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INTRODUCTION

The U.S. Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*[1] has upended abortion jurisprudence. The case concerned a Mississippi law barring most abortions when the probable gestational age of the fetus was greater than fifteen weeks.[2] Holding that the U.S. Constitution did not protect a right to abortion through the Due Process Clause of the Fourteenth Amendment,[3] the Court overruled *Roe v. Wade*[4] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[5] Abortion, it explained, differed from other protected acts because abortion destroyed potential life.[6] Deeming rational basis review appropriate,[7] the Court concluded that the Mississippi law was rationally related to what the Court accepted as legitimate state interests: protecting the unborn and pregnant people, halting "barbaric" procedures, and preserving the integrity of the medical profession.[8] The Court's standard of review, rationale, and outcome signaled that laws prohibiting abortion are now valid, including those that apply as soon as a pregnancy begins.

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1. 142 S. Ct. 2228 (2022).

2. The Mississippi law permitted abortion in case of medical emergency or severe fetal abnormality. *Id.* at 2243.

3. *Id.* at 2242.

4. 410 U.S. 113 (1973).

5. 505 U.S. 833 (1992).

6. *Dobbs*, 142 S. Ct. at 2258.

7. *Id.* at 2283.

8. *Id.* at 2284.

The Supreme Court did not acknowledge that abortion laws may impact other medical treatments, such as in vitro fertilization (IVF).[9] IVF is an assisted reproductive technology in which doctors create human embryos in the laboratory and transfer them to patients[10] for gestation.[11] IVF is not abortion, because it does not entail the deliberate termination of a pregnancy.[12] To the contrary, IVF seeks to initiate pregnancy.[13] However, IVF can involve practices that place embryos and fetuses at risk of damage or death, which, in turn, raises concerns about the applicability and validity of abortion laws. For example, does freezing or thawing an IVF embryo result in an abortion if the embryo dies?[14] Are IVF embryos aborted when a cryogenic storage unit fails?[15] If a doctor, with the patient's consent, discards surplus or abnormal IVF embryos, has he conducted an abortion?[16] And if an IVF patient becomes pregnant with multiple fetuses, and a doctor reduces one or more of those fetuses to save the pregnancy and the patient's health, is that procedure an abortion?[17]

This Article seeks to answer these and other questions that arise at the intersection of *Dobbs*, abortion laws, and IVF.[18] Part I describes IVF as currently practiced and explains why pro-life advocates oppose the technology.[19] Part II

9. Cathryn Oakley, *Not just Abortion: Overturning Roe v. Wade puts your Right to Conceive Babies at Risk, too*, USA TODAY (June 24, 2022) https://www.usatoday.com/story/opinion/contributors/2022/06/23/overturning-roe-v-wade-could-outlaw-ivf/7627665001/?gnt-cfr=1 ; Stephanie Kirchgaessner, *IVF Treatment Faces 'Clear and Present Danger' from US Anti-Abortion Effort*, THE GUARDIAN (May 12, 2022,), https://www.theguardian.com/us-news/2022/may/12/ivf-treatment-us-anti-abortion-laws-bills.

10. When discussing IVF, this Article uses the gender-neutral term "patient" to describe the person who undergoes ovarian stimulation and retrieval and subsequently receives embryos back into the uterus for gestation.

11. For a more detailed description of IVF, *see infra* Part I.A.

12. NEW OXFORD AMERICAN DICTIONARY 4 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010).

13. *See infra* Part I.A.

14. Myah Ward, *How Abortion Bans Might Affect IVF*, POLITICO (May 23, 2022), https://www.politico.com/newsletters/politico-nightly/2022/05/23/how-abortion-bans-might-affect-ivf-00034409.

15. Andrew Joseph, *If Roe Is Overturned, the Ripples Could Affect IVF and Genetic Testing of Embryos, Experts Warn*, STAT (June 6, 2022) https://www.statnews.com/2022/06/06/roe-v-wade-preimplantation-genetic-testing-ivf-clinics/.

16. *Id.*; Ward, *supra* note 14.

17. Emily Rosenthal, *In the Wake of Dobbs, IVF's Future Becomes Uncertain, Forecasts Prof. Melissa Murray*, NYU (Sept. 27, 2022) https://www.nyu.edu/about/news-publications/news/2022/september/in-the-wake-of-dobbs--ivf-s-future-becomes-uncertain--forecasts-.html

18. This Article is limited in scope to IVF and related practices that are used to increase the odds of fertilization and a healthy birth. This Article does not address many other assisted reproductive technologies, such as assisted insemination, intrauterine insemination, and gestational surrogacy. Nor does it address the use of technologies designed to produce a child with desired traits, such as embryo screening or heritable genome editing.

19. *See infra* Part I.

analyzes existing personhood and abortion laws and finds that most do not threaten IVF because they do not reach embryos outside the body.[20] But *Dobbs* begs this question: if legislators are now free to ban or restrict abortion, can they also ban or restrict IVF because of the threat it poses to human embryos and fetuses?

Thus, Part III addresses future laws that may be enacted to protect such embryos and fetuses, and discusses an alternative protocol performed with cryopreserved oocytes that would allow IVF to proceed nonetheless.[21] This Article then turns to consider constitutional issues. Part IV argues that substantive due process establishes rights to procreate and privacy that include access to IVF.[22] Part V goes on to analyze two hypothetical laws.[23] It concludes that bans on IVF are unconstitutional as applied to individuals who cannot procreate coitally. However, courts may uphold laws that permit IVF but prohibit practices that can harm embryos (cryopreservation, thawing, storage, testing, or discard) or fetuses (multifetal pregnancy reduction).

I. IVF AND ITS PRO-LIFE CRITICS

A. IVF Embroys and Fetuses in Current Practice

Louise Brown, the first "test-tube baby," was born in the United Kingdom in 1978 after Robert Edwards and Patrick Steptoe harvested, fertilized, and transferred a single egg[24] to her mother.[25] Elizabeth Carr was born in the United States in 1981, also as the product of a single embryo transfer.[26] Since these early births, the practice of IVF has evolved.[27] Today, a patient takes powerful drugs that induce her to produce multiple oocytes.[28] These oocytes are surgically

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part IV.

23. *See infra* Part V.

24. The term "egg" or "ovum" is often used to refer to a mature female gamete that has completed meiosis following fertilization. By contrast, the term "oocyte" refers to an immature female gamete prior to fertilization. *Oocyte*, FERTILITYPEDIA, https://fertilitypedia.org/edu/reproductive-cells/oocyte (last accessed July 27, 2022); *but see* Francesca E. Duncan et al., *Unscrambling the Oocyte and the Egg: Clarifying Terminology of the Female Gamete in Mammals*, 26 MOLECULAR HUM. REPROD. 797, 797 (2020) (arguing that it makes more sense to describe a female gamete that is ready for fertilization as an egg). This Article adopts these meanings except when discussing statutes that use the terms differently.

25. ROBERT EDWARDS & PATRICK STEPTOE, A MATTER OF LIFE: THE STORY OF A MEDICAL BREAKTHROUGH 145–55 (1980).

26. Doree Lewak, *America's First IVF Baby, Elizabeth Carr, Turns 40*, NEW YORK POST (Dec. 27, 2021), https://nypost.com/2021/12/27/americas-first-ivf-baby-elizabeth-carr-turns-40/.

27. Stephanie K. Boys & Evan M. Harris, *IVF and the Anti-Abortion Movement: Considerations for Advocacy Against Overturning Roe v. Wade*, 19 ADVANCES IN SOC. WORK 518, 523 (2019).

28. *Id.*

retrieved and fertilized with sperm to create multiple embryos.[29] The patient then has the option of receiving multiple embryos to increase the odds of pregnancy.[30] However, multiple embryos can lead to multiple gestations and births that are hazardous for pregnant persons and their children.[31]

After Nadya Suleman ("Octomom") birthed octuplets in 2009,[32] the fertility industry cut back on multiple embryo transfer. The American Society for Reproductive Medicine (ASRM) has guidelines that attempt to balance safety with the needs of individual patients.[33] For example, the guidelines recommend single embryo transfer (SET) for any patient under the age of thirty-five with a favorable prognosis, or who has a tested, euploid (chromosomally normal) embryo and a favorable prognosis.[34] In a cycle with fresh embryos, a favorable prognosis includes prior live birth after transfer of sibling embryos or anticipation that one or more high-quality embryos will be available for cryopreservation.[35] In a cycle with frozen embryos, a favorable prognosis includes: vitrified blastocysts; euploid embryos; first frozen embryo transfer; or prior live birth following an IVF cycle.[36]

Oocyte quality decreases with age.[37] The ASRM guidelines suggest that patients between thirty-five and thirty-seven should consider SET.[38] However, they also say that older patients can receive more embryos to increase their odds of success: up to two blastocysts or three cleavage-stage embryos for patients with a favorable prognosis between thirty-eight and forty years of age; and up to three blastocysts or four untested cleavage-stage embryos for patients with a favorable prognosis who are forty-one to forty-two.[39]

Of course, some patients do not satisfy the criteria for a favorable prognosis.[40] The guidelines take that into account and add one to two embryos

29. *Id.*

30. *Id.* For a more detailed account of this process, see SHERMAN J. SILBER, HOW TO GET PREGNANT (paperback ed. 2007).

31. Practice Comm. of the Am. Soc'y for Reprod. Med. and the Practice Comm. for the Soc'y for Assisted Reprod. Tech., *Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, 116 FERTILITY & STERILITY 651, 651 (2021) [hereinafter *Guidance*].

32. Adam Popescu, *The Octomom Has Proved Us All Wrong*, N.Y. TIMES (Dec. 15, 2018), https://www.nytimes.com/2018/12/15/style/octomom-kids-2018.html.

33. *Guidance*, *supra* note 31.

34. *Id.* at 652.

35. *Id.* at 653 tbl.1.

36. *Id.*

37. Kerry Lynn Macintosh, *Teaching about the Biological Clock: Age-Related Fertility Decline and Sex Education* 22 UCLA WOMEN'S L.J. 1, 4 (2015).

38. *Guidance*, *supra* note 31, at 652.

39. *Id.*

40. *Id.*

to the foregoing totals.[41] For example, a woman under the age of thirty-five should receive one embryo if her prognosis is favorable; but if it is not, she may receive up to two.[42]

Given such guidelines, a round of ovarian stimulation, retrieval, and fertilization can create more embryos than the patient can receive at one time.[43] "Leftover" embryos are cryopreserved (frozen) and retained for future use.[44] If the patient does not become pregnant after the first embryo transfer, the doctor may thaw one or more embryos and transfer them to the uterus[45]—a practice known as frozen embryo transfer (FET).[46] Repeated transfers can yield good results: for example, when patients under the age of 35 use their own oocytes, they have a cumulative live birth rate of 55.7 percent.[47] Thus, cryopreservation has become an essential component of IVF as it is currently practiced.[48]

To be sure, cryopreservation has its downsides. These days, nearly 100 percent of embryos survive cryopreservation[49] and 95 percent survive thaw;[50] but those figures imply that some embryos still die. Moreover, one 2020 article reported that there were over 620,000 embryos in storage.[51] Although patients who have completed their families have options, including discarding the embryos or donating them to research or other couples, they often simply stop paying storage fees and do not respond when the clinic tries to contact them.[52] The doctors who hold these abandoned embryos in storage hesitate to dispose of them, lest the patients return and demand access to them.[53] And if cryogenic

41. *Id.* at 653, tbl. 1.

42. *Id.*

43. Boys & Harris, *supra* note 27, at 523.

44. *Id.*

45. *Id.*

46. *See* Junwei Zhang et al., *Fresh Versus Frozen Embryo Transfer for Full-term Singleton Birth: A Retrospective Cohort Study*, 11 J. OVARIAN RSCH. 59 (2018) (discussing advantages of FET).

47. CTRS. FOR DISEASE CONTROL AND PREVENTION, 2019 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC AND NATIONAL SUMMARY REPORT 26 (2021).

48. *Supra* note 47.

49. *Guidance*, *supra* note 31, at 652.

50. Mindy Christianson, *Freezing Embryos*, JOHN HOPKINS MED., https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/freezing-embryos (last visited June 9, 2022).

51. Anna Hecker, *What Should I Do with My Unused Embryos?*, N.Y. TIMES, https://www.nytimes.com/2020/04/15/parenting/fertility/ivf-unused-frozen-eggs.html (updated Nov. 9, 2021).

52. Mary Pflum, *Nation's Fertility Clinics Struggle with a Growing Number of Abandoned Embryos*, NBC NEWS (Aug. 12, 2019), https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806/.

53. Hecker, *supra* note 51.

storage tanks fail, frozen embryos are lost, leading to anguish for prospective parents and liability for fertility clinics.[54]

Ancillary services can pose further risk to embryos. For example, preimplantation genetic diagnosis (PGD) tests for chromosomal abnormalities or genes that cause disease.[55] PGD can entail removal of a blastomere from a three-day-old cleavage-stage embryo; however, loss of a blastomere can reduce the odds that the embryo will implant.[56] To reduce harm to the embryo and increase chances of implantation, an alternative protocol removes multiple cells from the trophectoderm (outer layer) of a five-day-old blastocyst.[57] The excised cell(s) are then tested.[58] If disease-causing genes or chromosomal abnormalities are found, the embryo will be discarded.[59] But if they are not, the embryo will be transferred to the patient for gestation or cryopreserved for future use.[60]

Lastly, if a doctor transfers multiple embryos to a patient, more than one may implant in the uterus.[61] When there are three or more fetuses, the pregnancy becomes more dangerous for the patient, and offspring are more likely to be born prematurely and with medical disabilities.[62] Under such circumstances, the patient may elect to undergo multifetal pregnancy reduction to terminate one or more fetuses while leaving others in place to complete gestation.[63] This procedure is conducted in the first trimester or early in the second trimester.[64]

54. *Loss of Embryos*, CLEVELAND.COM (Sept. 29, 2019), https://www.cleveland.com/news/2019/09/uh-freezer-malfunction-update-more-than-150-families-settle-lawsuits-in-loss-of-embryos.html; *California Jury Awards 15m Over Lost Fertility Clinic Eggs and Embryos*, BBC (June 11, 2021), https://www.bbc.com/news/world-us-canada-57446504.

55. Harvey J. Stern, *Preimplantation Genetic Diagnosis: Prenatal Testing for Embryos Finally Reaching Its Potential*, 3 J. CLIN. MED. 280, 281 (2014).

56. *Id.* at 286–87.

57. *Id.* at 287; *see also* Danilo Cimadomo et al., *The Impact of Biopsy on Human Embryo Developmental Potential During Preimplantation Genetic Diagnosis*, BIOMED RSCH INT'L, Jan. 5, 2016, at 1, http://dx.doi.org/10.1155/2016/7193075 (discussing various PGD methods and concluding blastocyst method is best).

58. *See* Stern, *supra* note 55, at 288–300 (describing testing methodologies).

59. Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 607 (2013).

60. Stern, *supra* note 55, at 281.

61. AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS COMM. ON ETHICS, MULTIFETAL PREGNANCY REDUCTION 1 (2017) [hereinafter ACOG COMM. ON ETHICS].

62. *Id*. at 2.

