1104.

170. *Id.*

Another flaw in originalism is that once originalist theorists move away from an extreme or pure position, they, in essence, indoctrinate the fundamental rights approach. For example, Justice Scalia, who has referred to himself as a "faint-hearted" originalist,¹⁷¹ applies an abstract interpretation to the Eighth Amendment's mandate that "cruel and unusual punishments [shall not be] inflicted."¹⁷² A true originalist would strictly interpret "cruel" to mean what the ratifiers thought was cruel punishment.¹⁷³ In other words, a pure originalist must conclude that because public flogging was a punishment administered at the time of the ratifiers, this punishment should still be permissible today. Justice Scalia states, however, that at times, an originalist approach is "too bitter a pill" for a court to swallow.¹⁷⁴ Although historically public flogging was not considered cruel, it would be intolerable for a modern court to uphold a law that permitted such a punishment to be administered.¹⁷⁵ In essence, Justice Scalia uses a fundamental rights approach to interpret the Constitution's mandates when originalism fails to properly address the clause at issue.

Similarly, rather than being labeled "faint-hearted," Professor Michael McConnell uses the term "evolving" to describe his latent fundamental rights approach to constitutional interpretation.¹⁷⁶ Although claiming to "have a great deal of affinity for the originalist notion,"¹⁷⁷ Professor McConnell believes that "the constitutional text, historically understood, has reference to a slowly evolving, common law understanding of rights, and that the people who instituted the Constitution expected that their traditional rights and privileges would continue to evolve—not by judicial fiat, but by decentralized processes of legal and cultural change."¹⁷⁸ Strict understanding of originalist intent cannot evolve, however; only abstract principles are malleable in this way. Therefore, although theorists might label themselves as "originalists," their approach, unless they take a strict position, is in reality a distorted version of a fundamental rights approach that recognizes that the present meaning of a law is not necessarily the same as the meaning at its enactment.

The frozen embryo conflict further highlights originalism's flaws, as well as the flaws of interpreting rights narrowly. On a practical level, by interpreting rights narrowly, a court is forced to either ignore rights that must be addressed when they emerge in new technological con-

171. Scalia, *supra* note 112, at 862.

172. U.S. Const. amend. VIII.

173. Dworkin, *Arduous Virtue*, *supra* note 1, at 1253-54.

174. Scalia, *supra* note 112, at 861.

175. *Id.* at 861-62.

176. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *Fordham L. Rev.* 1269, 1292 (1997).

177. *Id.*

178. *Id.*

texts, or to apply a “faint-hearted” approach to determine the level of generality of a given right, expanding rights as the court sees fit—when a narrow approach will prove useless because of technological advances. Similarly, a prominent weakness of originalism is its inapplicability to modern technological reproductive methods such as IVF. It seems unlikely that any of the ratifiers fathomed that courts would be faced with IVF conflicts, let alone provide for non-coital procreation in the text of the Constitution.¹⁷⁹ Nonetheless, theorists like Judge Bork would hold that because the Constitution contains no original textual reference to any right of reproductive autonomy, nor is there any indication that the ratifiers ever intended to create such a right, there are no protected reproductive autonomy rights, specifically the right to affirmative procreation. In essence, originalists cannot find any constitutional protection when procreation is achieved non-coitally.

In contrast to the originalist approach, the fundamental rights approach allows for an interpretation of terms such as “equal,” “cruel,” and “liberty” by viewing these terms in the abstract. Hence, the meaning of “cruel” can adapt to the present society’s values and traditions. Instead of having to “take the top off the heads of the authors and framers—like soft-boiled eggs—to look inside for the truest account of their brain states at the moment that the texts were created,”¹⁸⁰ a fundamental rights approach recognizes that principles, rather than specific, ambiguous words, are what is important in interpreting the Constitution.

