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THE POST-*DOBBS* WORLD: HOW THE IMPLEMENTATION OF FETAL PERSONHOOD LAWS WILL AFFECT IN VITRO FERTALIZATION

MONIKA JORDAN*

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Throughout the editorial process, she had the privilege of participating in the U.N. review of U.S. compliance with the ICCPR treaty, delving into crucial topics such as reproductive rights in the U.S. In the hope that her article contributes to the ongoing discourse, Monika expresses great gratitude to the dedicated UIC Law Executive Board for their diligent work in the editing process. She extends a special thank you to her supportive husband, Davyd, for standing by her in all her pursuits. Finally, Monika dedicates this article to anyone who has been hurt or angered by the Supreme Court's *Dobbs* decision, and to all of those who have continued fighting to ensure that women are not excluded from the nation's mantra of "liberty and justice for all."

I. INTRODUCTION

Arizona, 2025: a millionaire couple dies in a car crash. The couple's will makes no mention of their two frozen embryos obtained through in vitro fertilization (IVF).¹ At the time of the couple's death, the injunction against implementing Arizona's Senate Bill 1457, which grants fetal rights from the moment of conception, has been lifted.² Thus, the law, which classifies embryos, fetuses, and fertilized eggs as "persons," by extension grants fetal personhood to the couple's two frozen embryos.³ Do the frozen embryos inherit the dead couple's estate?

While the above hypothetical concerns a fictional couple, it is based on actual events that occurred in Australia, where the inheritance rights of frozen embryos were at issue.⁴ And, after the Supreme Court's decision holding that there is no fundamental right to abortion, a similar scenario could soon arise in the U.S.⁵

In 2021, Arizona first introduced Senate Bill 1457, which granted personhood rights to all unborn children from the moment of conception (i.e., beginning from "the fusion of a human spermatozoon with a human ovum").⁶ Once enacted, the law was immediately challenged, and the U.S. District Court for the District of Arizona issued a partial preliminary injunction that prevented certain provisions within the law from going into effect.⁷ In July 2022, following the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Org.*, a federal judge in Arizona temporarily

1. *In Vitro Fertilization (IVF)*, MAYO CLINIC, www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [perma.cc/RKA2-QCNB] (last visited Oct. 9, 2022) (defining in vitro fertilization as "a complex series of procedures used to help with fertility or prevent genetic problems and assist with the conception of a child"). An egg that is fertilized through this process (i.e., an embryo) can be frozen for future use years later. *Id.*

2. At the time of writing of this article, the injunction against the personhood provision of Arizona's Senate Bill 1457 remains in place, but for purposes of the hypothetical, it has been treated as lifted and the law in effect.

3. *Arizona Law Granting "Personhood" to Fetuses Blocked in Court*, CTR. FOR REPROD. RTS. (July 11, 2022), www.reproductiverights.org/arizona-law-granting-personhood-to-fetuses-blocked-in-court [perma.cc/BXF8-REEC]. See also *infra* Part II.B (discussing the concept of fetal personhood).

4. Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 665 (1986) [hereinafter Brown, *Rights and Issues*].

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

6. S.B. 1457, 55 Leg., 1st Sess., Sec. 1, Sec. 8, pt. 4 (Ariz. 2021), www.azleg.gov/legtext/55leg/1R/bills/sb1457c.pdf [perma.cc/56WX-TTVL].

7. *Isaacson, et al. v. Brnovich, et al.*, CTR. FOR REPROD. RTS., www.reproductiverights.org/case/isaacson-et-al-v-brnovich-et-al-arizona-abortion [perma.cc/YL6L-G577] (July 7, 2022). See also Complaint for Declaratory Relief and Injunctive Relief at 4, *Isaacson, et al. v. Brnovich, et al.*, No. CV-21-01417-PHX-DLR (appeal docketed Oct. 13, 2021) (challenging Arizona law as being "constitutionally vague").

blocked the law's personhood requirement.⁸ If the injunction is lifted, Arizona's law and its defining of fetal personhood could be used to restrict access to certain forms of birth control and IVF within the state.⁹

Arizona is not alone in facing challenges to its current legislation: as of November 2023, four states (Iowa, Montana, Ohio, and Wyoming) have been blocked from enforcing their bans on abortion or other gestational limits on the procedure, while Wisconsin's abortion ban is under dispute in the state court system.¹⁰ An additional three states (Arizona, Florida, and Utah) allow abortion up through the fifteenth or eighteenth week of pregnancy, but are currently blocked from implementing stricter limits that would ban abortion after the sixth week or almost in entirety.¹¹ Moreover, fourteen states have banned abortion entirely, and an additional four states have banned abortion starting at six or twelve weeks.¹² As the rise in abortion bans and concurrent pursuits for legalizing fetal rights continues, states will be faced with difficult questions on what it actually means to be a "person."¹³ Or, in the context of the above scenario, can a frozen embryo inherit the family fortune?

This comment explores how the *Dobbs* decision will lead to an increase in state laws granting fetal personhood rights and how that will adversely impact IVF. Part II will provide a background on (1)

8. Shawna Chen & Oriana Gonzalez, *District Court Temporarily Blocks Arizona Law Granting "Personhood" Rights to Fetuses*, AXIOS (July 11, 2022), www.axios.com/2022/07/12/arizona-abortion-personhood-law-fetuses-court. See also *What's at Stake - Summary*, ACLU, www.aclu.org/cases/paul-isaacson-md-et-al-v-mark-brnovich-et-al [perma.cc/N5JB-BNFZ] (Apr. 28, 2023) (providing an overview on the movement of Arizona's law through the state's court system).

9. *Id.*

10. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [perma.cc/9ZS8-9QG7] (Nov. 7, 2023, 9:15 PM).

11. See *Tracking the States Where Abortion Is Now Banned*, *supra* note 10 (discussing Florida's attempt to ban abortion after the sixth week of pregnancy, Arizona's attempt to reintroduce an 1864 law that would ban abortion with no exceptions for rape or incest, and Utah's attempt to ban any abortions not performed in a hospital); see also Lillie Boudreaux & Lauren Irwin, *A Year Later, Uncertainty from Dobbs Lingers Over Arizona Abortion Care*, CRONKITE NEWS (June 23, 2023), cronkitenews.azpbs.org/2023/06/23/a-year-later-uncertainty-from-dobbs-lingers-over-arizona-abortion-care [perma.cc/BU7Z-EHYM] (discussing the tumultuous experience of Arizonians since the *Dobbs* decision, with the state court first blocking Arizona's fetal personhood law, followed by the legislature's attempt to implement an 1864 law that would have banned all abortions, followed by a permanent stay of the 1864 law by Arizona's Court of Appeals).

12. See *Tracking the States Where Abortion Is Now Banned*, *supra* note 10 (listing states with full, six-week, or twelve-week bans, including the most recent addition of Indiana, whose Supreme Court held in August 2023 that a total-ban does not violate the state's constitution).

13. Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 371 (2007).

abortion in the U.S., (2) fetal personhood laws and limitations to their passage under *Roe v. Wade*, and (3) the IVF process and IVF access.¹⁴ Part III will discuss what the *Dobbs* decision means in terms of states (re)defining fetal personhood, and how the *Dobbs* decision and/or passage of fetal personhood laws will impact IVF.¹⁵ Specifically, this section will touch on whether the use of and/or access to IVF could become limited following the passage of such laws, how inter-state rights may be impacted, and what rights and responsibilities are created for the state, parents, and doctors if personhood is redefined as beginning at conception. Part IV will propose two alternatives for the application of fetal personhood laws to IVF.¹⁶

With the overturning of *Roe v. Wade*, states are left to freely implement fetal personhood laws that have the potential to affect many facets of private life.¹⁷ In the context of IVF, defining an embryo as a person would restrict IVF access and create conflicting rights and responsibilities between the state, parents, fetus, and/or doctor, which would be difficult to resolve and could lead to unintended and harmful consequences for all parties involved. As such, states that implement fetal personhood laws should carve out an exception within the law for IVF. Alternatively, courts in states with newly implemented abortion laws should redefine embryos procured through the IVF process as property, and not as persons.

II. BACKGROUND

On June 24, 2022, demonstrators gathered outside the building of the Supreme Court of the United States anticipating the ruling of *Dobbs v. Jackson Women's Health Org.*¹⁸ This case not only looked at the constitutionality of Mississippi's Gestational Age Act, but also the fundamental right to abortion.¹⁹ The Court's decision, which held the Constitution does not confer a right to abortion and overturned *Roe v. Wade*, "sent shockwaves across the legal and political landscape."²⁰ The *Dobbs* decision marked the first time in

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part III.

18. *Demonstrators Converge Outside Supreme Court After Dobbs Decision*, SCOTUSBLOG (June 24, 2022, 6:33 PM), www.scotusblog.com/2022/06/demonstrators-converge-outside-supreme-court-after-dobbs-decision [perma.cc/KEF2-2LTF].

19. *Id.*; *see also Dobbs*, 142 S. Ct. at 2234 (describing the constitutional questions raised by the parties).

20. Gregory Care, *United States: The Dobbs Abortion Ruling and Its Effect on Residency Training*, MONDAQ (Oct. 6, 2022), www.mondaq.com/unitedstates/healthcare/1237830/the-dobbs-abortion-ruling-and-its-effect-on-residency-training [perma.cc/QJ4C-9CXN]; *see also Dobbs*, 142 S. Ct. at 2242 (holding that *Roe* and *Casey* must be overturned).

history that the Court decided to revoke, rather than recognize or define, a Constitutional right.²¹ Moreover, the general climate of unease was exacerbated with concern over “trigger laws” that states passed in anticipation of *Roe* being overruled.²² Additionally, overturning *Roe* left many open questions as to the reach and effect of any legislation that states could now enact to restrict abortions.²³

Central to this ongoing discussion of a post-*Dobbs* world has been the idea of fetal personhood.²⁴ Fetal personhood laws can vary from state to state, but their basic tenet is they recognize an embryo or fetus as a “person,” and, in doing so, extend legally cognizable rights to that “person.”²⁵ Not all states with abortion bans have also passed laws establishing fetal personhood.²⁶ But in states where fetal rights are, or in the near future may be recognized, the impact and reach of such laws has raised many questions.²⁷ Specifically, for

21. *The Supreme Court Overturns Right to Abortion, Raising Questions and Uncertainties for ART Patients and Providers*, AM. SOC’Y FOR REPROD. MED. (July 21, 2022), www.asrm.org/news-and-events/asrm-news/legally-speaking2/the-supreme-court-overturns-right-to-abortion-raising-questions-and-uncertainties-for-art-patients-and-providers [perma.cc/RCY4-GXKR] [hereinafter *Questions and Uncertainties for ART*].; *see also Dobbs*, 142 S. Ct. at 2343 (stating that “all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*’s and *Casey*’s protections”) (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

22. Abortion trigger laws are “laws that are passed by a legislative body but only go into effect once a certain thing happens” – in this case, the overturning of *Roe*. *Abortion Laws: Trigger Laws*, TEX. STATE L. LIBR., guides.sll.texas.gov/abortion-laws/trigger-laws [perma.cc/NB97-FXYM] (July 26, 2023, 3:05 PM). Prior to the *Dobbs* decision in 2022, thirteen states had trigger laws pertaining to abortion that would take effect if *Roe* were overturned. *Id.* Depending on the state, the trigger law would either go into effect immediately upon the overturning of *Roe*, shortly thereafter (i.e., within 30 days), or following additional state action. *Id.* *See also* Ava Sasani, *What Are the Effects of New ‘Trigger’ Bans in Tennessee, Idaho and Texas?*, N.Y. TIMES (Aug. 24, 2022, 1:28 PM), www.nytimes.com/article/abortion-trigger-laws-tennessee-idaho-texas.html# [perma.cc/RJR6-QWGS] (noting that the trigger laws would result in abortion being banned entirely, or after six weeks – “a time at which many women do not know they are pregnant”).

23. Care, *supra* note 20.

24. Madeleine Carlisle, *Fetal Personhood Laws are a New Frontier in the Battle Over Reproductive Rights*, TIME (June 28, 2022, 4:40 PM), www.time.com/6191886/fetal-personhood-laws-ro-abortion [perma.cc/86WR-WAZ5].

25. *Id.*

26. *Id.*; *see also State Legislation Tracker – Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST., www.guttmacher.org/state-policy [perma.cc/94AQ-7KTM] (last visited Nov. 15, 2023) (tracking states that have enacted or pending fetal personhood laws).

27. Lydia Wheeler, *Fetal Rights Laws’ Impact Extends From Abortion to HOV Lanes*, BLOOMBERG L. (July 27, 2022, 3:45 AM), news.bloomberglaw.com/us-law-week/fetal-rights-laws-impact-extends-from-abortion-to-hov-lanes [perma.cc/T5LH-ZYBP] (responding to the Georgia’s fetal personhood regulation by stating that “[i]t becomes an unsteady ground or what people are calling the “wild, wild west”).

processes such as IVF, where an embryo is created not in a woman's body but inside a petri dish in a lab, the impact of fetal personhood on the IVF procedure remains an open question.²⁸

A further analysis into this question requires first a deeper dive into the history of abortion and fetal rights in the U.S. Section A will look at the interweaving of the right to privacy with the right to abortion.²⁹ Section B will discuss fetal personhood laws and limitations to their passage under *Roe*.³⁰ Lastly, Section C will provide an overview of IVF – its history, the process, and its disparate use among socioeconomic classes.³¹

A. *Recognizing the Constitutional Right to Privacy*

From 1972 to 2022, a woman's right to an abortion in the U.S. was protected under the constitutional right to privacy.³² The right to privacy first appeared in *Griswold v. Connecticut*, where the Supreme Court examined reproductive freedom in light of the right to purchase and use contraceptives.³³ Examining this idea, Justice Goldberg stated that the concept of liberty protects not just rights that are specifically enumerated in the Constitution, but rather those that are fundamental and personal.³⁴ The Court specifically held that “[v]arious guarantees [in the Constitution] create zones of privacy,” and looked at several Amendments (First, Third, Fourth, Fifth, and Ninth) in making its argument for why the right to purchase and use contraception was protected.³⁵

When the Supreme Court heard *Roe v. Wade* eight years later, it extended the *Griswold* decision, holding that the right of privacy includes the right to decide whether or not to have an abortion.³⁶ The Court specifically noted that the right to privacy could either be found in the Fourteenth Amendment's protection of liberty, or in the Ninth Amendment's reservation of non-enumerated rights for the people.³⁷ Thus, the Court's analysis further built on the idea of

28. *In Vitro Fertilization (IVF)*, *supra* note 1.