63. *Id.* at 1–2. For the methods of termination available, see Sridevi Beriwal et al., *Multifetal Pregnancy Reduction and Selective Termination*, 22 OBSTETRICIAN & GYNECOLOGIST 284 (2020).

64. ACOG COMM. ON ETHICS, *supra* note 61, at 1.

B. Pro-life Opposition to IVF as Currently Practiced

Many religions, including Judaism, Islam, Hinduism, Buddhism, and some Protestant denominations, accept IVF.[65] Significantly, however, the Roman Catholic Church, which has 51 million adherents in the United States, deems it unacceptable.[66] The Church has a Congregation for the Doctrine of the Faith which is charged with protecting doctrine on faith and morals.[67] The Congregation has labeled IVF as illicit, in part because the technology disassociates procreation from the conjugal act,[68] but also because it entails "abortions"[69] when human embryos die. In its words:

> In many countries, it is now common to stimulate ovulation so as to obtain a large number of oocytes which are then fertilized. Of these, some are transferred into the woman's uterus, while the others are frozen for future use. The reason for multiple transfer is to increase the probability that at least one embryo will implant in the uterus. In this technique, therefore, the number of embryos transferred is greater than the single child desired, in the expectation that some embryos will be lost and multiple pregnancy may not occur. In this way, the practice of multiple embryo transfer implies *a purely utilitarian treatment of embryos.*[70]

The Congregation also disapproves of related practices: screening IVF embryos and discarding those with defects;[71] freezing and thawing embryos, which exposes them to death or harm and leaves behind surplus embryos that are "orphans";[72] and intracytoplasmic sperm injection (ICSI), in which a technician selects and injects a single spermatozoon into an oocyte to achieve fertilization, a feat that "establishes the domination of technology over the origin and destiny

65. H.N. Sallam & N.H. Sallam, *Religious Aspects of Assisted Reproduction*, 8 FACTS VIEWS & VISION OBGYN 33, 34–35, 37–38, 42, 44–45 (2016); Cynthia B. Cohen, *Protestant Perspectives on the Uses of the New Reproductive Technologies*, 30 FORDHAM URB. L.J. 135, 145 (2002).

66. David Masci & Gregory A. Smith, *7 Facts About American Catholics*, PEW RSCH. CTR. (Oct. 10, 2018), https://www.pewresearch.org/fact-tank/2018/10/10/7-facts-about-american-catholics/; Sallam, *supra* note 65, at 33.

67. Kerry Lynn Macintosh, *Psychological Essentialism and Opposition to Human Embryonic Stem Cell Research*, 18 J. TECH. L. & POL'Y 229, 238 (2013).

68. CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION DIGNITAS PERSONAE ON CERTAIN BIOETHICAL QUESTIONS ¶ 16 (2008), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html [hereinafter DIGNITAS PERSONAE].

69. *Id.*

70. *Id.* ¶ 15.

71. *Id.* ¶¶ 15, 22.

72. *Id.* ¶ 18.

of the human person."[73] Unsurprisingly, the Congregation objects to multifetal pregnancy reduction.[74]

However, it would be a mistake to assume that the pro-life movement is limited to Catholics. To be pro-life, all one requires is a sincere belief that human embryos are persons entitled to protection against damage and destruction.[75] Students for Life of America, a pro-life organization for young people, and the Personhood Alliance, a coalition of Christian pro-life groups, have protested IVF because embryos are often discarded.[76] Now that *Roe* and *Casey* are gone, these and other pro-life advocates may urge prosecutors to use abortion laws against IVF practitioners who engage in practices that harm embryos and fetuses.

II. IVF AND EXISTING LAWS

IVF is legal in the United States.[77] No federal or state laws expressly prohibit it.[78] However, other laws may inadvertently impinge upon its use. This Part considers two types: personhood and abortion laws. Before analysis commences, a few clarifications are in order. First, some abortion laws apply only after an embryo or fetus has been gestating for a stated number of weeks. Such laws will be discussed only in relation to multifetal pregnancy reduction. Second, this Article addresses abortion laws as they existed right after the *Dobbs* decision. As time passes, federal and state legislators may add new laws or amend old ones. Also, lawsuits have been filed and judges have temporarily blocked some abortion laws.[79] Lawsuits take time to resolve, so this Article discusses laws without regard to these challenges.

A. Personhood Laws

The personhood movement seeks to confer legal rights upon human beings from their earliest biological beginnings.[80] For the most part, the movement has

73. *Id.* ¶ 17.

74. *Id.* ¶ 21.

75. Alexandra Hutzler, *Anti-Abortion Groups Take On IVF, Fertility Clinics Over Unused Embryos: 'They Are Still Alive'*, NEWSWEEK (Oct. 8, 2019), https://www.newsweek.com/anti-abortion-groups-take-ivf-1463839.

76. *Id.*

77. Elizabeth Price Foley, *Human Cloning and the Right to Reproduce*, 65 ALB. L. REV. 625, 630 (2002).

78. *Id*.

79. Debra Cassens Weiss, *Litigation Over Abortion Bans Begins at State Level; Judges Block Laws in 5 States*, ABA J. (June 28, 2022), https://www.abajournal.com/news/article/litigation-over-abortion-bans-begins-at-state-level-louisiana-judge-issues-a-tro.

80. Will, *supra* note 59, at 583.

failed.[81] For example, a personhood initiative in Mississippi foundered in 2011 after the electorate realized it could impede medical care for pregnant women and IVF.[82]

Even when the personhood movement has succeeded in enacting legislation, IVF has survived.[83] To illustrate, Arizona decrees that state laws must be interpreted to acknowledge that an unborn child has all rights available to other persons.[84] "Unborn child" is defined as human offspring from conception through birth,[85] so a fertilized egg has rights under Arizona state laws. However, the law does not create a claim against "[a] person who performs in vitro fertilization procedures as authorized under the laws of this state."[86]

Louisiana has a personhood law that defines an in-vitro-fertilized human ovum as an embryo and makes the doctor or clinic that created it responsible for its safekeeping.[87] Moreover, an in-vitro-fertilized human ovum is a juridical person and its intentional destruction is prohibited.[88] Louisiana still has fertility clinics that offer IVF.[89] However, the law has shaped the practice of IVF in that state. Once viable embryos are created, doctors must transfer them to the patient or cryopreserve them; thereafter, the patient must use the embryos in a later cycle, donate them to another couple, or maintain them in storage indefinitely.[90]

Two other states deserve mention here. In Missouri, state laws must be interpreted to acknowledge that an unborn child, from the moment of conception, has all the rights available to other persons.[91] While *Roe* was still in effect, abortion providers sued, claiming the provision was unconstitutional.[92] Missouri retorted that the provision was precatory and did not restrict abortions.[93] The U.S. Supreme Court reasoned that the provision could be read simply to affirm

81. Henry T. Greely, *The Death of Roe and the Future of Ex Vivo Embryos*, 9 J.L. & BIOSCIENCES 1, 13–14 (2022); *see also* Will, *supra* note 60, at 578–86 (discussing history of movement).

82. Will, *supra* note 59, at 584-86.

83. See *infra* text accompanying notes 84-90 (detailing successful Arizona and Louisiana personhood statutes that fail to implicate IVF).

84. ARIZ. REV. STAT. ANN. § 1-219(A) (2022). Abortion providers have claimed this law creates uncertainty as to which procedures are permitted. A federal district court has preliminarily enjoined the law as applied to otherwise lawful abortions, reasoning that the law is unconstitutionally vague. Isaacson v. Brnovitch, No. CV-21-01417, 2022 WL 2665932, at *6 (D. Ariz. July 11, 2022).

85. ARIZ. REV. STAT. ANN. §§ 1-219(C), 36-2151(16) (2022).

86. *Id.* § 1-219(B)(1).

87. LA. STAT. ANN. §§ 9:121, 127 (2002).

88. *Id.* § 9:129. However, if the ovum fails to develop further over a 36-hour period, it is deemed non-viable and not a juridical person, and thus can be discarded. *Id.*

89. Greely, *supra* note 81, at 13.

90. Britney Glaser, *The Fertility Dilemma: Frozen Embryos*, KPLCTV (Mar. 27, 2009), https://www.kplctv.com/story/10081861/the-fertility-dilemma-frozen-embryos/.

91. MO. REV. STAT. § 1.205(2), (3) (2022).

92. Webster v. Reproductive Health Servs., 492 U.S. 490, 501 (1989).

93. *Id.* at 505.

the state's preference for childbirth over abortion.[94] It declined to rule on constitutionality because the provision had not yet been used to restrict abortion.[95] If this provision truly is precatory, as Missouri once averred, it does not preclude IVF practices that endanger ex vivo embryos. Similarly, Alabama declares that its public policy is to recognize "the rights of unborn children, including the right to life" and to protect "the rights of the unborn child in all manners and measures lawful and appropriate."[96] This vague policy declaration is likely precatory as well. It should not be interpreted to restrict IVF, particularly when Alabama's strict abortion law exempts the technology (as discussed in Part II.B.1 below).

B. Abortion Laws

By breathing new life into abortion laws, *Dobbs* raised many uncomfortable questions. IVF practitioners may be afraid to provide patients with services that were once commonplace, lest they be labeled abortionists and indicted. Such services include cryopreservation, thawing, storing, testing, and discarding human embryos.[97] Therefore, this Part evaluates abortion laws that apply from the inception of a pregnancy. Multifetal pregnancy reduction raises unique issues and implicates a wider range of abortion laws; thus, it will be addressed in a separate section.[98] Because this Part evaluates specific laws, it tracks statutory terms, such as mother or pregnant woman, rather than using the more inclusive "parent" or "pregnant person."

1. Abortion bans expressly limited to embryos and fetuses within a body

Some states have abortion laws that expressly apply when an embryo or fetus is inside the body of a pregnant woman.[99] For example, Alabama prohibits any person from intentionally performing an abortion except to prevent a serious health risk to the mother[100] or when the unborn child suffers from a lethal anomaly that would cause it to be stillborn or die after birth.[101] A doctor who performs an abortion commits a Class A felony[102] and can be sentenced to prison

94. *Id.* at 506.

95. *Id.* at 506–07.

96. ALA. CONST. amend. 930(a), (b) (2022).

97. *See* text accompanying notes 14–16, *supra*.

98. *See infra* Part II.B.4.

99. See *infra*, text accompanying notes 100-107 (detailing state statutes that restrict abortion laws to embryos or fetuses inside the body of a pregnant person).

100. ALA. CODE § 26-23H-4 (2022).

101. *Id.* § 26-23H-3(1), (3).

102. *Id.* § 26-23H-6(a).

for life or between ten and ninety-nine years.[103] The term "abortion" includes various acts performed with the intent to "terminate the pregnancy of a woman known to be pregnant with knowledge that the termination . . . will with reasonable likelihood cause the death of the unborn child."[104] The term "unborn child" is defined as a "human being, specifically including an unborn child in utero at any stage of development, regardless of viability."[105] Thus, in Alabama, if an IVF embryo is not inside a uterus, destroying that embryo is not an abortion.[106] Idaho, Kentucky, Louisiana, Missouri, Tennessee, Texas, and Wyoming have similar laws[107] that expressly situate the unborn child within the body of a pregnant woman and do not reach acts that kill in vitro embryos.

2. Abortion bans impliedly limited to embryos and fetuses within a body

Other states make it illegal to abort an embryo but impliedly require that the embryo be inside the body of the pregnant woman.[108] For example, Arkansas bars abortion except to save a pregnant woman's life in a medical emergency.[109] Sanctions for violation include a fine up to $100,000 and/or a prison sentence of up to ten years.[110] The term "abortion" includes various acts undertaken "with the purpose to terminate the pregnancy of a woman, with knowledge that the termination by any of those means will with reasonable likelihood cause the death of the unborn child."[111] The term "unborn child" encompasses human

103. *Id.* § 13A-5-6(a)(1).

104. *Id.* § 26-23H-3(1).

105. *Id.* § 26-23H-3(7) (emphasis added).

106. Jerry Lambe, *Alabama Abortion Law Says Terminating a Fertilized Egg Is Legal in a Lab Setting*, L. AND CRIME (May 29, 2019), https://lawandcrime.com/high-profile/alabama-abortion-law-says-terminating-a-fertilized-egg-is-legal-in-a-lab-setting/.

107. IDAHO CODE §§ 18-604(1), 18-604(11), 18-622 (2022) (prohibiting termination of a clinically diagnosable pregnancy, that is, the condition of having a fetus within the body beginning with fertilization); KY. REV. STAT. ANN. § 311.772(1)(b), (3) (West 2022) (prohibiting acts done to a pregnant woman with the intent to terminate the life of an unborn human being within her body); LA. STAT. ANN. § 40:1061(C), I(2), I(3) (2022) (forbidding acts done to a pregnant woman with the intent to terminate the life of an unborn human being within her body); MO. REV. STAT. §§ 188.015(1), 188.017(2) (2022) (defining abortion as using or prescribing means or substances with the intent to destroy an embryo or fetus in the womb, or intentionally terminating the pregnancy of a mother); TENN. CODE ANN. § 39-15-213(a)(1), (3), (b) (2022) (barring intentionally acting to terminate the pregnancy of a woman known to be pregnant, that is, having a living unborn child within her body); TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001(1), (3), (5), 170A.002(a), 245.002(1) (2022) (banning intentionally causing the death of the unborn child of a pregnant woman who has a living unborn child within her body); WYO. STAT. ANN. §§ 35-6-101(a)(i), (vi), 35-6-102(b) (2022) (banning abortion performed upon a pregnant woman with an embryo or fetus within her).

108. See *infra* text accompanying notes 109-20 (referencing statutes that merely imply the abortion laws apply only to in-utero embryos or fetuses).

109. ARK. CODE ANN. § 5-61-404(a) (2022).

110. *Id.* § 5-61-404(b).

111. *Id.* § 5-61-403(1)(A).

organisms from fertilization until live birth, [112] and "fertilization" means the joining of sperm with ovum.[113] Thus, with *Roe* overruled, Arkansas has one of the most restrictive abortion laws in the nation; but does the law reach IVF?[114] The Arkansas law leaves the term "pregnancy" undefined, allowing room for interpretation.[115] However, according to the dictionary, "pregnancy" refers to the condition of being pregnant, and "pregnant" entails a child developing in a uterus.[116] These everyday meanings are not broad enough to include ownership of ex vivo embryos. Moreover, the Arkansas law excludes sale, use, prescription, or administration of birth control if such birth control is administered before a pregnancy can be discerned with conventional medical tests.[117] Pregnancy tests can detect the hormone human chorionic gonadotropin (hCG) after a fertilized egg implants in the uterus.[118] This exclusion further suggests that the Arkansas legislature does not intend to protect ova before implantation.

Other states with abortion laws that require a pregnant woman or pregnancy include Indiana, Mississippi, North Dakota, Oklahoma, South Dakota, and Utah.[119] As discussed, a patient who owns IVF embryos but has not received them into the uterus is not pregnant.[120] Therefore, fertility doctors who provide IVF services should not violate these abortion laws, even if some embryos die or are discarded during the process. Interestingly, Indiana, which enacted the first abortion law after *Dobbs* was handed down,[121] addressed this point by expressly providing that its abortion law does not apply to IVF.[122]

112. *Id.* § 5-61-403(4).

