



THE CONSTITUTION AND THE RIGHTS NOT TO
PROCREATE

I. Glenn Cohen

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Does the Federal Constitution protect a right not to procreate, and what does that mean? Modern reproductive technology has made this question both more salient and more problematic. For example, a number of courts and commentators have assumed the existence of a federal constitutional right not to procreate and relied on it to resolve disputes over stored frozen preembryos that couples have fertilized in the course of in vitro fertilization (IVF).

In this Article, I challenge that assumption. I argue that these authorities err by relying on a monolithic conception of the right not to procreate. I instead contend that the right is best conceived as a bundle of rights containing three possible sticks: the right not to be a genetic parent, the right not to be a legal parent, and the right not to be a gestational parent. Using this framework, I show that while the Supreme Court's jurisprudence unquestionably protects a right not to be a gestational parent as a fundamental right, it does not compel recognizing a right not to be a genetic parent, when genetic parenthood is unbundled from the obligations of legal and gestational parenthood. I also examine three other challenges to the Court's and commentators' constitutional claim. First, I suggest that even if there is a fundamental right not to be a genetic parent, infringement thereof might survive constitutional scrutiny under the appropriate standard of review. Second, I argue that there is no state action in preembryo disputes and others like them, such that the Constitution is not implicated at all. And finally, I argue that the asserted constitutional right not to be a genetic parent may be subject to advance waiver, as are many other constitutional rights.

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INTRODUCTION

When do we have a legal right *not* to procreate, and what does that mean? Modern reproductive technologies have increasingly problematized this issue. Legal analysis has, I will argue, not kept pace. Rather, reflecting the fact patterns that traditionally resulted from our natural biology, it has tended to collapse the rights not to be a genetic, gestational, or legal parent into one monolithic right not to procreate. But each of those rights is conceptually distinct, and unbundling them significantly alters the analysis.

Consider, for example, the following fact pattern:

A husband and wife undergo in vitro fertilization (IVF), mixing his sperm with her eggs in culture dishes and allowing those that have been fertilized to

develop into 2-8 cell organisms called “preembryos.”¹ They manage to fertilize six preembryos, two of which are used for implantation in the woman, while the other four are cryopreserved and stored in canisters frozen with liquid nitrogen for future use. Neither implanted preembryo leads to a successful pregnancy. The parties divorce, and reach an impasse as to the disposition of the remaining preembryos. Can the wife obtain the cryopreserved preembryos and use them for implantation, producing a child against her husband’s contemporaneous objection? Does the answer turn on whether the husband and wife executed a prior agreement on the issue?

A number of state Supreme Courts have confronted cases like these, called preembryo disposition disputes, and none of these courts have allowed the preembryos to be used for implantation even when there was an agreement so providing.² Some of these courts have suggested that the outcome of these disputes depends on a “right not to procreate” or a “right to avoid procreation” or a “right to procreational autonomy,” and many commentators agree.³ Both

1. *E.g.*, *In re Marriage of Witten*, 672 N.W.2d 768, 772 (Iowa 2003). For more details on the process of cryopreservation including ovarian hyperstimulation, harvesting, fertilization, and implantation, see Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 59-63 (1999).

2. Two courts found the particular agreements at issue flawed but indicated, in dicta, that even if faced with a completely procedurally valid agreement they would refuse to enforce it. *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001). A third court assumed *arguendo* that participation in IVF constituted an implied agreement to become a parent, but nonetheless held that despite such an agreement neither party could be made a parent against their contemporaneous objection. *In re Marriage of Witten*, 672 N.W.2d at 780. One court found that in the absence of an agreement neither party could be made a parent against his or her contemporaneous objection, but suggested, in dicta, that a disposition agreement mandating implantation would be enforceable. *Davis v. Davis*, 842 S.W.2d 588, 597-98 (Tenn. 1992). Finally, one court found such agreements enforceable, but the agreement in question mandated preembryo destruction. *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998). Florida has by legislation made these contracts enforceable, and provides that in the absence of “a written agreement, decisionmaking authority regarding the disposition of preembryos shall reside jointly with the commissioning couple.” FLA. STAT. ANN. § 742.17 (West 2007).

A number of non-U.S. courts have also weighed in, including the European Court of Human Rights in *Evans v. United Kingdom*, Application No. 6339/05 Eur. Ct. H.R. (2007) (holding that, post-separation, a man could demand the destruction of preembryos he had fertilized, notwithstanding the fact that they represented the woman’s only chance of having a genetic child due to the removal of her ovaries), and the Israeli Supreme Court, CFH 2401/95 Nahmani v. Nahmani [1996] IsrSC 50(4) 661 (reaching the opposite conclusion in a similar case). *See also* Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 97-100 (2006) (discussing the Nahmani case). For further discussion of the laws of various European countries, see *Evans*, ¶¶ 39-42.

3. *E.g.*, Joseph Russell Falasco, *Frozen Embryos and Gamete Providers’ Rights: A Suggested Model For Embryo Disposition*, 45 JURIMETRICS 273, 284 (2005); Russell Korobkin, *Autonomy and Informed Consent in Nontherapeutic Biomedical Research*, 54 UCLA L. REV. 605, 626 (2007); Sara K. Alexander, Note, *Who Is Georgia’s Mother? Gestational Surrogacy: A Formulation for Georgia’s Legislature*, 38 GA. L. REV. 395, 420-

rely on Supreme Court cases relating to access to contraceptives and abortion to claim that this is a fundamental right protected by the Federal Constitution.

In this Article, I challenge this claim, and examine four separate strategies for attacking it. Each of these strategies produces a different understanding of what aspects of the rights not to procreate are constitutionally compelled.

Part I, a background section, briefly introduces the unbundling framework I will employ in this Article, which suggests that it is an error to rely on a monolithic conception of the right not to procreate. I instead argue that we should think of the right as containing three *possible* sticks: the right not to be a genetic parent, the right not to be a legal parent, and the right not to be a gestational parent (because at present only women can carry a fetus in the uterus, this last right is limited to women). This Part also specifies the scope of the right I am most interested in, what I call the “naked” right not to be a genetic parent (that is, unbundled from other types of parenthood). Finally, it introduces two sets of test cases to be used.

In Part II, I discuss the first strategy, which uses the unbundling to demonstrate that while the Fourteenth Amendment’s Due Process Clause and the Supreme Court jurisprudence interpreting it unquestionably protect a fundamental right not to be a *gestational* parent, they do not compel recognizing a fundamental right not to be a *genetic* parent. Refusing to recognize the right yields a plausible reading of the contraception cases and the most plausible reading of the abortion cases, although we cannot make the stronger claim that recognizing the right is incompatible with this jurisprudence.

The second strategy, which I discuss in Part III, assumes that the right not to be a genetic parent is a constitutionally protected fundamental right, but suggests that the alleged infringement can survive under the appropriate standard of review, strict scrutiny or perhaps undue burden analysis.

The third strategy, discussed in Part IV, suggests that there is no state action in these cases, and therefore the Constitution does not apply to these disputes *at all*. I first examine this strategy as to cases of prior consent by contract, and then move on to cases where there is no consent at all.

Finally, in Part V, I examine the advance waiver strategy, which does not dispute that the Constitution applies and that there exists a fundamental right not to be a genetic parent, but instead objects to the further claim that it is not waivable in advance. This strategy is a narrower one, which would lead to a conclusion that the Constitution does not compel an outcome only in cases involving prior consent to genetic parenthood by contract (and potentially some weaker forms of consent as well).

If one or more of these strategies succeeds, I will have shown that the Federal Constitution does not compel an answer to the preembryo disposition

21 (2003); Kimberly Berg, Note, *Special Respect: For Embryos and Progenitors*, 74 GEO. WASH. L. REV. 506, 508 (2006).

agreement disputes or other disputes involving the right not to be a genetic parent. In this Article, I do not seek to provide an answer to what the best approach to these kinds of cases are, which is a matter I explore in other work.⁴ But, at least as to U.S. jurisdictions under the current constitutional order, this Article establishes the logically prior claim that the states have the legal discretion to select the approach they favor.

While my argument style is largely analytic, I do not want to mask the fact that these disputes are as emotional and personal as any the law must confront. For many these disputes carry still deeper questions such as what is the proper attitude to take to embryonic life. But unlike the judges in Rome who could throw their hands up and declare a particular dispute *non-liquet*, or without law to apply,⁵ our legal system does not permit us to escape making a decision about how these disputes should be resolved. Whatever we select as the legal rules in this area will have strong emotional consequences for the parties involved, and it is precisely for this reason that these legal analytics are important. That said, it is also important to recognize that behind the abstract issues the law faces there is an inescapable human dimension.

I. BACKGROUND

A. *Unbundling the Rights Not to Procreate*

1. *The rights introduced*

As I have said, a number of courts and commentators have made reference to a “right not to procreate” (singular) but are not at all clear on what exactly this right means. I argue that many of these authorities have erred by conceiving of a monolithic “right not to procreate,” and we should instead recognize a bundle of rights having multiple *possible* sticks.

It is fairly intuitive that reproductive technology requires a re-conceptualization of the notion of parenthood.⁶ That is, a woman can be a parent in (at least) three possible senses: gestational parent, legal parent, and genetic parent—men are restricted by biology to only the last two types of parenthood. To give a fairly obvious example, a woman who undergoes IVF with her egg fertilized by her husband, but whose baby is carried by a

4. I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. (forthcoming 2008).

5. See, e.g., W. Michael Reisman, Comment, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE J. INT'L L. 316, 325 (1990).

6. See JOHN ROBERTSON, CHILDREN OF CHOICE 108-09 (1994) (distinguishing “reproduction *tout court*” from more limited forms of parenthood); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 310-11; Lee M. Silver & Susan Remis Silver, *Confused Heritage and the Absurdity of Genetic Ownership*, 11 HARV. J.L. & TECH. 593, 593 (1998).

gestational surrogate, is the child's genetic mother and (under certain circumstances) legal mother, but not its gestational mother. By contrast, the surrogate is the gestational mother but not the genetic or legal mother.

What is perhaps less apparent is that the same technological innovation also makes clear the need to unbundle the concept of *non*-parenthood, or rather, freedom from parenthood. So, when we are discussing the right not to procreate, we need to recognize three possible rights *not* to be a parent—a right not to be a gestational parent, a right not to be a genetic parent, and a right not to be a legal parent.⁷ The tendency to view these rights as a monolithic bundle is an outgrowth of the fact that, in natural reproduction, the three rights tend to be clustered together: when a woman seeks an abortion, she is simultaneously exercising a right not to be a gestational, legal, and genetic parent, and we seldom have reason to try and disaggregate the three. But the world of reproductive technology allows us to see that the bundling of these three rights is not inherent.

Conceptually, we can add the three rights not to be a parent and three possible opposing rights *to be* a parent, for a relationship of six possible rights:

A right not to be a gestational parent	A right to be a gestational parent
A right not to be a genetic parent	A right to be a genetic parent
A right not to be a legal parent	A right to be a legal parent. ⁸

Each of these six possible rights is a negative right to be free from interference rather than an affirmative right to assistance.⁹ Thus, as I am using the terms, the right to be a gestational parent should be understood as a negative right against interference with your gestation of a fetus rather than a

7. Some of these rights could be further subdivided. For example, legal parentage implies both an (at least *prima facie*) obligation to provide financial support and a custodial obligation. We could subdivide the right further into a right not to be a financial parent and a right not to be a custodial parent, and, at least conceptually, recognize the one but not the other, or recognize one in a waivable form but the other in a non-waivable form, etc. For my purposes, there is not much additional benefit to taking the unbundling much further, but I recognize that others might find doing so useful for their specific analyses.

8. This move is, broadly speaking, Hohfeldian. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); see JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 131-34 (2000) (describing Hohfeld's relational nature of rights theory). We could also be even more Hohfeldian and specify jural opposites and correlates for each of these. So, X person either has a right or no right not to be a genetic parent; if he has a right, then person Y has a duty not to make him a genetic parent, whereas if he has no right, then person Y has a privilege of making him a genetic parent. *Id.* at 132-33.

9. Thus, conceptually these positive rights might add a *third* set of rights—a right to assistance in becoming a gestational, genetic, and legal parent. See ROBERTSON, *supra* note 6, at 23 (1994) (noting the possibility of “a positive right to have the state or particular persons provide the means or resources necessary to have or avoid having children” but claiming there is no constitutional basis for that obligation).

right to have a fetus provided to you for the purpose of gestation. The right to be a genetic parent is a negative right that might be violated, for example, if you were a carrier of a genetic disease and the state or another party attempted to prevent you from having genetic children. It is to be contrasted with an affirmative right to be a genetic parent which might, for example, obligate the state to make available reproductive technology as part of Medicaid.¹⁰ A society could hypothetically recognize affirmative rights of this sort, but for present purposes I put aside questions relating to those possible rights.

American constitutional jurisprudence appears to treat the right to be and not to be a gestational parent (still in the non-interference sense) as conjoined.¹¹ But this bundling is not inherent. A jurisdiction could recognize a right not to be a gestational parent as against a marital partner, such that a husband could not force his wife to carry the fetus to term, and yet not recognize an equivalent right to be a gestational parent, such that the husband *could* force his wife to abort the fetus. The regime could also be configured in the exact opposite way. Thus, unbundling reveals that one side of the gestational right does not follow ineluctably from the other and must be independently justified as a policy choice.

More generally, even as to the rights *not* to procreate, one could imagine a legal regime that recognized one or two of these rights but not the remaining one or ones. Further, some disputes about assisted reproduction depend on one of the sticks in the bundle but not others, and in resolving them a court need only determine the existence and applicability of one of the sticks in the bundle.

To illustrate these points, consider the following five fact patterns:

Case 1: Imagine that a husband and wife¹² undergo IVF and cryopreserve additional preembryos. Imagine that they execute an agreement specifying that, in the event of divorce, the wife would be able to implant the preembryos. The couple divorces, and the wife wants to use the preembryos but the husband opposes her doing so. Imagine further, for the purposes of the hypothetical, that under these circumstances the jurisdiction provides that if the wife implants the preembryos the husband will not be made the legal parent of the child unless he

10. As to the right not to be a gestational parent, this distinction is captured nicely by the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), on the one hand, finding a non-interference right, and *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), on the other, finding no obligation to fund either therapeutic (*Harris*) or non-therapeutic (*Maher*) abortions under Medicaid.

11. The Supreme Court has framed the right as a decisional one that encompasses both elements. See *Roe v. Wade*, 410 U.S. at 153 (finding the Fourteenth Amendment "broad enough to encompass a woman's decision *whether or not* to terminate her pregnancy") (emphasis added).

12. Although I use "husband" and "wife" throughout the Article for the sake of convenience, I do not mean to suggest that other configurations of these fact patterns are not possible, for example, ones involving same-sex partners, single individuals and sperm or egg donors, etc.

consents.¹³ In such a case, if the husband claims that notwithstanding the contract, it would violate his rights for the court to allow the wife to implant the preembryos, his claim is really that he has a right not to be a genetic parent against his (contemporaneous) will. His claim is premised on a right not to be a genetic parent. He has no gestational rights to assert.¹⁴

Case 2: This case is the same as Case 1, except the jurisdiction does *not* provide that the husband will be free from the obligations of legal parenthood. In such a case, the husband's claim is that he has both a right not to be a genetic parent and a right not to be a legal parent.¹⁵ He has no gestational rights to assert.¹⁶

Case 3: A gestational surrogate is carrying the genetic offspring of the husband and wife. As part of her surrogacy agreement she has agreed that she will not do anything to endanger the fetus, including getting an abortion, without the permission of the husband and the wife.¹⁷ The agreement also provides that the husband and the wife will be the legal parents of the child, assuming all attendant financial obligations. Assume that the jurisdiction allows such assignments of parentage. Notwithstanding the agreement, in the third month of her pregnancy, the surrogate announces her intention to get an abortion, a course of action the husband and the wife attempt to prevent. If she argues that enforcing the agreement violates her rights by preventing her from getting an abortion, then her claim is really that the enforcement infringes her right not to be a gestational parent against her will. Thus, it is necessary and sufficient for her claim that she has a right not to be a gestational parent, it is neither necessary nor sufficient that she have a right not to be a legal parent or a

13. This is already the law in Colorado, Texas, and Washington. COLO. REV. STAT. ANN. § 19-4-106 (West 2007); TEX. FAM. CODE ANN. § 160.706 (Vernon 2007); WASH. REV. CODE ANN. § 26.26.725 (West 2007). Because the genetic father is deemed not to be the legal parent of the child, under this approach he cannot have duties of child support imposed upon him even if the mother is unable to provide support.

14. The wife is, by contrast, asserting a right to be a genetic and legal parent. Case 1 is similar to the facts of *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000), although there the Court found that the agreement in question was not an "unambiguous agreement," for a variety of reasons. *Id.* at 1056-59.

15. If adoption is a serious possibility—for example, if the wife is remarried and her new husband is willing and able to legally adopt the resulting child thus *terminating* the ex-husband's legal parenthood—there would be interesting questions about the strength of the ex-husband's claim. One way of putting the point is whether temporary unwanted legal parenthood constitutes a significant injury. In practice, however, from the husband's ex ante position at the time of implantation, the possibility of adoption of a possible future child is always a matter of uncertainty.

16. Again, the wife would claim a right to be a genetic and legal parent.

17. The agreement in *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), featured a clause prohibiting the surrogate from getting an abortion "except as allowed by the male promisor," that the court found unenforceable, although in that case the surrogate was a full surrogate, and thus the gestational and genetic mother of the child. *Id.* at 1159. A number of states have by statute made such promises unenforceable, whether or not the surrogate is the genetic mother of the child. *E.g.*, IND. CODE ANN. § 31-20-1-1 (West 1998).

genetic parent.¹⁸

Case 4: A gestational surrogate is carrying the child of the husband and the wife. Prenatal testing indicates that the child has a significant genetic abnormality. The husband and the wife want the surrogate to have an abortion. She refuses to do so. If the husband and the wife argue that allowing her to continue with the pregnancy would violate their rights, their claim is really that it violates their right not to be genetic parents against their will (as well as their right not to be legal parents in any jurisdiction that would attach legal parentage to the genetic parents in this case). It is neither necessary nor sufficient that they have a right to be or not to be gestational parents.¹⁹

Case 5: During the course of their marriage and unbeknownst to the husband, the wife has an affair with another man, Alfred. When the wife conceives, the husband mistakenly believes the child is his. Two years after the child's birth, however, the wife confesses her adultery. Assume that the law of the jurisdiction is that the husband of a woman who has given birth is presumed to be the legal father of the child, and that this state of affairs cannot be changed after two years has gone by.²⁰ If the husband argues that the parentage determination violates his rights, his claim is that it violates his right not to be a legal parent against his will. It is neither necessary nor sufficient that he has a right not to be a genetic parent, and gestation is not implicated.²¹

These are only a few examples of fact patterns—we can easily come up with many more—but it gives some demonstration of the utility of discussing these possible rights in an unbundled way.²²

18. Nor does it matter that she has or does not have a right to be a gestational parent, since she is not being forced to have an abortion against her will. By contrast, in this case the husband and wife would be asserting a right to be genetic and legal parents.