29. *See infra* Part II.A.

30. *See infra* Part II.B.

31. *See infra* Part II.C.

32. *Roe v. Wade*, 410 U.S. 113 (1973).

33. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (discussing the arrest of two licensed physicians who were convicted as accessories for providing medical advice and information to a married couple about how to prevent conception).

34. *Id.* at 486 (Goldberg, J., concurring).

35. *Id.* at 484 (majority opinion) (stating that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

36. *Roe*, 410 U.S. at 152-53 (revisiting and revising zones of privacy and highlighting that the Fourteenth Amendment's personal liberty rights and the Ninth Amendment's reservations of rights to the people language support the Constitution's guarantee of a right to privacy).

37. *Id.*

liberty as expressed in *Griswold*, where the Court stated that any encroachments on fundamental personal liberties could only be justified by a compelling state interest.³⁸

With the right to abortion thus deemed a fundamental right, the Court in *Roe* held that a state's interest in the fetus only becomes compelling at viability – i.e., when the fetus can live outside of the womb.³⁹ The Court stated the line of viability was typically placed at about seven months, or twenty-eight weeks, though could occur as early as at twenty-four weeks.⁴⁰ Using this point of viability to strike a balance between a woman's choice and state interests, the Court set what has since been called the “trimester framework.”⁴¹ Under this framework, the abortion decision largely remained with the woman and her physician pre-viability, but post-viability, or at the start of the third trimester, a state could set limits on abortion access.⁴² Importantly, in reaching its decision, the Supreme Court found that the word “person,” as used in the Fourth Amendment, *did not* include the unborn.⁴³

In 1992, the Supreme Court was again called to rule on the right to abortion in *Planned Parenthood v. Casey*.⁴⁴ There, the Court upheld the central holding of *Roe*, recognizing a woman's right to have an abortion before viability, while affirming that a state cannot interfere with her choice of doing so.⁴⁵ However, the Court stepped away from its focus on the right to privacy, and instead placed its prior precedents (i.e., cases concerning marriage, procreation, and contraception, among others) directly within the Fourteenth Amendment's protection of liberty.⁴⁶ Moreover, while

38. *Griswold*, 381 U.S. at 497.

39. *Roe*, 410 U.S. at 160.

40. *Id.*; see also *Fetal Development: Stages of Growth*, CLEVELAND CLINIC, my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth [perma.cc/Q2LC-FJC6] (last visited Feb. 19, 2023) (defining a standard, full-term pregnancy as forty weeks).

41. *Roe*, 410 U.S. at 155, 164-65 (determining that abortions occurring prior to approximately the end of the first trimester were left to the judgment of the pregnant woman's attending physician). Further, if the abortion were considered after the end of the first trimester, the state could “regulate the abortion procedure in ways that are reasonably related to maternal health.” *Id.* Finally, for the stage following viability, the State could promote “its interest in the potentiality of human life.” *Id.*

42. *Id.*; see also *Fetal Development: Stages of Growth*, *supra* note 40 (expressing that, in modern medicine, a baby born after week twenty-three might survive with intensive care, while a baby born prematurely at weeks twenty-five to twenty-eight is likely to survive).

43. *Roe*, 410 U.S. at 158-59 (discussing the Court's reluctance in extending the Fourteenth Amendment's protections to the unborn, instead stating that “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary. . . is not in a position to speculate as to the answer”).

44. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

45. *Id.* at 846.

46. Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New*

the Court upheld the right to abortion, it struck down the trimester framework established in *Roe* and replaced it with an “undue burden test.”⁴⁷ This test permitted states to implement measures “aimed at ensuring that a woman’s choice contemplates the consequences for the fetus,” so long as such measures do not unduly interfere with the women’s right to abortion as recognized in *Roe*.⁴⁸

In June 2022, the Court decided *Dobbs v. Jackson Women’s Health Org.*, where it held that no fundamental right to abortion could be found in the Constitution.⁴⁹ The Supreme Court applied a contextual approach to the case, stating that the Constitution makes no reference to abortion, nor is abortion “implicit in the concept of ordered liberty.”⁵⁰ In analyzing the latter, the Court turned to the idea previously advocated in *Casey*, that the right to abortion falls under the “liberty” protected by the Fourteenth Amendment’s Due Process Clause – an argument that it rejected.⁵¹ Specifically, the Court found that the right to abortion was *not* “deeply rooted in this Nation’s history and tradition,” and was therefore *not* “essential to our Nation’s ‘scheme of ordered liberty.’”⁵²

Despite existing precedent, the Court also rejected the notion that the right to abortion is an integral part of the right to privacy.⁵³ Specifically, it stated that the cases *Roe* and *Casey* relied on in extending the right of privacy to abortion were fundamentally different.⁵⁴ Therefore, the right to abortion lacked a “sound basis in precedent.”⁵⁵ Though the Supreme Court ultimately ruled that there was no Constitutional right to abortion, it did, in its reasoning, clarify that it was not endorsing any view as to when

Rhetoric of Planned Parenthood v. Casey, 45 AM. U.L. REV. 77, 119-20 (1995).

47. *Casey*, 505 U.S. at 872-76 (describing the Court’s trimester framework in *Roe* as an “elaborate but rigid construct” that was ultimately unnecessary to protect a woman’s right to choose). Rather, the Court stated that protecting the women’s right does not prohibit a state from acting to ensure that a woman’s decision to terminate her pregnancy is “thoughtful and informed.” *Id.*

48. *Id.*

49. *Dobbs*, 142 S. Ct. at 2242.

50. *Id.* at 2242-45 (stating that the right to privacy, which has been used to justify the right to abortion, is also not found in the Constitution).

51. *Id.* at 2245-54 (stating that the Due Process Clause only protects two categories of substantive rights: (1) those guaranteed by the First and Eighth Amendments, and (2) those that are “deeply rooted in [the nation’s] history and tradition,” concluding that the right to abortion fell in neither category).

52. Taylor Kordsiemon, *A Right to Marital Rape? The Immorality of the Dobbs Approach to Unenumerated Rights*, 12 HOUSTON L. REV. 90, 93 (2022).

53. *Dobbs*, 142 S. Ct. at 2257-58.

54. *Id.* at 2257 (citing to a long list of precedent cases, including *Loving v. Virginia*, which recognized the right to interracial marriage; *Griswold v. Connecticut*, which recognized a right to obtain contraceptives; and ten other cases).