Nevertheless, fundamental rights theorists realize that some flaws do exist in their method of constitutional interpretation.¹⁸¹ Judge Bork, a critic of the fundamental rights theory, argues that “every theory not based on the original understanding . . . requires the judge to make a major moral decision.”¹⁸² He further asserts that “[t]here is no satisfactory explanation of why the judge has the authority to impose his morality upon us.”¹⁸³ The outcome of giving the judges such

179. Professor Farber points out that the framers spent much time with issues that were important to them, yet

[l]ittle thought was given to questions that today hold greater interest. . . . Similarly, the debates about the fourteenth amendment focused on the now forgotten section 2 and 3, which were of immediate concern in the context of Reconstruction but had no lasting importance. Section 1 of the amendment, [containing the Due Process Clause] which today looms larger in judicial application than any other provision of the Constitution, received only the most cursory attention.

Farber, *supra* note 116, at 1087-88.

180. Charles Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 *Harv. L. Rev.* 751, 758-59 (1987).

181. For example, Professor Dworkin states that “[c]onstitutional interpretation is not mathematics, and no one but a fool would think his own constitutional judgments beyond any conceivable challenge.” Dworkin, *Arduous Virtue*, *supra* note 1, at 1258.

182. Bork, *supra* note 112, at 251-52.

183. *Id.* at 252.

power, the argument goes, is that judges will not be bound by the necessary clauses in the Constitution, because the Constitution only mandates that judges act fairly.¹⁸⁴ Professor Dworkin answers this criticism by arguing that our democratic society has designated judges as the interpreters of the Constitution's abstract clauses.¹⁸⁵ To carry out this function, it is only proper that judges have the power to elaborate what these clauses mean.¹⁸⁶

This fundamental rights theory does not argue or aim to imply that the text of the Constitution can be callously ignored; rather, it hopes, simply, to reveal that originalism is too narrow a doctrine to allow a truly faithful interpretation of the liberties that the framers intended to bestow on the newly formed nation, specifically when courts at the threshold of the twenty-first century must deal with modern technological issues such as IVF. When courts address a frozen embryo conflict, a fundamental rights approach to reproductive autonomy rights is broad enough to recognize that timely constitutional issues arise. Thus, courts should use this method to interpret constitutional rights, recognizing the malleable fundamental rights that are involved.

B. *The Competing Interests*

When applying a method of constitutional interpretation to analyze the competing interests of the parties in a frozen embryo custody dispute, courts must analyze the right "to bear and beget."¹⁸⁷ Constitutional questions ensue from this mandate. First, can a court take for granted that the ambiguous right to bear and beget includes both the right to affirmative procreation and the right to contraception? Specifically, does an unmarried woman who desires to implant a frozen embryo have an equivalent fundamental reproductive autonomy right as a man who wishes to terminate the embryo? Second, can a court extend the guarantee of reproductive autonomy that developed from the Court's decisions in *Meyer v. Nebraska*,¹⁸⁸ *Skinner v. Oklahoma*,¹⁸⁹ *Griswold v. Connecticut*,¹⁹⁰ and *Eisenstadt v. Baird*¹⁹¹ to non-traditional procreation methods like IVF—especially when the parties are no longer married? Deciding whether both parties have liberty interests in a frozen embryo dispute will depend on how the court interprets constitutional rights and whether the right to reproductive autonomy is viewed broadly or narrowly.

184. Shih, *supra* note 116, at 1268 (citing Jeffrey Rosen, *Life's Dominion: An Exchange*, *The New Republic*, Sept. 6, 1993, at 43 (colloquy with Ronald Dworkin)).

185. Dworkin, *Unenumerated Rights*, *supra* note 113, at 383.

186. Anders, *supra* note 116, at 901.

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

188. 262 U.S. 390 (1923).

189. 316 U.S. 535 (1942).

190. 381 U.S. 479 (1965).

191. 405 U.S. 438 (1972).