19. By contrast, the surrogate could assert a right to be a gestational parent and, depending on the laws of the jurisdiction, perhaps a right to be a legal parent as well.

20. This was the law in California at issue in *Michael H. v. Gerald D.*, 491 U.S. 110, 115 (1989), which presumed the paternity of the husband of the birth mother, rebuttable by a blood test or affidavit by the true genetic father, but only within two years from the date of the child's birth pursuant to CAL. EVID. CODE § 621(a), (c), (d) (West Supp. 1989).

21. See also *In re Paternity of Cheryl*, 746 N.E.2d 488, 490 (Mass. 2001) (sustaining a judgment of paternity and an order to pay child support when, more than five years after a man voluntarily acknowledged paternity, genetic tests established that he was not the child's genetic father). Alfred, by contrast, might assert a right to be the legal parent of the child in Case 5.

22. I do not want to suggest that the list of rights I set out is exhaustive. In particular, at the conceptual level, there are at least two more rights worth identifying that are not rights not to *procreate per se*.

The first can be called a right to control one's tissue *qua* tissue. For example, in *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990), researchers at the University of California developed and patented a cell line from spleen tissue taken during patient Moore's splenectomy; the California Supreme Court dismissed his suit to recover the proceeds on a theory of conversion, implicitly rejecting such a right, at least as to "abandoned" tissue. *Id.* at 487-97. *Moore* concerned non-reproductive tissue but similar claims could be made regarding reproductive tissue like sperm used for non-reproductive

2. Conflict

Unbundling also reveals that various conceptions of procreative rights can conflict with one another. To give a straightforward example, if a woman undergoes IVF with her husband and implants the preembryo and the husband decides at some point in gestation that he no longer wants to be a genetic parent, but she decides she wants to continue the pregnancy, there is a conflict between his right not to be a genetic (and possibly legal) parent and her right to be a genetic, gestational, and legal parent. To give some other examples, in the two surrogacy cases discussed above, the couple's right to be genetic and legal parents conflicts with the gestational surrogate's right not to be a gestational parent (Case 3), and the couple's right not to be genetic and legal parents conflicts with the gestational surrogate's right to be a gestational parent (Case 4).²³

The possibility of conflict between these rights suggests that, if we recognize all of them, we need some mechanism to resolve these conflicts. One possibility is a meta-rule which tells us how conflicts between each of the six rights are to be resolved.²⁴ A different possible method would be to apply some balancing device, not at the categorical level, but at the level of a particular case taking into account idiosyncratic facts that might determine whose interest we should favor.²⁵ A system could also resolve the conflict by following a

purposes.

Second, whether or not *tissue* of one sort or another ever leaves the body, an individual might claim a right to control her genetic information *qua* information. Such a right might be implicated, for example, in employer or insurance companies using information from genetic tests to make enrollment decisions, requiring someone to provide genetic information, in police collecting an individual's "left-over" DNA for criminal investigation purposes, or having one's genetic information revealed in the course of the screening of a genetically related individual. *See, e.g.,* Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857 (2006); Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. HEALTH CARE L. & POL'Y 225 (2000).

I identify these rights only to bracket them off from my inquiry here. Whether a jurisdiction chooses to recognize either of these types of rights is a separate question from whether and how it decides to recognize each of the sticks in the bundle of rights not to procreate.

23. While some of these six possible rights will conflict, some will not. For example, it seems as though there will never be a case presenting a conflict between the right not to gestate and the right not to be a genetic parent.

24. A couple of the courts dealing with preembryo disposition disputes appear to endorse a crude version of such a rule suggesting that rights not to procreate trump rights to procreate, *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000); *J.B. v. M.B.*, 783 A.2d 707, 716 (N.J. 2001), but they fail to unbundle each of the sticks *within* the rights to and not to procreate.

25. A couple of courts in the preembryo disposition dispute context have indirectly gestured at such case-by-case balancing. *See J.B.*, 783 A.2d at 719-20 (explicitly refraining from deciding a case where the party who now seeks to use the preembryos has become infertile and will not be able to have genetic offspring without the preembryos); *Davis v.*

written agreement or imposing a majoritarian (or other) default rule in the absence of an agreement. Still another possibility would be some type of best-interests inquiry focused on the potential child.

3. Waiver and against whom?

Even if we recognize all six sticks in the bundle of rights, we have a further question of whether they can be waived, and, if so, how such a waiver can be effectuated.²⁶ Instead of an on-off switch, we have multiple possibilities. We could decide that these rights are never waivable,²⁷ waivable in advance, or waivable only contemporaneously. Once we have unbundled the rights, we can see that a jurisdiction *could make different decisions about waiver for each of the rights.*

We could also specify different standards as to what qualifies as a “waiver” of each right. I mainly focus on contractual waivers, but, as Professor Edward Rubin has suggested, waivers can be effective even if they are not an intentional relinquishment of the right through an “explicit statement of waiver” but instead through a mere “fail[ure] to assert the right or tak[ing] an action inconsistent with its exercise,” which is referred to as “forfeiture.”²⁸ So, for example, we could hold that engaging in intercourse constitutes a waiver of the right not to be a legal parent,²⁹ or that agreeing to participate in IVF itself constitutes a waiver of the right not to be a genetic parent.³⁰

There is also a further dimension to the waiver question that I want to identify, if only to bracket off. As Professor Margaret Jane Radin and others have recognized, for things like sperm, egg, and fertilized embryos, a regime might make them truly inalienable (they cannot be given away or sold), market inalienable (they can be given away but not sold), or completely alienable (they can be given away and sold).³¹ There are interesting questions relating to this issue, but for present purposes I want to distinguish what we might term anti-

Davis, 842 S.W.2d 588, 603-04 (Tenn. 1992) (suggesting that, in favoring non-implantation, it was moved in part by the “impact that this unwanted parenthood would have on [Mr.] Davis” which could “only be understood by considering his particular circumstances” of being essentially abandoned by his parents following their divorce).

26. I use the term “waiver” here although “alienated” is also frequently used in the literature.

27. Again, I am speaking only conceptually. It would be very odd to think of a regime where no one could ever consent to be a gestational, genetic, or legal parent.

28. Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 483 (1981).

29. See *Child Support Enforcement Agency v. Doe*, 125 P.3d 461, 469 (Haw. 2005).

30. The trial court in *Kass v. Kass* makes such a suggestion, No. 19658/93, 1995 WL 110368, at *2 (N.Y. Sup. Ct. Jan. 18, 1995), and the Iowa Supreme Court assumes this to be the case for the purposes of argument in *In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003). But see *Davis v. Davis*, 842 S.W.2d at 598 (rejecting the waiver argument).

31. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852-55 (1987).

commercialization arguments about reproductive technology from anti-contractualization arguments—the former object to the buying and selling of reproductive goods, the latter to the imposition of the binding regime of contract onto those disputes, even if money never changes hands.³² I will focus on the anti-contractualization arguments.

A second attribute of interest is against *whom* the right attaches—other individuals, the state, or both? We again might make this determination differently for each of the different rights. A jurisdiction could recognize a right not to be a genetic parent against the state, such that the state could not use discarded genetic material for procreative purposes (if that became possible), but *not* recognize such a right as against a person’s marital partner, such that there is no right to prevent the implantation of cryopreserved preembryos. As we will see in Part IV, at the constitutional level, this distinction manifests itself in the question of state action.

B. The “Naked” Right Not to Be a Genetic Parent, Prior-Consent and No-Consent Cases

My focus in this Article is on the “naked” right not to be a genetic parent, unbundled from unwanted gestational or legal parenthood. I concentrate on cases where someone will be made a genetic parent, but *only* a genetic parent, against his or her will, and there is no imposition of unwanted gestational or legal parenthood. The preembryo disposition disputes, with which this Article began, provide such a case. No one will be forced to gestate a child against her will, and three states (Colorado, Texas, and Washington) have statutes that specify that if a fertilized preembryo is implanted *after* the parties divorce, a former spouse (who contributed genetic material) is not deemed to be the legal parent of any resulting child if the former spouse does not contemporaneously consent to implantation.³³ A second example is someone who provided sperm or egg for reproductive use who demands the return of his or her gametic material.³⁴ Here again, there is no forced gestation, and a number of states have

32. Anti-commercialization arguments focus on access, voluntariness, and corruption (or commodification) problems. *See, e.g.*, I. Glenn Cohen, Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003).

33. COLO. REV. STAT. ANN. § 19-4-106 (West 2007); TEX. FAM. CODE ANN. § 160.706 (Vernon 2007); WASH. REV. CODE ANN. § 26.26.725 (West 2007). The Texas statute provides that:

(a) If a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child.

(b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record at any time before the placement of eggs, sperm, or embryos.

TEX. FAM. CODE ANN. § 160.706 (Vernon 2007). The Colorado and Washington provisions are nearly identical.

34. Few such cases have been reported, but Professor Robertson notes one such case in

by statute absolved donors of gametic material from legal parenthood obligations.³⁵

In each of these examples there was *prior* consent to genetic parenthood but a contemporaneous objection. Again, there are important variations in the *form* and *strength* of that prior consent. For example, if the consent in the preembryo case comes from a well-drafted contract, it looks more like waiver. If it is inferred from participating in IVF or cryopreservation, then it is forfeiture.

I want to contrast both of these cases with ones where there is no consent *at all*. Let me use two cases as examples. The first is a real case, *Phillips v. Irons*, with quite salacious facts alleged by the plaintiff: A man tells a woman with whom he is having an affair that he does not want to have children. Throughout the course of their relationship they engage only in oral sex, and during one occasion when she is performing oral sex on him, she, unbeknownst to him, retains his sperm and uses it to conceive a child.³⁶ The second is a science fiction thought experiment: Imagine it became possible to use a man's leftover dead skin in the place of semen to create a child, and an individual collected that material for these purposes from the bathtub of a hotel. Call this the bathtub case.³⁷ While the bathtub case is still science fiction, science fact is

the Australian province of Victoria. John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1021 n.148 (2001). The administering agency interpreted its local act to allow withdrawal of consent by a sperm donor up until the point at which the fertilized embryo was placed in the mother's uterus, but later changed its interpretation to allow for withdrawal only up until the point that fertilization took place, because of concerns about detrimental reliance. *Id.*

35. About half the states have adopted the 1973 version of the Uniform Parentage Act, absolving sperm donors of legal parenthood so long as the recipient is married and the semen is provided to a licensed physician for use in artificial insemination. UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 408 (1973); see Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 20 n.78 (2003). Colorado and Wyoming have modified the statute so that it absolves the sperm donor of legal parenthood when the recipient is unmarried as well. *Id.* at 20 n.79.

The 2000 version of the Uniform Parentage Act, which has been adopted by Texas and Washington, drops both the requirement that the recipient be married and that there be physician assistance. UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2000); TEX. FAM. CODE ANN. §§ 160.001 to .821 (Vernon 2001); WASH. REV. CODE §§ 26.26.011 to 26.26.913 (2002); Ertman, *supra*, at 20 n.78; see Bernie D. Jones, *Single Motherhood by Choice, Libertarian Feminism, and the Uniform Parentage Act*, 12 TEX. J. WOMEN & L. 419, 440 (2003). For egg providers, only five states have equivalent laws, all of which relieve egg providers of parental rights and obligations but only three (North Dakota, Virginia, Oklahoma) make the recipient woman the legal mother, the other two (Florida and Texas) do not specify who is the parent, only that the donor is not the parent. Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 27 & nn.185 & 187 (2003).

36. No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. Ct. Feb. 22, 2005).

37. One might push back against the claim that there is no consent in these cases. If the background rule allowed use of skin discarded in the bathtub, then someone who failed to clean the tub might be held to "consent." *Cf.* California v. Greenwood, 486 U.S. 35, 39-40

quickly catching up: German scientists have taken bone marrow from adult males, derived adult stem cells from it, and coaxed them into spermatogonial cells, the cells found in the testes that normally mature into sperm cells.³⁸ Still more recently, two teams of scientists announced they had successfully developed methods for making induced pluripotent stem cells, that is, reprogramming adult skin cells and “making the cells into blank slates that should be able to turn into any of the 220 cell types of the human body.”³⁹

With that background we can ask, does the Constitution compel giving an individual a right to prevent being made a genetic (but only a genetic) parent in any of these cases? In particular, does it enable the individual to intervene at a stage when no one has begun gestation?⁴⁰ This is the central question of this Article, to which I now turn.

II. IS THERE A FUNDAMENTAL CONSTITUTIONAL RIGHT NOT TO BE A GENETIC PARENT?

A. *The Argument*

This strategy denies that the Constitution covers a naked right not to be a genetic parent as a fundamental right for substantive due process purposes. Courts and commentators claiming the existence of a constitutional right not to procreate have relied on the abortion cases and, to a lesser extent, the contraception cases, as support for that right. I argue that the contraception cases do not mandate that conclusion and that the abortion cases can be read as implicating only a right not to be a gestational parent, not a right not to be a genetic parent.

1. *The contraception cases*

A number of courts and commentators rely on the contraception cases, *Griswold*, *Eisenstadt*, and *Carey*, to support a “right not to procreate,” forbidding implantation in the preembryo disposition cases, or what I call a right not to be a genetic parent.⁴¹ But I will discuss several arguments that

(1988) (no expectation of privacy in one’s garbage left at the curb and therefore search thereof was constitutional). This is true as far as it goes, but most of us would agree this was not “consent” as the concept is normally conceived. If you think otherwise, consider my discussion to be of cases posing *very* minimal consent.

38. *Sperm Made from Human Bone Marrow*, BBC NEWS, Apr. 13, 2007, <http://news.bbc.co.uk/2/hi/health/6547675.stm>.

39. Gina Kolata, *Scientists Bypass Need for Embryo to Get Stem Cells*, N.Y. TIMES, Nov. 21, 2007, at A1.

40. As we will see, once gestation has begun, existing Supreme Court precedent quite clearly prevents interference in that gestation to avoid genetic parenthood (i.e., forcing an abortion).

41. For courts, see *J.B. v. M.B.*, 783 A.2d 707, 715-17 (N.J. 2001); *Davis v. Davis*,

drive a wedge between these cases and the right not to be a genetic parent.

Griswold v. Connecticut found unconstitutional a statute making it illegal to use contraceptives or to aid or counsel another in doing so.⁴² The problem with the statute was that it “operate[d] directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”⁴³ The Court then famously discussed a series of cases which it interpreted as “suggest[ing] that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance” and found that these “[v]arious guarantees create zones of privacy.”⁴⁴ It concluded in a short and unelaborated passage that:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁴⁵

In *Griswold*, the constitutional problem was the state’s invasion into the “notions of privacy surrounding the marriage relationship,” and the chief evil was the state’s invasion of the “sacred precincts of marital bedrooms for telltale signs of the use of contraceptives.” *Griswold* thus emphasized the invasion of the marital “space,” not the interference with procreative decisions per se as the

842 S.W.2d 588, 600-04 (Tenn. 1992); see also *In re Baby M.*, 537 A.2d 1227, 1253 (N.J. 1988) (surrogacy). For commentators, see Kim Pittman, *Resolving Disputes Over the Disposition of Frozen Preembryos: Playing Catch-Up with IVF Technologies*, 20 ME. B.J. 228, 232 (2005); Berg, *supra* note 3. See also Korobkin, *supra* note 3, at 626 (arguing, in the preembryo disposition context, that “[c]ontracts to procreate should be unenforceable on public policy grounds because of a constitutionally recognized interest in avoiding procreation”).

42. 381 U.S. 479 (1965).

43. *Id.* at 482.

44. *Id.* at 484 (citing *Poe v. Ullman*, 367 U.S. 497, 516-22 (1961) (Douglas, J., dissenting)).

45. *Id.* at 485-86.

harm; the fact that contraceptives were used to prevent *procreation* was incidental. The reasoning of *Griswold* would appear to apply equally to a decidedly non-procreative activity, for example the use of sex toys in the marital relationship, where police searches of marital bedrooms would be equally invasive.⁴⁶ From *Griswold* itself, then, there is little to suggest that there exists a right not to be a genetic parent that applies here—enforcing an agreement between now-divorced parents as to use of fertilized preembryos does not require the invasive intrusion by the state into the “marital space.”

Seven years later, in *Eisenstadt v. Baird*, the Court struck down a Massachusetts law similar to the one in *Griswold*, a law that criminalized the provision of contraceptives but *only* as to unmarried persons for the purpose of preventing pregnancy.⁴⁷ The challenge to the statute was made under the Equal Protection Clause not the Due Process Clause, with the question being “whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under” the statute.⁴⁸ The Court held there was not. Having concluded that the “the Massachusetts statute [could not] be upheld as a deterrent to fornication or as a health measure,” it went on to wonder whether it might “nevertheless, be sustained simply as a prohibition on contraception?”⁴⁹ The Court noted that “[w]e need not and do not, however, decide that important question in this case because, 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.”⁵⁰

The Court then essentially decided the case using the strategy of “hypothetical dilemma”—if P then Z; if Q then Z; P or Q; therefore Z. If, on the one hand, “under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.”⁵¹ If, on the other hand, “*Griswold* is no bar to a

46. Compare *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004) (upholding as constitutional a statute banning commercial distribution of sex toys), with *Reliable Consultants, Inc. v. Earle*, No. 06-51067, 2008 WL 383034, at *1 (5th Cir. Feb. 12, 2008) (reaching the opposite conclusion). See also David B. Cruz, “*The Sexual Freedom Cases*”? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 339-42 (2000) (discussing the plausibility of a Fourth Amendment reading of *Griswold*).

47. 405 U.S. 438, 440-42 (1972).

48. *Id.* at 447.

49. *Id.* at 452. The problem with the statute as a deterrent to fornication or a health measure was *not* that the Court determined that those purposes were constitutionally forbidden, but that the Court did not believe the statute could be characterized as serving those goals. *Id.* at 448-51. In fact, the Court said it was “[c]onceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as ‘(e)vil . . . of different dimensions and proportions, requiring different remedies.’” *Id.* at 448 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)).

50. *Id.* at 453.

51. *Id.*

prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons” because “[i]n each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious.”⁵² Therefore, the ban was impermissible.

This required a bit of fancy footwork since *Griswold* emphasized the importance of the marital relationship. The Court explained, however, in a now-famous passage that:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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*.⁵³

This passage significantly expanded and transformed the conception of privacy at work in *Griswold*—from a sense of privacy that protects against state intrusion into the marital bedroom into a more decisional right protecting against state intrusion into personal decisions.