55. *Id.* at 2254-58 (clarifying that “these attempts to justify abortion through appeals to a broader right to autonomy and to define one’s ‘concept of existence’ prove too much”).

prenatal life should have legally cognizable interests.⁵⁶

B. Fetal Personhood

While the Supreme Court's holding in *Dobbs* is expected to have a significant impact on fetal rights, fetal personhood is not a new concept.⁵⁷ Fetal personhood refers to the idea that, under the law, a fetus is a separate person from the woman carrying it.⁵⁸ The idea of fetal personhood exists outside what is explicitly stated in the U.S. Constitution, which does not define what constitutes a "person."⁵⁹ Additionally, as discussed above, the Supreme Court has been unwilling to define personhood.⁶⁰ In fact, in *Dobbs*, the Court stopped short of holding that fetuses have legally cognizable rights.⁶¹ Yet, even in the pre-*Dobbs* landscape, many states began experimenting with how to incorporate fetal personhood into their state statutes and/or state Constitutions.⁶²

Historically, courts did not recognize the idea of fetal rights.⁶³ In *Dietrich v. Northampton*, decided in 1884, Justice Holmes, then writing for the Supreme Judicial Court of Massachusetts, reasoned that an unborn child suffering prenatal injuries could not have a separate cause of action because it had been a part of, or a dependent of, the mother when the injury occurred.⁶⁴ However, in a

56. *Id.* at 2256.

57. Lisa M. Brown, *The Feminism and Legal Theory Project: Celebrating Twenty Years of Pedagogy, Praxis and Prisms: Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization*, 13 AM. U.J. GENDER SOC. POL'Y & L. 87, 91 (2005) [hereinafter Brown, *Feminism and Legal Theory*].

58. Brown, *Feminism and Legal Theory*, *supra* note 57, at 90.

59. See Berg, *supra* note 13, at 371 (noting that neither the Constitution nor the Supreme Court have provided an express definition of "person"); see also *Roe*, 410 U.S. at 157 (discussing the three references to "person" in the Constitution and how all of these refer to persons only postnatally).

60. Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J.L. & MED. 573, 574 (2013).

61. *Dobbs*, 142 S. Ct. at 2256 (holding that the "decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests"); see also *Roe*, 410 U.S. at 157 (stating that "no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment").

62. See *infra* note 77; see also Brown, *Feminism and Legal Theory*, *supra* note 57, at 94-95 (noting that twenty-eight states permit criminal punishment against someone who injures an "unborn child;" while cautioning that expansion of fetal rights in the criminal context has previously led to the rights of the fetus engulfing the rights of the woman); Will, *supra* note 60, at 579-86 (describing initiatives in Mississippi and Colorado to amend the state constitutions to recognize fetal rights).

63. *Miller v. Kirk*, 905 P.2d 194, 196 (N.M. 1995).

64. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 14-16 (Mass. 1884) (discussing how the mother of an unborn child slipped on a highway in a town, fell, and had a miscarriage). According to witness testimony, the child was alive for ten to fifteen minutes. *Id.* Justice Holmes turned to English common

subsequent case, *Bonbrest v. Kotz*, the District Court of D.C. held that a viable child, if born alive, is no longer a part of the mother and should therefore be allowed to recover for prenatal injuries.⁶⁵

What distinguished *Bonbrest* from *Dietrich* was the idea of viability.⁶⁶ Viability is defined as the “capability of living,” and looks as to whether a new-born child is able to continue its independent existence outside of the mother’s womb.⁶⁷ Since the *Bonbrest* decision in 1946, courts have discarded the prior rule from *Dietrich*, and every jurisdiction currently permits a cause of action for prenatal injuries, so long as the child survives.⁶⁸ Moreover, since 2003, multiple state legislatures have examined whether to criminalize conduct that causes harm against a fetus or embryo that is independent from a cause of action that may be brought by the pregnant woman.⁶⁹ Currently, thirty-eight states have fetal homicide laws, while twenty-nine have fetal laws that target the early stages of pregnancy.⁷⁰ As the Supreme Court has not ruled on the permissibility of fetal rights outside of the context of abortion, state legislatures have used these laws to limit a women’s right to choose, while simultaneously abiding by the Court’s holding in *Roe*.⁷¹

Aside from the right of a viable child to recover for prenatal injuries, extending fetal rights was limited under the holding of *Roe*.⁷² Specifically, a woman’s constitutional right to privacy, which included the right to abortion, limited the implementation of fetal

law for the proposition that a child must “have reached some degree of quasi-independent life at the moment of the act [injury].” *Id.*

65. *Bonbrest v. Kotz*, 65 F. Supp 138, 140-42 (D.D.C. 1946).

66. Compare *Dietrich*, 138 Mass. at 17 (holding that no separate cause of action could be maintained where the unborn child is “a part of the mother at the time of the injury”), with *Bonbrest*, 65 F. Supp 138 at 140-42 (holding that a viable fetus is not a part of its mother, and if born alive, can maintain a cause of action for injuries sustained in its mother’s womb). Additionally, while *Dietrich* was a decision at the state level, the *Bonbrest* decision was issued by a federal district court.

67. *Viability Definition & Legal Meaning*, L. DICTIONARY, www.thelawdictionary.org/viability [perma.cc/2BXD-ZTJD] (last visited Oct. 8, 2022); see also *Roe*, 410 U.S. at 160 (placing viability at 28 weeks, or sometimes as early as twenty-four weeks).

68. *E.g.*, Miller, 120 N.M. at 656.

69. Brown, *Feminism and Legal Theory*, *supra* note 57, at 91.

70. *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT’L CONF. STATE LEGISLATURES (May 1, 2018), www.ncsl.org/research/health/fetal-homicide-state-laws.aspx [perma.cc/FJEG-PEJX]; see also *Who Do Fetal Homicide Laws Protect? An Analysis for a Post-Roe America*, NAT’L ADVOCS. FOR PREGNANT WOMEN (Aug. 17, 2022), pregjustdev.wpengine.com/wp-content/uploads/2022/08/Feticide-Brief-w-Appendix.pdf [perma.cc/PB8W-PB3M] (describing the laws’ differing approaches in defining and criminalizing fetal homicide).

71. See Brown, *Feminism and Legal Theory*, *supra* note 57, at 91.

72. *Roe*, 410 U.S. at 164-65.

personhoods laws.⁷³ Thus, it was commonly believed that a state's fetal personhood framework that infringed on a woman's Constitutional right to privacy would be struck down by the Supreme Court.⁷⁴

Yet, proponents of fetal personhood have advocated for redefining a person as a "human being at any stage of development," a definition that would grant rights even to the unborn.⁷⁵ Leading this initiative has been Personhood Alliance, a prominent national organization that has been advocating for the passage of fetal personhood initiatives through its multiple regional affiliates across the U.S.⁷⁶ Calling itself a "Christ-centered, biblically informed organization dedicated" to the "advancement of personhood" and the "God-given, inalienable right to life of all human beings," Personhood Alliance has been behind several pushes to amend state constitutions to include fetal personhood rights.⁷⁷ Arguably, such campaigns have paid little heed to what a state's electorate actually wants, given that the proposed amendments were put up to a vote and failed multiple times.⁷⁸

Where state courts were faced with cases that asked whether fetuses should have rights, the arguments made often turned on the idea of viability; courts would ultimately hold that no viability translated to no legally cognizable rights.⁷⁹ Yet, states have toed the

73. See Will, *supra* note 60, at 575 (indicating that the Supreme Court would have struck down any fetal personhood laws infringing on a woman's right to privacy prior to *Dobbs*).