In *Davis*, the woman sought a right to affirmative procreation—to implant the embryo so that a child would be born.¹⁹² The man sought contraception—to terminate the embryo.¹⁹³ If the court had interpreted the right to bear and beget very narrowly, by looking at tradition, neither party would have any rights because no tradition is applicable to IVF. If the court broadened the framework slightly, then only the man who sought contraception—by terminating the embryo—would have a fundamental right, because only contraception,¹⁹⁴ not the right of affirmative procreation for unmarried individuals,¹⁹⁵ has been recognized explicitly in prior Court decisions.¹⁹⁶ Finally, if

192. *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992), cert. denied, 507 U.S. 911 (1993).

193. *Id.* at 590. See *infra* part III.B.1 for an explanation of why terminating a frozen embryo can be viewed as contraception. If a court applies an extremely narrow interpretation of levels of generality, the court might not analogize this act to contraception, but rather classify the act as something entirely new and different.

194. Although nothing in the original text of the Constitution grants any right to contraception, Justice Scalia, arguably the Court's most outspoken originalist, explicitly states in footnote six of *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), that his analysis using the most specific level of tradition "is not inconsistent with the result in cases such as *Griswold . . . or Eisenstadt.*" *Id.* at 128 n.6 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)). By comparing his *Michael H.* analysis to the results of *Griswold* and *Eisenstadt*, Justice Scalia strongly implies that these two cases were rightly decided, and therefore that both single and married persons are guaranteed the right to contraception.

195. Professor Robertson points out:

[R]ecognition of a right of single persons to conceive children would be seen as another foray into the thickets of substantive due process. . . . Although recognition of a right to procreate should extend to any means or technique of reproduction, the right has not yet been extended in this manner, and it is not inevitable that it will be. Defining and articulating the scope of the right to procreate will set the Supreme Court adrift in the largely uncharted waters of substantive due process.

Robertson, *Procreative Liberty*, *supra* note 29, at 418-20.

196. A close examination of the privacy decisions reveals that except for *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which examines involuntary sterilization in an equal protection context, all of the Court's right to privacy cases deal with restrictions on reproduction, not with questions over affirmative procreative rights or non-coital reproduction conflicts involving only IVF rights. In *Skinner*, the first case recognizing a right of privacy in reproduction, Justice Douglas determined that marriage and procreation were among the "basic civil rights of man." *Id.* at 541. The Court's decision preserved *Skinner's* reproductive capacity until such time as he could exercise it. Although *Skinner* dealt with the ability to cause conception, it was only in the context of state action that would have resulted in permanently sterilizing an individual, not in the context of affirmative procreative rights for one parent by forcing conception on the other parent. Indeed, the Court has only recognized the right to avoid involuntary sterilization, *Skinner*, 316 U.S. at 535; the right to employ contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and the right to an abortion, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1975); *Roe v. Wade*, 410 U.S. 113 (1973). *Eisenstadt*, however, interpreted broadly, expressly extends procreative autonomy rights to an unmarried woman's right to beget—the right to conception. *Eisenstadt*, 405 U.S. at 452.

the right was viewed broadly, however, then both parties would have equal rights because reproductive autonomy rights would include both contraception and conception, regardless of the marital status of the couple and whether fertilization was achieved coitally.

The courts that have addressed IVF disputes have not justified their conclusions that an unmarried mother has fundamental procreative autonomy rights to a four to eight cell preembryo that she helped create. The remainder of this section undertakes this analysis utilizing a fundamental rights approach in establishing the competing rights of the man and the woman. This section concludes that when rights collide, as they did in *Davis*¹⁹⁷ and *Kass*,¹⁹⁸ and no previous agreement exists, the most equitable method of resolving the constitutional dispute is the one employed by the *Davis* court: balancing the interests of the parties.¹⁹⁹

1. The Man's Right to Contraception

To understand the constitutional rights of the man who seeks to terminate the embryo, a court must first determine whether the act of terminating a frozen embryo is more analogous to an act of abortion or contraception. Second, a court must determine whether the man has a reproductive autonomy right to terminate a frozen embryo. If this right does in fact exist, the court must then determine the scope of the right and decide whether to interpret it broadly or narrowly as compared to previously held rights.