113. *Id.* § 5-61-403(2).

114. *Id.* § 5-61-403(1)(A), (2), (4).

115. ARK. CODE ANN. § 5-61-403 (2022).

116. NEW OXFORD AMERICAN DICTIONARY, *supra* note 12, at 1378.

117. § 5-61-404(c)(2) (2022).

118. *Knowing if You Are Pregnant,* OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/pregnancy/you-get-pregnant/knowing-if-you-are-pregnant (last updated Feb. 22, 2021).

119. IND. CODE§§ 16-18-2-1, 16-34-2-1 (2022); MISS. CODE ANN. § 41-41-45(1), (2) (2022); N.D. CENT. CODE§ 12.1-31-12 (2021); OKLA. STAT. tit. 63, §§ 1-730(A)(1), 1-731.4(A)(1), (B)(1) (2022); S.D. CODIFIED LAWS § 22-17-5.1 (2022); UTAH CODE ANN. §§ 76-7a-101(1)(a)(i), 76-7a-201(1) (West 2022). Utah's law is complicated and merits a bit more explanation. The definition of abortion includes termination of human pregnancy after implantation of a fertilized ovum, but also includes killing of a live "unborn child," an undefined term. *Id.* § 76-7a-101(1)(a)(ii). However, the term "unborn child" also appears in Utah's law defining criminal homicide, and the Utah Supreme Court has interpreted it there to mean "a human being at any stage of development *in utero*." *Id.* § 76-5-201(1)(a)(ii); State v. MacGuire, 84 P.3d 1171, 1175 (Utah 2004). Ergo, IVF embryos outside the body are not unborn children, and the deliberate discard of surplus or abnormal ones is not abortion.

120. *See* text accompanying note 116, *supra*.

121. Veronica Stracqualursi et al., *Indiana Becomes First State Post-Roe to Pass Law Banning Most Abortions*, CNN (Aug. 6, 2022), https://www.cnn.com/2022/08/05/politics/indiana-state-house-abortion-bill/index.html.

122. IND. CODE § 16-34-1-0.5 (2022).

3. Pre-Roe Abortion Bans

Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin have abortion laws that were enacted before *Roe* and never repealed.[123] With *Roe* now overruled, these laws may go into effect. However, some laws apply only when there is a pregnant woman or pregnancy and thus should not reach IVF embryos located outside a uterus.[124] For example, Texas bars the intentional administration of drugs to a pregnant woman or use of any means to procure an abortion, which occurs when the fetus or embryo is destroyed *in the woman's womb* or caused to be born prematurely.[125] Alabama prohibits willful administration of a drug or substance to a pregnant woman or the use of any instrument or other means to induce an abortion except to preserve her life or health.[126] Arkansas, Michigan, and Mississippi have similar laws that refer to a pregnant woman, woman with child, or woman pregnant with child, respectively.[127] Arizona forbids providing any medicine, drug, or substance to a pregnant woman or using any instrument or means to procure her miscarriage.[128] Finally, when West Virginia adopted a new abortion law in 2022, it amended its pre-*Roe* law to cross-reference its new definition of abortion, which requires termination of a pregnancy.[129]

Other pre-*Roe* laws threaten IVF because they are vague. For example, Oklahoma forbids the procuring of an abortion, defined in terms of inducing a miscarriage.[130] The statute does not define miscarriage, but the dictionary describes it as the expulsion of a fetus from the uterus.[131] If that dictionary meaning prevails, a doctor who freezes, tests, or discards IVF embryos does not perform an abortion because those embryos are located outside the uterus.

Wisconsin makes it a felony to intentionally destroy an unborn child.[132] Wisconsin defines the term "unborn child" as "a human being from the time of conception until it is born alive."[133] Thus, prosecutors in this state may believe they can charge medical providers who intentionally discard surplus or abnormal

123. ALA. CODE § 13A-13-7 (2022); ARIZ. REV. STAT. ANN. § 13-3603 (2022); ARK. CODE ANN. 5-61-102 (2022); MICH. COMP. LAWS§ 750.14 (2022); MISS. CODE ANN. § 97-3-3 (2022); OKLA. STAT. tit. 21, § 861 (2022); TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 2021).

124. *See supra* Part II.B.2.

125. TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 2021) (emphasis added).

126. ALA. CODE § 13A-13-7.

127. ARK. CODE ANN. § 5-61-102 (2022); MICH. COMP. LAWS ANN. § 750.14 (2022); MISS. CODE ANN. § 97-3-3 (2022).

128. ARIZ. REV. STAT. ANN. § 13-3603 (2022).

129. W. VA. CODE ANN. §§ 16-2R-2, 61-2-8 (2022).

130. OKLA. STAT. tit. 21, § 861 (2022).

131. NEW OXFORD AMERICAN DICTIONARY, *supra* note 12, at 1117.

132. WIS. STAT. § 940.04(1) (2021).

133. WIS. STAT. § 940.04(6) (2022).

IVF embryos.[134] However, medical providers can counter that the Wisconsin law is limited to abortion. The dictionary defines "abortion" as deliberate termination of a pregnancy or natural expulsion of a fetus from the uterus.[135] Thus, the law may apply only when an "unborn child" is within a uterus.[136] The stakes are high: violators face a prison sentence of up to six years and/or a fine up to $10,000 in Wisconsin.[137] Surely, it is better to never be charged with a crime than to hope courts will dismiss charges, so this pre-*Roe* law may chill the practice of IVF in Wisconsin.

4. Multifetal Pregnancy Reduction

Finally, multifetal pregnancy reduction differs significantly from most IVF practices because it affects embryos or fetuses inside the body of a patient.[138] Pro-life prosecutors may be strongly tempted to indict a doctor who terminates such embryos or fetuses. However, even after multifetal pregnancy reduction, the patient remains pregnant.[139] Thus, whether multifetal pregnancy reduction qualifies as an abortion depends on statutory language.

Recalling the laws discussed earlier, Alabama, Arkansas, Idaho, Indiana, Oklahoma, Mississippi, North Dakota, Tennessee, and West Virginia define abortion in a manner that requires termination of a pregnancy.[140] South Dakota prohibits "abortion" without definition,[141] but the dictionary requires deliberate termination of a pregnancy or natural expulsion of a fetus from the uterus.[142] Multifetal pregnancy reduction does not end a pregnancy altogether, and thus should not violate these laws. Likewise, pre-*Roe* laws in Alabama, Arizona, Arkansas, Michigan, Mississippi, and Oklahoma forbid procuring, inducing, or producing an abortion, miscarriage, or premature delivery.[143] These are events

134. Fertility clinics and their employees should not be criminally liable if they intentionally freeze, thaw, or test embryos without intending to destroy them. Similarly, they should not be criminally liable if cryogenic storage tanks fail due to their negligence.

135. NEW OXFORD AMERICAN DICTIONARY, *supra* note 12, at 4.

136. WIS. STAT. § 939.50(3)(h) (2022).

137. *Id*.

138. *See supra* Part I.A.

139. Radhika Rao, *Selective Reduction: "A Soft Cover for Hard Choices" or Another Name for Abortion?*, 43 J.L. MED. & ETHICS 196, 202 (2015).

140. ALA. CODE. § 26-23H-3(1) (2022); ARK. CODE ANN. §§ 5-61-403(1)(a), 5-61-404(a) (2022); IDAHO CODE§ 18-604(1), (11) (2022); IND. CODE§§ 16-18-2-1, 16-34-2-1 (2022); MISS. CODE ANN. § 41-41-45(1), (2) (2022); N.D. CENT. CODE§ 12.1-31-12(1)(a) (2022); TENN. CODE ANN. § 39-15-213(a)(1), (3) (West 2022); W. VA. CODE §§ 16-2R-2 (2022).

141. S.D. CODIFIED LAWS § 22-17-5.1 (2022).

142. NEW OXFORD AMERICAN DICTIONARY, *supra* note 12, at 4.

143. ALA. CODE § 13-A-13-7 (2022); ARIZ. REV. STAT. ANN. § 13-3603 (2022); ARK. CODE ANN. 5-61-102 (2022); MICH. COMP. LAWS § 750.14 (2022); MISS. CODE ANN. § 97-3-3 (2022); OKLA. STAT. tit. 21, § 861 (2022).

during which a pregnancy comes to an end;[144] thus, the laws should not reach multifetal pregnancy reduction.

Despite this analysis, medical providers in the above states cannot rest, for pro-life prosecutors may interpret these laws aggressively. For example, Arkansas forbids the abortion or premature delivery of "any fetus before or after the period of quickening."[145] Although this pre-*Roe* law was probably intended to protect fetuses of any gestational age, it could also be interpreted to refer to a procedure that terminates "any fetus" among many.

Turning to the other laws discussed earlier in this Part, Louisiana, Kentucky, Missouri, Texas, Utah, and Wyoming prohibit the destruction of an unborn child or human being without requiring that a pregnancy be terminated.[146] Similarly, pre-*Roe* laws in Texas and Wisconsin prohibit the destruction of a fetus or an unborn child.[147] Multifetal pregnancy reduction violates these laws because it destroys or kills one or more fetuses.[148]

Finally, many states also have laws that forbid abortion once an embryo or fetus has a detectable heartbeat or achieves a specified gestational age during the first or early second trimester, when multifetal pregnancy reduction occurs.[149] Consider first the heartbeat laws. On one side of the spectrum, North Dakota's heartbeat law defines abortion to include multifetal pregnancy reduction.[150] On the other, heartbeat laws in Georgia, Idaho, Iowa, Kentucky, Ohio, South Carolina, Tennessee, and Texas may not prohibit multifetal pregnancy reduction because they either define abortion as termination of a pregnancy[151] or, by

144. For analysis of the terms "abortion" and "miscarriage," see *supra* Part II.B.3.

145. ARK. CODE ANN. § 5-61-102 (2022).

146. LA. STAT. ANN. § 40:1061(C), I(3) (2022); KY. REV. STAT. ANN. § 311.772(1)(c), (3)(a) (West 2022); MO. STAT. §§ 188.015(1)(a), 188.017(2) (2022); TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001(1), 170A.002(a), 245.002(1) (West 2021); UTAH CODE ANN. §§ 76-7a-101(1)(a)(ii), 76-7a-201 (West 2022); WYO. STAT. ANN. §§ 35-6-101(a)(i), 35-6-102(b) (2022).

147. TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 2021); WIS. STAT. § 940.04(1) (2021).

148. Supra Part I.A.

149. *E.g.* S.C. CODE ANN. §§ 44-41-610, 44-41-680 (2022) (where the South Carolina statute bans performing, inducing, or attempting to perform or induce an abortion when a fetal heartbeat has been detected); TEX. HEALTH & SAFETY CODE ANN. §§ 171.201, 171.204(a) (West 2021) (where the Texas statute bans knowingly performing or inducing an abortion when a fetal heartbeat has been detected).

150. "'Abortion' means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable *intrauterine* pregnancy of a woman, *including the elimination of one or more unborn children in a multifetal pregnancy*, with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child." N.D. CENT. CODE § 14-02.1-02 (2021) (emphasis added); § 14-02.1-05.2 (heartbeat law).

151. GA. CODE ANN. §§ 16-12-140, 16-12-141(a)(1), (b) (2022); IDAHO CODE ANN. §§ 18-8801(1), 18-8804 (West 2022); IOWA CODE§§ 146C.1, 146C.2 (2022); KY. REV. STAT. ANN. §§ 311.720(1), 311.7706(1) (West 2022); OHIO REV. CODE ANN. §§ 2919.11, 2919.195 (West 2022); TENN. CODE ANN. §§ 39-15-211(a)(1), 39-15-216(a)(1), (c)(1) (2022). Interestingly, some states

leaving the term undefined,[152] invite resort to the dictionary meaning of pregnancy termination.[153] However, medical providers cannot rest easy while performing the procedure, especially in states where abortion laws refer to termination or death of a fetus or unborn child.[154]

Next, consider laws based on the gestational age of the fetus. Arizona, Florida, and Mississippi forbid abortion after fifteen weeks of gestation; Kentucky bars it at or after fifteen weeks.[155] Utah bans abortion after eighteen weeks of gestation.[156] Arkansas,[157] Missouri,[158] and Tennessee[159] ban abortion at multiple gestational ages. Most define abortion as termination of pregnancy,[160] hinting that multifetal pregnancy reduction might be tolerated because the pregnancy continues. Still, the procedure remains risky for medical providers, particularly in states with laws that include references to termination or death of a fetus or unborn child.[161] Moreover, in Arkansas, Missouri, and Utah, multifetal pregnancy reduction is clearly illegal because laws define abortion to include

define abortion to allow pregnancy to be terminated in order to produce a live birth or preserve the life or health of the unborn child. *E.g.*, OHIO REV. CODE ANN. § 2919.11 (West 2022); TENN. CODE ANN. § 39-15-211(a)(1) (2022). Such language is likely intended to protect doctors who induce labor, and not doctors who perform multifetal pregnancy reduction.

152. S.C. CODE ANN. §§ 44-41-610, 44-41-680 (2022); TEX. HEALTH & SAFETY CODE ANN. §§ 171.201, 171.204(a) (West 2021).

153. NEW OXFORD AMERICAN DICTIONARY, *supra* note 12, at 4.

154. GA. CODE ANN. § 16-12-141(a)(1) (2022); IDAHO CODE§ 18-8801(1) (2022); KY. REV. STAT. ANN. § 311.7706(1) (West 2022); OHIO REV. CODE ANN. § 2919.195 (West 2022); S.C. CODE ANN. § 44-41-680(A) (2022).

155. ARIZ. REV. STAT. ANN. §§ 36-2151(1), 36-2321(1), 36-2322 (2022); FLA. STAT. §§ 390.011(1), 390.0111(1) (2022); KY. REV. STAT. ANN. §§ 311.720(1), 311.782 (West 2022); MISS. CODE ANN. § 41-41-191(3)(a), (4) (2022).

156. UTAH CODE ANN. § 76-7-302.5 (West 2022).

157. ARK. CODE ANN. §§ 20-16-1302, 20-16-1304, 20-16-2003, 20-16-2004 (2022) (at or after twelve, and after eighteen weeks).

158. MO. STAT. §§ 188.015(1), 188.056, 188.057, 188.058 (2022) (at or after eight, fourteen, and eighteen weeks).

159. TENN. CODE ANN. §§ 39-15-211(a)(1), 39-15-216(a)(1), (c)(2)-(12) (2022) (at or after six, eight, ten, twelve, fourteen, eighteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four weeks).

160. ARIZ. REV. STAT. ANN. § 36-2151(1) (2021); ARK. CODE ANN. § 20-16-2003(1)(A) (2021) (eighteen weeks); FLA. STAT. § 390.011(1) (2022); KY. REV. STAT. ANN. § 311.720(1) (2017); MISS. CODE ANN. § 41-41-191(3)(a) (2018); TENN. CODE ANN. § 39-15-211(a)(1) (2017). Again, some states define abortion to allow pregnancy to be terminated to increase the odds of a live birth or preserve the life or health of the unborn child. *E.g.*, ARK. CODE ANN. § 20-16-2003(1)(B)(i) (2021) (allowing termination of pregnancy to "[s]ave the life or preserve the health of the unborn child"); MISS. CODE ANN. § 41-41-191(3)(a) (2018) (defining abortion as a termination of pregnancy for reasons other than preserving the life or health of the unborn human being, among others). This language is probably meant to exempt doctors who induce labor, and not those who perform multifetal pregnancy reduction.