74. *Id.*

75. *Id.*

76. *Id.* at 580.

77. *About Us*, PERSONHOOD ALLIANCE, www.personhood.org/about-us [perma.cc/3V48-CPFW] (last visited Oct. 9, 2022). Of course, the Constitution does not support a "God-given, inalienable right" given the separation of church and state. See, e.g., U.S. CONST. amend I. Moreover, even in *Dobbs*, where the Supreme Court stripped women's right to abortion, the Court reiterated that it was not advocating for any view about when, or if, a State should recognize a fetus's legally cognizable rights. *Dobbs*, 142 S. Ct. at 2256.

78. See Will, *supra* note 60, at 578-84 (describing the failed 2008 and 2010 initiatives led by state officials and Personhood USA to have the Colorado electorate vote to amend its constitution and redefine personhood); see also Ashton Pittman, *10 Years After Mississippians Rejected 'Personhood,' Federal 'Life At 'Conception' Efforts Underway*, MISS. FREE PRESS (Nov. 12, 2021), www.mississippifreepress.org/18093/10-years-after-mississippians-rejected-personhood-new-national-efforts-target-abortion [perma.cc/DG83-XBHJ] (describing a subsequent push for Mississippi to vote on fetal personhood laws after state voters rejected the constitutional amendment in 2011). Further, in critiquing the state for raising the issue again with voters after the failed Personhood Amendment in 2011, Valencia Robinson, the executive director of state organization, Mississippi in Action, said "Mississippians spoke and voted...[i]f we voted for this, why are we constantly talking about it again?" *Id.*

79. See, e.g., *Ferguson v. Dist. of Columbia*, 629 A.2d 15, 20 (D.C. 1993) (opposing the establishment of a cause of action for a fetus that emerges from its mother without the independent capacity to survive); *Wixtrom v. Dep't of Child. & Families (In re J.D.S.)*, 864 So. 2d 534, 545 (Fla. Dist. Ct. App. 2004)

line with prosecuting pregnant women for their conduct.⁸⁰ In certain cases, courts have been hesitant to prosecute mothers, even in instances where their behavior during pregnancy caused harm to their newborn, and thus viable child.⁸¹ In *Johnson v. State*, the Florida Supreme Court overturned a conviction against a woman for transmitting a controlled substance to her child, that was born alive, through its umbilical cord.⁸²

In contrast, in *State ex rel. Angela M.W. v. Kruzicki*, the Wisconsin Appellate Court held that a state had an interest in protecting a viable fetus, even if it meant controlling the conduct (i.e. illegal drug use) of the pregnant mother.⁸³ Similarly, in *Whitner v. State*, the supreme court of South Carolina found that the state could charge the mother with child endangerment for cocaine use during pregnancy.⁸⁴ Some commentators have found the ruling in *Whitner* troubling: not only did the South Carolina court chose to interpret the statute's language of "child under the age of eleven" as including a viable fetus, but it also applied the law retrospectively to criminalize Whitner's behavior.⁸⁵

Just four years later in 2001, South Carolina prosecuted Regina McKnight for child endangerment, and convicted her of homicide by child abuse after only fourteen minutes of jury

(upholding the denial of the appointment of a guardian ad litem for a fetus); *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984) (reversing a charge of manslaughter because the state infanticide statute had never applied to fetuses, while also ruling that future causes of action for homicides could be maintained where the state could prove beyond a reasonable doubt that the fetus at issue was viable); *Reyes v. Superior Court*, 141 Cal. Rptr. 912, 915 (Cal. Ct. App. 1977) (holding that if the legislature had wanted to include unborn children in its Penal Code it would have done so); *Hughes v. State*, 868 P.2d. 730, 734 (Okla. Crim. App. 1994) (holding that extending a homicide statute to cover viable fetuses was consistent with legislative intent); *but see* Brown, *Feminism and Legal Theory*, *supra* note 57, at 92 (recognizing that state statutes in Louisiana and Missouri define a fetus as a person from "the time of conception or fertilization and implantation").

80 Nora C. Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 LAW & INEQ. 171, 178-84 (2008).

81. *Id.* at 180.

82. *Johnson v. State*, 602 So. 2d 1288, 1296-97 (Fla. 1992).

83. *State ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482, 497 (Wis. Ct. App. 1995); *see also* Sandstad, *supra* note 80, at 181 (discussing how treating the unborn as fully human results in state prosecutors placing less value on the rights of the pregnant women).

84. *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997) (stating that "the additional penalty simply recognizes that a third party – the viable fetus or newborn child – is harmed by the behavior").

85. *See* Dana Page, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 HOW. L.J. 363, 380-88 (2003) (noting that a prospective interpretation would have placed Whitner outside the law's reach); *see also* S.C. Code Ann. § 16-3-85 (stating that "[a] person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect. . .").

deliberation.⁸⁶ In reaching its decision, the supreme court of South Carolina rejected the argument that a right to privacy protected McKnight, and instead “framed the privacy argument in terms of whether or not smoking crack while pregnant was a constitutional right.”⁸⁷

Ultimately, fetal personhood laws that permit a cause of action for the injured fetus disproportionately affect marginalized and low-income women.⁸⁸ A study conducted by the National Advocates for Pregnant Women (NAPW) looked to the forced interventions, arrests, and detentions of pregnant women from 1973 to 2005.⁸⁹ The study found that 71% of these women were impoverished, while 59% were women of color.⁹⁰ Where criminal prosecutions involve drug use, as in the case of McKnight, prosecutors define the women as “irresponsible crack-head[s],” rather than addressing the underlying causes of poverty that contribute to the maternal and fetal health outcome.⁹¹

At the federal level, the passage of the Unborn Victims of Violence Act (2004) (UVVA) marks a shift in the federal government’s approach to fetal personhood.⁹² The UVVA states that any person who commits a federal violent crime, and in doing so “causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place,” will be guilty of a separate federal crime for such conduct, regardless of the stage of fetal development during which the conduct occurs.⁹³ The

86. Brown, *Feminism and Legal Theory*, *supra* note 57, at 95; *see also* State v. McKnight, 576 S.E.2d 168, 176-77 (S.C. 2003).

87. Sandstad, *supra* note 80, at 183.

88. *See* Brown, *Feminism and Legal Theory*, *supra* note 57, at 95-96. *See also* AMNESTY INTERNATIONAL, CRIMINALIZING POVERTY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA 60 (2017) (stating that the U.N. Committee on Economic, Social and Cultural Rights has found that women from marginalized groups are “more closely scrutinized and targeted by the State, [and] are disproportionately affected by pregnancy criminalization laws”).

89. AMNESTY INTERNATIONAL, *supra* note 88, at 23. (identifying a NAPW study that looked at a sample size of 413 forced interventions, arrests, and detentions of pregnant women).