The Supreme Court's decision in *Planned Parenthood v. Casey*²⁰⁰ poses the most significant threat to the man's right to destroy the frozen embryo. In *Casey*, the Court held that the spousal notification provision²⁰¹ in a Pennsylvania abortion statute was an undue burden on a woman and therefore unconstitutional.²⁰² The Court broadened the scope of protection for a woman's right to abortion by classifying abortion rights as liberty rights rather than privacy rights.²⁰³ One re-

197. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993).

198. *Kass v. Kass*, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995) (no docket number).

199. *Davis*, 842 S.W.2d at 603-04.

200. 505 U.S. 833 (1992) (plurality opinion).

201. See Stephanie S. Gold, Note, *An Equality Approach to Wrongful Birth Statutes*, 65 *Fordham L. Rev.* 1005, 1022 n.91 (1996) (pointing out that the term "spousal notification" may be a misnomer, and that the term should be "husband notification" because it is only the woman who gets pregnant, and therefore, it is the woman who is forced to notify).

202. *Casey*, 505 U.S. at 895-98.

203. *Id.* at 851 (holding that a woman's decision to choose an abortion is "central to the liberty protected by the Fourteenth Amendment"); see Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 *Am. U. L. Rev.* 77, 136-37 (explaining how *Casey* expanded women's liberty rights); Gold, *supra* note 201, at 1033-37 (discussing the principles of equality established in *Casey*).

sult of *Casey* which will most affect a frozen embryo dispute is that by striking down the spousal notification requirement, a husband no longer has any veto power nor control over his wife's abortion decision. Hence, if frozen embryo termination is deemed to be more analogous to abortion than contraception, the man would have no rights against the woman.²⁰⁴ Accordingly, the man will find it imperative for a court to analogize the destruction of a frozen embryo to contraception, in which he has a fundamental privacy right,²⁰⁵ rather than to abortion, in which the woman has greatly expanded liberty rights since *Casey*.²⁰⁶

In his attempt to establish that the destruction of a four to eight celled frozen embryo is more akin to contraception, the man would attempt to distinguish such an act from abortion.²⁰⁷ Because "the preimplantation embryo is substantially different in physiology and development from an implanted embryo and later fetus,"²⁰⁸ the man will argue that the act of destruction cannot be analogized to abortion; rather, it must be compared to contraception. Professor John Robertson, a leading expert in IVF and its related legal issues,²⁰⁹ has found that biological experts agree on three points of early embryonic development.²¹⁰ First, the earliest stages in the development of the embryo "relate more to the extra-embryonic rather than the embryonic structures and functions."²¹¹ In the preembryo stage, therefore, the four to eight cell entity is merely a feeding layer or "trophoblast,"²¹² rather

204. Although there is a fundamental distinction between abortion, where the embryo is inside the woman's body, and IVF, where the embryo is outside the woman's body, a court may very well take the position of the *Kass* court and hold that "it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish" and that therefore "an in vivo husband's rights and control over the procreative process ends with ejaculation." *Kass v. Kass*, 1995 WL 110368, at *3, *2 (N.Y. Sup. Ct. Jan. 18, 1995) (no docket number).

205. See *supra* notes 238-44 and accompanying text.

206. In light of *Casey*'s striking down Pennsylvania's spousal notification requirement, *Kass*'s rationale of analogizing the termination of a frozen embryo to abortion even further establishes a woman's rights over a man in a frozen embryo dispute and increases the man's stake in analogizing this act to contraception.

207. Contraception is a protected right for both the man and woman. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (referring to the right of contraception as one belonging to "single persons" generally). The Supreme Court has consistently held, however, that even though the right to abortion is limited, a woman has a right to terminate the pregnancy before viability. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Roe v. Wade*, 410 U.S. 113 (1973).

208. Robertson, *Embryos*, *supra* note 6, at 970.

209. This observation about Professor Robertson is stated in Carow, *supra* note 2, at 541-42.

210. Robertson, *Embryos*, *supra* note 6, at 969.

211. *Id.* (quoting American Fertility Society, *Ethical Considerations in the Use of New Reproductive Technologies*, 46 Fertility & Sterility (1986) (spec. supp.) [hereinafter American Fertility Society]).