161. ARIZ. REV. STAT. ANN. §§ 36-2151(1) (2021); ARK. CODE ANN. § 20-16-2003(1)(A) (2021); KY. REV. STAT. ANN. §§ 311.720(1) (West 2017).

terminating the life of an unborn human, destroying the life of an embryo or fetus, and killing an unborn child, respectively.[162]

C. Summary

In the immediate aftermath of *Dobbs*, IVF remains legal in the United States.[163] One state, Louisiana, treats viable in vitro embryos as juridical persons and prohibits their intentional destruction.[164] IVF continues to be practiced in Louisiana, but embryos must be transferred to a patient, donated to another patient, or cryopreserved and stored.[165]

This Article has reviewed abortion laws that protect unborn life from the point of fertilization. It finds that most such laws protect fertilized eggs or embryos inside the uterus of a pregnant person. Thus, this Article concludes that such laws do not outlaw IVF practices that affect embryos located outside a uterus, such as cryopreservation, thawing, storage, PGD testing, or discard. However, as explained above, Wisconsin has a pre-*Roe* abortion law that may prohibit acts that intentionally destroy embryos, such as deliberately discarding surplus or abnormal embryos.[166]

This Article finds that multifetal pregnancy reduction is illegal in many states.[167] In others, there may be no abortion in a technical legal sense as long as the patient remains pregnant with at least one fetus. However, pro-life prosecutors confronted with the deliberate killing of abnormal or surplus fetuses may disagree, placing those who provide multifetal pregnancy reduction in a precarious position. Further, once pro-life legislators realize that this legal loophole exists, they may enact laws that prohibit multifetal pregnancy reduction, like North Dakota's heartbeat law.[168]

Lastly, in states where abortion laws are vague, or their application to IVF is uncertain, medical providers may assert the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Vague criminal laws violate due process rights.[169] This Article does not focus on vagueness issues, but Part

162. ARK. CODE ANN. § 20-16-1304 (2013) (twelve weeks); MO. REV. STAT. § 188.015(1)(a) (2019); UTAH CODE ANN. § 76-7a-101(1)(a)(ii) (West 2022).

163. Erin Heidt-Forsythe et al., *Roe is Gone. How Will State Abortion Restrictions Affect IVF and More?*, WASH. POST (June 25, 2022), https://www.washingtonpost.com/politics/2022/06/25/dodds-roe-ivf-infertility-embryos-egg-donation/.

164. LA. STAT. ANN. § 9:129 (2022).

165. Glaser, *supra* note 90.

166. *See supra* Part II.B.3.

167. *Supra* Part II.B.4.

168. *See* text accompanying note 150, *supra*.

169. Lifchez v. Hartigan, 735 F. Supp. 1361, 1364 (N.D. Ill. 1990), *aff'd*, 914 F.2d 260 (7th Cir. 1990) (unpublished opinion), *cert. denied sub nom* Scholberg v. Lifchez, 498 U.S. 1069 (1991).

IV.D.2 will present a case in which fertility doctors successfully challenged a vague abortion law that threatened their practice.

III. IVF AND FUTURE LAWS

Dobbs emphasized that the U.S. Congress and state legislatures must determine whether abortion is available and on what terms.[170] However, *Dobbs* also stressed that abortion is distinguishable from other constitutionally protected rights because it destroys potential life.[171] Thus, Congress and state legislatures may take *Dobbs* as an open invitation to enact new laws that protect IVF embryos even when abortion laws do not.

A. Banning IVF Altogether

The Roman Catholic Church's Congregation for the Doctrine of the Faith finds that "artificial procreation" is inherently unacceptable.[172] Pro-life organizations claim IVF involves manufacture[173] or commodification[174] of human life. Given such vehement opposition, *Dobbs* may inspire attempts to ban IVF altogether.[175] However, attempts to ban IVF are likely to encounter fierce opposition. Infertility is common in the United States.[176] After a year of unprotected sex, twelve to fifteen percent of heterosexual couples still cannot conceive.[177] LGBTQIA couples may be considered socially infertile when they are unable to procreate with their partners without medical assistance.[178]

Thus, it is not surprising that assisted reproduction is also common. In a recent poll, thirty-three percent of American adults had either used fertility treatments themselves or knew someone who had.[179] The CDC states that two out of every 100 babies born in the United States have been conceived through

170. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).

171. *Id.* at 2258.

172. DIGNITAS PERSONAE, *supra* note 68, at ¶ 20.

173. *E.g.*, Illinois Right to Life, *In Vitro Fertilization*, https://illinoisrighttolife.org/end-of-life/in-vitro-fertilization/ (last visited Dec. 5, 2022).

174. *E.g.*, Caroline Wharton, *The Pro-Life Take on IVF: Debunking the Media Hysteria*, STUDENTS FOR LIFE OF AMERICA (July 7, 2022), https://studentsforlife.org/2022/07/07/the-pro-life-take-on-ivf-debunking-the-media-hysteria/.

175. I. Glenn Cohen et al., *What Overturning Roe v Wade May Mean for Assisted Reproductive Technologies in the US,* 328 JAMA 15, 16 (2022).

176. *How Common Is Infertility?*, NAT'L INST. OF CHILD HEALTH AND HUM. DEV. (Feb. 8, 2018), https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common.

177. *Id*.

178. Anna Louie Sussman, *The Case for Redefining Infertility*, NEW YORKER (June 18, 2019), https://www.newyorker.com/culture/annals-of-inquiry/the-case-for-social-infertility.

179. Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR., (July 17, 2018), https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/.

assisted reproduction, primarily IVF.[180] Furthermore, in 2015, the IVF services industry was worth over $2.2 billion and was projected to reach more than $4.4 billion by 2022.[181] ASRM and other fertility organizations lobby to protect the industry and will oppose attempts to ban it.[182]

Moreover, the public approves of IVF far more than abortion.[183] In 2013, the Pew Research Center published a public opinion poll on both.[184] Of the U.S. respondents, forty-nine percent found having an abortion to be morally unacceptable.[185] Twenty-three percent felt that having an abortion was not a moral issue; and only fifteen percent believed having an abortion was morally acceptable.[186] By contrast, only twelve percent of U.S. respondents viewed IVF as morally unacceptable; forty-six percent thought that IVF was not a moral issue at all; and another thirty-three percent deemed IVF morally acceptable.[187] In other words, seventy-nine percent either considered IVF morally acceptable or dismissed it as a moral issue. Given these poll results, proposals to ban IVF altogether are likely to fail.

B. Limiting IVF to Protect Embryos and Fetuses

Alternatively, legislators could regulate IVF to protect embryos and fetuses from damage and death. For example, they could enact laws against discarding IVF embryos, as Louisiana has done, or they could limit the number of embryos created in a single IVF cycle, require immediate transfer to the patient, or forbid cryopreservation.[188] Critics note that this approach could lower success rates, increase multiple pregnancies (which are dangerous for carriers and children), and raise expense and risk due to multiple cycles of ovarian stimulation and oocyte retrieval.[189] However, such laws might also incentivize fertility

180. *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/artdata/index.html (last reviewed June 14, 2022).

181. Boys & Harris, *supra* note 27, at 524.

182. *Id.*

183. *Abortion Viewed in Moral Terms: Fewer See Stem Cell Research and IVF as Moral Issues*, PEW RSCH. CTR. (Aug. 15, 2013), https://www.pewresearch.org/religion/2013/08/15/abortion-viewed-in-moral-terms/.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Boys & Harris, *supra* note 27, at 524; *see also* Paolo Emanuele Levi Setti & Pasquale Patrizio, *The Italian Experience of a Restrictive IVF Law: A Review*, 2 J. FERTILIZATION IN VITRO 1 (2012) (discussing Italy's law and its negative effects on IVF success rates). The Italian Constitutional Court held that the law violated the Italian constitution by restricting embryo creation to three, requiring transfer of all created, and prohibiting cryopreservation. Giuseppe Benagiano & Luca Gianaroli, *The Italian Constitutional Court Modifies Italian Legislation on Assisted Reproduction Technology*, 20 REPROD. BIOMEDICINE ONLINE 398, 399–400 (2010).

189. Boys & Harris, *supra* note 27, at 525–26.

professionals to offer IVF in a new protocol that creates embryos on an as-needed basis.

In 2012, the ASRM concluded that oocyte cryopreservation, known colloquially as egg freezing, was no longer experimental.[190] Vitrification, a type of fast freeze, is the standard method because it reduces the formation of ice crystals within the oocytes.[191] Cryopreservation first helped cancer patients faced with gonadotoxic treatments; but today, planned cryopreservation for delayed childbearing or oocyte donation is also possible.[192] Studies show that ninety to ninety-seven percent of vitrified oocytes survive cryopreservation and thaw.[193]

In 2021, the ASRM surveyed the literature and found insufficient evidence to predict live birth rates after planned oocyte cryopreservation.[194] However, other data were promising. Infertile women who used vitrified oocytes for nonelective reasons and infertile women who employed fresh oocytes had similar ongoing pregnancy rates, leading the ASRM to recommend that doctors offer oocyte cryopreservation to patients who wish to limit the number of fertilized embryos they create.[195] Moreover, limited data indicated that neonatal health outcomes were similar when infertile patients used their own oocytes, whether fresh or frozen.[196] The ASRM acknowledged the risk that patients might delay childbearing beyond the point where they could conceive with their own fresh oocytes because they falsely believed that conception with cryopreserved oocytes was guaranteed.[197] Nevertheless, its call for more data on cumulative live birth rates and long-term outcomes with planned oocyte cryopreservation

190. Charlotte Schubert, *Egg Freezing Enters Clinical Mainstream*, NATURE (Oct. 3, 2012), http://blogs.nature.com/news/2012/10/egg-freezing-enters-clinical-mainstream.html. The ASRM published its guideline for oocyte cryopreservation in 2013. The Practice Comms. of the Am. Soc'y for Reprod. Med. and the Soc'y for Assisted Reprod. Tech., *Mature Oocyte Cryopreservation: A Guideline*, 99 FERTILITY & STERILITY 37 (2013) [hereinafter *Mature Oocyte Cryopreservation*].

191. The Practice Comm. of the Am. Soc'y for Reprod. Med., *Evidence-based Outcomes After Oocyte Cryopreservation for Donor Oocyte In Vitro Fertilization and Planned oocyte Cryopreservation: A Guideline*, 116 FERTILITY & STERILITY 36, 36 (2021) [hereinafter *Evidence-based Outcomes*].

192. *Id.* at 36–37.

193. *Mature Oocyte Cryopreservation*, *supra* note 190, at 39.

194. *Evidence-based Outcomes*, *supra* note 191, at 45.

195. *Id.* at 39. Similarly, the ASRM found moderate evidence that pregnancy rates per transfer were not significantly different when cryopreserved donor oocytes were used instead of fresh ones, leading it to recommend that doctors inform patients that cryopreserved donor oocytes are a reasonable alternative to fresh ones. *Id.* at 42. Unfortunately, data were insufficient to assess live birth rates with cryopreserved donor oocytes versus fresh donor oocytes. *Id.*

196. *Id.* at 41. The ASRM also found limited evidence that neonatal outcomes were similar with fresh versus cryopreserved donor oocytes. *Id.* at 44.

197. *Id.* at 44.

and donor oocyte cryopreservation[198] hints that IVF has the potential to evolve in a new direction.[199]

Suppose a patient undergoes ovarian stimulation with fertility drugs. The doctor surgically retrieves multiple oocytes but does not fertilize them all to create surplus embryos. Rather, he fertilizes only as many as the patient wishes to receive into the uterus at that time. The rest are frozen and stored. If no pregnancy results, the patient can ask to have one or more oocytes thawed, fertilized, and transferred.[200] Alternatively, the patient can donate or dispose of the oocytes without feeling guilty because embryonic human life was destroyed.[201]

To be sure, the future prospects of this alternative protocol are uncertain. As mentioned above, ASRM has found insufficient data to predict live birth rates after planned oocyte cryopreservation and has called for more research.[202] Moreover, because it limits the number of embryos created at once, this alternative protocol is likely to be more time-consuming and expensive.[203] IVF already includes many of the above steps: ovarian stimulation; surgical retrieval of oocytes; fertilization; uterine transfer of fresh embryos; cryopreservation; thawing; and transfer of embryos in subsequent rounds if the first attempt fails.[204] However, the alternative protocol will require multiple fertilization attempts rather than one.[205]

Finally, legislators may enact laws that prohibit ancillary services that can harm or kill embryos. For example, PGD may be prohibited because its purpose is to determine which embryos have abnormalities and should be discarded rather than transferred.[206] But if PGD is prohibited, patients who carry deleterious genes or chromosomal abnormalities may conclude that they should not reproduce at all because the odds of bearing a sick or disabled child are too great.

Likewise, legislators may amend abortion laws to clarify that multifetal pregnancy reduction is illegal. Because high-order pregnancies are medically risky, fertility providers may feel obliged to reduce the number of embryos

198. *Id.* at 45.

199. *See* Will, *supra* note 59, at 606–07 (anticipating that personhood laws could encourage research to perfect oocyte cryopreservation).

200. Greely, *supra* note 81, at 15.

201. *Should You Freeze Your Eggs or Your Embryos?*, THE IVF CENTER, https://theivfcenter.com/should-you-freeze-your-eggs-or-your-embryos/ (last visited June 5, 2022).

202. *Evidence-based Outcomes*, *supra* note 191, at 45.

203. Sonia M. Suter, *All the Ways* Dobbs *Will Harm Pregnant Women, Whether or Not They Want an Abortion*, Slate (June 29, 2022), https://slate.com/news-and-politics/2022/06/dobbs-pregnant-women-surveillance-ivf-bans-abortion.html.

204. *Supra* Part I.A.

205. Greely, supra note 81, at 15.

206. Will, *supra* note 59, at 607–08.

transferred at one time, even for older patients whose odds of success are already poor. Providers may also prefer to transfer embryos that have proven their capacity to develop into blastocysts, rather than earlier cleavage-stage embryos. If such adjustments cause pregnancy rates to decline, patients who fail to conceive after the first transfer may incur added expense and delay associated with subsequent fertilizations and transfers.

In sum, despite some religious and pro-life opposition, IVF bans are unlikely. The technology has a strong constituency and high rate of public approval.[207] However, now that the *Dobbs* Court has overruled *Roe* and *Casey* and eliminated the right to abortion, pro-life legislators may feel emboldened to curb IVF practices. In anticipation of such new legislation, this Article will now consider the extent to which substantive due process protects access to IVF, even after *Dobbs*.

IV. IVF AND SUBSTANTIVE DUE PROCESS

The U.S. Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.[208] The Due Process Clause not only ensures procedural safeguards but also protects fundamental rights against governmental intrusion—a feature known as substantive due process.[209] Two such rights are pertinent here: the right to procreate and the right to privacy. This Part first discusses these rights in general, and then in relation to IVF.