It is this passage that advocates for a right not to be a genetic parent have glommed on to. In *Eisenstadt* this language was dictum, since the decision (unlike *Griswold*) was premised on an equal protection and not a due process violation, and the language appears in a section where the Court is very explicitly *avoiding* deciding whether a statute banning contraception *qua* contraception was permissible. But the Court has obscured both these points in its later decisions and has frequently relied on this language.⁵⁴

The final decision in the line of contraception cases, *Carey v. Population Services International*, solidifies a reading of *Eisenstadt* as establishing a substantive due process right that prevents state interference in obtaining contraception.⁵⁵ The case concerned a New York law criminalizing advertisement of contraceptives and distribution of contraceptives to minors.⁵⁶ In a part of the decision joined by the majority of Justices, the Court noted that the Constitution provided a “right of personal privacy [that] includes ‘the interest in independence in making certain kinds of important decisions.’”⁵⁷ The Court then noted that “[t]he decision whether or not to beget or bear a child

52. *Id.* at 454.

53. *Id.* at 453 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)) (emphasis added).

54. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (treating *Eisenstadt* as a due process decision); *see also* *M.L.B. v. S.L.J.*, 519 U.S. 102, 115 n.6 (1996); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875 (1992) (plurality).

55. 431 U.S. 678 (1977).

56. *Id.* at 681.

57. *Id.* at 684 (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

is at the very heart of this cluster of constitutionally protected choices,” and that this protection “is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether *to accomplish or to prevent* conception are among the most private and sensitive.”⁵⁸

Are there ways of reading these decisions that do not imply a right not to be a genetic parent? There are still the arguments about surviving constitutional scrutiny, the lack of state action, and waiver that I discuss below, but even as to the substantive right I think there are a few arguments (in descending order of plausibility).

The first move is to focus on the Court’s statement in *Carey* that “decisions whether *to accomplish or to prevent* conception are among the most private and sensitive.”⁵⁹ But here we have parties articulating opposite positions such that we have both a party wanting to “accomplish” implantation and one seeking to “prevent” implantation, rather than two parties who have jointly decided to accomplish or prevent conception and a government interfering with that right. This can bleed into the state action analysis below and suggest no state action, or it can be an account of the substantive right itself, suggesting that the right can never be against another individual, only the state. The substantive right in *Carey* was freedom from state interference with the *collective* decision of both parties to prevent procreation, but the substantive right being sought here is by one party *as against the other party* to prevent procreation.⁶⁰

Second, one can argue that the right recognized in these cases is really a right to have sexual intercourse without the state conditioning that right on the individual having to risk becoming pregnant (or, especially in the modern era, the risk of contracting HIV or another STD).⁶¹ Because the cases that concern

58. *Id.* at 685 (emphasis added).

59. *Id.* (emphasis added).

60. The New York Court of Appeals’ decision in *L. Pamela P. v. Frank S.*, 59 N.Y.2d 1 (1983), gestures at this reasoning. There, the Court rejected reliance on the contraception cases as giving a father a constitutional right to avoid paying child support when he was deceived into believing his female sex partner was using contraception. The Court found the contraception cases inapposite:

[T]he interest protected [in the contraception cases] has always been stated in terms of governmental restrictions on the individual’s access to contraceptive devices. It involves the freedom to decide for oneself, without unreasonable governmental interference, whether to avoid procreation through the use of contraception. This aspect of the right of privacy has never been extended so far as to regulate the conduct of private actors as between themselves.

Id. at 6 (internal citations omitted).

This kind of reasoning might allow us to distinguish a hypothetical where the state itself is seeking to use one’s genetic material to produce children against one’s will. Alternatively, such a case might be distinguished by suggesting that the state action could not survive even rational basis scrutiny.

61. Justice Brennan implies as much in a portion of the *Carey* opinion joined by three other Justices. *Carey*, 431 U.S. at 694-95 (Brennan, J., plurality); see Robin West, *Integrity and Universality: A Comment on Ronald Dworkin’s Freedom’s Law*, 65 *FORDHAM L. REV.*

us do not involve sex at all, the contraception cases are inapposite.⁶²

Third, one can argue that the right recognized in *Carey* concerns all three sticks in the bundle, and suggest that just because the Court was willing to find it violates substantive due process to impose *all three* types of parenthood (gestational, legal, and genetic) on a couple it does not mean there is a fundamental right when only genetic parenthood is at stake.⁶³ The difficulty with this argument is that while women use contraception as a defense against all three types of parenthood, for men there is no threat of gestational parenthood, and yet the Court's logic in the contraception cases would seem to apply equally to both sexes.⁶⁴ One can counter that men are still avoiding legal *and* genetic parenthood, although it is not clear why avoiding the two together would be sufficient for there to be a fundamental right while avoiding genetic parenthood alone would not be sufficient.

Fourth, and least plausible, one can make the highly formalistic argument that even as stated in *Carey*, the right concerns decisions "whether to accomplish or to prevent *conception*,"⁶⁵ and in the preembryo disposition dispute cases, conception has already occurred, and it is the accomplishment or prevention of *implantation* that is at issue. But this seems too clever by half. For one thing it would draw a distinction between the case of a sperm donor trying to retake his sperm to prevent conception proper, implicating a fundamental right, and the preembryo disposition disputes which would not.⁶⁶ It is not at all clear why we should care about conception but not implantation, and mapping the doctrine onto the developmental timetable would result in the

1313, 1325 (1997) ("What *Griswold* and *Eisenstadt* protected for both married and unmarried individuals was the freedom to engage in heterosexual intercourse without fear of familial and reproductive consequences."); cf. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 975 (2007) (reading *Griswold* as protecting a "right to engage in nonprocreative sex").

62. A statute that, for example, banned contraception for homosexual sex but not heterosexual sex provides an interesting test case. Perhaps such a statute would be struck down on the earlier "intrusion into the bedroom" reasoning of *Griswold*, although of course (except in Massachusetts) it would not be the "marital" space that would be invaded. Or perhaps the statute would fail on rational basis review, see *Lawrence v. Texas*, 539 U.S. 558 (2003), or as an equal protection violation, as in *Eisenstadt*.

63. See ROBERTSON, *supra* note 6, at 108-09.

64. Moreover, preventing use of contraception does not in fact deprive women of the right to decide whether or not to *be* a gestational parent. Rather it deprives them of an opportunity to avoid *becoming* a gestational parent in the first place. That is, abortion remains an option. Adoption fulfills a similar function with the right not to be a legal parent.

65. *Carey*, 431 U.S. at 685 (emphasis added).

66. There may be other reasons to suggest a morally relevant difference between these two situations. For example, if one believes that life begins at conception, destruction of sperm does not pose the problems that destruction of fertilized preembryos do. But that distinction turns on the existence of a competing constitutionally significant interest (in potential life), which I discuss in the next Part, not on whether the party has a fundamental constitutional right in the first place.

bizarre continuum where the conception decision is a fundamental right, the implantation decision is not, and the decision to abort an already-implanted fetus is fundamental again. While this continuum is aesthetically unappealing, it is not necessarily unintelligible if we see the abortion decisions as hinging on bodily integrity and not merely as a continuation of the right to prevent conception; the perceived “continuum” instead turns out to be two different doctrinal rationales, with the decision whether to implant falling within neither. Still this seems like a strange result. There is also the further problem that the language in contraception cases speaks more broadly of the decision to “bear or beget” children, which seems to encompass more than just conception.⁶⁷

In sum, there are several plausible ways to read the contraception cases that do not mandate recognizing a fundamental constitutional right not to be a genetic parent. Among these, the reading I favor treats the contraception cases as establishing a fundamental right against state interference with the *collective* decision of both parties to prevent procreation but not a right by one party *as against the other party* to prevent procreation.

2. *The abortion cases*

a. Neither the language nor the holdings of the abortion cases compel recognition of the right not to be a genetic parent

A number of courts and commentators have relied on the Supreme Court’s abortion decisions to support a federal constitutional right not to procreate relevant to the preembryo disposition cases.⁶⁸ These analyses demonstrate one of the shortcomings of a monolithic conception of the right not to procreate: while the abortion cases clearly establish a right not to be a gestational parent (and imply the existence of a right to be a gestational parent), they do not establish a right not to be a genetic parent, which is a stick in the bundle relevant to the preembryo disposition disputes.

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

68. For courts, see Kass v. Kass, No. 19658/93, 1995 WL 110368, at *2 (N.Y. Sup. Ct. Jan. 18, 1995); Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992). To its credit, elsewhere in the opinion, the *Davis* court recognizes that “[n]one of the concerns about a woman’s bodily integrity that have previously precluded men from controlling abortion decisions is applicable here.” *Id.* at 601. For commentators, see, for example, Ingrid H. Heide, *Negligence in the Creation of Healthy Babies: Negligent Infliction of Emotional Distress in Cases of Alternative Reproductive Technology Malpractice Without Physical Injury*, 9 J. MED. & L. 55, 61 & n.14 (2005); Paula Walter, *His, Hers, or Theirs—Custody, Control, and Contracts: Allocating Decisional Authority over Frozen Embryos*, 29 SETON HALL L. REV. 937, 944 (1999); Tracy Haslett, Case Note, *J.B. v. M.B.: The Enforcement of Disposition Contracts and the Competing Interests of the Right to Procreate and the Right Not to Procreate Where Donors of Genetic Material Dispute the Disposition of Unused Preembryos*, 20 TEMP. ENVTL. L. & TECH. J. 195, 206 (2002); Hyun Jee Son, Note, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability’s Doctrinal Ambiguity*, 14 UCLA WOMEN’S L.J. 213, 231 (2005).

It is beyond cavil that nothing in the *holdings* of the Supreme Court's abortion decisions themselves establish a right not to be a genetic parent. As a class, these cases only establish limits on the state's ability to prevent or otherwise regulate a woman's having an abortion.⁶⁹

Nor can one establish a persuasive case for a constitutional right not to be a genetic parent in the reasoning or language of these cases. Consider the key passage in *Roe v. Wade*⁷⁰ where the Court, having catalogued a series of rights it views as related to privacy, reasons that:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.⁷¹

This language suggests a broad range of types of interests that are motivating the Court to find a violation of the privacy right: concerns about harm to women's bodies, concerns about harm to women's reputations, and concerns about harms to women's lives if they are forced to bring up unwanted children. These concerns, however, relate to the burdens of legal and gestational parenthood. A woman who is made a genetic, but only a genetic, parent against her will suffers none of these detriments.⁷²

Much of the Court's abortion jurisprudence connects the constitutional protections afforded to abortion with the need to protect bodily integrity.⁷³ The

69. Cf. ROBERTSON, *supra* note 6, at 108 ("The constitutionality of laws that prevent the discard or destruction of IVF embryos is independent of the right to abortion established in *Roe* . . . and . . . *Casey*.").

70. 410 U.S. 113 (1973).

71. *Id.* at 153.

72. See also John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 467 (1990). The only possible exception is the reference to the "stigma of unwed motherhood," but it is not clear that such a stigma attaches when one is only an unmarried genetic, and not gestational or legal parent. *Roe v. Wade*, 410 U.S. at 153.

73. See, e.g., *Roe v. Wade*, 410 U.S. at 154 (connecting the abortion right to "right to do with one's body as one pleases," but rejecting the claim that the right is "unlimited" (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Buck v. Bell*, 274 U.S. 200 (1927))). There is some language elsewhere in the Court's jurisprudence that somewhat suggests there is *also* something more than bodily integrity involved. For example, there is language in

belief that an individual is sovereign over his body is, of course, an idea with old philosophical and jurisprudential roots,⁷⁴ that stands behind a number of familiar legal doctrines like the right to be free from battery, the right to give informed consent, and the right to refuse medical treatment.⁷⁵ Many normative arguments in favor of a right to non-interference with having an abortion (a right not to be a gestational parent) are likewise based on the idea that such interference would constitute an invasion of the bodily integrity of the woman.⁷⁶

But the Court's recognition of a right to be free from interference with bodily integrity does not mandate recognition of a similar right to prevent the

Planned Parenthood of Southeastern Pennsylvania v. Casey, noting that "state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman." 505 U.S. 833, 896 (1992) (plurality opinion). This statement is made in the context of the spousal notification requirement. The best reading of the passage is that the *spousal notification requirement* is "doubly" deserving of scrutiny because such notification requirements *in general* interfere with the private realm of family, and because the notification pertains to abortion, it *additionally* interferes with bodily integrity. Further, as I discuss in more depth below, grounding the abortion right in "the private sphere of the family" cannot account for cases where the husband and wife, both members of the family, disagree. In any event, nothing here or elsewhere in the Court's jurisprudence suggests that bodily integrity is not a *necessary* condition for justifying the abortion right.

As I discuss later, while there is sometimes an Equal Protection leitmotif in courts' and commentators' justification of the abortion right, that claim turns on gender differences regarding the capacity for gestational parenthood, and is inapposite when we are discussing a right not to be a genetic parenthood when it is unbundled from gestational parenthood. *See infra* note 238 and accompanying text.

74. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27, at 19 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690) (arguing that "every man has a property in his own person"); JOHN STUART MILL, ON LIBERTY 9, 12 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859) (recognizing that "[o]ver himself, over his own body and mind, the individual is sovereign" and "each is the proper guardian of his own health, whether bodily or mental and spiritual"); *see also* *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

75. Justice Souter's concurrence in *Washington v. Glucksberg*, gives a good summary of the numerous substantive due process rights the Court has based on bodily integrity. 521 U.S. 702, 777 (1997) (Souter, J., concurring).

76. *See, e.g.*, Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 49 (1971) (grounding a defense of abortion in the thought experiment of waking up one morning to find a world-famous violinist connected to your vital organs without your permission); Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2117 (1999) (reviewing EILEEN L. MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996), and Eileen L. McDonagh, *My Body, My Consent: Securing The Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057 (1999)) (endorsing argument that a woman's right to abortion "should be understood as a right to defend herself against the nonconsensual invasion, appropriation, and use of her physical body by an unwelcome fetus, rather than as a right to choose medical procedures free of interference by the state").

use of the products of our body. To use a non-reproductive technology example, while it might infringe on an individual's bodily integrity to force a tube down his throat with an emetic to "stomach pump" up pills as incriminating evidence,⁷⁷ or to force an attempted robbery suspect to undergo a surgical intrusion to recover a bullet fired by a victim in self-defense,⁷⁸ the same concerns are not present when one examines saliva on pills an individual had already regurgitated or tests the blood on a bullet found at the scene of a crime. Similarly, to take an example involving reproductive material (although used for non-reproductive purposes), there is a difference between using a rape kit to try and collect and analyze DNA from the rapist's semen on the victim and requiring him to supply semen in the first place.

This is not to say that the latter may not be justified, or that the former is always justified, but merely to show that one rests on an idea of bodily integrity while the other does not. The key word in "bodily integrity" is integrity, and once that integrity is broken because biological material is no longer attached to the body, the rationale for avoiding invasion of bodily integrity seems to lose its purchase. Professor Radin gives an interesting illustration of the moral intuition associating bodily integrity with "attachment": blood is considered to be part of the body when it courses through our veins but not when removed, while a plastic limb is considered to not be the body when it is produced in a manufacturing plant but becomes part of the body when it is connected to one's body.⁷⁹

Support for a right not to be a genetic parent cannot be gleaned from the Supreme Court's decision three years after *Roe*, in *Planned Parenthood of Central Missouri v. Danforth*,⁸⁰ although it is a favorite citation for courts and commentators discussing a right not to procreate in the preembryo disposition cases. There, the Court considered a matter formally left open in *Roe*, the constitutionality of a state law requiring the father's consent before an abortion could be performed, and found it unconstitutional.⁸¹ *Danforth* can be viewed as presenting a conflict between the mother's right not to be a gestational parent, and the father's right to be a genetic and legal parent. The *Danforth* court recognized a "deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and

77. See *Glucksberg*, 521 U.S. at 720 (citing *Rochin v. California*, 342 U.S. 165 (1952), which found that it violates the Due Process Clause to do so, as recognizing a substantive due process right "to bodily integrity").

78. *Winston v. Lee*, 470 U.S. 753 (1985) (employing a Fourth Amendment rather than due process analysis and finding it "unreasonable" to do so given the risks of surgery and where other evidence available made need to recover bullet less compelling).

79. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966-67 (1982).

80. 428 U.S. 52 (1976).

81. *Id.* at 69 (citing *Roe v. Wade*, 410 U.S. 113, 165 n.67 (1973)). A number of other provisions of the Missouri law were also challenged in *Danforth*, but spousal consent is the one relevant for this discussion. *Id.* at 58-59.

development of the fetus she is carrying,” the “importance of the marital relationship in our society,” and the “profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious” that “the decision whether to undergo or to forego an abortion may have.”⁸² But “[n]otwithstanding these factors” the Court found that it could not “hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right.”⁸³ The Court held that:

We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.⁸⁴

As in *Danforth*, when the parties disagree in the preembryo disposition context as to whether to allow implantation of preembryo, it is an “obvious fact” that only one can prevail. But the fact that the *Danforth* court relies on to tip the balance in the mother’s favor, as a constitutional matter, that “the woman who physically bears the child . . . is the more directly and immediately affected by the pregnancy,” is absent here. Because *Danforth* implies that it is the burdens of unwanted gestation (i.e., a violation of the right not to be a gestational parent) that is constitutionally significant, the application of *Danforth* to cases where no one will bear the burden of compelled gestation is dubious.⁸⁵

This same emphasis on gestational burdens as establishing an asymmetry as to parental rights in the abortion context pervades the Supreme Court’s re-articulation of its abortion jurisprudence in *Planned Parenthood of*

82. *Id.* at 69-70. The fact that the Court treats the father’s interest as equivalent to that of the state also seems to suggest that the father’s interest in genetic parenthood, which the state cannot assert, is not particularly significant.

83. *Id.* at 70.

84. *Id.* at 71.

85. The trial court in the preembryo disposition decision of *Kass v. Kass*, No. 19658/93, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995), essentially ignored this key difference. That court stated:

It cannot seriously be argued that a husband has a right to procreate or avoid procreation following an *in vivo* fertilization. He cannot force conception. He cannot compel or prevent an abortion. The simple fact of the matter is that an *in vivo* husband’s rights and control over the procreative process ends with ejaculation. From that moment until such time as the fetus reaches a stage of development sufficient to trigger the State’s interest in its life the fetus’ fate rests with the mother to the exclusion of all others. . . .

It is clear then if there is no difference between *in vivo* and *in vitro* fertilizations the rights of the wife must be considered paramount and her wishes with respect to disposition must prevail.

Id. at *2-3 (citation omitted).

Southeastern Pennsylvania v. Casey.⁸⁶ While discussing Pennsylvania's spousal notification requirement, the Court returns to its language in *Danforth*, and then notes that "[i]f these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal."⁸⁷ But, the plurality continued, "[b]efore birth, [] the issue takes on a very different cast" because "[i]t is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's" and "[t]he effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman."⁸⁸ The plurality then concludes that in many cases the spousal notification requirement will be "tantamount to the veto found unconstitutional in *Danforth*" and rejects it for that reason, denying that "a husband's interest in the potential life of the child outweighs a wife's liberty."⁸⁹

At the same time, other language of the *Casey* plurality opinion might seem more hospitable to recognizing a right not to be a genetic parent. The opinion is well-known for its expansive statement of the boundaries of substantive due process protection. The Court reads its prior cases as holding that:

[M]atters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁹⁰

Whether or not to have genetic children, even if one will not be obligated to be their gestational or legal parent, might be thought, at first glance, to be exactly the kind of choice "central to personal dignity and autonomy" to which the *Casey* plurality is referring.