212. See Stedman, *supra* note 38, at 1488 ("The ectodermal cell layer covering the blastocyst which erodes the uterine mucosa and through which the embryo receives nourishment from the mother.")

than an embryo.²¹³ Hence, when a preembryo is terminated, in essence all that is terminated is a feeding layer that has the potential of turning into an embryo, rather than an "early human being,"²¹⁴ which makes the act of destruction less analogous to abortion.

Second, the preembryo does not develop individuality until an embryonic axis is formed, an event which corresponds roughly to the time the embryo is implanted and initiates physiological changes in the mother.²¹⁵ Prior to this stage, the preembryo cannot be considered an individual because twinning—a process producing two individuals—or mosaicism—a process producing less than one individual—could still occur.²¹⁶ Third, before implantation, the preembryo has not yet developed the embryonic disc, axis, and primitive streak, which are all rudimentary structures of a nervous system.²¹⁷ It is only roughly in the sixth to eighth week of gestation that a spinal column and nervous system develop.²¹⁸

Similarly, Dr. Charles Gardner argues that a fertilized egg is not yet a legally protected human being.²¹⁹ Gardner states:

[t]here is no program to specify the fate of each cell. Rather, a cell's behavior is influenced at each stage by its location within the developing body pattern of the embryo. Each stage brings new information, information that will change as the body pattern changes. And each cell will respond to this new information in a somewhat random way. For example, one cell of the sixteen-cell embryo may contribute randomly to the formation of many different organs or structures of the body. . . . With this layering of chance event upon chance event the embryo gradually evolves its form.²²⁰

Gardner concludes that "[t]he fertilized egg is clearly not a prepackaged human being. There is no body plan, no blueprint, no tiny being pre-formed and waiting to unfold. . . . [T]he particular person that it might become is not yet there."²²¹

Statistically, Gardner's argument is convincing. Research has shown that "[l]eft undisturbed in a mother's uterus, a viable fetus has

213. Robertson, *Embryos*, *supra* note 6, at 969 (quoting American Fertility Society, *supra* note 211).

214. *Davis v. Davis*, 842 S.W.2d 588, 593 (Tenn. 1992) (quoting Dr. Jerome LeJeune, a French geneticist who testified at the *Davis* trial), *cert. denied*, 507 U.S. 911 (1993).

215. Robertson, *Embryos*, *supra* note 6, at 970.

216. *Id.*

217. *Id.*

218. *Id.*

219. Charles A. Gardner, *Is an Embryo a Person?*, *The Nation*, Nov. 13, 1989, at 557; *see also* Tribe, *Abortion*, *supra* note 139, at 118 (quoting Dr. Gardner to advance the argument that a fertilized egg can not yet be classified as a person).

220. Gardner, *supra* note 219, at 558.

221. *Id.*

an excellent chance of being brought to term and born alive."²²² A preembryo in a petri dish, in contrast, has only a thirteen to twenty-one percent chance of successful implantation.²²³ Of these pregnancies, only between fifty-six and seventy-five percent "result in live births."²²⁴ Thus, a preembryo has only, at best, a sixteen percent chance of resulting in a live birth. With these statistics, the four to eight cell preembryo is very distinguishable from "an early human being."²²⁵

Further, the man would bolster his claim to reproductive autonomy rights by arguing that destroying a frozen embryo is analogous to contraception. First, by freezing embryos, a couple can plan when to implant the embryo and thus have a child. Deciding when to implant a four to eight celled frozen embryo controls when pregnancy will take place and when a party will bear the responsibility of parenthood. Similarly, using contraceptives controls whether a couple's coitus will result in a pregnancy.