90. *Id.*

91. *Id.* at 22-23 (citing long-term studies indicating that complex social environment factors, such as poverty, influence fetal development outcomes much more substantially than cocaine use); *see also* Page, *supra* note 85, at 368 (noting that the jury did not hear the full story of Regina McKnight, including that she was mentally handicapped and a victim of abuse). In fact, the jury never heard that McKnight had sent her other children to live with family members out of a love for them, nor was the jury privy to information suggesting that McKnight’s drug use began only after drugs were offered to her at her mother’s funeral. *Id.* Additionally, McKnight sought drug treatment on multiple occasions, but she was repeatedly told that it was unavailable. *Id.* Lastly, the jury never knew that when she was finally admitted to a drug treatment center, one of the center’s counselors got her pregnant. *Id.*

92. *See* Sandstad, *supra* note 80, at 184-85 (describing the UVVA as an “erosion of pregnant women’s rights”).

93. Unborn Victims of Violence Act of 2004, 18 U.S.C § 1841, 10 U.S.C §

UVVA does not apply to “any person for conduct relating to an abortion,” nor to the pregnant woman.⁹⁴ Yet, it has been viewed by some scholars as a way of undermining *Roe*, given that it places “the fetus in competition against its mother-to-be in the legal and medical arenas.”⁹⁵ From this perspective, the UVVA indirectly tests a women’s right to bodily autonomy by pinning her interests against the statute’s recognition of fetal rights.⁹⁶

Despite varying state and/or federal interpretations of how to define “person,” no state’s law takes precedence over the law enacted by another state.⁹⁷ Controlling fetal personhood on a state level will therefore lead to widely differing approaches nationwide as to whether a fetus is recognized as a “person.”⁹⁸ A concern with fetal personhood laws is that their implementation could require people to “compromise their own body integrity for the benefit of another.”⁹⁹ Ultimately, fetal personhood could create a “slippery-slope” implicating more complicated and harmful legal, scientific, and social issues, including prosecution for miscarriages, birth control methods, IVF, stem cell research, tax deductions for the unborn, and negligence and/or child endangerment charges for actions taken prior to knowledge of pregnancy.¹⁰⁰

C. *In Vitro Fertilization*

With the *Dobbs* ruling leaving states free to pass fetal personhood legislation, one area where the recognition of fetal rights may have far-reaching impact is IVF. Specifically, if life is defined as beginning at conception, questions may arise of what that means in terms of IVF, the embryos that are created, and the rights and responsibilities of the various parties involved.¹⁰¹ Sub-section 1 below will introduce IVF as an alternative to natural reproduction,

919(a).

94. *Id.*

95. See Sandstad, *supra* note 80, at 185-86 (explaining how the UVVA recognizes legal protection for fetuses).

96. *Id.*; see also Unborn Victims of Violence Act of 2004 (defining an unborn child as a “homo sapiens” in the womb and at any stage of development – effectively extending fetal protection to nonviable fetuses).

97. U.S. Const. art. IV; U.S. Const. amend. X.

98. However, under the Supremacy Clause of the Constitution, any federal laws made pursuant to the Constitution will take precedence over state law. U.S. Const. art. VI, cl. 2.

99. Kimberly A. Prior, *The Ultra-Sound Off: The Ultrasound Mandate Debate and a Litigator’s Guide to Overcoming Obstacles to a Woman’s Right to Abortion*, 19 Suffolk J. Trial & App. Adv. 155, 165 (2013/2014).

100. Prior, *supra* note 99, at 165-66, 166 n.64.

101. Chabeli Carranza & Jennifer Gerson, *IVF May Be in Jeopardy in States Where Embryos Are Granted Personhood*, *The Guardian* (July 16, 2022, 8:00 AM), www.theguardian.com/society/2022/jul/16/ivf-anti-abortion-states-embryos-personhood [perma.cc/NSG9-9GYV].

and describe the IVF process.¹⁰² Sub-section 2 will discuss already existing disparities in IVF access.¹⁰³ Finally, Sub-section 3 will take a look at how the specific wording of different state personhood statutes can result in vastly different effects on the IVF process and IVF access.¹⁰⁴

1. *The Rise and Use of IVF*

During the 1980's, IVF arose as a potential solution to combat rising infertility.¹⁰⁵ In the U.S., among women aged fifteen to forty-nine who have had no prior births, about one in five (specifically, nineteen percent) are unable to get pregnant within a year of trying.¹⁰⁶ The World Health Organization further estimates that infertility impacts 186 million women in developing countries.¹⁰⁷ In 2019, the United Nations (UN) termed the “capability to reproduce” as significant to sexual and reproductive health.¹⁰⁸ On the 25th anniversary of the International Conference on Population and Development, the issue was raised again by sexual and reproductive health organizations from around the world, who identified infertility as a “global area of unmet need” that the UN and national governments should address.¹⁰⁹

The reasons and purposes for a couple's use of IVF can be varied.¹¹⁰ Outside of its immediate value in combating infertility, IVF can also be used by women who have damaged fallopian tubes, or same-sex couples who want to conceive using the gametes¹¹¹ of one partner.¹¹² The IVF process generally involves a combination of

102. *See infra* Part II.C.1.

103. *See infra* Part II.C.2.

104. *See infra* Part II.C.3.

105. *See* Carlisle, *supra* note 24; *see also* *The History of IVF: Origin and Developments of the 20th Century*, Pac. Fertility Ctr. L.A. (July 25, 2022), www.pfcla.com/blog/history-of-ivf [perma.cc/8UMZ-ZMQ3] (noting that while the foundations for IVF were laid in the 1920's, IVF did not gain mainstream use until the 1980's).

106. *Infertility*, CTRS. FOR DISEASE CONTROL & PREVENTION www.cdc.gov/reproductivehealth/infertility/ [perma.cc/4S85-ANTC] (last visited Oct. 9, 2022).

107. *Infertility and IVF Access in the United States: A Human Rights-Based Policy Approach*, CTR. FOR REPROD. RTS., www.reproductiverights.org/wp-content/uploads/2020/02/64785006_Infertility-and-IVF-Access-in-the-U.S.-Fact-Sheet_2.5.2020_Final.pdf [perma.cc/C8AZ-8K7A] (last visited Oct. 10, 2022).

108. *Id.* The U.N. also advocated for “delink[ing]” the ability to pay from IVF access, an idea that will be discussed further *infra* Part II.C.2.

109. *Infertility and IVF Access in the United States*, *supra* note 107.

110. CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING SCIENCE AND LAW 104-06 (Am. Bar Ass'n eds., 2nd ed. 2011).

111. *See id.* at 2 n.7 (defining gametes as sperm or egg; a gamete provider, is thus someone who provides their egg or sperm for use in IVF or assisted reproduction, more generally).