Of course, there are problems with applying this language too literally. In

86. 505 U.S. 833 (1992).

87. *Id.* at 895-96 (citing *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972)).

88. *Casey*, 505 U.S. at 896.

89. *Id.* at 897-98.

90. *Id.* at 851; see also Drucilla Cornell, *Dismembered Selves and Wandering Wombs*, in *LEFT LEGALISM/LEFT CRITIQUE* 337, 351 (Wendy Brown & Janet Halley eds., 2002) (conceptualizing the harm as a more abstract invasion of the "right to realize the legitimacy of the individual woman's projections of her own bodily integrity, consistent with her imagination of herself at the time she chooses to terminate her pregnancy").

Washington v. Glucksberg, the Court cautioned against reading this *Casey* language too broadly, noting the fact “[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”⁹¹ Moreover, on several occasions the Court has treated decisions that seem equally “intimate” as not meriting heightened scrutiny.⁹²

However, even taking this passage seriously, the argument cannot succeed. In the cases that concern us we are faced with *two competing* “choices central to personal dignity and autonomy” that of one party to implant embryos they fertilized and *become* a genetic parent, the other to *avoid becoming* a genetic parent. The *Casey* analysis addresses state interference with one extremely personal choice, nothing therein tells us how to resolve a case where *each* party is claiming that resolving the case against them will violate a personal choice.⁹³ As the *Casey* decision puts it, “[i]t is a promise of the Constitution that there is a realm of personal liberty which the *government* may not enter.”⁹⁴

91. 521 U.S. 702, 727 (1997). The open-endedness of this language has led Justice Scalia and others to criticize this aspect of the *Casey* decision. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (castigating “the dictum of its famed sweet-mystery-of-life passage”). Perhaps the *Lawrence* majority’s reliance on this language from *Casey* signals a resurgence. *See* 539 U.S. at 574 (2003). However, all the circuit courts to have addressed *Lawrence* so far have read it as a rational basis case, and thus not involving a fundamental right. *See* *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005); *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1236-38 (11th Cir. 2004).

92. *See Glucksberg*, 521 U.S. at 751 n.24 (“[T]he Due Process Clause of the Fourteenth Amendment does not provide heightened protection to the asserted liberty interest in ending one’s life with a physician’s assistance”); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 3-7 (1974) (reviewing under rational basis test a zoning ordinance preventing cohabitation by those not related by blood, adoption, or marriage); *see also* Cass Sunstein, *Is There a Constitutional Right to Clone?* 5 (Chi. Pub. Law And Legal Theory Working Paper No. 22, 2002), available at <http://www.law.uchicago.edu/academics/publiclaw/resources/22.Sunstein.Clone.pdf>.

93. This parallels a point made about similar language from *Carey*. *See supra* text accompanying note 60.

94. *Casey*, 505 U.S. at 847 (emphasis added). This same theme underlies the state action analysis in Part IV. This particular argument for distinguishing the *Casey* language, like the one made to distinguish similar language in *Carey*, depends on the existence of the other genetic parent asserting an opposing interest. Thus, this argument would be unavailable for different alleged infringements of the right not to be a genetic parent where the state’s action was contrary to the claims of *both* genetic parents—for example, if the state prohibited individuals from destroying cryopreserved preembryos, and instead required them to implant them themselves or make them available for “preembryo adoption” to other couples. *Cf.* Kathryn Venturatos Lorio, *The Process of Regulating Assisted Reproductive Technologies: What We Can Learn from Our Neighbors—What Translates and What Does Not*, 45 LOY. L. REV. 247, 261 n.84 (1999) (citing laws in Australia, Germany, and Switzerland limiting couples to fertilizing only the number of eggs that will be implanted in one cycle). That said, as to that kind of alleged infringement, some of the other arguments discussed in this Part would still be available.

Further, as I will argue below, this language still offers no refuge in the cases I am interested in because they do not involve “compulsion of the State” (the state action strategy), and in cases involving prior consent we are still respecting their “most intimate and personal choices” but choose to prefer their advance relied-upon expression of those choices at the time of contracting rather than their expression at the time of performance (the advance waiver strategy).

b. Is recognizing a right not to be a genetic parent incompatible with the abortion cases?

So far, I have shown why the holdings and language of the Court’s abortion jurisprudence do not *compel* recognition of a right not to be a genetic parent. Now I want to go further and examine whether the holding of those cases is actually incompatible with recognizing a right not to be a genetic parent.

Recognizing a right not to be a genetic parent might be thought, at first glance, to be in conflict with three elements of abortion jurisprudence.

First, it is well accepted by courts and commentators that a woman not only has a right to have a (pre-viability) abortion notwithstanding the objection of the fetus’ genetic father (per *Danforth*), but she also has a right *to carry the baby to term* notwithstanding the objection of a genetic father who wants her to have an abortion,⁹⁵ although the Supreme Court has never actually decided a case that has this latter configuration. That result seems to violate the father’s right not to be a genetic parent.

Second, many commentators plausibly read the current doctrine as mandating that a gestational surrogate, who is not a genetic parent at all, could refuse to have an abortion notwithstanding the objection of both genetic parents.⁹⁶ That result seems to violate the assertion of both genetic parents’ right not to be a genetic parent.

Third, as Professor Robertson and others have noted, the orthodox view of abortion jurisprudence as rooted in “bodily integrity or freedom from unwanted bodily intrusions or burdens,” implies that while a woman has a right to refuse to gestate, she does not have “a right to destroy the embryo/fetus if her bodily

95. See, e.g., *Harris v. State*, 356 So. 2d 623, 624 (Ala. 1978) (“[T]his case presents the question of whether an unmarried man may unilaterally require his unmarried paramour to abort the fetus which he fathered, and, if he cannot, he is not liable for the child’s support after its birth. We hold that he cannot [require an abortion], and that he is [liable for child support.]”); *People in the Interest of S.P.B.*, 651 P.2d 1213, 1216 (Colo. 1982) (“[T]he equal treatment which appellant seeks could only be achieved by according a father the right to compel the mother of his child to procure an abortion. This result is clearly foreclosed by *Roe, Maher, and Danforth.*”).

96. See, e.g., Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 122 (1998).

integrity may otherwise be protected,” that “*Roe* does not give a right to choose a means of termination that would inevitably cause fetal death, if equally safe but nonlethal means of abortion existed.”⁹⁷ Recognizing a right not to be a genetic parent appears to imply exactly the opposite conclusion—that the abortion right is a right to terminate the fetus, not merely to cease gestating it.

Refusing to recognize a right not to be a genetic parent allows us to easily avoid each of these conflicts. But it is a mistake to think that recognizing the right is incompatible with these three results. It all depends on what *kind* of right not to be a genetic parent we recognize.

As discussed in Part I, we could recognize a waivable right not to be a genetic parent, and find that in the parental disagreement case the father waived his right not to be a genetic parent by engaging in coitus. Likewise, in the gestational surrogate disagreement case we could treat the genetic parents as having waived their rights not to be genetic parents by consenting to the implantation of their embryo in the surrogate. Such a reading of the cases would suggest that there is no constitutional problem with enforcing preembryo disposition agreements, because if coitus is sufficient to waive the right not to be a genetic parent, it seems that contract will *a fortiori* be sufficient.⁹⁸ One problem with this reading of the abortion cases is that if engaging in coitus is sufficient to waive the father’s right not to be a genetic parent, it is not clear why it should not also be sufficient to waive the mother’s right not to be a gestational parent as well in the run-of-the-mill abortion case. But perhaps we can draw a distinction between the conditions for waiver of gestational and genetic parenthood rights and, as I noted in Part I, say that while the act of coitus is sufficient to forfeit the right not to be a genetic parent, the right not to be a gestational parent is non-waivable or at least requires waiver through an explicit statement such as a contract. Accepting this reading requires conceding that one can waive the right not to be a genetic parent in advance, the strategy I examine in more depth in Part V.

A second approach, also drawing on the discussion from Part I, is to

97. Robertson, *supra* note 72, at 486-87; see also Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1068 (1996); Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1114 (1998).

Professor Cornell takes an opposite position, suggesting that “[t]he argument that the woman has the right to get rid of the fetus at the point of viability—but not to prevent the state from trying to keep it alive—is to take away from the woman her right to keep a baby, her baby, from happening.” Cornell, *supra* note 90, at 363. But even on its own terms, her argument is premised on her expanded conception of bodily integrity for which gestation is necessary, and by which she differentiates men and women’s rights regarding pregnancy. *Id.* at 342-51. Therefore, even assuming *arguendo* that her expansive conception of bodily integrity is sound, on her account the abortion right does not seem to be implicated by the kind of pre-gestation cases we are discussing.

98. The argument that IVF is as much a waiver as engaging in coitus was made by the trial court in *Kass v. Kass*, No. 19658/93, 1995 WL 110368, at *3 (N.Y. Sup. Ct. Jan. 18, 1995).

suggest a meta-rule for resolving conflicts between the rights. That rule might establish the following priority: (1) protect the interests of potential life after viability;⁹⁹ (2) protect the right to be or not to be a gestational parent, because of its close tie to bodily integrity; (3) protect the right not to be a genetic parent.

Such a meta-rule, ordering fundamental constitutional rights, would explain why pregnant women are allowed to continue their pregnancy over the objection of one (or both) of the genetic parents in the parental disagreement and gestational surrogate disagreement cases. It also explains why, where bodily integrity can be protected without killing the fetus, that is, even in cases where the right not to be a gestational parent has “run out,” neither genetic parent has the right to kill the fetus notwithstanding their interest in avoiding genetic parenthood.

The real question is how plausible a reading of the Constitution this is, and how it compares to the alternative of simply refusing to read in a fundamental right not to be a genetic parent in the first place. The meta-rule approach requires reconceptualizing every parental disagreement on abortion as a *prima facie* conflict of two fundamental constitutional rights. There is nothing in the opinions of courts that have faced this kind of dilemma so suggesting.¹⁰⁰ But perhaps this is not fatal in that the Supreme Court itself has never actually confronted this particular type of case.¹⁰¹

Even if the conflict of constitutional rights is itself endemic, justifying the particular meta-rule needed to make sense of the cases provides further difficulties.

If the right not to be a genetic parent has the same constitutional stature and origin (in the Fourteenth Amendment) as the right to be and not to be a gestational parent, it is not clear why, as a constitutional matter, we must favor one over the other. There is nothing in the text of the Amendment or in the case law interpreting it suggesting a mechanism for ordering fundamental rights. One might instead think that given such a conflict of constitutional rights between parents, a state is entitled to treat its interest in the realization of

99. The Court has suggested such a rule, by holding that the state’s interest in fetal life only becomes compelling at viability. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *see also Roe v. Wade*, 410 U.S. 113, 163-64 (1973).

100. *See, e.g., Harris*, 356 So. 2d at 624; *People in the Interest of S.P.B.*, 651 P.2d at 1214-16.

101. The closest the Court gets is in a portion of the *Casey* decision reflecting on the *Danforth* decision, where the Court calls the husband’s stake in the coming into being of the child an “interest,” while the wife’s stake terminating the pregnancy is referred to as a “liberty,” *Casey*, 505 U.S. at 895-96, and elsewhere as a full-fledged “right,” *id.* at 844, 856. It would be tempting to treat this as a hook for suggesting that the interest not to be a genetic parent does not rise to the level of a fundamental constitutional “right,” but I think that puts entirely too much weight on some stray language. In any event, as the unbundling from Part I shows, even if there was no constitutional right *to be* a genetic parent, that does not mean there is no constitutional right *not to be* one.

potential life as a tie breaker.¹⁰²

Moreover, there are plausible arguments for setting the meta-rule in the opposite direction. Consider the rationale given by the New Jersey Supreme Court in its preembryo disposition case for prioritizing what it called the right not to procreate over the right to procreate: the ex-husband exercising his right not to procreate would lose that right forever while the wife seeking implantation could seek to have children with a different partner at a later time.¹⁰³ Why should the meta-rule not track the same reasoning, that a woman forced to abort by her husband could always have more children in the future, whereas a husband who opposed bringing the baby to term will lose his right not to be a genetic parent to an unwanted child forever?

Further, Textualists (and perhaps Originalists), who think the abortion right itself is a problematic extension of the constitutional text will have difficulties in an attempt to read in not only a right to and not to be a gestational parent, but a further right not to be a genetic parent, and a meta-rule for ordering these rights.¹⁰⁴

The strongest counter-argument in favor of this meta-rule is an intuition that bodily integrity is a more “important” kind of interest, that the invasion is more severe, than that of compelled genetic parenthood. But if the interest is so unimportant so as to be “trumped,” one wonders about the grounds for attaching constitutional significance to the interest in the first place. Using data on sperm donors and disappearing fathers, Professor Waldman has argued that the claim “that the creation of biological ties presages a life of psychological bondage . . . [is] empirically unsupported” and that the “threat of psychological

102. Of course, there is the language in *Roe* and similar language in *Casey* that the preservation of potential prenatal life becomes a compelling state interest only at the point of fetal viability. *Roe*, 410 U.S. at 163; *Casey*, 505 U.S. at 871-72. But just because the state’s interest pre-viability is insufficient to overcome the assertion of a single fundamental constitutional right, it does not follow that it cannot be used to break a tie between conflicting fundamental constitutional rights. See also *infra* text accompanying notes 130-32.

103. *J.B. v. M.B.*, 783 A.2d 707, 717 (N.J. 2001).

104. Reading the abortion cases as establishing a right not to be a gestational parent, but *not* as a right not to be a genetic parent, also makes it easier to defend viability as a relevant cut off. Viability becomes important because it is the point where the mother’s ability to assert a right not to gestate has “run out,” since she is not required to continue gestating. This seems to me to have significant benefits over an attempt to justify the viability line as a theory of personhood. Chief among the problems with the personhood theory is that viability is a “moving target,” since advances in technology mean the point at which a fetus can survive outside the womb (viability) will recede. See *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 457-58 (1983) (O’Connor, J., dissenting). But if the viability point is a theory of personhood, it seems strange to think that the onset of personhood should change with the advancement of technology—that the development of neo-natological care could, for example, make eight-month-olds “persons” in 2007 but “non-persons” in 1907. On the other hand, perhaps some of this strangeness can be dispelled by viewing viability as a theory of legal and not ontological personhood; if changes in the law altered whether slaves and women were *legal* persons, why should changes in technology not have similar effects as to fetuses?

bondage is a product of the courts' collective imagination."¹⁰⁵ While compelled unwanted gestational and legal parenthood has obvious tangible effects on an individual, compelled genetic parenthood does not when it does not carry with it any gestational or legal burdens. It may cause emotional distress, but that is a kind of injury to which tort law has been somewhat hostile in the absence of physical injury.¹⁰⁶ And while an individual has an interest in avoiding these negative emotional effects, and we might even support a legal system that sought to prevent or attach liability to the imposition of those effects, it is not at all clear that we think that interest is superordinate or of constitutional significance. To hold otherwise would be to sweep in a much larger group of rights into the ambit of substantive due process.¹⁰⁷

To be sure, none of this is decisive. The possibility of recognizing a conflict of constitutional rights resolved by a meta-rule of the kind I describe makes recognizing the right not to be a genetic parent logically compatible with the three elements of abortion jurisprudence I have discussed. But it does require us to significantly depart from the constitutional text, and employ reasoning about the abortion jurisprudence that is quite different from the kind on which the Court has relied.

B. *Evaluating the Strategy*

I have demonstrated why nothing in the abortion or contraception cases compels the recognition of a right not to be a genetic parent. Further, recognizing a right not to be a genetic parent, while not incompatible with certain elements of the abortion jurisprudence, certainly complicates the picture and paints a wide range of abortion-related disputes as conflicts of fundamental constitutional rights in need of a meta-rule for resolution.

None of this is in and of itself fatal to the claim that the Constitution protects a naked right not to be a genetic parent. The canon of substantive due process rights is not forever frozen. But the days of expansively adding to what is protected by substantive due process, if not over, are substantially reigned in. In *Washington v. Glucksberg*, the Court cautioned that "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and

105. Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1060, 1062 (2004). I evaluate whether the data Waldman relies on really proves her case, and discuss the nature of the interest in not being a genetic parent in more depth in Cohen, *supra* note 4 (manuscript at 22-23).

106. RESTATEMENT (SECOND) OF TORTS §§ 46 cmt. b, 436A (1965).

107. It would seem to imply that recognition of the torts of negligent and intentional infliction of emotional distress, even absent physical injury, is constitutionally compelled (at least against government tortfeasors where there is no state action problem).

personal decisions are so protected,”¹⁰⁸ requiring instead that any right recognized be “objectively, ‘deeply rooted in this Nation’s history and tradition’”¹⁰⁹ and “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it] were sacrificed.’”¹¹⁰

If this analysis holds the day, it is here that the inability to “grandfather” the right not to be a genetic parent in through the contraception and abortion decisions has bite. It seems unlikely that the right not to be a genetic parent, standing alone, can satisfy the historical analysis prong, since reproductive technologies, and the ability to make someone a genetic parent without imposing unwanted gestation, is a very recent development. Much of this analysis might turn on the level of generality with which we define the relevant right, a very contentious issue in substantive due process analysis.¹¹¹

In the realm of natural conception, there is a long tradition of courts being insouciant to arguments by husbands seeking to be freed from the obligations of child support who complain that they were deceived into believing that their partners could not conceive,¹¹² or that conception took place without meaningful consent.¹¹³ There is also the case law discussed in the last section holding that husbands cannot compel wives to have abortions.¹¹⁴ But perhaps these cases can be distinguished on the theory that they merely suggest that gestational rights trump the right not to be a legal or genetic parent. In any

108. 521 U.S. 702, 727 (1997).

109. *Id.* at 720-21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 503 (1977)).

110. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

111. *Compare id.* at 722, and *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J.) (arguing for specific description of rights), with *id.* at 139 (Brennan, J., dissenting) (arguing for a more general description). Depending on one’s view of this question one might look for a “tradition” as to frozen preembryos or parenthood through assisted reproduction on the one hand, or simply think more generalized traditions as to non-assisted reproduction are sufficient.

112. *See, e.g.*, *Beard v. Skipper*, 451 N.W.2d 614, 614-15 (Mich. Ct. App. 1990) (mother misrepresents use of birth control); *Hughes v. Hutt*, 455 A.2d 623, 624-25 (Pa. 1983) (mother ceases taking birth control without telling the father and refuses to have an abortion). Other cases have precluded tort suits by fathers due to such misrepresentations. *See Lasher v. Kleinberg*, 164 Cal. Rptr. 618, 619 (Cal. Ct. App. 1980); *Linda D. v. Fritz C.*, 687 P.2d 223, 225-27 (Wash. Ct. App. 1984); *see also C.A.M. v. R.A.W.*, 568 A.2d 556 (N.J. Super. Ct. App. Div. 1990) (suit by mother against father for false representation as to having a vasectomy). For a more detailed discussion of the case law in this area, see Jill E. Evans, *In Search of Paternal Equity: A Father’s Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1065-92 (2005).