Second, there are many contraceptives either on the market or approved by the Food and Drug Administration ("FDA") that destroy eggs already fertilized through coitus in a similar manner as the process of destroying a frozen embryo.²²⁶ The intrauterine birth control device ("IUD") is an example of such a product. Although the egg is already fertilized when it is destroyed, Justice Blackmun classified these products as contraceptives in his dissent in *Webster v. Reproductive Health Services*.²²⁷ Justice Blackmun used the term "contraceptive devices" in referring to "the IUD and the 'morning after' pill, which may operate to prevent pregnancy only after conception."²²⁸ These devices operate in a manner similar to that in which terminating the four to eight celled frozen embryo prevents that fertilized egg from being implanted in a womb.²²⁹ Any analysis of constitutional law applied to IVF and cryopreservation, therefore, is much more applicable in a contraception framework, rather than analogizing the destruction of the preembryo to abortion. Because destroying the four to eight celled embryo is more analogous to an act of contraception

222. *Davis v. Davis*, 842 S.W.2d 588, 595 n.19 (Tenn. 1992), *cert. denied*, 507 U.S. 911 (1993) (citations omitted).

223. *Id.*

224. *Id.*

225. *Id.* at 593 (quoting Dr. Jerome LeJeune).

226. See Anita Womack, *FDA Panel Backs Contraceptive Pills for Emergency Use*, Wall. St. J., July 1, 1996, at B7C (reporting that "[a] unanimous Food and Drug Administration panel declared that contraceptive pills for emergency use, known as morning-after pills, are safe and effective in reducing unwanted pregnancies").

227. 492 U.S. 490, 539 n.1 (1989) (Blackmun, J., dissenting).

228. *Id.*

229. See Brenda L. Henderson, Note, *Achieving Consistent Disposition of Frozen Embryos in Marital Dissolution Under Florida Law*, 17 Nova L. Rev. 549, 570 (1992) (pointing out that the IUD is a "form of contraception [that] destroys the fertilized ovum by preventing successful implantation in the uterus").

than abortion, the man would argue that a court must conclude that he has a right to contraception and allow him to terminate the frozen embryo.

2. The Woman's Right to Conception

To understand the breadth of the woman's reproductive rights in a frozen embryo conflict, it is first necessary to examine Supreme Court jurisprudence to understand how the Court has developed the right of privacy, extending it from a parent's right to choose an education for their children to an individual's right to choose contraception and abortion. Only after examining how the Supreme Court has developed the right to privacy can a court attempt to define the breadth of reproductive rights and whether IVF is part of the natural progression of the right to privacy.

The Supreme Court decision which established the foundation for the contemporary right to privacy²³⁰ was *Meyer v. Nebraska*,²³¹ in which the Court struck down a state law that prohibited the instruction of foreign languages to young children. Recognizing that the government could not interfere with certain private decisions of parents, the Court held that "the individual has certain fundamental rights which must be respected,"²³² among them, the rights to "marry, establish a home and bring up children."²³³ The Supreme Court first recognized the contemporary concept of a constitutionally protected right of reproductive privacy, however, in 1942, in the landmark privacy case of *Skinner v. Oklahoma*.²³⁴ In *Skinner*, the Court invali-

230. Justice Louis Brandeis laid the foundation for the right to privacy when he recognized a right of protection of one's private life from government intrusion or "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). With such a basis, Justice Harlan, in *Poe v. Ullman*, 367 U.S. 497 (1961), was the first Justice to expressly argue for a constitutional right to privacy. *Id.* at 522-55 (Harlan, J., dissenting). In *Poe*, the plaintiffs challenged Connecticut statutes prohibiting the use of contraceptive devices and the giving of medical advice on the use of such devices. The majority held that there was no justiciable controversy because state officials apparently had no intent to enforce the statutes. *Id.* at 501-09. In his dissent, Justice Harlan argued that the application of the statute to married persons would violate the Due Process Clause because the regulation was an "intolerable and unjustifiable invasion of privacy," *id.* at 539, by intruding upon "the most intimate details of the marital relation." *Id.* at 548. Commentators have cited Justice Harlan's dissent in *Poe* for the proposition that it created the right to privacy. See Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. Sch. L. Rev. 33, 35 (1991); Gerald Gunther, *Another View of Justice Harlan—A Comment on Fried and Ackerman*, 36 N.Y.L. Sch. L. Rev. 67, 68 (1991).