A. Fundamental Right to Procreate

To understand why procreation is a fundamental right, one must begin with the case of *Buck v. Bell*.[210] Carrie Buck was a teenage resident of the State Colony for Epileptics and Feeble-Minded.[211] The Board of Directors conducted a hearing and found that she was the feeble-minded daughter of a feeble-minded mother and had given birth to a feeble-minded child of her own.[212] The Board ordered her to be sterilized per a state eugenics law.[213] The Supreme Court of Appeals of

207. *Abortion Viewed in Moral Terms*, *supra* note 183.

208. *See* U.S. CONST. amend. V (safeguarding individual rights against federal government); U.S. CONST. amend. XIV, § 1 (protecting individual rights against states).

209. RONALD D. ROTUNDA & JOHN E. NOWAK, PRINCIPLES OF CONSTITUTIONAL LAW 277–78 (5th ed. 2016).

210. 274 U.S. 200 (1927).

211. *Id*. at 205.

212. For a book that challenges these claims of feeblemindedness, see PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL (2008).

213. Buck v. Bell, 130 S.E. 516, 517–18 (Va. 1925). For a history of the eugenics movement and sterilization laws, see DANIEL J. KEVLES, IN THE NAME OF EUGENICS (1985), and PHILIP R. REILLY, THE SURGICAL SOLUTION (1991).

Virginia affirmed a judgment entering the order[214] and Carrie appealed to the U.S. Supreme Court. There, she challenged the law on the ground that it violated her substantive due process rights.[215] Her attorney argued that "[t]he inherent right of mankind to go through life without mutilation of organs of generation needs no constitutional declaration."[216] However, Justice Holmes quickly dismissed this challenge, reasoning that society had the right to stop Carrie from reproducing because "[t]hree generations of imbeciles are enough."[217]

Carrie also brought an equal protection challenge to the law on the ground that persons housed within mental institutions were subject to sterilization while those outside institutions were not.[218] Justice Holmes rejected her argument out of hand.[219] "[T]he law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."[220]

Skinner v. Oklahoma[221] addressed the constitutionality of another state law that was grounded in eugenics. Jack T. Skinner had been convicted of three felonies involving moral turpitude: chicken theft once and robbery with firearms twice.[222] Following a jury trial, the court entered a judgment ordering him to be sterilized.[223] The Supreme Court of Oklahoma rejected an equal protection challenge and upheld the judgment.[224] Skinner then appealed to the U.S. Supreme Court, which invalidated the sterilization law on equal protection grounds.[225]

Justice Douglas's majority opinion began by defining what was at stake.[226] "This case touches a sensitive and important area of *human rights*. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race-*the right to have offspring*."[227] Thus, from the beginning, *Skinner* focused on the right to procreate.[228] After discussing the arbitrariness of the classifications in

214. *Buck*, 130 S.E. at 520.
215. *Buck*, 274 U.S. at 201–02.
216. *Id.* at 202.
217. *Id.* at 207.
218. *Id.* at 208.
219. *Id.*
220. *Id.*
221. 316 U.S. 535 (1942).
222. Skinner v. State, 115 P.2d 123, 125 (Okla. 1941).
223. *Id*.
224. *Id.* at 128–29.
225. *Skinner*, 316 U.S. at 538.
226. *Skinner*, 316 U.S. at 536.
227. *Id.* (emphasis added).
228. *Id.*

the sterilization law,[229] Justice Douglas reverted to procreation in this subsequent passage:

We are dealing here with legislation which involves one of the *basic civil rights of man*. *Marriage and procreation are fundamental to the very existence and survival of the race.* The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a *basic liberty*. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[230]

As one scholar explained, this standard of review—strict scrutiny—was a judicial innovation first applied in *Skinner*.[231] Moreover, this new standard was key to the outcome.[232] Without strict scrutiny, the Supreme Court would have found it hard to explain why it should invalidate Oklahoma's sterilization law on equal protection grounds when it had allowed Virginia's sterilization law to stand.[233] But the passages quoted above make it clear that the Supreme Court applied strict scrutiny *because* sterilization threatened procreation, a right that the Court deemed fundamental to human existence and survival.[234] Thus, even though the Court stopped short of ruling on substantive due process grounds, and contrary to the claims of some scholars,[235] the identification of procreation as a fundamental right is not dicta, because it is essential to the holding of the case.[236]

Cleveland Board of Education v. LaFleur is another Supreme Court case involving procreation.[237] School boards in Cleveland, Ohio, and Chesterfield County, Virginia had rules requiring public school teachers to take unpaid

229. *Id.* at 538–40.

230. *Id.* at 541 (emphasis added).

231. VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 152 (W. W. Norton & Co.) (2008).

232. *Skinner*, 316 U.S. at 541–43.

233. NOURSE, *supra* note 231, at 157–59.

234. *Skinner*, 316 U.S. at 541.

235. *E.g.*, Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 150 (1995) (explaining the viewpoint that the identification of procreation as a fundamental right is dicta).

236. *Skinner*, 316 U.S. at 541.

237. 414 U.S. 632, 634 (1974).

maternity leave five and four months before giving birth, respectively.[238] Additionally, teachers in Cleveland could not return to work until the semester after their newborns reached three months of age. Teachers in Chesterfield could return to work at the start of the following school year, but needed a medical certification of fitness and assurance that childcare would not interfere with their work duties.[239] Three teachers forced to leave their jobs filed lawsuits challenging the constitutionality of these rules.[240] The Supreme Court held that these rules violated the Due Process Clause of the Fourteenth Amendment.[241]

The Supreme Court addressed the mandatory leave rules first.[242] It recognized a right "'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'"[243] Maternity leave rules could heavily burden the decision to bear a child, which as *Skinner* recognized, was "'one of the basic civil rights of man.'"[244] The Court accepted as legitimate the school boards' asserted interests in ensuring continuity of instruction and physical fitness to teach.[245] However, setting cutoff dates months in advance of childbirth was neither rational nor necessary,[246] and the rules swept too broadly by imposing a conclusive presumption of debility in place of individual determinations.[247]

While some language in this decision appears to invoke the rational basis standard of review,[248] a closer look indicates a stricter standard. In assessing the mandatory leave rules, the Court rejected the school board's solution because it was not narrowly tailored to achieve the goal of continuity without infringing on the teachers' basic liberty.[249] Similarly, when rejecting the claim that cutoff dates were an administratively convenient way to protect against incapacity, the Court said, "The Fourteenth Amendment requires the school boards to employ alternative administrative means which do not so broadly infringe upon basic constitutional liberty."[250] Rather than accept the solution the school boards had

238. *Id.* at 634, 636.
239. *Id.* at 635, 637.
240. *Id.* at 636, 638.
241. *Id.* at 651.
242. *Id.* at 639–41.
243. *Id.* at 640 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
244. *Id.* (quoting *Skinner* at 316 U.S. at 541).
245. *Id.* at 641, 643.
246 *Cleveland Bd. of Educ.*, 414 U.S. at 642-43.
247 *Id.* at 644–66.
248 *See id.* at 643 (finding that the mandatory leave rules bore no rational relation to the valid state interest in continuity of instruction).
249 *See id.* at 643 (stating that the board could have chosen later advance notice dates that would have imposed a lesser burden on the women's constitutional rights).
250. *Id.* at 647.

crafted, the Court insisted that narrower means be employed to preserve a basic liberty.[251]

The Court next concluded that the Cleveland rule was unconstitutional insofar as it required teachers to wait until their newborns reached the age of three months before returning to work.[252] The problem resided not in the legitimate ends, but rather in the arbitrary and irrational means.[253] In presuming that no mother would be physically fit to return before three months, the rule suffered from the same constitutional problems as the mandatory leave rules.[254] And the rule did not bear any relation to continuity of instruction, since infants would reach the three-month mark at different points in the year.[255]

Again, even though the Court used some language reminiscent of a rational basis standard of review, the strictness of its approach becomes evident when one contrasts its decision to uphold Chesterfield County's medical certificate requirement for returning to work.[256] The Court found the requirement was a reasonable and narrow way to ensure teacher fitness; and deferring return until the next school year preserved the continuity of instruction.[257] The rule promoted legitimate interests, without "unnecessary presumptions that broadly burden the exercise of protected constitutional liberty."[258] This language demonstrates the Court's willingness to insist on narrow means to safeguard a protected liberty.[259]

Thus, *Cleveland Board of Education* matters for several reasons. Like *Skinner*, it addressed a rule that significantly burdened procreation.[260] It confirmed *Skinner's* identification of procreation as a basic civil right and extended that right to people who bear children.[261] Although *Cleveland Board of Education* did not use the term strict scrutiny, or question whether the school boards had compelling interests, it did insist that the rules be necessary; and invalidated them when they were not, because it considered procreation to be protected.[262]

251. *Id.*
252. *Id.* at 650.
253. *Id.* at 648–50.
254. *Id.* at 648-49.
255. *Cleveland Bd. of Educ.*, 414 U.S. at 650.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 639–40.
261. *Id.*
262. *Compare id.* at 647–48 (concluding that the mandatory leave regulations that the Cleveland and Chesterfield County School Boards adopted went farther than necessary because they employed irrebuttable presumptions that unduly penalized a female teacher for deciding to bear a child), *with id.* at 651 (finding that the Chesterfield medical certificate requirement served legitimate state interests without

B. Right to Privacy

Although the fundamental right to procreate can stand on its own, it may also be characterized as part of the right to privacy. Constitutional law experts Ronald Rotunda and John Nowak believe that *Skinner* paved the way for later privacy cases.[263] However, the Supreme Court first identified this right in *Griswold v. Connecticut*.[264] Writing for the majority, Justice Douglas reasoned that a right of privacy could be inferred from express constitutional rights, including the First Amendment right of free association, the Third Amendment right against quartering of troops in the home, the Fourth Amendment right against unreasonable search and seizures, and the Fifth Amendment right against self-incrimination.[265] Marital relationships fell within this zone of privacy; ergo, states like Connecticut could not prohibit married couples from using contraceptives.[266] Justices Goldberg, Warren, and Brennan concurred, reasoning that privacy in marriage was an unspoken right that the people retained per the Ninth Amendment.[267] Justice Harlan and White concurred in the judgment; but they sought protection for marital privacy in substantive due process under the Fourteenth Amendment.[268]

In *Eisenstadt v. Baird*, the Supreme Court went a step further by invalidating a law that forbade the distribution of contraceptives to unmarried people.[269] The Court decided the case on equal protection grounds, reasoning that the law's differing treatment of married and unmarried persons had no rational basis.[270] Thus, the case did not address the right to privacy as such.[271] However, the Court did include this influential dicta: "If the right to 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."[272]

employing unnecessary presumptions that broadly burdened the exercise of protected constitutional liberty).

263. ROTUNDA & NOWAK, *supra* note 209, at 540.

264. 381 U.S. 479 (1965).

265. *Id.* at 484.

266. *Id.* at 485–86.

267. *Id.* at 499 (Goldberg, J., concurring).

268. *Id.* at 500, 502–03 (Harlan, J., concurring).

269. Eisenstadt v. Baird, 405 U.S. 438, 440 (1972).

270. *Id.* at 443. The Supreme Court rejected deterrence of premarital sex as a basis for the classification in the law. *Id.* at 448. The statutory scheme was too "riddled with exceptions"; for example, Massachusetts allowed the use of contraceptives to prevent the spread of disease. *Id.* at 449. Nor was the classification plausible as a health measure to prevent distribution of harmful articles, particularly given that federal and state regulations already controlled harmful drugs. *Id.* at 450–52.

271. *Id*. at 443 (invalidating statute only on equal protection grounds).

272. *Id.* at 453.

A third case deals not only with the use of contraceptives, but also their sale.[273] In *Carey v. Population Services International*, the Supreme Court held that New York could not make it illegal for anyone other than a licensed pharmacist to distribute nonmedical contraceptives to adults.[274] In reaching this conclusion, the Court cited the right of privacy, which it expressly acknowledged as an aspect of the liberty protected under substantive due process.[275] The Court listed several choices an individual could make without unjustified government interference and stated that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[276] By limiting the distribution of nonmedical contraceptives to licensed pharmacists, the law placed a significant burden on the individual's right to use those contraceptives.[277] Only a compelling interest could justify this burden, but nonmedical contraceptives did not implicate health, and New York did not assert any other compelling interest.[278]

Until recently, the right to privacy also included the right to abortion.[279] *Roe* reasoned that the privacy right was broad enough to include a person's decision to terminate pregnancy, citing *Skinner*, *Griswold*, and *Eisenstadt* in support of that conclusion.[280] *Casey* then cited those cases plus *Carey* in support of what it considered a settled principle: " the Constitution places limits on a state's right to interfere with a person's most basic decisions about family and parenthood."[281] But now that *Roe* and *Casey* have been overruled, what remains of the fundamental right to procreate and the right to privacy?

C. Procreation and Privacy After Dobbs

Dobbs conceded that the Due Process Clause protected some rights not explicitly mentioned in the Constitution.[282] However, to be protected, any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[283] Based on an exhaustive examination of the history of abortion in America, the Supreme Court concluded that abortion was

273. Carey v. Population Servs., Int'l, 431 U.S. 678 (1977).

274. *Id.* at 681–82.

275. *Id.* at 684.

276. *Id.* at 684–85 ("[T]he decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education.").

277. *Id.* at 689.

278. *Id.* at 690–91.

279. Roe v. Wade, 410 U.S. 113, 153 (1973).

280. *Id*. at 152–53.

281. Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).

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

283. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

not such a right.[284] But the Court did not stop there. It also had to consider whether a right to abortion was part of a broader, entrenched right established through other precedents.[285] The Court concluded the answer was "no."[286] It deemed *Skinner*, *Griswold*, *Eisenstadt*, and *Carey* inapposite because they did not address the destruction of a potential human life which was the central moral issue of abortion.[287]

Dobbs could be read as a case about abortion, and only about abortion. After all, the Court emphasized that its decision did not undermine other precedents, including *Skinner*, *Griswold*, *Eisenstadt*, and *Carey*.[288] If that reading were correct, *Dobbs* would not impact the right to procreate or the right to privacy in any of its aspects other than abortion. However, this Article believes that *Dobbs* has broader implications due to its strict test for substantive due process rights. Therefore, this Article now applies that strict test in light of surviving precedents to determine the ongoing vitality of the right to procreate and right to privacy.

1. Fundamental Right to Procreate

We begin with *Skinner*. As discussed in Part IV.A, *Skinner* recognized a fundamental right to procreate.[289] Moreover, the Supreme Court has recognized this right through dicta in later cases.[290] For example, *Eisenstadt* cited *Skinner* to support its claim that the right to privacy includes the right of the individual to decide whether to bear or beget a child.[291] Similarly, when listing decisions an individual can make without unjustified governmental interference, *Carey* included procreation and cited *Skinner*.[292] And even in *Washington v. Glucksberg*, a case known for establishing a narrow test for substantive due process rights, the Court acknowledged in dictum that liberty under the Due Process Clause included the right to have children and cited *Skinner* for that proposition.[293] Of course, the *Dobbs* majority described *Skinner* differently, as

284. *Id.* at 2248–54.

285. *Id.* at 2258.

286. *Id*.

287. *Id.*

288. *Id.*

289. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

290. Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972); Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977); Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

291. Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972) (citing *Skinner*, 316 U.S. at 535).

292. Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977) (citing *Skinner*, 316 U.S. at 541–42).

293. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing *Skinner*, 316 U.S. at 535).

establishing only a "right not to be sterilized."[294] However, this narrow description is also dictum; procreation was not at stake in *Dobbs*.

Loving v. Virginia is another precedent that survived *Dobbs*.[295] There, the Supreme Court invalidated a Virginia law that prohibited white persons from marrying non-white persons.[296] The Court reasoned that this anti-miscegenation law discriminated on the basis of race and denied the individual the liberty to marry in violation of the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.[297] Although *Loving* did not hold that there was a fundamental right to procreate, its decision strongly implied as much. In discussing substantive due process, the Court stated: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" and cited *Skinner* for that proposition.[298] But marriage is fundamental to existence and survival because it creates a relationship within which procreation can occur, an inference reinforced by the citation to *Skinner*. Moreover, as the Supreme Court of Appeals of Virginia admitted in an earlier opinion, Virginia's anti-miscegenation law aimed to prevent the birth of mixed-race offspring, who the state considered inferior.[299] Thus, by overturning the law, and recognizing a right to marry the partner of one's choice, the Supreme Court implicitly recognized a right to procreate with that partner.

Thus, *Skinner* and *Loving* established an entrenched right to procreate. But even if they did not, the Supreme Court would be justified in recognizing such a right, for it is deeply rooted in American history and tradition and implicit in the concept of ordered liberty. In general, American law has not penalized or prohibited procreation within marriage.[300] To make the claim that history and tradition allowed exceptions, the Supreme Court would have to embrace the

294. *Dobbs*, 142 S. Ct. at 2257, 2268.

295. *Id.* at 2257–58.

296. Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

297. *Id.*

298. *Id.* at 12 (citing *Skinner*, 316 U.S. at 541).

299. Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (1956), *appeal dismissed*, 350 U.S. 985 (1956).

300. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 36 (1994); Foley, *supra* note 78, at 627, 630. In the colonial era, states had bastardy laws that made it a crime to sire or bear a nonmarital child. However, these laws were not against procreation as such; rather they aimed to reduce the financial burden that communities incurred in caring for nonmarital children. JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 32 (2d ed. 1997); *see also* Dominik Lasok, *Virginia Bastardy Laws: A Burdensome Heritage*, 9 WM. & MARY L. REV. 402, 411–12, 416–20 (1967) (discussing Virginia's bastardy laws during the colonial period and their underlying goal of ensuring financial support).

More recently, many states have banned human cloning. KERRY LYNN MACINTOSH, HUMAN CLONING: FOUR FALLACIES AND THEIR LEGAL CONSEQUENCES 185–86 (2013). However, human cloning is a form of asexual reproduction, and thus presents unique issues. It is outside the scope of this Article, which addresses IVF, a form of sexual reproduction.

racist anti-miscegenation laws that *Loving* invalidated and/or the eugenic sterilization laws that states remember with shame[301] and *Skinner* rejected—an unlikely prospect.[302] Further, if the Supreme Court asserted that *Skinner* only protected against involuntary sterilization, the implications would be serious. Congress or state legislatures could then enact laws penalizing even married couples for having more than a limited number of children, subject only to rational basis review. Such an extreme outcome is more consistent with the practices of authoritarian regimes[303] than ordered liberty.

2. Right to Privacy Post-Dobbs

Roe, which placed abortion within the right to privacy,[304] is now overruled. However, *Dobbs* acknowledged that earlier Supreme Court precedents involving the right to privacy survived.[305] *Griswold* and *Carey* situated constitutional protection for contraception within the right to privacy.[306] *Eisenstadt* granted unmarried persons access to contraception on equal protection grounds but opined in dicta that the right to privacy included the right of the individual to decide whether to bear or beget a child.[307]

To be sure, these contraception cases address the right not to procreate. However, they are still relevant to the right to procreate. Consider *Griswold*. There, Justice Douglas found that marital relationships exist within a zone of privacy.[308] If it would be repulsive to notions of privacy to let police search the marital bedroom for telltale signs of contraceptives,[309] it must be equally repulsive to let them search the bedroom for telltale signs of the coitus that comes along with contraceptives. But coitus can also happen without contraceptives,

301. Many states have apologized through their elected representatives for their participation in the eugenics movement. LOMBARDO, *supra* note 212, at 258–65. California, Virginia, and North Carolina have enacted reparations to compensate victims of forced sterilization. Juliana Jimenez, *California Compensates Victims of Forced Sterilizations, Many of Them Latinas*, NBC, (Jul. 23, 2021), https://www.nbcnews.com/news/latino/california-compensates-victims-forced-sterilizations-many-latinas-rcna1471

302. *See* ROTUNDA & NOWAK, *supra* note 209, at 540 (stating that the Supreme Court likely would not uphold eugenic sterilization laws today).

303. China restricted couples to one child from 1979 to 2015. Enforcement included beatings, forced abortions, and infanticide. In 2016, China raised the limit to two children, and in 2021 to three. Emily Feng, *China's Former 1-Child Policy Continues to Haunt Families*, NPR (July 4, 2021), https://www.npr.org/2021/06/21/1008656293/the-legacy-of-the-lasting-effects-of-chinas-1-child-policy.

304. Roe v. Wade, 410 U.S. 113, 152–53 (1973).

305. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257–58 (2022).

306. Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965); Carey v. Population Servs. Int'l, 431 U.S. 678, 684–90 (1977).

307. Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972).

308. *Griswold*, 381 U.S. at 485–86.

309. *Id*.

and when it does, it can lead to conception. Thus, it is reasonable to conclude, based on *Griswold*, that the marital right to privacy includes coital procreation.[310]

Moreover, dicta in the contraception cases also links *Skinner* to the right to privacy. *Griswold* described *Skinner* as a case involving a penumbral right of privacy.[311] *Carey* characterized *Skinner* as a right to privacy case about procreation.[312] *Eisenstadt* cited *Skinner* in support of its dictum that the right to privacy included the right of the individual to decide whether to bear or beget a child.[313] Thus, it is not surprising that constitutional law scholars Ronald Rotunda and John Nowak have traced the right to privacy back to *Skinner*.[314] But *Skinner* was not about contraception; it was about procreation.[315] To hold that the right to privacy does not include the right to procreate, the Supreme Court would have to repudiate these cases and others that reference a right to have children or procreate.[316]

But even if the right to procreate falls within the privacy right, the breadth of the right to procreate remains in question. Is it limited to coital reproduction, or does it extend to IVF, which is noncoital reproduction?[317]

D. The Right to Procreate Through IVF

IVF has not been banned in the United States, so the Supreme Court has not addressed the constitutionality of such bans.[318] Whether the Constitution protects IVF is an open question. This Part applies the *Dobbs* test in an effort to answer that question. Is a right to IVF deeply rooted in American history and tradition and essential to a scheme of ordered liberty? Alternatively, is the right to IVF part of a broader, entrenched right established through precedents? This Part considers each question in turn.

1. Rooted in History and Tradition

Some academics reason that a right to IVF cannot be deeply rooted in history and tradition because IVF was first used in the United States in 1981.[319]

310. *See* Massie, *supra* note 235, at 160–61 (concluding that married couples have the right to procreate and citing *Griswold*).

311. *Griswold*, 381 U.S. at 485.

312. Carey v. Population Services Int'l, 431 U.S. 678, 684–85 (1977).

313. Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972).

314. *See* ROTUNDA & NOWAK, *supra* note 209, at 539–40.

315. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

316. *E.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (right to have children); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (right to conceive and raise one's children).

317. *See* Foley, *supra* note 77, at 644-45 (wondering if a court might view coitus and assisted reproduction as "apples and oranges," leaving the latter constitutionally unprotected).

318. Greely, *supra* note 81, at 9.

319. Cohen et al., *supra* note 175.

However, as Elizabeth Price Foley notes, a constitutional right can be exercised through new technology.[320] Were this not so, the government could prohibit speech that occurs on television or the Internet, despite the First Amendment's guarantee to free speech. Thus, it does not matter that IVF was first used in the United States in 1981. Rather, one must describe the putative right narrowly, as *Glucksberg* requires, and then investigate the legal history of the nearest possible analog.[321]

Defining the nearest possible analog is not a straightforward task. The choice may depend in part on the marital status of those who assert the right to IVF, and whether they use their own gametes. For example, suppose a married man and woman, both infertile, wish to have children through IVF. IVF has only 40 years of direct history, and during those years, the technology has been legal.[322] The next closest analog is a married man and woman engaging in coitus and having children as a result. Generally, the law has not prohibited such activity.[323] Thus, if a married man and woman have a fundamental right to procreate through coitus, a married man and woman should have a fundamental right to procreate through IVF, particularly when they use their own gametes.[324]

To amend the hypothetical, suppose that a man and his infertile wife wish to undergo IVF with donor oocytes. Or suppose a lesbian married couple wishes to undergo IVF using donor sperm. Again, IVF has been legal for forty years and use of donor gametes has likewise been legal during that time. To some, the use of donor gametes may bring to mind adultery and fornication, two activities that states have prohibited.[325] However, that analogy is inapt. Although donor

320. Foley, *supra* note 77, at 643–44.

321. *Id.* at 644.

322. *See supra* Part II.

323. *See supra* Part IV.C.1. By contrast, the Supreme Court has refused to grant constitutional protection to abortion, assisted suicide, and sodomy because those activities historically were prohibited. *See* Dobbs v. Jackson's Women's Health Org., 142 S. Ct. 2228, 2248–54 (2022) (recounting the history of English and American laws that criminalized abortion); Washington v. Glucksberg, 521 U.S. 702, 710–19 (1997) (presenting the history of English and American laws that prohibited assisted suicide); Bowers v. Hardwick, 478 U.S. 186, 192–94 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) (tracing the history of American laws that criminalized sodomy).

324. *See* ROBERTSON, *supra* note 300, at 39 (arguing that if coital procreation is protected, so should noncoital procreation be).

325. For a list of relevant state laws, see RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 98–110 (paperback ed. 1998).

gametes have drawn disapproval,[326] particularly in their early years,[327] their use does not involve sexual intercourse and should not be considered adultery[328] or fornication.

Moreover, even if the use of donor gametes were comparable to adultery and fornication,[329] the analogy would strengthen rather than weaken the argument for constitutional protection. In 2003, *Lawrence v. Texas* invalidated a sodomy law on the ground that individuals have the liberty to engage in a consensual homosexual relationship of which sex is a part.[330] The sodomy law furthered no legitimate state interest that could justify intrusion into that private relationship.[331] The *Dobbs* court acknowledged that *Lawrence* remains good law.[332]

2. Entrenched Rights

Alternatively, substantive due process could support a right to IVF as part of an entrenched right. This section considers two such rights: the fundamental right to procreate, asserted in *Skinner*,[333] and the right to privacy, established

326. In the first half of the twentieth century, doctors quietly pioneered assisted insemination by donor until the legal community noticed and began to debate the morality and legality of this new medical practice. For a history, see Kara W. Swanson, *Adultery by Doctor: Artificial Insemination* 1890–1945, 87 CHI.-KENT L. REV. 591 (2012). Much has changed since then: donor oocytes and sperm are readily available and those who use them are recognized as the legal parents of resulting offspring. *E.g.*, CAL. FAM. CODE § 7540(a) (child of cohabiting spouses conclusively presumed to be child of marriage); § 7610(a) (woman who gives birth is natural parent of child) (West 2022). However, critics remain. For example, the Roman Catholic Church holds that it is morally illicit to inseminate a married woman with the sperm of a man not her husband, or for a married man to inseminate the ovum of a woman not his wife. The Church also considers it unjustified to inseminate a single or widowed woman with sperm from any person. CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY ¶ II.A.2 (1987) [hereinafter DONUM VITAE], available at https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

327. For a history of assisted insemination by donor, see Swanson, *supra* note 326.

328. *See* Charles E. Rice, *A.I.D.- An Heir of Controversy*, 34 NOTRE DAME L. REV. 510, 514–16 (1958-1959); George P. Smith II, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 139–40 (1968); *but see* Doornbos v. Doornbos, No. 54 S.14981 (Superior Court, Cook Co., Dec. 13, 1954), *aff'd*, 139 N.E.2d 844 (Ill. App. Ct. 1956) (comparing assisted insemination by donor to adultery and denying legitimacy to a child).

329. *See* Barbara Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 21–22 (1981) (giving several reasons to reject the relation between artificial insemination and fornication).

330. 539 U.S. 558, 578 (2003).

331. *Id.*

332. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258, 2261 (2022).

333. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)

through the birth control cases and applied to assisted reproduction in certain lower court decisions.[334]

In 1994, the late John A. Robertson published an influential book about assisted reproduction entitled *Children of Choice*.[335] He read *Skinner* together with other precedents to indicate that married couples had a fundamental right to coital reproduction.[336] He noted that coital reproduction served certain values and interests: transmitting genes, achieving solace in the face of death, giving life meaning, expressing love, and satisfying religious needs.[337] He reasoned that persons who could not reproduce coitally shared the same values and interests; ergo, assisted reproduction deserved the same constitutional protection as coital reproduction, particularly when married couples employed their own eggs and sperm in IVF.[338] However, some other academics disagreed with Robertson because they read the Constitution and precedents more narrowly as protecting only coital reproduction or bodily integrity.[339]

The right to privacy is another entrenched right that could include use of IVF. The Supreme Court has not addressed the matter directly, but a federal district court has. *Lifchez v. Hartigan*[340] involved an Illinois abortion law. The law included a provision banning experimentation on fetuses, except where such experimentation was therapeutic for fetuses.[341] Although IVF was excluded from this provision, a fertility doctor sued, asking for a declaratory judgement that it was unconstitutional and seeking a permanent injunction against its enforcement. [342] The court responded as follows. First, the provision violated the Due Process guarantee of the Fourteenth Amendment because it was vague.[343] It did not define "experimentation" and "therapeutic to the fetus," leaving doctors to worry that innovative IVF techniques, including embryo transfer,[344] might expose them

334. J.R. v. Utah, 261 F. Supp.2d 1268 (D. Utah 2002); Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill.), *aff'd*, 914 F.2d 260 (7th Cir. 1990) (unpublished opinion), *cert. denied sub nom* Scholberg v. Lifchez, 498 U.S. 1069 (1991).

335. ROBERTSON, *supra* note 300.

336. *Id.* at 36–37.

337. *Id.* at 24.

338. *Id.* at 39.

339. Massie, *supra* note 235, at 149–150, 160 n.114, 161 (arguing that only coital reproduction between married persons is constitutionally protected); Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1484–85 (1995) (criticizing Robertson's theory and arguing that *Skinner* can be read as guaranteeing only a right to bodily integrity).

340. 735 F. Supp. 1361 (N.D. Ill.), *aff'd*, 914 F.2d 260 (7th Cir. 1990) (unpublished opinion), *cert. denied sub nom* Scholberg v. Lifchez, 498 U.S. 1069 (1991).

341. *Id.* at 1363 (*citing* former ILL. REV. STAT., Ch. 38 para. 81-26, § 6(7) (1989)).

342. *Id.* at 1363.