113. *See, e.g.*, *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186 (Ala. Civ. App. 1996) (intoxication to the point of unconsciousness and sexual assault); *Evelyn v. Shire*, No. 242681, 2004 WL 314915 (Mich. Ct. App. Feb. 19, 2004) (fourteen-year-old father’s claim of incapacity to consent); *Mercer County Dep’t of Soc. Servs. ex rel. Imogene T. v. Alf M.*, 589 N.Y.S.2d 288 (N.Y. Fam. Ct. 1992) (same claim by a sixteen-year-old father). *See generally* Dana Johnson, *Child Support Obligations That Result from Male Sexual Victimization: An Examination of the Requirement of Support*, 25 N. ILL. U. L. REV. 515, 519-29 (2005) (collecting cases on statutory rape of men and imposition of child support).

114. *See supra* text accompanying note 95.

event, finding an affirmative historical pedigree for the right not to be a genetic parent seems like an uphill battle.

For these reasons, there is a strong argument that the asserted right not to be a genetic (but only genetic) parent is not a fundamental constitutional right.

This strategy is the most “powerful” one in that, if it obtains, an individual does not violate the Constitution by making another individual a genetic (but only genetic) parent against his or her will, whether or not there is prior consent. It therefore implies that there is no *constitutional* problem with compelled genetic parenthood even in something like the bathtub case.

III. COULD ANY INFRINGEMENT SURVIVE CONSTITUTIONAL SCRUTINY?

Even if the right not to be a genetic parent is protected as a fundamental right by the federal Constitution, a second strategy suggests that the infringements of that right in the kinds of cases with which we are concerned can survive the appropriate level of scrutiny (strict scrutiny or undue burden analysis).

A. *The Argument*

Recognizing the right not to be a genetic parent as a fundamental right for substantive Due Process purposes does not end the constitutional inquiry. All it means is that strict scrutiny applies.¹¹⁵ Although frequently “strict in theory, but fatal in fact,”¹¹⁶ this is not always the case,¹¹⁷ and one might argue that some infringements could survive this scrutiny.

But, in fact, infringements of the right not to be a genetic parent may be reviewed under something more deferential than strict scrutiny. While the contraception cases have consistently invoked strict scrutiny,¹¹⁸ Professor David Meyer has argued that when we survey the realm of fundamental rights in “family” contexts more generally, “[b]oth the Court’s description of the applicable standard of review and its own conduct of review in particular cases strongly suggest that the Court in fact applies a less stringent form of review.”¹¹⁹ In particular, regarding abortion, while *Roe* firmly established strict

115. If we accept the first strategy and find that the right not to be a genetic parent is not a fundamental right, any infringement will be reviewed only for rational basis, and the types of considerations I discuss here seem readily to pass that deferential standard.

116. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (plurality opinion) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

117. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003); *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

118. *See, e.g.*, *Carey v. Population Servs. Int’l.*, 431 U.S. 678, 696 (1977); *Griswold v. Connecticut*, 381 U.S. 479, 504 (1965).

119. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 537

scrutiny as the relevant standard of review,¹²⁰ between *Roe* and *Casey* the Court's abortion jurisprudence "abandoned any pretense of strict scrutiny" in favor of a sort of reasonableness inquiry.¹²¹ With *Casey* this change became explicit, with the Court announcing its "undue burden" test and stating that the touchstone was reasonableness such that states could "enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning."¹²² The Court's application of this test is a good deal more deferential than traditional strict scrutiny.¹²³

Thus, owing to the two doctrinal lineages of the asserted right not to be a genetic parent, we are faced with two possible frameworks for review. If we view it as a continuation of the contraception cases, strict scrutiny; if it is a continuation of the abortion decisions, undue burden analysis.

Under either standard, there are at least two interests the state might muster. First, the state may have an interest in the preservation or development of embryonic life. This interest is to be contrasted with the state's much weaker interest in preventing barriers to conception. Thus, this distinction could allow us to draw a line between the preembryo disposition cases on the one hand and the sperm donor case, the bathtub case, and the *Phillips* type case on the other. In the first, the government could appeal to an interest protecting embryonic life, while in the other cases it could not, if the "moment" where the law seeks to intervene in those cases is *before* fertilization.

A second possible state interest, limited to the cases involving agreements, calls upon the benefits of advanced reproductive planning and contracts. For

(2000).

120. *Roe v. Wade*, 410 U.S. 113, 156-64 (1973); *id.* at 170-71 (Stewart, J., concurring) (applying strict scrutiny).

121. Meyer, *supra* note 119, at 537 (citing Daniel A. Farber & John E. Nowak, *Beyond the Roe Debate: Judicial Experience with the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519, 523 (1990)).

122. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873-74 (1992). Concurring in part, Justice Blackmun would have hewn more closely to the strict scrutiny form of analysis. *Id.* at 925-26 & n.1; *see also* *Lawrence v. Texas*, 539 U.S. 558, 595 (2003) (Scalia, J., dissenting) ("We have since rejected *Roe's* holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, and thus, by logical implication, *Roe's* holding that the right to abort an unborn child is a 'fundamental right.'" (citations omitted)). In the Court's most recent partial birth abortion decision, *Gonzales v. Carhart*, the majority says it "assume[d]" that the principles of *Casey* and the undue burden test apply. 127 S. Ct. 1610, 1626-27, 1635 (2007). Justice Scalia and Thomas, though joining the majority, would have overruled *Casey* and *Roe*. *Id.* at 1639-40 (Thomas, J., concurring). This suggests that the undue burden test is, at the present moment, still good law.

123. *See, e.g.*, Meyer, *supra* note 119, at 538-39. For example, Professor Meyer notes that the Pennsylvania law at issue in *Casey* requiring that information about the risks of abortion be given by a licensed physician and not a qualified assistant survives the undue burden standard but would fail strict scrutiny. *Id.* at 539 n.52. Particularly revealing in coming to this conclusion is the Court's citation of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), the standard citation for *rational basis* review. *See* Meyer, *supra* note 119, at 539 n.52 (quoting *Casey*, 505 U.S. at 884-85).

example, the New York Court of Appeals in *Kass v. Kass* urged that:

[P]arties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs.¹²⁴

Although recognizing the possibility of changed circumstances including divorce, death, aging, and the birth of other children, the *Kass* court found that “[t]hese factors make it particularly important that courts seek to honor the parties’ expressions of choice, made before disputes erupt, with the parties’ over-all direction always uppermost in the analysis” because “[t]o the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.”¹²⁵

A more generalized argument would be that reproductive contracts, like all contracts, are essential to facilitating situations requiring mutual reliance, and thus “enabl[ing] persons to combine resources and energies to achieve welfare-enhancing goals that could not be achieved without enforcement of the mutual promises.”¹²⁶ While I will not go into detail here about the benefits in this particular context, they include the ability to “insure” against future infertility, the ability to delay reproduction in order to pursue other life goals, which may be a welfare-enhancing move especially for women (for whom fertility declines steadily with age).¹²⁷ Enforceable contracts also allow the use of reproductive technology by persons unwilling to bear the cost or risks of IVF without assurances that unused preembryos will be available in the future. They also enable the use of reproductive technology by those holding strong religious or non-religious beliefs leading them to oppose the destruction of preembryos.¹²⁸

124. 696 N.E.2d 174, 180 (N.Y. 1998).

125. *Id.*

126. Robertson, *supra* note 34, at 1002 (2001); *see also* CHARLES FRIED, CONTRACT AS PROMISE 13 (1981) (noting how promise enables the pursuit of “more intricate, more far-reaching projects”).

127. *See, e.g.*, DEBORA L. SPAR, THE BABY BUSINESS 15 (2006); DEP’T OF HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL, 2003 ASSISTED REPRODUCTIVE TECHNOLOGY REPORT: NATIONAL SUMMARY (2003), *available at* <http://apps.nccd.cdc.gov/ART2003/nation03.asp>.

128. For more on the benefits of these contracts, *see* Cohen, *supra* note 4 (manuscript at 36-43).

B. Evaluating the Strategy

This strategy, suggesting that there is a right not to be a genetic parent but infringement thereof only survives constitutional scrutiny in appropriate cases, is considerably more cabined than the first strategy. If it is the state's interest in preserving embryonic life that is sufficiently compelling, then only infringements which seek to protect *already*-fertilized preembryos (e.g., enforcing a pro-implantation preembryo disposition agreement) are constitutional. Infringements which merely enable the provision of sperm or eggs or their combining (e.g., enforcing a contract to provide sperm) are not. If what matters instead is the interest in fostering reproductive autonomy and enabling the undertaking of mutually beneficial reproductive activities, then only infringements of the right that involve prior consent by contract (e.g., enforcing a preembryo disposition agreement, enforcing a contract to provide sperm) are constitutional, while infringements in the no-consent cases (e.g., the *Phillips* case, the bathtub case) are not.¹²⁹ If *both* types of interests have to be present for the infringement to survive constitutional scrutiny, then only interventions involving prior consent and already fertilized preembryos are covered.

But there are significant difficulties with the strategy.

The preservation of embryonic life seems like the stronger of the two state interests. But if strict scrutiny is the standard, this strategy faces a hurdle because pre-*Casey* abortion jurisprudence tells us that the interest in preservation of human life before birth does not become "compelling" until viability.¹³⁰

One response is to suggest that the relevant question is "compelling as against what?" Only at viability does that interest become compelling as against a woman's right not to be a gestational parent, a bodily integrity invasion, but it may be that the state's interest becomes compelling sooner, when the interest is merely in not becoming a genetic parent. That is, the government may "bear[] an affirmative duty to protect the interests of the fetus to the extent that it may do so without coercing involuntary *pregnancy*,"¹³¹ but that limitation does not apply when it need not coerce pregnancy. This response

129. Preembryo disposition disputes in the absence of an agreement present a hard middle ground. The interests furthered by contract and reproductive autonomy are certainly weaker in the application of a default rule, suggesting that silence during the cryopreservation of preembryos will be read as consent to implantation.

130. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); see also *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992) ("[I]f the state's interests do not become sufficiently compelling in the abortion context until the end of the first trimester, after very significant developmental stages have passed, then surely there is no state interest in these preembryos which could suffice to overcome the interests of the gamete-providers.").

131. Laurence H. Tribe, Commentary, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 341 (1985) (emphasis added).

is an outgrowth of the unbundling introduced in Part I, in suggesting that what might count as a compelling interest as to one stick in the bundle of rights not to procreate might not count as such an interest for a different stick.

Whether this is a valid rejoinder turns on the claim that an interest that is insufficiently compelling as to forced gestational parenthood is sufficiently compelling when the intrusion is the lesser one of forced genetic (and only genetic) parenthood.¹³² While, from a legal realist perspective, courts are always employing a sliding scale of what counts as “compelling” in relation to the extent of the violation, it is not clear that the *formal* doctrine permits us to do the same. The doctrine seems to demand that we make “laundry lists” of interests and determine whether or not they are compelling, and leave the context specific inquiry to the narrow tailoring part of the strict scrutiny analysis. If this is right, in order for this strategy to work the Court would have to revisit its declaration that preservation of life only becomes compelling at viability.

The narrow tailoring requirement may also produce problems for the argument. If preserving embryonic life is the compelling state interest, enforcing preembryo agreements might seem problematically *underinclusive* in that enforcing *all* preembryo disposition agreements would mean enforcing both those leading to implantation and destruction. Indeed, if this is the state’s interest, enforcing the contracts that further its asserted interest *as well as* those that are directly at odds with its asserted interest might be thought to be sufficiently irrational as to fail even rational basis review.¹³³ A stronger state intervention like banning the destruction of preembryos altogether would not face the same problem.

There is also the other possible state interest, the interest in facilitating the undertaking of mutually beneficial activities through contract and allowing individuals to protect their reproductive autonomy. But it is hard to know whether the Court would view this interest as sufficiently “compelling.”

If the undue burden test is the operative one in these cases, it seems as though the strategy set out in this Part—that infringements of the asserted fundamental right not to be a genetic parent survive the appropriate level of constitutional scrutiny in the kinds of cases with which we are concerned—is

132. I say “as to forced *gestational* parenthood,” but in the regular abortion context it is actually as to the combination of gestational, genetic, and legal parenthood. If the Constitution also prohibits barring gestational surrogates from abortion, then it is as to forced gestational parenthood, standing alone.

133. *Cf. Stenberg v. Carhart*, 530 U.S. 914, 946-47 (2000) (Stevens, J., concurring) (“Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a *reason* to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of ‘potential life’ than the equally gruesome procedure Nebraska claims it still allows. . . . [T]he notion that . . . the State furthers any legitimate interest by banning one but not the other, is simply irrational.”). If, by contrast, the Court decided it would only enforce agreements that called for implantation, that might raise equal protection claims.

more likely to succeed. Something less than a compelling interest will be sufficient.¹³⁴ Further, the reasonableness standard and “substantial obstacle” analysis seem to allow for more of a calibration of the strength of the interest and the degree of the invasion, as well as more room for fit. That said, it is not clear how far that calibration and leeway goes.

All of these uncertainties make me skeptical that this strategy would succeed. That said, there is at least a colorable argument that enforcement of preembryo disposition agreements, in particular, would survive undue burden scrutiny if that is the test; that it is a reasonable regulation of the right not to be a genetic parent for the state to allow individuals to bind themselves in these matters in advance, and that it imposes no substantial obstacle to the exercise of the right. Such an approach would generate a rule very similar to adopting the waiver strategy discussed in Part V.

IV. IS THERE STATE ACTION?

This strategy suggests that in the prior consent cases (e.g., enforcing a preembryo disposition agreement) and no-consent cases there is no state action. Therefore, the Fourteenth Amendment of the Federal Constitution does not apply to these disputes *at all*.

A. *The Argument*

The Fourteenth Amendment, by its very text, applies only to state actors, and the Supreme Court’s 1883 *Civil Rights Cases* decision made clear that “[i]t is state action of a particular character that is prohibited. *Individual invasion of individual rights is not the subject-matter of the amendment.*”¹³⁵ This decision “affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, ‘however discriminatory or wrongful,’ against which the Fourteenth Amendment offers no shield.”¹³⁶ But as the Court has also observed, “[w]hile the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is ‘private,’ on the one hand, or ‘state action,’ on the

134. The *Casey* Court broke from *Roe* in acknowledging that “there is a substantial state interest in potential life throughout pregnancy,” and that the state can burden that right so long as it does not do so in a way that is “undue,” which the Court connects to a distinction between “inform[ing]” choice and “placing a substantial obstacle in the path of a woman’s choice.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992).

135. *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (emphasis added); see U.S. CONST. amend. XIV; see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

136. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

other, frequently admits of no easy answer.”¹³⁷

Both the courts deciding and commentators discussing the preembryo disposition cases have largely ignored the state action question.¹³⁸ But these cases seem crucially different from the abortion and contraception decisions that they invoke. In *Griswold*, *Eisenstadt*, *Roe*, *Carey*, and *Casey*, the state action was obvious. Each of these cases involved a state law making it a crime to provide an individual or class of individuals with contraception or abortion under certain conditions, and imposing criminal penalties for what was asserted to be constitutionally protected conduct.

Of course, the state action requirement can also be satisfied more indirectly. The Supreme Court has described the test for state action as having two prongs: “First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible,” and “[s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor.”¹³⁹ This second prong has recently been characterized as “determining whether ‘there is a sufficiently close nexus between the State and the challenged action.’”¹⁴⁰ The elements of this second inquiry are sometimes defined as “tests” and sometimes as “factors” by the Court,¹⁴¹ and consist of: “whether the private party is performing a public or government function; whether the government compelled or significantly encouraged the challenged action; whether the government jointly participated in the action; and whether there is symbiotic interdependence between the government and the private

137. *Id.* at 349-50 (citing *Moose Lodge v. Iris*, 407 U.S. 163, 172 (1972); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961)).

138. In *J.B. v. M.B.*, the New Jersey intermediate appellate court noted, without resolving the issue, that it was “not clear that judicial enforcement of the alleged private contract would constitute state action under the Fourteenth Amendment.” 751 A.2d 613, 619 (N.J. Super. Ct. App. Div. 2000) (citing cases). On appeal, the New Jersey Supreme Court noted the lower court’s point as to state action but said that “resolution of the constitutional issue was not necessary to dispose of the litigation.” *J.B. v. M.B.*, 783 A.2d 707, 711 (N.J. 2001). However, the court relied heavily on a federal constitutional right not to procreate in its opinion but never returned to the issue.

The only discussion of the problem I have found in academic commentary on these cases discusses the issue in a fairly conclusory way. *See Falasco, supra* note 3, at 279 (“Although a court’s construction of a local contract under local law does not provide the necessary state action to implicate the United States Constitution, the Constitution’s guiding principles can be used in deciding how to enforce a contract in light of the fundamental rights associated with one’s personal liberty.”).

139. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

140. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1412 (2003) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999)).

141. *Id.*; *see also, e.g.*, Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U. L. REV. 1, 7 (describing the three tests employed by the Court); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 314-21 (1995) (similar).

party.”¹⁴² The government compulsion or significant encouragement strand, sometimes also referred to as “entanglement,” is the most relevant in our context.

I divide my analysis in two, first examining the state action argument in the enforcement of agreements compelling genetic parenthood, and then discussing state action in the no-consent cases.

1. *Enforcing disposition (and other reproductive) agreements*

The best reading of the Court’s state action jurisprudence is that the enforcement of agreements to become a genetic parent, such as preembryo disposition agreements and agreements to provide sperm or egg, over contemporaneous objection, does not constitute state action raising a constitutional issue.

The touchstone of any discussion of state action in the enforcement of contracts is, of course, the Supreme Court’s 1948 decision in *Shelley v. Kraemer*.¹⁴³ In *Shelley*, thirty property owners signed an agreement whereby they agreed to a racially restrictive covenant on their lots.¹⁴⁴ Shelley, an African-American, purchased one of the parcels covered by the agreement (apparently without knowledge of the covenant,) and Kraemer and the other respondents (owners of the *other* lots covered by the restrictive covenant) brought suit against Shelley seeking enforcement of the covenant in the form of a judgment divesting Shelley of title to the property.¹⁴⁵ The Supreme Court found that enforcement of the covenant was state action in violation of the Fourteenth Amendment’s Equal Protection Clause.¹⁴⁶

The Court recognized that had a state statute or a local ordinance imposed the restriction it would violate the Fourteenth Amendment, but here the restrictions were “determined, in the first instance, by the terms of agreements among private individuals,” and the question was whether this distinction was determinative.¹⁴⁷ The Court noted that the Fourteenth “Amendment erects no shield against merely private conduct, however discriminatory or wrongful,” and if the “agreements [we]re effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.”¹⁴⁸ “But here there was more,” noted the Court, in that in these cases “the agreements were secured

142. Metzger, *supra* note 140, at 1412 (citing cases); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288, 296 (2001) (recent re-statement of the tests).