112. *Id.* at 104-06.

medical and surgical procedures that occur outside of the woman's body and involve the fertilization of a woman's ovum¹¹³ with a male's sperm.¹¹⁴ In a typical IVF cycle, ten to fifteen ovum are retrieved for fertilization.¹¹⁵ One or more of a woman's ova are then placed into a petri dish in a laboratory.¹¹⁶ Subsequently, the processed sperm and ova are mixed together and left in the petri dish to see whether fertilization will occur.¹¹⁷ If the fertilization has been successful, the ovum will undergo a period of cell division where its nucleus and chromosomes split.¹¹⁸ After two or three days, the resulting early embryo will be ready for implantation.¹¹⁹ The early embryos can then be tested before choosing which one to transfer to the uterus, and the rest are either frozen, donated, or discarded.¹²⁰

Despite the increased reliance on IVF and other assisted reproductive technology, there is generally no state statute that regulates or controls IVF parties (e.g., patients, donors, or medical personnel).¹²¹ There is also no federal regulation of assisted reproductive technology, though individual associations have produced model acts that state and federal governments can adopt or borrow from when and if they draft legislation.¹²²

2. IVF Costs and Disparities in Access

With the IVF procedure comes a steep price tag that limits IVF

113. Naveen, *Difference Between Ovum and Egg*, DIFFERENCE BETWEEN (Dec. 25, 2011), www.differencebetween.com/difference-between-ovum-and-vs-egg [perma.cc/HF7T-H59J] (defining "ovum" – or, plural, "ova" – as a female reproductive cell; once the ovum is fertilized, it becomes an egg).

114. Carlisle, *supra* note 24.

115. Chabeli Carrazana, *Many Low-Income People Are Already Shut Out of IVF. Could Abortion Bans Make It Even More Expensive?*, THE 19TH (June 8, 2022, 2:56 PM), www.19thnews.org/2022/06/ivf-abortion-law-impact-cost-availability-future [perma.cc/2GP5-QQZ5] [hereinafter Carrazana, *Shut Out of IVF*].

116. Brown, *Rights and Issues*, *supra* note 4, at 608-09.

117. *Id.*

118. The Editors of Encyclopaedia Britannica, *Oogenesis - Physiology*, BRITANNICA (Feb. 17, 2019), www.britannica.com/science/oogenesis [perma.cc/W8NN-DF7C].

119. Brown, *Rights and Issues*, *supra* note 4, at 609.

120. Carrazana, *Shut Out of IVF*, *supra* note 115; see also KINDREGAN & MCBRIEN, *supra* note 110, at 102 (discussing how freezing embryos allows the parties to check for diseases; however, some testing, like HIV, may take as long as six months given the incubation period of the disease).

121. See KINDREGAN & MCBRIEN, *supra* note 110, at 96, 333 (discussing how the "law of assisted reproductive technology (ART) is for the most part unsettled").

122. See *Id.* at 1, 22-25 (noting that the American Bar Association's 2008 Model Act Governing Assisted Reproductive Technology and the Uniform Parentage Act, amended in 2000, serve as primary models for addressing questions arising in assisted reproduction, though the latter primarily concerns issues of parentage).

access. A single cycle of IVF, on average, can cost patients about \$23,000.¹²³ As of 2023, only fourteen states require coverage for fertility treatments, while coverage through insurance remains limited for all but employees that work at some of the largest U.S. firms.¹²⁴ Even with private insurance covering a significant portion of IVF and/or fertility medicine, out-of-pocket deductibles can raise the cost of IVF to the thousands.¹²⁵ These high costs place IVF out of the reach of many.¹²⁶

Following its research on IVF access, the Center for Reproductive Rights (CRR) identified disparities in access to IVF in the U.S., particularly for people of color, low-income households, people with disabilities, and LGBTQ+ communities.¹²⁷ Looking to women of color, specifically, the CRR report noted that Black women report infertility at an eighty percent higher rate than other groups, but only account for less than twenty percent of infertility care.¹²⁸ In line with the CRR's report, a survey conducted in 2020 identified 75% of IVF patients as White, with 80% of patients having annual household incomes greater than \$100,000.¹²⁹ Thus, while IVF does address the infertility problem, it does so disparately, with the farthest reach extending to White, middle class females.¹³⁰

123. Carrazana, *Shut Out of IVF*, *supra* note 115.

124. Tom Murphy & The Associated Press, *Most of the Biggest U.S. Employers Now Cover Fertility Treatments, but Many Americans Still Can't Afford It*, FORTUNE (May 16, 2023, 4:03 AM), fortune.com/2023/05/16/most-biggest-us-employers-cover-fertility-treatments-many-americans-still-cant-afford/ [perma.cc/2QER-3QEM] (stating that 43% of companies with over 500 employees covered IVF services in 2022). In companies with over 20,000 employees, 54% extend coverage to cover IVF services. *Id.* However, smaller employers are less likely to provide IVF coverage, and many state-mandated regulations pertaining to IVF coverage do not apply to small employers or to individual insurance plans. *Id.*

125. Phil Galewitz, *Even When IVF is Covered by Insurance, High Bills, Surprises, and Hassles Abound*, NAT'L PUB. RADIO (May 4, 2022, 5:00 AM), www.npr.org/sections/health-shots/2022/05/04/1095589987/ivf-insurance-bills [perma.cc/JE7J-J6CV]. *See also* Carrazana, *Shut Out of IVF*, *supra* note 115 (cautioning that insurance providers may rethink their policy coverages following the additional risks that the *Dobbs* decision introduces to the IVF field).

126. *Compare* Carrazana, *Shut Out of IVF*, *supra* note 115 (noting how a single cycle of IVF costs, on average, \$23,000), *with Average Wage Index (AWI)*, SOC. SEC. ADMIN., www.ssa.gov/oact/cola/awidevelop.html [perma.cc/ML2F-T36Z] (last visited Sept. 3, 2023) (determining that the average wage nationwide was \$58,129 for 2021).

127. *Fertility and IVF Access in the United States*, *supra* note 107.

128. *See id.* (explaining further that the costs of an IVF cycle are out of the reach for many Black and Hispanic women, whose median household incomes in 2017 averaged \$40,258 and \$50,486, respectively).

129. Carrazana, *Shut Out of IVF*, *supra* note 115.

130. *Id.*

3. *Recognizing Fetal Personhood in the IVF Context*

While the disproportionate access to IVF across races and socio-economic classes is certainly a concern, IVF may face an attack from another end – the implementation of fetal personhood laws.¹³¹ Prior to the Supreme Court’s overturning of *Roe*, some states, such as Louisiana and Missouri, had already considered fetal personhood in the context of IVF.¹³² Louisiana’s statute § 9:121 specifically defines “human embryo” as an “in vitro fertilized human ovum...that will develop in utero into an unborn child.”¹³³ However, the Louisiana Attorney General has clarified that criminal sanctions of the statute will not apply until after the fertilized ovum has been successfully implanted.¹³⁴ In Missouri, previous legislation defined abortion as the “intent to destroy the life of an embryo or fetus.”¹³⁵ Given that the fundamental right to abortion still existed at the time, Missouri passed its legislation as a “trigger” law that would take effect only if *Roe* were overturned.¹³⁶

In 2021, Arizona introduced Senate Bill 1457, which defines conception as “the fusion of a human spermatozoon with a human ovum.”¹³⁷ However, an Arizona federal judge blocked certain provisions of the law from taking effect.¹³⁸ Georgia, on the other hand, recently implemented its “fetal heartbeat” law (named the “LIFE Act”).¹³⁹ The law, which was passed in 2019 and went into effect July 2022 after *Roe* was overturned, bans abortions beginning

131. Yet, any fetal personhood laws enacted in one state will not control in another state. *See supra* notes 97, 98, and accompanying text.