343. *Id.*

344. Embryo transfer was an experimental treatment at the time of the opinion. An early embryo could be created in vitro and placed in the uterus of the first person, or created in vivo by inseminating an

to criminal liability.[345] Second, the provision infringed a woman's constitutional right to privacy in making reproductive decisions.[346] The court reviewed right to privacy cases such as *Griswold*, *Roe*, and *Carey*,[347] and noted the *Eisenstadt* dicta regarding the individual's right to decide whether to bear or beget a child.[348] The court then stated :

Embryo transfer is a procedure designed to enable an infertile woman to bear her own child. It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.[349]

The *Lifchez* court proceeded to apply strict scrutiny.[350] Citing *Roe*, it reasoned that if the state did not have an interest compelling enough to keep a woman from terminating her pregnancy during the first trimester, it could not have an interest compelling enough to bar the use of innovative assisted reproductive technologies such as embryo transfer during the first trimester, despite the risk to the embryo.[351] Thus, the court held the disputed provision was unconstitutional and entered a permanent injunction against its enforcement.[352]

Another federal district court has addressed IVF performed with gestational surrogacy. In *J.R. v. Utah*,[353] a woman (J.R.) was unable for medical reasons to carry a child.[354] She underwent IVF to create embryos using her eggs and her husband's (M.R.) sperm.[355] The couple contracted for the services of a gestational surrogate, who received their embryos and gave birth to twins.[356] However, the Office of Vital Records and Statistics refused to issue a birth

oocyte within the body of the first person. As the *Lifchez* court noted, flushing that embryo out and transferring it might be therapeutic for the recipient but not the embryo. *Id.* at 1364, 1367–68.

345. *Id.* at 1376.

346. *Id.* at 1377.

347. *Id.* at 1376 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down statute which forbade use of contraceptives on grounds that statute invaded zone of privacy surrounding marriage relationship); Roe v. Wade, 410 U.S. 113 (1973) (establishing unrestricted right to an abortion in the first trimester); and Carey v. Population Services International, 431 U.S. 678 (1977) (striking down a statute which forbade anyone other than pharmacists from distributing contraceptives to anyone)

348. *Id.* (noting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (striking down statute forbidding distribution of contraceptives to unmarried persons on equal protection grounds, but observing in dicta that: "if the right to privacy means anything, it is a 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.").

349. *Lifchez*, 735 F. Supp. at 1377.

350. *Id.* at 1377.

351. *Id.*

352. *Id.*

353. 261 F. Supp.2d 1268 (D. Utah 2002).

354. *Id.* at 1270.

355. *Id.* at 1271.

356. *Id.* at 1270–71.

certificate listing J.R. and her husband as parents and named the surrogate as mother instead. [357] It did so because a Utah statute declared that a surrogate mother was the mother of the child for all legal purposes.[358] The couple and their surrogate sued the State of Utah, its Governor, Attorney General, and the Director of the Office of Vital Records, challenging the statute under the Due Process Clause of the Fourteenth Amendment.[359]

The defendants conceded that a married couple had a constitutional right to procreate but claimed the right did not extend to gestational surrogacy.[360] The *J.R.* court rejected this claim, stating that, "the fundamental right to bear and raise children within the context of a marriage is already clearly established."[361] The court then considered whether the statute unduly burdened J.R. and M.R. in the exercise of their procreative and parental rights by refusing to acknowledge them as the legal parents of the twins.[362] Although Utah had a compelling interest to ensure the best interests of the children and the physical and psychological well-being of the surrogate, its law was not narrowly tailored to achieve those objectives.[363] Utah's other interests also failed to support the law: avoiding custody disputes was not compelling; protecting surrogates against exploitative, for-profit arrangements was not apposite; and no facts indicated that the twins had been commodified.[364] Therefore, Utah's conclusive presumption that the surrogate was the mother of the twins for all legal purposes was unconstitutional as applied to J.R. and M.R.[365]

Lifchez v. Hartigan and *J.R. v. Utah* squarely hold that fundamental rights protect access to IVF and other technologies that help initiate pregnancy.[366] Certainly, patients and doctors can still cite *Lifchez* for the proposition that vague abortion laws are unconstitutional when they threaten access to IVF and related reproductive technologies.[367] Beyond that, predictions become murkier. Much depends on the reach of *Dobbs*.

Suppose *Dobbs* holds only that substantive due process does not secure a right to abortion. *Lifchez* and *J.R.* then stand for the principle that the right to privacy and/or right to procreate include access to IVF and other technologies that help initiate pregnancy. Moreover, both cases apply strict scrutiny to laws

357. *Id.*
358. *Id.* at 1271–72.
359. *Id.* at 1268, 1271.
360. *Id.* at 1274-75.
361. *Id.* at 1277–78.
362. *Id.* at 1278-79.
363. *Id.* at 1283–88.
364. *Id.* at 1288–89.
365. *Id.* at 1293.
366. *See supra* text accompanying notes 340-365.
367. *See supra* text accompanying notes 340-352.

that burden the right.[368] If that standard of review is correct, laws that burden access to IVF and other reproductive technologies will not survive legal challenges, as Part V of this Article discusses.[369]

On the other hand, *Dobbs* emphasized that abortion differs from other constitutionally protected liberties in that it destroys potential life.[370] As Part II.B of this Article demonstrated, IVF practices such as cryopreservation, thawing, storing, testing, and discarding surplus or abnormal embryos are not abortion because no person is pregnant yet.[371] Even multifetal pregnancy reduction is not always an abortion in the technical, legal sense.[372] Nevertheless, like abortion, these practices can damage or destroy potential life.[373] Thus, *Dobbs* may signal that these IVF-related practices fall outside the scope of protected rights, so that laws burdening them are subject only to rational basis review and are likely to be upheld, as Part V of this Article explains.[374]

At least one Justice may have already made up her mind. In 2006, Amy Coney Barrett signed a newspaper ad supporting the right to life from fertilization until natural death.[375] Although this ad did not mention IVF, the pro-life group that ran it has called for the criminalization of embryo discard and multifetal pregnancy reduction.[376] Justice Barrett's views so unnerved the fertility industry that its flagship publication, *Fertility & Sterility*, ran an article opposing her nomination to the Supreme Court.[377]

3. Bragdon v. Abbott: Infertility as a Protected Disability

One other Supreme Court case deserves mention here. In *Bragdon v. Abbott*,[378] a dentist refused to fill the cavity of a woman infected with human immunodeficiency virus (HIV).[379] The woman sued, claiming he had

368. Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill.), *aff'd*, 914 F.2d 260 (7th Cir. 1990) (unpublished opinion), *cert. denied sub nom* Scholberg v. Lifchez, 498 U.S. 1069 (1991); J.R. v. Utah, 261 F. Supp.2d 1268, 1278–79 (D. Utah 2022).

369. *See infra* Part V.A.

370. Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2258, 2261 (2022).

371. *See supra* Part II.B.

372. *See supra* text accompanying notes 138-162.

373. *See supra* text accompanying notes 106-120, 138-162.

374. *See infra* Part V.

375. Ema O'Connor, *A Senator Wrote an Impassioned Letter to Her Colleagues about Her IVF Treatment and Trump's Supreme Court Nominee*, BUZZFEEDNEWS (Oct. 2, 2020), https://www.buzzfeednews.com/article/emaoconnor/ivf-amy-coney-barrett-supreme-court-tammy-duckworth-letter.

376. *Id.*

377. Craig Niederberger et al., *For the Supreme Court: Choose Another*, 114 FERTILITY & STERILITY 941 (2020).

378. 524 U.S. 624 (1998).

379. *Id.* at 628–29.

discriminated against her on the basis of disability in violation of the Americans with Disabilities Act (ADA).[380] The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual."[381] The Supreme Court held the woman was disabled on this reasoning: HIV infection qualified as a physical impairment; reproduction was a major life activity; and because sex, pregnancy, and childbirth would expose partners and offspring to HIV infection, her ability to reproduce was substantially limited.[382] Today, the ADA expressly includes reproductive function within its statutory definition of major life activities.[383] Thus, infertile men and women who have a physical impairment that substantially impairs their reproductive function qualify as disabled persons entitled to the protections of the ADA.[384]

Although *Bragdon* is not a constitutional law case, it is nevertheless relevant. Suppose that the Supreme Court were to hold that coital procreation is a fundamental right under the Constitution, but procreation through IVF is not. Then, fertile men and women could procreate at will, but infertile men and women who required medical assistance to procreate would have no meaningful constitutional protection, even though they qualified as disabled under federal law. Worse, because fertile people are more numerous, in a democratic system, they would be the dominant group and could enact and enforce laws that caused the disabled, infertile "type" to wither and disappear.[385] This discriminatory and cruel outcome would contravene the spirit of *Skinner* and expose the Supreme Court to disrespect and censure.

V. THE CONSTITUTIONALITY OF LAWS THAT BURDEN IVF

With the foregoing background, this Article is now poised to evaluate the constitutionality of laws that burden IVF. It will employ hypotheticals to facilitate analysis of two categories of laws. The first addresses laws that ban IVF. The second examines laws that restrict practices that damage or kill IVF embryos.

380. *Id.* at 629.

381. 42 U.S.C. § 12102(1)(A).

382. *Bragdon*, 524 U.S. at 630–41. The Supreme Court remanded the case so the Court of Appeals could reconsider whether the dentist had presented objective evidence or a triable issue of fact as to the health risk of treating the woman in his office. *Id.* at 655.

383. 42 U.S.C. § 12102(2)(B).

384. *E.g.*, Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 324 (S.D.N.Y. 2000), *aff'd in part*, 316 F.3d 337 (2d Cir. 2003) (finding infertile woman was a "'person with a disability' within the meaning of the ADA"); Shorge Sato, *A Little Bit Disabled: Infertility and the Americans with Disabilities Act*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 189, 202 (2001) ("[T]he law appears relatively clear that infertility is indeed a disability and that people with reproductive disorders do have standing to sue for workplace accommodations and even insurance coverage for their maladies under the ADA.").

385. *Cf.* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (using similar language in explaining why eugenic sterilization laws must be subjected to strict scrutiny).

A. Laws that Ban IVF

Suppose a state enacts a law that makes it a crime for doctors to provide IVF to anyone. The vast majority of heterosexuals could continue to procreate via coitus. Some infertile people and members of the LGBTQIA community could also procreate through interventions the law does not reach, such as assisted insemination or fertility-restoring surgeries. However, many others would be unable to procreate, including people with blocked fallopian tubes, like Lesley Brown (the mother of Louise Brown),[386] individuals whose sperm cannot penetrate an oocyte without ICSI, and gay couples who require the assistance of an egg donor.

But to start with the strongest case in light of history, tradition, and Supreme Court precedents, let us narrow the circle of plaintiffs to an infertile man and woman who are married to each other and wish to procreate via IVF using their own gametes. They could challenge the law on the basis that it significantly burdens the exercise of their fundamental rights[387] to procreation or privacy and thus violates substantive due process as applied to them.

1. Strict Scrutiny

If these asserted rights include IVF, the court must apply strict scrutiny, as the Supreme Court has in cases involving procreation and privacy.[388] The state must carry the burden of proving that its ban is narrowly tailored to serve a compelling interest.[389] This Article will not attempt to anticipate every interest that states may raise. However, four key interests come to mind.

First, a state may assert an interest in sparing embryos, which are potential life, from destructive practices like cryopreservation or discard. *Dobbs* recognized that the state has a legitimate interest in preserving potential life but did not address whether that interest was compelling.[390] Let us assume arguendo that it is. Even then, a ban on IVF would not survive strict scrutiny, for the state could accomplish its goal through narrower means. For example, the state could require doctors to transfer any embryos created to the patient for gestation, so that none are damaged by cryopreservation or discarded.

386. EDWARDS & STEPTOE *supra* note 25, at 145–55 (describing IVF cycle leading to Lesley Brown's pregnancy).

387. Carey v. Population Servs. Int'l, 431 U.S. 678, 689 (1977).

388. *Id.* at 686, 688; *Skinner*, 316 U.S. at 541.

389. *Carey*, 431 U.S. at 686; *see also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 802 (2006) (explaining that strict scrutiny reverses the usual presumption of constitutionality and requires the government to carry the burden of defending the law).

390. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

Second, the Supreme Court has upheld laws against standard and intact dilation and evacuation (D & E) abortions, reasoning that government has a legitimate interest in preserving the integrity of the medical profession from association with death-dealing procedures.[391] Thus, a state may argue that it has an interest in protecting the integrity of the medical profession from debasement through its association with standard IVF, which includes practices that harm or destroy human embryos. However, strict scrutiny requires a compelling rather than legitimate interest.[392] Moreover, as Part III.B of this Article explained, IVF can be performed in an alternative protocol that minimizes risk to embryos.[393] Thus, even if preserving the integrity of the medical profession were a compelling interest, the state could vindicate it by enacting a narrower law to limit the number of embryos created at one time and mandate their transfer for gestation.

Third, a state may assert an interest in preventing the birth of children who have an increased risk of birth defects, rare disorders, and poor perinatal outcomes such as preterm birth and low birth weight.[394] However, this reason for barring access to IVF is unlikely to qualify as compelling. Studies that purport to link IVF to an increased risk of birth defects, rare disorders, and poor perinatal outcomes are contestable because infertility increases these risks even when IVF is not employed.[395] Given the link between infertility and negative outcomes, banning IVF would be tantamount to saying that infertile people should not procreate because their offspring are likely to be defective. Legislators who recoil from twentieth-century sterilization laws should hesitate to embrace such a frankly eugenic rationale for twenty-first century bans on assisted reproduction.[396]

Fourth, a state may claim an interest in protecting human reproduction and children against debasement or maltreatment.[397] IVF costs money; thus, some

391. *Id.*; Gonzales v. Carhart, 550 U.S. 124, 157 (2007).

392. Winkler, *supra* note 389, at 800.

393. *See supra* Part III.B.

394. PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 38–41 (2004).

395. Kerry Lynn Macintosh, *Brave New Eugenics: Regulating Assisted Reproductive Technologies in the Name of Better Babies*, 2010 U. ILL. J.L. TECH & POL'Y 257, 283–84, 287–88, 290–91; *see also* Sine Berntsen et al., *The Health of Children Conceived by ART: The 'Chicken or the Egg?'*, 25 HUM. REPROD. UPDATE 137 (2019) (reviewing literature and finding infertility and assisted reproduction both contribute to negative perinatal outcomes); Alina Pelikh et al., *Medically Assisted Reproduction Treatment Types and Birth Outcome: A Between-Family and Within-Family Analysis*, 139 OBSTETRICS & GYNECOLOGY 211 (2022) (comparing siblings conceived spontaneously and via assisted reproduction and concluding that the technology is not the source of negative perinatal outcomes).

396. *See* Macintosh, *supra* note 395, at 296–303 (providing an argument that regulation of assisted reproduction can be a form of eugenics).