143. 334 U.S. 1 (1948).

144. *Id.* at 4-5.

145. *Id.* at 5-6.

146. *Id.* at 20.

147. *Id.* at 11-13.

148. *Id.* at 13.

only by judicial enforcement by state courts of the restrictive terms of the agreements.”¹⁴⁹ The Court then reasoned that “there has been state action in these cases in the full and complete sense of the phrase” because:

The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.¹⁵⁰

Those seeking to argue that enforcement of a preembryo disposition agreement would violate a constitutional right would presumably latch on to *Shelley* to supply the state action analysis. I come neither to bury *Shelley* nor to praise it; there has been a voluminous literature doing both that I do not attempt to recapitulate here.¹⁵¹ What I want to do is briefly suggest a number of reasons, drawn from this literature, why it is unlikely that most courts would apply *Shelley* to find state action in the preembryo disposition context. First, a number of courts and commentators have suggested that *Shelley* should be limited to cases of race-based Equal Protection violations.¹⁵² Second, some have suggested *Shelley* is best read as a decision limited to the law of restrictive covenants, because it occurred against a background common law of property that generally disfavored the enforcement of restrictive covenants running with the land; that is, the “state’s policy of selectively enforcing restrictive

149. *Id.* at 13-14.

150. *Id.* at 19.

151. For some representative work on the subject, see Louis Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

152. See *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995); *Parks v. “Mr. Ford,”* 556 F.2d 132, 136 (3d Cir. 1977); *Hardy v. Gissendaner*, 508 F.2d 1207, 1210 (5th Cir. 1975); *Linn Valley Lakes Prop. Owners Ass’n v. Brockway*, 824 P.2d 948, 951 (Kan. 1992); *Midlake on Big Boulder Lake Condo. Ass’n v. Cappuccio*, 673 A.2d 340, 342 (Pa. Super. Ct. 1996); see also, e.g., Cole, *supra* note 141, at 10.

covenants reflected a decision to facilitate some kinds of private behavior but not others,” since if “only a handful of restrictive covenants would be honored, it is odd indeed that the state would elect to make a racially restrictive covenant one of the chosen few.”¹⁵³ Third, in *Shelley* neither party to the transaction wanted the racially restrictive covenant enforced, and it was instead the co-covenantors who brought the action seeking enforcement; and some have suggested that *Shelley* be read as applying only to cases where the state is interfering with a transaction between a willing seller and buyer.¹⁵⁴

Perhaps for these reasons, more recent decisions by the federal courts have tended to limit *Shelley* to its facts.¹⁵⁵ In particular, in cases concerning constitutional challenges to judicial enforcement of agreements to arbitrate, “[e]very federal court considering the question has concluded that there is no state action present in contractual arbitration.”¹⁵⁶ For example, in *Davis v. Prudential Securities, Inc.*, the Eleventh Circuit, considering the district court’s confirmation of an arbitrator’s punitive damages award, rejected an argued procedural Due Process violation premised on the arbitration’s lack of adequate safeguards.¹⁵⁷ The plaintiff’s attempt to rely on *Shelley* was rebuffed because the court concluded that “[i]n light of [the Supreme Court’s] narrow interpretation of state action . . . [we] decline to extend *Shelley* and hold that the mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause.”¹⁵⁸ Other circuits have reached similar conclusions.¹⁵⁹

If anything, the case for state action in the enforcement of arbitration

153. Krotoszynski, *supra* note 141, at 317.

154. See, e.g., Cole, *supra* note 141, at 11 n.43; Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 496 (1998). Dissenting opinions in subsequent cases have read *Shelley* this way. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 635 (1991) (O’Connor, J., dissenting) (emphasizing that in *Shelley* the “state courts were called upon to enforce racially restrictive covenants against sellers of real property *who did not wish to discriminate*” (emphasis added)); see Bell v. Maryland, 378 U.S. 226, 330-31 (1964) (Black, J., dissenting) (arguing that under *Shelley* the Fourteenth Amendment only becomes involved when “an owner of property is willing to sell and a would-be purchaser is willing to buy”).

155. See also Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 606 (1991) (“[T]he Court seldom cites [*Shelley*] even when it is relevant, largely leaving it as an isolated anomaly.”).

156. Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1161 & n.68 (2004).

157. 59 F.3d 1186, 1190 (11th Cir. 1995).

158. *Id.* at 1192 (citations omitted).

159. See *Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999); *Fed. Deposit Ins. Co. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987); *Elmore v. Chi. & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986); see also Cole, *supra* note 141, at 4 n.11 (collecting lower court cases). Interestingly, the consensus in legal commentary is to find state action here. Cole & Spitko, *supra* note 156, at 1161-62 & n.69 (citing commentators).

agreements is more compelling than in the enforcement of preembryo disposition agreements, because there are arguments for non-entanglement forms of state action in arbitration: “[A]rbitration is performing a traditionally exclusive government function”¹⁶⁰ in the “binding resolution of disputes.”¹⁶¹ Moreover, the degree of state entanglement in contractual arbitration is much more pronounced, in that “the statutory scheme provides for the court to retain an active supervisory role even after the case has been ordered to arbitration; it authorizes the trial court to correct, modify, or vacate an arbitration award,” and to “confirm the award as a judgment, thus making it available for enforcement as any other judgment, with the full panoply of vehicles available for enforcement, including garnishment and attachment.”¹⁶² Further, in contractual arbitration, ADR providers are granted a number of substantial additional benefits from the state, they “are statutorily vested with broad judicial powers to administer depositions and discovery, including subpoena and sanction powers,” and are also given the same “judicial” immunity from civil liability that is conferred upon the states’ own “constitutionally authorized judiciary.”¹⁶³

Given that the courts have consistently refused to find state action in the enforcement of agreements to arbitrate, where there is a much stronger case for state action, there is good reason to doubt that the courts will find state action in the enforcement of preembryo disposition agreements.

Does it matter to the analysis that, unlike an agreement to arbitrate,

160. Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 622 (1997).

161. *Id.* at 621.

162. *Id.* at 628 (footnotes omitted). Here, Reuben is referring specifically to the California arbitration scheme. *Id.* at 627-28 & nn.265-68 (citing CAL. CIV. PROC. CODE §§ 1281.2, 1284-86, 481.010-493.060 (West 1982 & Supp. 1996)).

163. *Id.* at 629 (citing CAL. CIV. PROC. CODE § 1282.6 (West Supp. 1996); CAL. CIV. PROC. CODE §§ 1283, 1283.05, 1283.1 (West 1982)); *see also id.* (“[T]he argument that arbitration is state action is much more than a call for an extension of *Shelley*,” because “the dramatic intertwining of public and private actors in contractual arbitration pervades the entire seemingly private process, including but (unlike *Shelley*) not limited to the mere stage of enforcement.”).

One might be tempted to call on pervasive government oversight over the reproductive medical sector as a distinguishing factor. But this claim founders on both factual and doctrinal shoals. Factually, reproductive technology is actually quite unregulated in the United States as compared to most major Western countries. *E.g.*, SPAR, *supra* note 127, at 66-67, 228. As a doctrinal matter, pervasive regulation is itself insufficient to establish state action. As the Court noted in *Blum v. Yaretsky* “although it is apparent that nursing homes in New York are extensively regulated, ‘[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.’” 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)). And the mere licensing of fertility doctors seems clearly insufficient to make the state “a partner or even a joint venturer” in their conduct. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (state granting of a liquor license to private club that racially discriminated insufficient to establish state action).

enforcement of preembryo disposition agreements may lead to a determination of legal parentage if a successful pregnancy results?¹⁶⁴ No, the fact that parentage determinations are state action does not mean that the conduct that leads to parentage is. If A seduces B, and B becomes pregnant and produces a child, that will lead to a parentage determination; B's complaint is not with the state's accurate determination of parentage, but with the private act of seduction.¹⁶⁵ Further, as discussed, a number of states have by statute absolved men of legal parenthood in these situations.¹⁶⁶

Despite all this, one difficulty in finding no state action comes from the Court's decision in *Cohen v. Cowles Media Co.*, allowing a promissory estoppel suit to go forward based on a promise by a newspaper of confidentiality to a source.¹⁶⁷ Although the Court found no First Amendment violation on the merits because of waiver (as discussed in the next Part), it did find state action leading to a live First Amendment question. The Court noted that "the Minnesota Supreme Court held that if Cohen could recover at all it would be on the theory of promissory estoppel, a state-law doctrine which, in the absence of a contract, creates obligations never explicitly assumed by the parties," that "[t]hese legal obligations would be enforced through the official power of the Minnesota courts" and that "[u]nder our cases, that is enough to constitute 'state action' for purposes of the Fourteenth Amendment."¹⁶⁸ If there was state action in the enforcement of the promise in *Cohen*, why should there not be state action in the enforcement of preembryo disposition agreements?

Some commentators have suggested that it is possible to read this passage as distinguishing the enforcement of contracts from promissory estoppel, the imposition of "obligations never explicitly assumed by the parties."¹⁶⁹ They argue that *Cohen* can be read as holding that only the latter is state action, the

164. The claim that parentage determinations are themselves state action seems straightforward. The Court appears to assume state action in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), where a genetic father brought a constitutional challenge against a California law that treated the husband of the birth mother as the father with only a limited window to rebut that presumption, without explicitly discussing the point. There is an explicit discussion of state action in *Palmore v. Sidoti*, 466 U.S. 429 (1984), where a state court's decision shifting custody of a child from the mother to the father because the mother had allowed her African American boyfriend to move in with her was found unconstitutional, *id.* at 432 n.1, although the issue was custody, not parentage.

165. *Cf.* *Dubay v. Wells*, 442 F. Supp. 2d 404, 410 (E.D. Mich. 2006); *Child Support Enforcement Agency v. Doe*, 125 P.3d 461, 468 (Haw. 2005) (finding no state action in claims by men attempting to avoid legal parentage and its attendant financial obligations in cases involving deception by the woman as to her use of contraceptives); *see also* *N.E. v. Hedges*, 391 F.3d 832, 834 (6th Cir. 2004) (noting but not resolving a similar argument).

166. *See supra* text accompanying note 13. Moreover, the success rate for IVF is quite low, even lower with frozen preembryos, so many implantations will not lead to successful child births. *See SPAR, supra* note 127, at 53-55.

167. 501 U.S. 663 (1991).

168. *Id.* at 668.

169. Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 350 (1998) (quoting *Cohen*, 501 U.S. at 668).

rationale being that the state does not act by enforcing obligations that parties have formally undertaken between themselves, but it does act when it imposes those obligations absent a contract.¹⁷⁰

But this distinction seems somewhat formalistic and unsatisfying, especially when the promissory estoppel theory invoked seems so close to a contract, as in *Cohen*, rather than the doctrine's more tort-like forms.¹⁷¹ Yes, promissory estoppel is the state imposing obligations "from outside" on individuals without contract, but the state seems to be equally imposing obligations "from outside" by having a rule that recognizes contractual liability without the formality of a seal, for example. Still, at a deeper level, this may just be the *bête noire* of state action doctrine: it is difficult to find a middle ground between the state being everywhere and nowhere.¹⁷²

In sum, jurisprudential developments have rendered *Shelley* largely inert. *Cohen* can be viewed as a slight push in the opposite direction, but as a formal matter it can be distinguished. Moreover, in the fifteen years since it was decided, *Cohen* has not prompted the federal courts to embrace *Shelley* with renewed vigor. The best reading of the current doctrine is that there would be no state action in the enforcement of preembryo disposition or other reproductive agreement and hence no constitutional issue.

2. In the no-prior-consent cases

The failure of the state to protect an individual's interest in not becoming a genetic parent without prior consent (such as in *Phillips* or the bathtub case) is also unlikely to constitute state action.

As Professor Tribe has observed, "[t]he general proposition that common law is state action—that is, that the state 'acts' when its courts create and enforce common law rules—is hardly controversial" but "[n]onetheless, in different contexts courts have come to very different conclusions about the necessity for judging common law rules in light of constitutional

170. *Id.*; Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 64 (1995).

171. *E.g.*, Gilles, *supra* note 170, at 64. For a discussion on the various forms the doctrine has taken historically, see generally, for example, Eric Mills Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE U. L. REV. 45 (1996).

172. *Cf.* David J. Barron, *Privatizing the Constitution: State Action and Beyond*, in THE REHNQUIST LEGACY 345, 352 (Craig M. Bradley ed., 2005) (suggesting that the pre-Rehnquist state action doctrine "recognized the realist point that individuals were located within a broader society, and that the broader society established—through law—the structures within which individuals operated," and therefore "[t]here was, then, no private domain that, a priori, was unaffected by or free from law"); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004) ("The state action doctrine is analytically incoherent because, as Hohfeld and Hale demonstrated, state regulation of so-called private conduct is always present, as a matter of analytic necessity, within a legal order.").

limitations.”¹⁷³

The *Shelley* Court was careful to contrast its factual situation from one where the “States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit,” where there would be no state action.¹⁷⁴ The failure for state law to afford a remedy in our case resembles this situation.

One might be tempted to reach for *New York Times Co. v. Sullivan*,¹⁷⁵ holding that Alabama libel law allowing the City Commissioner (a private party) to recover money damages against the New York Times (also a private party) violated the United States Constitution’s First Amendment protections because it did not require a showing of “actual malice.”¹⁷⁶ There, the Supreme Court found state action, noting that “[a]lthough this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press” and that “[i]t matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute,” because “[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”¹⁷⁷ Even on its own terms, however, the decision’s logic is inapposite. In *New York Times* it was the existence of a state tort law *that attached liability* to certain forms of speech that constituted state action; in our case it would be the *failure to attach tort liability* that is argued to create state action.

The rejoinder is that “[i]t has long been clear that the state can violate the [Fourteenth] amendment by ‘inaction’ as well as by ‘action.’”¹⁷⁸ Those espousing such a view reach for the Supreme Court’s decision in *Reitman v. Mulkey*, holding unconstitutional a California constitutional amendment giving individuals absolute discretion in choosing to whom to sell, lease, or rent property, and having the effect of repealing several pieces of legislation that prohibited racial discrimination in the sale or rental of most dwellings.¹⁷⁹ The Court determined that the Amendment constituted state action because “we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations,” but one that instead “was intended to authorize, and does authorize, racial discrimination in the housing market,” such that

173. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1711 (2d ed. 1988) (citations omitted).

174. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1947).

175. 376 U.S. 254 (1964).

176. *Id.* at 256-59, 279-80.

177. *Id.* at 265.

178. Henkin, *supra* note 151, at 481.

179. 387 U.S. 369, (1967); e.g., Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 137 (2004).

“[t]he right to discriminate is now one of the basic policies of the State.”¹⁸⁰ The Court concluded that the “California Supreme Court believes that the section will significantly *encourage and involve* the State in private discriminations” and “[w]e have been presented with no persuasive considerations indicating that these judgments should be overturned.”¹⁸¹ In dissent, Justice Harlan criticized the Court’s weak standard of “encouragement” as problematic, since it was hard to see how repealing the existing antidiscrimination provisions was any different from failing to pass them in the first place.¹⁸² But it is exactly this theory—failure to pass a legal protection as state action—that would be invoked here. So, it is not the theory of *Reitman*, but the one that is so clearly not state action that the dissent treats it as a touchstone for criticizing the majority, that would have to be invoked here.

More support for this view comes from the Court’s 1999 decision in *American Manufacturers Mutual Insurance Co. v. Sullivan*, involving a due process challenge to Pennsylvania’s workers’ compensation law that provided that when an employer is found liable for an employee’s work-related injuries, “the employer or its insurer must pay for all ‘reasonable’ and ‘necessary’ medical treatment.”¹⁸³ In 1993, by statutory amendment, Pennsylvania created “utilization review organizations” (UROs), private entities consisting of licensed health care providers that evaluate contested workers’ compensation claims.¹⁸⁴ Under the system, when an insurer filed a claim with a URO asserting that the payments were not reasonable and necessary, the insurer could withhold payment to the employee’s health care provider.¹⁸⁵ Ten employees and two employee organizations who received benefits under the act sued both state officials and private insurance companies that offered workers’ compensation coverage, claiming that the system violated their due process rights because the withholding occurred without notice or hearing.¹⁸⁶ As against the private insurers, the Supreme Court held that there was no state action, finding a failure to show that “‘the party charged with the deprivation must be a person who may fairly be said to be a state actor.’”¹⁸⁷ As the Court

180. *Reitman*, 387 U.S. at 380-81.

181. *Id.* at 381 (emphasis added).

182. *Id.* at 394-95 (Harlan, J., dissenting); *see also* TRIBE, *supra* note 173, at 1697.

183. 526 U.S. 40 (1999) (quoting Pennsylvania’s Workers’ Compensation Act, 77 PA. STAT. ANN. § 1 (Purdon 1992 and Supp. 1998)); *id.* at 48.

184. *Id.* at 45.

185. *Id.* at 45-46.

186. *Id.* at 47-48.

187. *Id.* at 50 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)); *see also id.* at 53, 58. As a formal matter, because the suit was brought under § 1983, the actual question was whether the plaintiffs could establish that “the alleged deprivation was committed under color of state law,” not state action. *Id.* at 49-50. But, as the Court recognized, “[w]here, as here, deprivations of rights under the Fourteenth Amendment are alleged, these two requirements converge,” and the Court accordingly relied on its state action cases to reach its conclusion. *Id.* at 50 & n.8 (citation omitted).

stated:

We do not doubt that the State's decision to provide insurers the option of deferring payment for unnecessary and unreasonable treatment pending review can in some sense be seen as encouraging them to do just that. But, as petitioners note, this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy. We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it. See *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) ("Private use of state-sanctioned private remedies or procedures does not rise to the level of state action"); see also *Lugar*, 457 U.S., at 937, 102 S.Ct. 2744; *Flagg Bros.*, 436 U.S., at 165-166, 98 S.Ct. 1729. It bears repeating that a finding of state action on this basis would be contrary to the "essential dichotomy," *Jackson*, *supra*, at 349, 95 S.Ct. 449, between public and private acts that our cases have consistently recognized.¹⁸⁸

If a statute making available "a remedy for wrongful conduct" for a private individual against another private individual that allegedly violates due process does not "make the State responsible for" the violation,¹⁸⁹ then it is very hard to see how the *failure* to make available a remedy in the cases that interest us could do so.¹⁹⁰ Just as the Court acknowledges in this decision, to hold otherwise would undermine the "essential dichotomy" between public and private.

A different, and perhaps more straightforward, argument that leads to the same conclusion could be premised on *DeShaney v. Winnebago County*, where the Court rejected a substantive due process challenge on behalf of a child (severely abused by his father) who was left at risk by government social workers aware of the situation.¹⁹¹ The Court noted that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," and that the clause only "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law.'"¹⁹² Though technically a holding about the scope of the substantive right protected by the Due Process clause rather than a holding about state action, *DeShaney* is fully applicable here since the asserted right not to be a genetic parent is likewise derived from substantive due process. Just as in *DeShaney*, the clause does not make actionable a government's failure to take affirmative steps to protect a party's substantive

188. *Id.* at 53.