231. 262 U.S. 390 (1923).

232. *Id.* at 401.

233. *Id.* at 399.

234. 316 U.S. 535 (1942). While in form an equal protection case, the Supreme Court's opinion in *Skinner* carried forceful due process implications. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, § 18.27, at 300 (2d ed. 1992).

dated under the Equal Protection Clause an Oklahoma statute requiring sterilization for persons convicted three times of felonies that were of moral turpitude.²³⁵ In invalidating the statute, Justice Douglas, writing for the majority of the Court, stated that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”²³⁶ Although *Skinner* did not mention a right to privacy that relates to sexual matters, the decision established that marriage and procreation have special constitutional significance.²³⁷

In 1965, building upon these established precedents, the Court in *Griswold v. Connecticut*²³⁸ held that a Connecticut law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy.²³⁹ Justice Douglas, writing for the majority, condemned the state regulation as invading “the area of protected freedoms,” which included a “zone of privacy” created by the “penumbras” and “emanations” of several guarantees in the Bill of Rights.²⁴⁰ These guarantees established what is today the basis for a “right to privacy.”

In *Eisenstadt v. Baird*,²⁴¹ the Court further developed the breadth of the right to privacy. There, the Court expanded the right to contraception found to exist in marital relations to include unmarried couples as well. Justice Brennan, writing for the majority, relied on a person’s constitutionally protected privacy right by invalidating a state statute prohibiting distribution of birth control to unmarried adults.²⁴² Interpreting reproductive rights broadly, Justice Brennan expanded individuals’ reproductive liberties by stating “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to

235. *Skinner*, 316 U.S. at 541. Under the statute, persons convicted of “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses” did not have to undergo sterilization. *Id.* at 537.

236. *Id.* at 541.

237. Rotunda & Nowak, *supra* note 234, § 18.27, at 300.

238. 381 U.S. 479 (1965).

239. *Id.* at 485-86. The Connecticut statute violated the established values of privacy in three ways: (1) it regulated a private marital relationship without a legitimate reason; (2) it gave the government the right to inquire into private marital relationships; and (3) it often required husbands and wives prosecuted under these statutes to testify to the private details of their marriage. Rotunda & Nowak, *supra* note 234, § 18.27, at 303.

240. *Griswold*, 381 U.S. at 484-85. Professor Charles Black, explaining the rationale of *Griswold*, states:

If our constitutional law could permit [a criminal ban on the use of contraceptives], then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous in itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble, in method and doctrine, to deal with a very great amount of equally outrageous material.

Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 Wash. L. Rev. 3, 32 (1970).

241. 405 U.S. 438 (1972).

242. *Id.* at 453.

be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁴³ The Court concluded, therefore, that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."²⁴⁴

In light of the development of the right to privacy, the woman would argue that rather than interpreting the right to privacy cases on an individual basis—viewing each case narrowly according to its specific fact patterns—a court must view the line of cases in its entirety. This would allow a court addressing a frozen embryo dispute to interpret accurately the Supreme Court's intention and to determine properly the breadth of the right to privacy. *Meyer*²⁴⁵ and *Pierce*²⁴⁶ are privacy cases that deal with the right to choose an education for a child. From there, the Court in *Griswold*²⁴⁷ took a quantum leap and extended the right to privacy in choosing an education to include the right of married couples to use contraceptives. Subsequently, in *Eisenstadt*, the Court further broadened this right to encompass the right of unmarried individuals to "bear and beget."²⁴⁸ Finally, the Court expanded privacy rights to cover a woman's autonomy right in choosing to have an abortion.²⁴⁹ Like the man who has a right to contraception in this fundamental rights context,²⁵⁰ a court should likewise broadly interpret this progression with respect to the woman, interpreting literally the right to bear and beget: the right to bear—"give birth to"²⁵¹—and beget—"produce"²⁵²—children. Indeed, in the context of abortion, Professor Dworkin specifically refers to the right to affirmative procreation, stating that "integrity demands general recognition of the principle of procreative autonomy, and therefore of the right of women to decide for themselves not only whether to conceive but whether to bear a child."²⁵³