397. *E.g.* J.R. v. Utah, 261 F. Supp. 2d 1268, 1284 (D. Utah 2022) (Utah asserting that children of surrogacy are commodified).

argue that patients "buy" their children and treat them as commodities rather than human beings.[398] But there must be evidence to support a compelling interest; arguments are insufficient.[399] The evidence points in the other direction: IVF patients are committed and involved parents[400] and their children are well-adjusted.[401]

To summarize the analysis thus far, the court should hold that the hypothetical state ban on IVF violates substantive due process as applied to the hypothetical infertile, married couple bringing the challenge. However, suppose the state law allows IVF but limits it to married couples. Single individuals and unmarried couples who need the technology to procreate could then raise *Eisenstadt v. Baird*.[402] The four state interests discussed above are the same whether a person seeking treatment is married or unmarried. Therefore, even under the most lenient standard of review, there would be no rational basis to support the classification in the law, which would violate the Equal Protection guarantee of the 14th Amendment.[403]

Alternatively, suppose a law allows IVF but prohibits donor gametes. The state may assert that family function and child psychological adjustment will suffer if one parent lacks a genetic relationship with the child.[404] Or the state may claim an interest in halting paid gamete donation, reasoning that money moves human reproduction in the direction of manufacture[405] and commerce.[406] However, speculations of this sort are insufficient to establish a compelling interest.[407] Moreover, the available evidence refutes these speculations: in general, families formed through gamete donation function well and the children are well-adjusted.[408]

398. For a sample of such reasoning, see Daniel Kuebler, *IVF, Designer Babies, and Commodifying Human Life*, PUB. DISCOURSE (Apr. 7, 2016), https://www.thepublicdiscourse.com/2016/04/16654/#:~:text=The%20entire%20IVF%20practice%20has,purchased%20through%20whatever%20means%20necessary.

399. *J.R.*, 261 F.Supp.2d at 1288–89; *see also* Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993) (finding no evidence that gestational surrogacy leads society to view children as commodities and refusing to declare that gestational surrogacy is against public policy).

400. SUSAN GOLOMBOK, MODERN FAMILIES: PARENTS AND CHILDREN IN NEW FAMILY FORMS 78–81 (2015).

401. *Id.* at 81–85.

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

403. *Cf. id.* at 453–54 (holding that state law prohibiting distribution of contraceptives to unmarried individuals violates equal protection).

404. *See* GOLOMBOK, *supra* note 400, at 93, 96 (noting without endorsing such claims).

405. REPRODUCTION AND RESPONSIBILITY, *supra* note 394, at 43–44.

406. *Id.* at 149–50.

407. *See supra* text accompanying note 399.

408. *See* GOLOMBOK, *supra* note 400, at 102–03, 106–09 (reviewing studies and finding healthy families and well-adjusted children); Susan Golombok et al., *A Longitudinal Study of Families Formed*

2. Rational Basis

The foregoing constitutional analysis assumes that the rights to procreate and privacy include IVF. If they do not, rational basis becomes the standard of review. Then, the hypothetical ban on IVF will survive so long as it bears a rational relation to the legitimate state interest, even if the plaintiffs are a married couple utilizing their own gametes.[409]

Dobbs asserts that the state has a legitimate interest in ensuring "respect for and preservation of prenatal life at all stages of development,"[410] including, perhaps, ex vivo embryos. *Dobbs* also recognized a legitimate interest in preserving the integrity of the medical profession.[411] Reasoning by analogy to *Dobbs*, a state with a strong pro-life constituency might argue that IVF debases the medical profession because fertility professionals routinely discard and destroy human embryos.[412] A court may then uphold the ban as a rational way to stop the embryo carnage and protect the integrity of the profession.

The state might also assert the other interests discussed above, such as preventing the birth of children with health issues and avoiding commodification. Before analyzing these interests through a rational basis lens, this Article must first consider yet another Supreme Court case. *Gonzales v. Carhart* upheld the federal Partial-Birth Abortion Ban Act of 2003 against charges that the Act was unconstitutional on its face.[413] The Act barred intact dilation and evacuation (D & E), an abortion method that Congress deemed to be disturbingly similar to killing an infant during childbirth.[414] At the time, *Casey* was still good law; thus, the Court had to decide whether the Act imposed

Through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14, 53 DEVELOP. PSYCH. 1966, 1975 (2017) (finding that mother-adolescent relationships and adolescent adjustment within families formed through gamete donation were comparable to those within natural conception families); Sophie Zadeh et al., *The Perspectives of Adolescents Conceived Using Surrogacy, Egg or Sperm Donation*, 33 HUM. REPROD. 1099, 1104 (2018) (surveying adolescents who knew about the gamete donation and finding that none were distressed and most were indifferent regarding their means of conception). *But see* Susan Imrie et al., *Families Created by Egg Donation: Parent-Child Relationship Quality in Infancy*, 90 CHILD DEV'T 1333, 1342–45 (2019) (finding less optimal mother-child relationship quality in egg donation families as compared with IVF families, but no statistically significant differences once data from twin families was removed). To be sure, donor offspring who do not learn the facts of their conception until adolescence or adulthood do sometimes experience psychological harm. Some feel that their parents deceived them and resent the withholding of such important information. GOLOMBOK, *supra* note 400, at 106. However, such reactions point to secrecy, rather than donor conception, as the source of the harm. A fuller examination of disclosure, and how best to achieve it, is beyond the scope of this Article.

409. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283 (2022).

410. *Id.* at 2284 (citing Gonzales v. Carhart, 550 U.S. 124, 157–158 (2007)).

411. *Id.*

412. *See* Hutzler, *supra* note 75 (explaining that pro-life organizations oppose IVF because embryos are discarded).

413. *Gonzales*, 550 U.S. at 168.

414. *Id.* at 158.

an undue burden on a woman's ability to obtain an abortion in the second trimester.[415] It concluded there was no such burden because other abortion procedures, including standard D & E, remained available.[416] Moreover, the Act furthered legitimate interests by promoting respect for the dignity of human life and preserving the integrity of the medical profession.[417] Finally, the Act had no health exception, but that omission was not fatal even though some medical experts believed intact D & E was sometimes necessary to preserve the health of pregnant persons.[418] The Court reasoned that lawmakers had "wide discretion to pass legislation where there is medical and scientific uncertainty."[419]

Let us consider the implications. If a state has a legitimate interest in preserving potential life, it may also claim a legitimate interest in preserving the health of future children.[420] If rational basis is the standard of review, the state can argue that studies linking IVF to health risks[421] give it a rational basis for banning the technology to achieve its legitimate interest. To be sure, other studies reveal that underlying infertility is the source of those health risks.[422] However, a court may cite *Gonzales* for the proposition that the state has discretion to act in the face of scientific and medical uncertainty.[423]

A state may also assert that it has a legitimate interest in protecting the parent-child relationship against a technology that commodifies and/or manufactures children.[424] But the assertion that IVF commodifies and/or manufactures children is just that—an assertion based not on evidence but speculation about the symbolism of paying for or employing technology in reproduction. Nevertheless, the Supreme Court indulged a similar speculation in *Gonzales*, reasoning that the federal government had a legitimate interest in halting an abortion procedure that might coarsen attitudes towards newborns and other vulnerable human life.[425] Relying on *Gonzales*, a court might conclude that the state has a legitimate interest in opposing commodification and/or

415. *Id.* at 146.

416. *Id.* at 150–55.

417. *Id.* at 157–58.

418. *Id.* at 161–64.

419. *Id.* at 163.

420. Sonia M. Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1590 (2008).

421. *See* PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 394, at 38–41 (describing these studies).

422. *See supra* text accompanying note 395.

423. *Gonzales*, 550 U.S. at 163.

424. *Cf.* J.R. v. Utah, 261 F. Supp. 2d 1268, 1284 (D. Utah 2022) (Utah asserting that children of surrogacy are commodified).

425. *Id*.

manufacture[426] and decide that banning IVF is a rational means of advancing that interest.

In sum, if a rational basis standard of review applies, a court could uphold a ban on IVF against a constitutional challenge. Fortunately for those who need IVF to procreate, such bans do not exist at the present time. Moreover, for the reasons set forth in Part III.A, enacting such bans would be politically difficult.[427] Therefore, this Article now considers a different legal threat.

B. Laws that Protect Embryos and Fetuses Within the IVF Process

As Part II noted, a few states already protect in vitro embryos or have abortion laws that may reach in vitro embryos.[428] Going forward, other states may wish to enact new legislation that regulates the IVF process to protect embryos and fetuses. Thus, this Article poses a second hypothetical.

Suppose a state law permits IVF but imposes one or more of these restrictions: limits on how many embryos can be created at one time; mandates to transfer all embryos created to a uterus; prohibitions on cryopreservation, thawing, storage, PGD, and/or discard of embryos; and bans on multifetal pregnancy reduction. As Part III.B noted, oocytes can be cryopreserved; thus, the law does not force patients to undergo multiple rounds of superovulation and oocyte retrieval, nor does it require them to receive more embryos at a time than they can safely carry.[429] But patients who do not become pregnant at first will have to pay for and undergo further rounds of fertilization and embryo transfer. If IVF becomes more expensive and effortful, a patient may claim that, as applied to them, the law significantly burdens the exercise of procreative liberty[430] and violates substantive due process.

The state will likely counter with two arguments. First, it will claim that the law does not impose a significant burden given the availability of IVF in the alternative protocol and cite *Gonzales*[431] in support. In *Gonzales*, the Court stated that a law could be valid even if it had the "incidental" effect of making an abortion more expensive or difficult to obtain.[432] Moreover, the Court held that the Act could survive a facial attack despite its lack of health exception and medical disagreement as to the need for intact D & E.[433] "[W]hen standard

426. Suter, *supra* note 420, at 1589–90.

427. *See supra* Part III.A.

428. *See supra* Part II.

429. *See supra* Part III.B.

430. Carey v. Population Servs. Int'l, 431 U.S. 678, 689 (1977).

431. *Gonzales*, 550 U.S. at 150–55.

432. *Id.* at 157–58 (2007) (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 883, 874 (1992)).

433. *Id.* at 161–63.

medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the state is altogether barred from imposing reasonable regulations."[434]

To be sure, the patient may be able to distinguish *Gonzales*. There, intact D & E was forbidden but standard D & E remained available.[435] Here, the reverse is true: the hypothetical state law forbids standard IVF as it has been performed for decades and relegates the patient to a new protocol with an inadequate track record. Moreover, as Part III.B discussed, this alternative protocol is likely to add expense and effort.[436] Further, *Gonzales* suggested that added expense did not matter,[437] but the Court never discussed whether there was a meaningful difference in cost between standard and intact D & E. A patient who challenges the hypothetical state law should take care to research and document the added expense and effort associated with the alternative protocol and emphasize its lack of track record.[438]

Carey also cuts against *Gonzales*. In *Carey*, the Supreme Court considered a New York law that made it illegal for anyone other than a licensed pharmacist to distribute nonmedical contraceptives to adults.[439] The Supreme Court noted that "the restriction of distribution channels to a small fraction of the total number of possible retail outlets renders contraceptive devices considerably less accessible to the public, reduces the opportunity for privacy of selection and purchase, and lessens the possibility of price competition."[440] Thus, the restriction significantly burdened the liberty to make reproductive decisions and was unconstitutional.[441] If a law that requires a person to purchase condoms from a pharmacist imposes a significant burden on the right to make reproductive decisions, then so must a law that relegates a patient to a more expensive and time-consuming version of IVF.

Second, and more powerfully, the state will claim that *Dobbs* is dispositive. In overturning *Roe* and *Casey*, the Supreme Court emphasized that abortion posed a central moral dilemma: destruction of "potential life."[442] Now, consider standard IVF, which creates more embryos than needed, transfers a few and

434. *Id.* at 166.

435. *Id*. at 150–55.

436. *See supra* Part III.B.

437. *Gonzales*, 550 U.S. at 157.

438. Patients who carry disease-causing genes or chromosomal abnormalities will have a strong claim that forbidding PGD imposes a substantial burden on them, particularly if they will decline to procreate without the availability of testing.

439. Carey v. Population Servs. Int'l, 431 U.S. 678, 681 (1977).

440. *Id.* at 689.

441. *Id.* at 689–91.

442. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022) (quoting Roe v. Wade, 410 U.S. 113, 193 (1973)).

cryopreserves the rest, which, if not used, are discarded.[443] Consider also PGD, which subjects embryos to invasive tests and yields information that may lead to their discard.[444] Finally, consider multifetal pregnancy reduction, in which some but not all fetuses are terminated.[445] The state will assert that these processes pose the same moral dilemma as abortion. Thus, in the wake of *Dobbs,* even if the patient has a fundamental right to procreate through technological means, that right may not extend to processes that are akin to abortion because they destroy potential life.[446]

If a court accepts this reading of *Dobbs*, it will apply the rational basis standard of review.[447] Then, the state need only show that its law is rationally related to legitimate interests. As Part V.A of this Article explained, *Dobbs* identified preservation of prenatal life and the integrity of the medical profession as legitimate interests.[448] Arguably, legal provisions that protect ex vivo embryos and multiple fetuses are rationally related to both those interests; they spare the embryos and fetuses from destruction and protect medical professionals from complicity in such destruction. Thus, the hypothetical law will survive constitutional scrutiny, even if it is burdensome for the patient.

VI. CONCLUSION

This Article has discussed *Dobbs*' implications for IVF providers and patients. Part I described IVF as currently practiced and explained why it concerns the pro-life movement.[449] Part II surveyed current personhood and abortion laws and concluded that few apply to IVF.[450] Turning to future laws, Part III reasoned that IVF bans are unlikely for political reasons.[451] If legislatures impose restrictions on practices that damage or kill embryos, the fertility industry may consider an alternative IVF protocol in which eggs are cryopreserved and embryos are created only on an as-needed basis. In states where abortion is illegal, the legal risks associated with multifetal pregnancy reduction will further incentivize medical providers to reduce the number of embryos transferred to a patient at one time.

443. *See supra* text accompanying notes 43-54.
444. *See supra* text accompanying notes 55-60.
445. *See supra* text accompanying notes 61-64.
446. I. Glenn Cohen et al., *supra* note 175, at 15–16.
447. *Dobbs*, 142 S. Ct. at 2283.
448. *Id.* at 2284.
449. *See supra* Part I.
450. *See supra* Part II.
451. *See supra* Part III.

Part IV reviewed Supreme Court precedents that survived *Dobbs*.[452] It found that Americans enjoy procreative and privacy rights that include use of IVF.[453] Part V then evaluated the constitutionality of laws that burden IVF.[454] It concluded that bans are unconstitutional as applied to individuals who cannot procreate coitally.[455] However, after *Dobbs*, courts may uphold laws that restrict IVF-related practices that endanger or kill embryos or fetuses.

In 1973, *Roe v. Wade* elevated the interests of pregnant people above those of embryos and fetuses.[456] *Casey* confirmed that constitutional hierarchy.[457] Fertility practitioners and patients benefited from those two decisions, which allowed IVF to proceed unimpeded for nearly fifty years. Now that the Supreme Court has overruled *Roe* and *Casey*, states have greater leeway to protect embryos and fetuses.[458] As a result, access to IVF in its present form is no longer as certain. Fertility providers, along with patients and families, must monitor and lobby against anti-fertility bills. But even the most zealous advocacy may fail in states with organized pro-life movements. Thus, fertility providers and patients must also prepare to bring legal challenges and adjust medical practices if their states restrict IVF in the future.

452. *See supra* Part IV.
453. *Id.*
454. *See supra* Part V.
455. *Id.*
456. Roe v. Wade, 410 U.S. 113 (1973).
457. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
458. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).