189. *Id.*

190. See also *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978) ("[T]he mere denial of judicial relief is [not] . . . sufficient encouragement to make the State responsible for those private acts . . .").

191. 489 U.S. 189, 191-95 (1989); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755 (2005).

192. *DeShaney*, 489 U.S. at 195.

due process right not to be a genetic parent.¹⁹³

B. *Evaluating the Strategy*

This strategy is, in a sense, narrower than the first two. While enforcing preembryo disposition agreements and failing to afford protection (or tort liability) against compelled genetic parenthood without prior consent would not constitute state action, and hence no constitutional violation, a number of true state actions infringing on a right not to be a genetic parent certainly *would* constitute state action. For example, if the government attempted to *force* individuals to contribute genetic material, or made it illegal to refrain from doing so, or itself used their discarded genetic material, it would clearly be state action under established doctrine. A statute making it illegal to fertilize preembryos that would not be used for implantation would also likely be state action,¹⁹⁴ as would Louisiana's prohibition on destroying fertilized preembryos.¹⁹⁵

I find the strategy quite persuasive. But the state action doctrine has evolved in such fits and starts that both Professor Black in 1967 and Judge Friendly in 1982 called it "a conceptual disaster area," and Professor Tribe has suggested that this area of law might better be described as an "anti-doctrine."¹⁹⁶ Therefore, it is hard to make any definitive claims as to its application. While current case law suggests a real state action problem, it is very difficult to say with any certainty what the Supreme Court would do with these types of cases.

If we accept this strategy, one troubling implication seems to be that enforcement of an agreement to have or not to have an abortion would also *not* amount to a constitutional violation under the Fourteenth Amendment. There, the infringement is of the right to be and not to be a gestational parent, instead of the right not to be a genetic parent, but it is not clear why the state action analysis should differ.¹⁹⁷

193. Cf. West, *supra* note 76, at 2132-35 (making a similar point as to abortion).

194. Australia, Germany, and Switzerland have such laws limiting the fertilization of eggs to those that will be implanted in one cycle. See Lorio, *supra* note 94, at 261 n.84.

195. LA. REV. STAT. ANN. § 9:129 (2006). Assuming there exists a constitutional right not to be a genetic parent, it is not clear that the Louisiana statute necessarily infringes upon that right because while it prohibits preembryo destruction, it does not mandate implantation—so indefinite cryopreservation may be done without violating the statute. But what about a case where the genetic parents were unwilling or financially unable to continue cryopreservation? As discussed earlier, even if there is an infringement here it may survive the appropriate level of constitutional scrutiny.

196. TRIBE, *supra* note 173, at 1691; Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982).

197. It would be tempting to distinguish the abortion hypothetical because the *form* of

To be sure, one might still find such contracts unenforceable as a *constitutional* matter if one concluded that the Thirteenth Amendment prohibition on slavery undergirds the right to have an abortion, since the Thirteenth Amendment does not have a state-action requirement.¹⁹⁸ The Thirteenth Amendment argument is that forced gestation renders a gestational mother the “slave” of the fetus she is carrying—the deprivation is less total than in slavery but no less constitutionally significant.¹⁹⁹ This is an interesting argument which faces difficulties I will not explore here,²⁰⁰ but, in any event, the Supreme Court has never relied on the Thirteenth Amendment in the abortion context, so such an argument would require a major doctrinal shift.

Such agreements might also be unenforceable on non-federal constitutional grounds; for example, a number of state constitutions do away with the state-action requirement. Or, these contracts might be found to be contrary to public policy more generally. There are many reasons that states might want to be leery about enforcing abortion contracts. Enforcing (or rather, having specific enforcement of)²⁰¹ a contract to refrain from having an abortion presents an extreme version of many of the concerns that lead courts to refuse to specifically enforce labor contracts: the difficulty of supervising performance and the threat of defective performance.²⁰² By contrast, with preembryo disposition agreements, the preembryo which has been cryopreserved is already

the state’s remedial intervention seems a good deal more coercive. But, for state action purposes, the Court seems relatively insensitive as to what form the enforcement of a contract takes. For example, under the Court’s jurisprudence it does not matter for state action purposes whether the remedy for breach of the contract is damages or specific performance. In *Barrows v. Jackson*, decided five years after *Shelley*, where damages were sought against a covenantor who violated a racially restrictive covenant, the Court found state action reasoning that damages would have “coerced to continue to use her property in a discriminatory manner” such that it was not “respondent’s voluntary choice but the State’s choice that she observe her covenant or suffer damages.” 346 U.S. 249, 251, 254 (1953). The Court had to employ a very broad sense of coercion to reach this result, a sense that Chief Justice Vinson, who authored the *Shelley* decision, expressly disagreed with in dissent, concluding that there was no state action. *Id.* at 268 (Vinson, C.J., dissenting). In another sense though, perhaps *Barrows* is the easier case for state action since the state is *more* involved in that it has to make a determination of the value of lost performance rather than merely order performance.

198. See *United States v. Kozminski*, 487 U.S. 931, 942 (1988).

199. See, e.g., Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

200. For work critical of this argument, see, for example, Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1937-38 (1986).

201. These considerations seem less relevant as a reason for refusing to allow a damages measure for contracts compelling genetic or gestational parenthood, a matter I discuss elsewhere. Cohen, *supra* note 4 (manuscript at 57-59).

202. E.g., Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 1016, 1025 (2005). These concerns are present in weaker form when the contract calls for the termination of a pregnancy.

in the custody of the clinic, and the party now objecting to the contractual arrangement need not *do* anything for the contract to be enforced.²⁰³ We might also conclude that there are advantages to a very strong taboo against invasions of bodily integrity and fear that a law that allowed invasions given contemporaneous objection (even when there is contracted-for consent) would undermine that taboo to an uncomfortable degree. Or, it may be that we think an invasion of bodily integrity even given prior consent is itself wrong. All of this seems plausible, but as we have seen, contracts that impose only genetic and not gestational parenthood do not implicate bodily integrity.

Finally, it is possible that the state-action analysis might be treated as not being trans-substantive. As we have seen, some have suggested that *Shelley* be limited to cases of race-based equal protection; perhaps in keeping with the conceptual unbundling discussed in Part I, one could propose still finer distinctions *between* the substantive due process rights not to be a gestational and genetic parent.²⁰⁴

V. IS THERE AN ADVANCE WAIVER OF CONSTITUTIONAL RIGHTS?

The last strategy argues neither that the Constitution applies to these disputes, nor that there are infringements of a substantive right not to be a genetic parent that cannot be upheld under the appropriate level of scrutiny. It takes issue with the assertion that the right is not waivable in advance.²⁰⁵ This strategy thus leads to a narrower conclusion that the Constitution compels a result in the no-consent cases, but not in the cases involving prior consent but contemporaneous objection.

A. *The Argument*

Although the Supreme Court has never specifically discussed the advance

203. Cf. Susan M. Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble with Specific Performance*, 4 N.Y.L. SCH. HUM. RTS. ANN. 375, 393 (1987) (making a similar point as to agreements by a surrogate to relinquish custody). Contracts to provide sperm or egg are more nuanced since we need to distinguish cases where the gametic material has not yet been provided from attempts to retake gametic material already provided but not yet used.

204. It is not clear that there is a textual hook for such a distinction, which might or might not matter depending on one's level of commitment to textualism.

205. In favor of making the right waiveable, see Robertson, *supra* note 34, at 1029 ("There is no *a priori* constitutional reason, however, why a state could not prefer to honor the free . . . and knowing waiver or relinquishment of reproductive rights when the interests of others who relied on the waiver or relinquishment would be significantly hurt, and such waiver enabled the parties to engage in the socially useful practice of treating infertility." (citation omitted) (emphasis added)). For an opposing view as to surrogacy, see Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, 17 J. CONTEMP. HEALTH L. & POL'Y 432, 443 (2001) (arguing that a surrogate's constitutional right not to have an abortion cannot be waived in advance).

waiver of rights relating to procreation, the vast majority of constitutional rights are clearly subject to advance waiver.²⁰⁶ The Ninth Circuit recently reiterated this point as to criminal procedural constitutional protections, observing:

A [criminal] defendant's rights under the Constitution may be waived, provided such waiver is voluntary, knowing, and intelligent. Characterization of the right of presence as "fundamental" adds little to the analysis. A defendant may waive such fundamental rights as the right to be silent, the right to counsel, . . . and the right to be present at a conference between the judge and a juror. By pleading guilty to a charge, an accused may waive the right to a jury trial, the right against self-incrimination, and the right to confront witnesses.²⁰⁷

Similarly, in the Fourth Amendment context, a number of courts have upheld searches of probationers and parolees that would not otherwise satisfy ordinary Fourth Amendment principles "on the ground that the search in question was pursuant to an express waiver of Fourth Amendment rights made as a condition of and at the time of release."²⁰⁸

206. The argument relates to *advance* waiver; there is no dispute that competent adults can *contemporaneously* waive any constitutional right by means of non-assertion. In part this is a function of the Article III standing doctrine: Generally speaking, an individual must bring suit to assert violations of his rights. *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 499 (1975). There are, of course, exceptions allowing third-party standing, *see* ERWIN CHERMERINSKY, FEDERAL JURISDICTION 84-91 (5th ed. 2007), but a third party cannot assert the right of an individual when that individual affirmatively chooses not to sue and assert his own right.

207. *Campbell v. Wood*, 18 F.3d 662, 671 (9th Cir. 1994) (internal citations omitted); *see also* Rubin, *supra* note 28, at 494 ("[M]ost rights connected with criminal adjudications can be waived . . .").

208. 5 WAYNE R. LAFAVE, SEARCH & SEIZURE 438-39 (4th ed. 2004); *see also* Samson v. California, 574 U.S. 843 (2006) (upholding suspicionless search of parolee as not violating the federal constitution). Professor Gostin attempts to resist the notion of advanced waivers of constitutional rights in the context of surrogacy by pointing to a few exceptions in the criminal procedure area: a criminal defendant's inability to irrevocably waive his right to be present at a capital trial, his right to raise a plea of incompetence to stand trial, or his right to assert a privilege against self-incrimination. Gostin, *supra* note 204, at 443 (citing *Stevens v. Marks*, 383 U.S. 234, 244 (1986), *Pate v. Robinson*, 383 U.S. 375, 384-85 (1966), *Diaz v. United States*, 223 U.S. 442, 455 (1912), and *Lewis v. United States*, 146 U.S. 370, 372 (1892)). Professor Coleman relies on the same cases in the preembryo disposition context. *See* Coleman, *supra* note 1, at 92 n.184. But these examples do not stand up, even on their own terms.

The *Pate* Court makes clear that its decision is not that one can never waive a competence claim because the right is inalienable, but rather a failure to meet the waiver standard, noting it is "contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate*, 383 U.S. at 384.

The *Diaz* court is drawing a pragmatic distinction between presence at capital and non-capital trial, because capital defendants are never released on bail. For a defendant free on bail, if it were enough to halt the proceedings for a defendant not to show up to court, that would give him the luxury of stopping the proceedings at any time. *See Diaz*, 223 U.S. at 457-58. The Supreme Court has reaffirmed in several non-capital cases that a defendant can waive his presence at trial. *See Taylor v. United States*, 414 U.S. 17, 18-19 (1973); *Illinois v.*

But it might be thought that criminal law constitutional rights waivers are *sui generis* because of the particular prosecutorial role of the sovereign. However, even if we limited our gaze to civil cases, a private party's advance waiver at Time₁ of a constitutional right against another private party they would like to assert at Time₂ is not at all uncommon. One of the most obvious examples is the waiver of one's right to adjudication by the execution of either a settlement agreement or a consent decree.²⁰⁹ When the underlying subject matter of the suit is itself a constitutional violation, the settlement or consent decree actually waives *two* constitutional rights: the right that is the subject of the suit and the due process right to an adjudication of the constitutional claim.²¹⁰ In the same vein, an agreement to arbitrate enforceable under the Federal Arbitration Act²¹¹ can be described as a waiver of the due process right to a judicial forum.²¹²

There are a number of other examples, some less familiar, of the advance waiver of the Due Process Clause and Seventh Amendment rights to access a judicial forum. *D.H. Overmyer Co. v. Frick Co.*, involved a due process

Allen, 397 U.S. 337, 342-43 (1970); *see also* Commonwealth v. L'Abbe, 656 N.E.2d 1242 (Mass. 1995) (affirming the lower court's acceptance of the defendant's waiver of his right to be at trial). Furthermore, waiver is explicitly contemplated by the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 43; *Taylor*, 414 U.S. at 20; 3A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 723 (2d ed. 1982). Even as to defendants in capital cases, there is a division of authority as to whether a defendant is barred from waiving his right to be present at trial. *Compare* L'Abbe v. DiPaolo, 311 F.3d 93, 97-98 (1st Cir. 2002) ("[T]he Supreme Court has never directly ruled on the issue of whether a criminal defendant can waive his right to presence in a capital case. In fact, the Court specifically reserved this question in *Drope v. Missouri*: 'Our resolution of the first issue . . . makes it unnecessary to decide whether, as he contends, it was constitutionally impermissible to conduct the remainder of his trial on a capital offense in his . . . absence' 420 U.S. 162, 182 (1975)."), *with* Proffitt v. Wainwright, 685 F.2d 1227, 1257 (11th Cir. 1982) ("[O]ur review of the relevant case law convinces us that presence at a capital trial is nonwaivable.").

As to the privilege against self-incrimination, we allow a form of waiver whenever someone signs a confession or pleads guilty. *See, e.g.,* Boykin v. Alabama, 395 U.S. 238, 243 (1969).

In any event, even if we granted these examples, they seem like exceptions that prove the rule.

209. *See* Rubin, *supra* note 28, at 513-14 (discussing consent decrees and settlements as forms of waiver in private law adjudication).

210. *See, e.g.,* United States v. Armour & Co., 402 U.S. 673, 682 (1971) (noting that "the defendant has, by the [consent] decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause"); *Erie Telecomms., Inc. v. City of Erie*, 853 F.2d 1084, 1094 (3d Cir. 1988) (plaintiff's execution of a release "constitutes a contractual waiver of its right to challenge the validity of the franchise agreement as violative of the first and fourteenth amendments" (emphasis omitted)); *see also* Rubin, *supra* note 28, at 514.

211. 9 U.S.C. §§ 1-16 (2000).

212. *See, e.g.,* Rubin, *supra* note 28, at 518-20 (discussing arbitration as waiver of a civil adjudication); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 177-80 (2004).

challenge to the enforcement of a “cognovit note” (or confession of judgment) permitted by Ohio law, a particularly nasty legal device that was in existence at least since Blackstone “by which the debtor consents in advance to the holder’s obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor’s behalf, of an attorney designated by the holder.”²¹³ The Court rejected the argument that it was “unconstitutional to waive in advance the right to present a defense in an action on the note,” finding that the company had “voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences,” such that the note was constitutional and enforceable.²¹⁴ At the same time, the Court recognized that the usual contract-law defenses would be available, such as where there was disparity in bargaining power, a contract of adhesion, or a lack of consideration.²¹⁵ Other examples of advance waiver by contract of Due Process Clause and Seventh Amendment rights arguably include forum-selection clauses and consent-to-jurisdiction clauses.²¹⁶

All of this is fine as far as it goes, but one might try to distinguish the waivers of rights “that are related to the adjudication process” from waivers of rights “which structure the basic relationship between the parties and establish their obligations to each other,” that is the “relinquishment of an existing substantive right.”²¹⁷ However, even if we search for examples of waivers that are more structurally similar to the type of waivers involved in the preembryo disposition cases, we find them permissible. Promises by individuals at Time₁ to limit First Amendment rights they might otherwise exercise at Time₂ provide a powerful analogy to the waiver that interests us, in that few rights are more hallowed than that of freedom of expression, and yet the right can be waived by contract.

In *Snepp v. United States*, a CIA employee agreed as part of an employment trust agreement not to publish any information relating to the Agency before submitting a request for clearance.²¹⁸ Based on his experiences

213. 405 U.S. 174, 176 (1972); *see also* Rubin, *supra* note 28, at 517 (discussing cognovit notes as waiver).

214. 405 U.S. at 184, 187 (citation omitted).

215. *Id.* at 188; *see also* Rubin, *supra* note 28, at 517-18 (reading the case as suggesting that “contract law provides the standard for determining whether civil law waivers satisfy the due process clause”).

216. *See* Ware, *supra* note 212, at 189-97. Indeed, the entire doctrine of unconstitutional conditions can be thought of as form of advance waiver of constitutional rights. *See, e.g.*, Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 11 (1987); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1477-89 (1998). Because “[t]he unconstitutional conditions cases ask not whether a constitutional right is inalienable in general, but rather whether it may be relinquished to government,” Sullivan, *supra*, at 1488-89 (emphasis omitted), I find it to be a less useful analogy.

217. Rubin, *supra* note 28, at 521-22.

218. 444 U.S. 507, 510-11 (1980) (per curiam).

at the agency, Snepp published a book about certain CIA activities in South Vietnam without submitting it to the Agency for prepublication review.²¹⁹ The Supreme Court affirmed the determination that Snepp had breached the contract and the grant of an injunction requiring him to submit future writings for prepublication review.²²⁰ It specifically rejected Snepp's "claim that his agreement is unenforceable as a prior restraint on protected speech," noting that "[w]hen Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review" and noted that he did "not claim that he executed this agreement under duress."²²¹ Rather, "he voluntarily reaffirmed his obligation when he left the Agency."²²² The Court reached this conclusion notwithstanding its recognition that, but for the "special trust reposed in him and the agreement that he signed," Snepp would have had a First Amendment "right to publish unclassified information."²²³

That said, *Snepp* involved fairly extraordinary facts and the disclosure of CIA information, and a few authors have suggested it ought to be read as limited to cases where national security is at stake.²²⁴ But even outside the national security context, the Supreme Court has found that First Amendment rights can be waived by contract.²²⁵ *Cohen v. Cowles Media Co.* can be characterized as a case of advance waiver by quasi-contract of First Amendment rights.²²⁶ In *Cohen*, a political staffer offered two newspapers

219. *Id.* at 507.

220. *Id.* at 508-16.

221. *Id.* at 510 & n.3.

222. *Id.* at 510.

223. *Id.*; see also G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 479 (1993). That said, it is doubtful that *the government* could force an employee to waive *all* First Amendment rights as a condition of public employment. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

224. See Garfield, *supra* note 169, at 354-55; G. Michael Harvey, *Confidentiality: A Measured Response to the Failure of Privacy*, 140 U. PA. L. REV. 2385, 2452 (1992).