In sum, the woman will argue that under a fundamental rights approach, a court would view *Eisenstadt* and the Court's other right to privacy cases as establishing an expansive right to procreate.²⁵⁴ A

243. *Id.*

244. *Id.*

245. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

246. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

247. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

249. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

250. *See supra* part III.B.1

251. Webster's, *supra* note 108, at 160.

252. *Id.* at 163.

253. Dworkin, *Life's Dominion*, *supra* note 28, at 159.

254. Doctrinally, the woman will argue that for the Constitution to be an effective tool in protecting individual liberties, it is essential for judges to interpret fundamental rights cases broadly, applying a fundamental rights interpretation of the Constitution, rather than a strict originalist approach.

recognition of this right would protect the woman's interest in implanting the embryo. The end result is that, in a fundamental rights context, both the man and the woman can establish competing constitutional rights to the frozen embryos. Given these competing rights, a court is now forced to decide which competing right should prevail. A court can establish a bright-line test and totally ignore one of the gamete provider's rights; alternatively, a court can apply a balancing test and weigh different factors in determining which parent should prevail. This was the quandary facing the *Kass*²⁵⁵ and *Davis*²⁵⁶ courts.

C. *Applying a Balancing Test*

Interpreting constitutional rights broadly leads to the conclusion that both parties in a frozen embryo dispute have equal reproductive autonomy rights. Rather than applying a strict bright-line test that will at times deprive one of the gamete providers from his or her constitutional right, courts should apply a balancing test similar to the *Davis* court's.²⁵⁷ This approach recognizes that a grave injustice will occur if a party either is denied his or her last chance to achieve parenthood or is forced into parenthood. A primary factor in the balancing test should be whether the party wishing to implant has other reasonable means of achieving parenthood: If that party does have other means, then the party seeking to terminate the frozen embryos should prevail. If, however, the party seeking to implant has no other reasonable means of becoming a parent and wishes to raise the future child, rather than put the child up for adoption, then that party should be permitted to implant the frozen embryo.

CONCLUSION

The highly advanced technology of our current era presents courts with novel problems, such as how to interpret what the rights of parties are in a frozen embryo conflict. It is therefore essential that courts apply a fundamental rights approach to reproductive autonomy rights, and broadly recognize the Constitution as a constitution of principle when interpreting these rights—specifically the right to conception or affirmative procreation. Such an approach is necessary in light of the fact that procreation is achieved today by so many different methods, in contrast to the eighteenth century. A mother should not be denied the right to procreate merely because she lacks marital

255. *Kass v. Kass*, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995) (no docket number).

256. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), cert. denied, 507 U.S. 911 (1993).

257. *Id.* at 604. *Davis* cited *Frisby v. Schultz*, 487 U.S. 474 (1988), in which the Court balanced the competing interests of a city in protecting an abortion doctor, and the people who picketed in front of the doctor's home. *Davis*, 842 S.W.2d at 603 n.29. *Frisby* implies that when competing rights are involved, a court must balance the competing interests in order to equitably resolve the conflict.

status, or because she has difficulty in conceiving and is thus forced to use difficult, expensive, and time-consuming methods for achieving parenthood. Similarly, under certain circumstances, a man should not be forced into parenthood. An analysis of reproductive liberty and reproductive technology forces courts to determine the breadth of the right to bear and beget.

For the Constitution to be a constitution of principle, a forward looking document, it must be interpreted broadly; one must extract principles, rather than rules. Only when liberties are interpreted in such a manner can the Constitution be a powerful and effective document that protects an individual's rights and liberties in today's technologically advanced society with the same force that it protected the liberties endangered during the ratifiers' generation.