225. The Federal Courts of Appeals have as well. See, e.g., *Lake James Cmty. Volunteer Fire Dept., Inc. v. Burke County*, 149 F.3d 277, 278 (4th Cir. 1998) (enforcing a voluntary agreement by a fire department with advice of counsel "not to sue a county for approving the transfer of certain fire protection areas to other fire departments" despite the claim that it required "the fire department to waive its First Amendment right to petition the government" (emphasis omitted)); *Leonard v. Clark*, 12 F.3d 885, 889-92 (9th Cir. 1993) (holding that there was a valid waiver of union's First Amendment rights where union agreed in a collective bargaining agreement provision that if union endorsed state payroll-increasing legislation and that legislation passed, that worker salaries would be reduced); *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1314-15 (8th Cir. 1991) (holding that a franchise agreement requiring Paragould to notify and get approval from Cablevision before soliciting advertising to air on its system did not violate the First Amendment, because "[b]y entering into the franchise agreement . . . Cablevision effectively bargained away some of its free speech rights"). For a more thorough discussion of the myriad types of contracts that concern speech, see Garfield, *supra* note 169.

226. 501 U.S. 663 (1991).

negative information on an opposing political candidate for governor in return for a promise of confidentiality.²²⁷ The newspapers decided to publish the information and, notwithstanding the confidentiality promise, to also identify the staffer as the source of the information.²²⁸ The staffer sued on a promissory estoppel theory, and the Court concluded that the suit could go forward notwithstanding the newspapers' claim that allowing it to do so would violate the First Amendment, relying on the notion that state laws of general applicability do not violate the First Amendment when applied against the press.²²⁹ Significantly, in responding to an objection by Justice Blackmun, the majority noted:

Justice BLACKMUN suggests that applying Minnesota promissory estoppel doctrine in this case will "punish" respondents for publishing truthful information that was lawfully obtained. This is not strictly accurate because compensatory damages are not a form of punishment, as were the criminal sanctions at issue in *Smith v. Daily Mail*. If the contract between the parties in this case had contained a liquidated damages provision, it would be perfectly clear that the payment to petitioner would represent a cost of acquiring newsworthy material to be published at a profit, rather than a punishment imposed by the State. The payment of compensatory damages in this case is constitutionally indistinguishable from a generous bonus paid to a confidential news source. In any event, as indicated above, the characterization of the payment makes no difference for First Amendment purposes when the law being applied is a general law and does not single out the press. Moreover, Justice BLACKMUN's reliance on cases like *Florida Star v. B.J.F.*, and *Smith v. Daily Mail* is misplaced. In those cases, the State itself defined the content of publications that would trigger liability. Here, by contrast, Minnesota law simply requires those making promises to keep them. *The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.*²³⁰

Thus, the Court's logic is that although the newspapers had a constitutional right under the First Amendment to print true information, such as the name of the staffer, by promising at Time₁ not to exercise that right, they could not use the right as a defense to a promissory estoppel claim when they broke their promise at Time₂.

The waiver of First Amendment rights is a particularly nice comparison to the waiver here, in that the ability to speak on a particular topic might be thought to be deeply personal in the way that the right not to be a genetic parent is deeply personal. Similarly, we might have the same concerns about the difficulties in anticipating future contingencies in the First Amendment context as in the reproductive context. One might not have foreseen at the start of CIA

227. *Id.* at 665.

228. *Id.* at 666.

229. *Id.* at 667-72.

230. *Id.* at 670 (citations omitted) (emphasis added).

employment that one would become a Vietnam war dissenter, just as one might not have foreseen at the time of preembryo disposition contracting that one's marriage would actually end and how much one would object to having an ex-spouse raise one's genetic children.²³¹

B. *Evaluating the Strategy*

The advance waiver strategy seems quite persuasive to me, especially given a more formal contract waiver of the right not to be a genetic parent. However, while the Supreme Court has allowed the advance waiver of a very large number of constitutional rights, there are hard cases where the prospect of waiver seems more doubtful. Could an individual waive in advance his Fourteenth Amendment right to be free from intentional discrimination that would not survive the appropriate level of scrutiny? Probably not, though perhaps we can say that this is because the right belongs to the collective and not the individual.²³² We also know that the Thirteenth Amendment's prohibition on slavery cannot be waived in advance, although the unwaiveability of this right might be thought to be more definitional.²³³

In the area of procreative rights, can a woman waive her right not to be a gestational parent by signing a contract not to have an abortion? A very small number of cases have considered the question, but the reasoning of the courts saying "no" makes a significant error: It confuses the right preventing the state from unduly burdening the seeking of a pre-viability abortion with the ability to waive that right.²³⁴ In addition, Indiana has by statute made such promises

231. Together, *Cohen* and *Snepp* suggest that it is immaterial for the waiver analysis whether the remedy sought for breach of the contract is an injunctive remedy (as in *Snepp*) or a damages remedy (as in *Cohen*). In the area of the First Amendment, specifically, there is a general reluctance to impose prior restraints, but as *Snepp* shows, this may drop out in cases of waiver.

232. Justice Souter's dissent in *Cohen* unsuccessfully argues something similar of the press's First Amendment rights. *Cohen*, 501 U.S. at 677-78 (Souter, J., dissenting) ("Nor can I accept the majority's position that we may dispense with balancing because the burden on publication is in a sense 'self-imposed' by the newspaper's voluntary promise of confidentiality. This suggests both the possibility of waiver, the requirements for which have not been met here, as well as a conception of First Amendment rights as those of the speaker alone, with a value that may be measured without reference to the importance of the information to public discourse." (citations omitted)). Whatever the merits of this critique, it is hard to see the right not to be a genetic parent as a right belonging to the collective.

233. See *Pollock v. Williams*, 322 U.S. 4, 24 (1944) (noting that the state "may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for"). This definitional problem is the Millian justification for making slavery contracts unenforceable, despite Mill's general anti-paternalist bent. MILL, *supra* note 74, at 107 ("The principle of freedom cannot require that he should be free not to be free."). It is also unlikely that the rights granted by the voting amendments could be relinquished by a contractual waiver, see U.S. CONST. amends. XIX, XXIII, XIV, XVI, although here the rationale might again be that the right is a type of collective right.

234. The contract at issue in the surrogacy contract case of *Baby M* contained language

unenforceable, and New Hampshire has passed a statute indicating that the remedy of specific performance for a breach is unavailable, though it is silent on the availability of damages.²³⁵ Some commentators believe such contracts would be unenforceable.²³⁶

But skepticism as to the enforceability of contracts to have or refrain from having an abortion need not carry over into preembryo disposition agreements' waivers of the asserted right not to be a genetic parent for at least two reasons.

Again, one can argue that there is no *constitutional* obstacle to enforcing a contract waiving the right not to be a gestational parent or the right not to be a genetic parent, but allow that state courts and legislatures could use the usual non-constitutional tools to invalidate the abortion contracts but not the preembryo disposition agreements. That is, while the Constitution does not *forbid* advance waivers of these rights, it also does not *compel* acceptance of them, and instead leaves states discretion. As discussed above, there are a number of reasons that states might want to be leery about enforcing abortion contracts.

A second response, also an outgrowth of the unbundling introduced in Part I, is to suggest that the waiver question is not trans-substantive across the rights not to procreate, and that even if the Constitution bars advance waivers of the right not to be a gestational parent, it need not bar waiver of the right not to be a genetic parent, something that unbundling allows us to see. One easy doctrinal hook for this distinction would be to suggest that the right not to be a

requiring that the surrogate not abort the fetus she was carrying. 525 A.2d 1128, 1143 (N.J. Super. Ct. Ch. Div. 1987). The trial court found this provision unenforceable because of *Roe*, but the reasoning fails to distinguish the existence of the right (which *Roe* clearly finds) from whether it can be waived by contract. *See id.* at 1159. It also ignores the question of whether *Roe*'s prohibition on state interference or penalization of the right not to gestate extends to private interference or penalties, the state action question of Part IV. On appeal, the New Jersey Supreme Court did not reach this part of the holding.

Martha Bohn refers to an unreported case from Kentucky, *Breidenbach v. Hayden*, where a man paid his lover \$20,500 to get an abortion, and when she failed to do so sought return of the funds on an unjust enrichment or restitution theory. Martha A. Bohn, Note, *Contracts Concerning Abortion*, 31 U. LOUISVILLE J. FAM. L. 515, 526 (1992-1993). The court found the contract unenforceable as against public policy reasoning "that since the state could not allow a spouse to veto a woman's decision concerning abortion, the state could not allow a spouse or putative father to have the power to require a woman to obtain an abortion." *Id.* at 527. But this again confuses the existence of a right with its waiveability. In fact, the plaintiff was not seeking an injunction or even damages to remedy the breach, merely restitution of the funds the defendant had promised to use in a way that she did not.

On the other side, a Missouri case involving a father who disinherited his unwed pregnant daughter, but agreed to put her back in the will if she would terminate her pregnancy, which she did, actually found the contract enforceable notwithstanding that getting an abortion was the consideration. *L.G. v. F.G.H.*, 729 S.W.2d 634 (Mo. Ct. App. 1987). But the setting is unusual, and involved a unilateral contract that could only be accepted by performance, so in a real sense it could not be enforced *against* the daughter.

235. IND. CODE § 31-20-1-1 (2007); N.H. REV. STAT. ANN. § 168-B:27 (2007).

236. *See, e.g.*, Coleman, *supra* note 1, at 93 (arguing that these contracts are unenforceable as a matter of contract law).

gestational parent has moorings in the Thirteenth Amendment, which we know to be unwaivable as a doctrinal matter. But, as discussed above, the Court has never relied on this reasoning in its abortion cases.

Even if both asserted rights are substantive due process rights, can we still suggest the waiver question is not trans-substantive? There is something a bit *ad hoc* about this argument; given that both (asserted) rights stem from the same constitutional provision, why should one be waivable in advance and not other? But such an objection proves too much, since it is beyond peradventure that (as discussed above) many of the procedural due process protections can be waived in advance, yet they come from the same constitutional text. One might counter that we ought to draw the line between substantive due process and procedural due process, but this distinction is too capacious. Imagine that a pupil's parents agreed to send the child to public school, executed a contract with the school to that effect, and then refused to send the child. If the school attempted to recover the costs it had expended in preparation for the student, it seems implausible that there ought to be a constitutional problem in seeking to maintain a breach of contract action, notwithstanding the substantive due process right recognized in *Pierce v. Society of Sisters* not to send one's child to public school.²³⁷

A different way of distinguishing the abortion contract is to argue, as Professor Tribe does, that the abortion rights ought to be singled out as non-waivable, because enforcing contracts not to abort would exploit a "special vulnerability of women in such a way as to reinforce their subservience to men, and thus their lack of fully autonomous and equal roles in social and political life."²³⁸ But the source of the "vulnerability" Tribe identifies as differentiating the sexes stems from gestational parenthood (which only women must bear), so this reasoning may give another reason why concluding that the right to and not to be a gestational is non-waivable does not require concluding the same about the right not to be a genetic parent.

Even if one accepts that the right not to be a genetic parent is, in theory, waivable, there are still significant questions as to how it may be waived. Is the waiver standard the stronger voluntary, knowing, and intelligent standard used mostly in the waiver of criminal law protections, or the lower civil law standard

237. 268 U.S. 510 (1925). Whether the school could get specific performance compelling the student's attendance is less likely, not for any *constitutional* reason, but for contract law's usual difficulties with compelled labor.

238. Tribe, *supra* note 131, at 332, 337-38. This view is given a possible doctrinal hook in Justice Ginsberg's dissent in *Gonzales v. Carhart*, which invokes a vision of the abortion right as an anti-subordination equal protection principle. 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." (citing Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002-28 (1984); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992))).

where waiver is “judged according to contract law principles”?²³⁹ Another possibility is to adopt a system similar to New Hampshire’s statute requiring judicial preclearance of surrogacy agreements,²⁴⁰ which begins to look more like the system for waiving criminal procedure rights by pleading guilty. It is also possible to suggest that a contractual waiver of the constitutional right is not needed, only forfeiture by participating in IVF or cryopreserving preembryos in the first place.²⁴¹ If that were the standard there would be no constitutional problem with adopting a default rule of preembryo implantation in these disputes. But, when it comes to constitutional rights, especially outside the criminal law context, there are few examples finding mere forfeiture sufficient to give up a constitutional right.²⁴² Overall, the civil standard seems the more likely doctrinal fit since it is used for First Amendment and due process waivers.

If we require contract waivers, many of the forms currently used in preembryo disposition cases seem to fall short even as simple contracts.²⁴³ But I see no reason why one could not draft an adequate document that more clearly

239. Rubin, *supra* note 28, at 512; *see also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

240. N.H. REV. STAT. ANN. § 168-B:23(III) (2007).

241. *Cf.* Rubin, *supra* note 28, at 524 (discussing forfeiture of constitutional rights). Some of the cases I discussed imposing child support obligations on fathers in cases involving minimal or no consent have this reasoning. *See supra* notes 111-112 and accompanying text. Alec Walen has discussed in depth the idea that engaging in the sex act can constitute an assumption of risk of the duty to be a *gestational* parent and offered a critique of that claim. Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051 (1997); *see also* West, *supra* note 76, at 2123, 2136-41 (evaluating the consent to unwanted gestational parenthood argument).

242. For a discussion whether, putting aside the constitutional question, forfeiture would be a desirable rule in this context, *see* Cohen, *supra* note 4 (manuscript at 61-69).

243. We might want to impose the fairly obvious requirements that the contract be in writing, that the agreement be separate from the consent form for IVF, that it make clear that it is a contract between the genetic parents and not an advanced directive to the clinic, and that it be unambiguous as to the contingencies it anticipates (i.e., specifying “divorce” as opposed to or in addition to “separation”). For criticisms of the actual forms used along these lines, *see* A.Z. v. B.Z., 725 N.E.2d 1051, 1056-57 (Mass. 2000); J.B. v. M.B., 783 A.2d 707, 713-14 (N.J. 2001).

Although I have largely bracketed off the question of selling sperm and egg, such agreements raise a further issue—is the waiver in such a case “voluntary” when it is done for pay? At a constitutional level, it does not seem that the waiver can be invalidated merely because it was “paid for.” Both the settlement agreement and cognovit note examples are paid-for waivers, and at a higher level so was the waiver in *Snepp*—the CIA agent was paid a salary to take a job which had the waiver as a condition. The unconstitutional conditions cases, alluded to at *supra* note 211, further suggest that conditioning the waiver of a constitutional right on an expected benefit is not per se problematic. The institution of plea bargaining suggests much the same thing. As the Seventh Circuit noted, “Constitutional rights like other rights can be waived Often a big part of the value of a right is what one can get in exchange for giving it up.” *United States v. Barnett*, 415 F.3d 690, 691 (7th Cir. 2005) (Posner, J.).

indicates an intention to waive a constitutional right not to be a genetic parent.²⁴⁴

CONCLUSION

Technology moves faster than law. Judges fill in gaps using analogy and metaphor, and try to apply established principles to new disputes. But sometimes this process is too crude, and the rethinking of an area of law is necessary. That is what I have argued for here. Courts and commentators have erred by thinking about a constitutional monolithic “right not to procreate.” I have argued instead that this concept needs to be unbundled to recognize the differences between compelled gestational, legal, and genetic parenthood.

In this Article, I have focused on the question of whether the Constitution mandates recognizing a right not to be a genetic parent when it is unbundled from the obligations of gestational and legal parenthood. I have suggested and evaluated four strategies for arguing that the answer is no.

The unbundling very directly leads to the first strategy, suggesting that the interest in not being a genetic parent is not a fundamental right for constitutional purposes. Refusing to recognize the right yields a plausible reading of the contraception cases and the most plausible reading of the abortion cases, although we cannot make the stronger claim that recognizing the right is incompatible with this jurisprudence. More decisive, perhaps, is the Court’s increasing focus on the cabined historical approach to substantive due process, exemplified by *Washington v. Glucksberg*. If that approach continues

244. I have reviewed the four strategies I think are most plausible. An additional strategy I do not develop here would be to accept that there is state action and that the Constitution provides a non-waiveable right not to be a genetic parent, but that it is trumped by a constitutionally recognized right *to* be a genetic parent. Some have argued for a constitutional right to be a genetic parent and rely on *Skinner v. Oklahoma*, 316 U.S. 535 (1942), striking down a law forcing thieves (but not embezzlers) to be sterilized after three convictions. See, e.g., ROBERTSON, *supra* note 6, at 36-38. There are some problems with this strategy. It is far from certain that *Skinner* is applicable in the realm of assisted reproduction; for one thing, sterilization has a component of physical invasion, and thus a bodily integrity violation, not present in these cases. See, e.g., Cruz, *supra* note 46, at 361 (suggesting that the rationale of *Skinner* was protection against a bodily integrity violation).

Even if *Skinner* applies, we might draw a distinction between cases where a party loses the possibility of being a genetic parent *at all*, as in *Skinner*, versus cases where a party loses the possibility of being a genetic parent to a *particular* fertilized preembryo. If the right cannot be derived from *Skinner*, claiming a fundamental right to *be* a genetic parent will run into problems with the *Glucksberg* historical approach, similar to the ones discussed above, *supra* text accompanying notes 110-114. Nor is it clear why, even if such a constitutional right exists, it should trump. It may be possible to overcome these concerns, but I do not focus on these issues here.

Much of what I have said here may have implications for reproductive cloning. But there are also important differences relating to, for example, an individual’s interest in *not* being cloned, the state’s interest in banning or allowing cloning, and the fear that the process might be harmful to the clone. I hope to address these issues in future work.

to hold sway with the Court, especially combined with lingering hostility to *Roe*, arguing for a substantive due process right not to be a genetic parent seems like a tough sell.

Although more domain-general, I also strongly favor the last two strategies. I think that courts and commentators have made a serious mistake in the preembryo disposition cases in thinking that this is the kind of dispute to which the Constitution applies at all. Further, I see nothing to suggest that as a *constitutional* matter an individual should be unable to waive an alleged constitutional right not to be a genetic parent the way she can waive many of her other rights.

Finally, I am more skeptical of the strict scrutiny/undue burden strategy, in part because once one gets that far in the analysis, few state interventions have survived, and in part because of prior Supreme Court statements suggesting that the state's interest in potential life becomes compelling. That said, given a Court willing to distance itself from these prior pronouncements, or to apply a form of review that is more context-sensitive, this strategy is not without promise, especially if the more deferential undue burden analysis is the one the Court applies.

If one or more of these strategies succeed, they establish a realm of legislative and judicial discretion permitting infringement (in at least some cases) of the asserted right not to be a genetic parent. Given the changing nature of these technologies, and the changes to our social norms they produce, such discretion and experimentation is much more desirable than freezing the law in this area in a Constitutional moment. Much like what Justice Rehnquist wrote about physician-assisted suicide in *Glucksberg*, there is an "earnest and profound debate about the morality, legality, and practicality" of different approaches to these cases, but the argument I have offered here "permits this debate to continue, as it should in a democratic society."²⁴⁵ These strategies seem particularly plausible as to the preembryo disposition cases with which I began this Article, the place where much of this talk of a "right not to procreate" originates. The best approach for courts and legislatures to take in those cases is a separate question, and I offer my thoughts in a companion article, *The Right Not to Be a Genetic Parent?*²⁴⁶ That article moves beyond the constitutional question into the realm of system design.

245. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

246. *See Cohen*, *supra* note 4.