132. Brown, *Feminism and Legal Theory*, *supra* note 57, at 92.

133. LA. REV. STAT. ANN § 9:121 (2022).

134. *Id.*

135. *Missouri Abortion Law After the Supreme Court’s Decision in Dobbs: Sidney Watson and SLW Law Student Mary Quandt Publish Primer Analyzing Missouri’s Criminal Laws*, CTR. FOR HEALTH L. STUD., www.slu.edu/law/health/pdfs/primer-mo-abortion-criminal-law-post-dobbs-final-7-1-22.pdf [perma.cc/5L9F-QMR7] (last visited Oct. 10, 2022) [hereinafter *Missouri Abortion Law*].

136. *See Missouri Abortion Law*, *supra* note 135.

137. Ariz. S.B. 1457.

138. Chen & Gonzalez, *supra* note 8.

139. Rachel Garbus, *Georgia’s “Fetal Personhood” Statute is Uncharted Territory*, ATLANTA (Aug. 23, 2022), www.atlantamagazine.com/news-culture-articles/georgias-fetal-personhood-statute-is-uncharted-territory [perma.cc/UJU3-WPJB]; *see also* H.B. 481, 2019 Gen. Assemb., Reg. Sess. (Ga. 2019), www.legis.ga.gov/legislation/55445 [perma.cc/W9BS-TLW4] (stating that the “full value of a child begins at the point when a detectable heartbeat exists,” or as early as six weeks). *But see* Jess Mador, *Reproductive Freedom Act Seeks to Repeal Georgia’s H.B. 481 Abortion Ban*, WABE (Jan. 24, 2023), www.wabe.org/reproductive-freedom-act-seeks-to-repeal-georgias-h-b-481-abortion-ban [perma.cc/4FDS-3NB8] (discussing a push by Georgia’s General Assembly Democrats to pass the Reproductive Freedom Act to repeal H.B. 481 and better align with the seventy percent of Georgians that support abortion access).

at week six of pregnancy, and defines a person as “any human being, including an unborn child.”¹⁴⁰ However, the LIFE Act specifically clarifies that “not all fertilized eggs signify personhood.”¹⁴¹ It further states that the Act does not apply to embryos created through assisted reproductive technology, such as IVF.¹⁴²

Most recently, in August 2023, the supreme court of South Carolina lifted the injunction against the state’s “Fetal Heartbeat and Protection from Abortion Act.”¹⁴³ In reaching its decision, the court appealed to the “balance struck by the legislature” in considering privacy and/or female autonomy and state interests, holding that a ban on abortion beginning after the detection of a fetal heartbeat (i.e., generally the sixth week of pregnancy) is reasonable.¹⁴⁴ Following the court’s ruling, South Carolina’s legislature may act to implement Bill 381, which defines a person from the moment of fertilization.¹⁴⁵ Interestingly, the states enacting abortion bans and/or fetal personhood laws are also the states that see the highest proportions of women of color working low-wage jobs.¹⁴⁶

Even with the implementation of IVF technologies, the

140. Garbus, *supra* note 139.

141. *Id.*

142. *Id.*

143. Patrick Phillips et al., *SC Supreme Court Upholds State’s ‘Fetal Heartbeat’ Law*, LIVE 5 NEWS (Aug. 23, 2023, 9:12 AM), www.live5news.com/2023/08/23/mcmaster-responds-sc-supreme-court-abortion-ruling-upholding-abortion-law [perma.cc/KT4N-G3EQ].

144. Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 131-32 (S.C. 2023). Specifically, the court stated that, because a “woman could learn of her pregnancy within seven to fourteen days of conception,” a six-week ban still left the woman with “ample” time to seek out an abortion. *Id.* at 127. In dissent, Chief Justice Beatty critiqued the majority’s blind reliance on statements made by the General Assembly that were unsupported by actual data concerning menstrual, financial, and emotional limitations of women learning about and acting on their pregnancies. *Id.* at 150-51 (Beatty, J., dissenting).

145. See Phillips et al., *supra* note 143 (noting that the only change between the 2021 Fetal Heartbeat Law, which was ruled unconstitutional, and the 2023 version of the bill, was the makeup of the Court responsible for its review). See also S.B. 381, 124th Gen. Assemb., Reg. Sess. (S.C. 2020), www.scstatehouse.gov/sess124_2021-2022/sj21/20210112.htm#p292 [perma.cc/MK9H-SZKA] (“The General Assembly finds that a human being is a person at fertilization.”). Accordingly, the rights guaranteed by the South Carolina Constitution “vest at fertilization for each born and preborn human being.” *Id.*

146. Compare *Tracking the States Where Abortion Is Now Banned*, *supra* note 10 (showing the breakdown of states that have abortion bans in effect, have abortion bans that have been temporarily blocked, and which currently allow abortion), with Chabeli Carrazana, *In Almost Every State, Over Half of All Women of Color Earn Less Than a Living Wage*, THE 19TH (Mar. 21, 2022, 11:00 PM), www.19thnews.org/2022/03/women-color-earn-less-living-wage [perma.cc/SG9L-JGUJ] [hereinafter Carrazana, *Women of Color Earn Less*] (showing a graphical breakdown of the states where women of color earn less than \$15/hour).

potential development of an embryo is “wholly dependent upon the services of women’s bodies and uteruses.”¹⁴⁷ Without a woman’s body into which an embryo can be implanted, the embryo will remain just that – an embryo with no potential for further development. Thus, fetal personhood rights and women’s rights will remain closely tied “until the advent of artificial womb technology” that permits the development of an embryo outside of a woman’s body.¹⁴⁸

III. ANALYSIS

The Supreme Court’s ruling in *Dobbs* raises legal questions in nearly every area of law, with the decision having far-reaching implications for tax purposes, traffic violations, criminal prosecutions, IVF, child abuse, manslaughter, and even murder prosecutions.¹⁴⁹ Part A of this section will discuss the significance of the *Dobbs* decision and how it “redefines” fetal personhood.¹⁵⁰ Part B will examine the impact of the *Dobbs* decision on IVF.¹⁵¹ Specifically, sub-section 1 will look at whether redefining fetal personhood will affect access to IVF and/or the IVF process.¹⁵² Sub-section 2 will look at how fetal personhood may impact inter-state rights and IVF clinic operations.¹⁵³ Lastly, sub-section 3 will discuss what rights and responsibilities are created for the state, parents, and the doctor¹⁵⁴ if personhood is defined as beginning at conception.¹⁵⁵

A. Significance of the *Dobbs* Decision

With access to abortion termed as one of “the most contentious issues in the country today,” the *Dobbs* case drew significant national attention long before the Supreme Court’s ruling.¹⁵⁶ More than one hundred-forty amicus briefs were filed by professors, politicians, states, and interest groups both in support of Mississippi’s challenge to *Roe*, and in support of the Jackson

147. J.K. Hammack, *Imagining a Brave New World: Towards a Nuance Discourse of Fetal Personhood*, 35 WOMEN’S RTS. L. REP. 357, 370 (2014).

148. *Id.*

149. See Wheeler, *supra* note 27. See also Carlisle, *supra* note 24 (discussing how “abortion laws regulate a procedure . . . [f]etal personhood laws allow the state to regulate pregnant women”).

150. See *infra* Part III.A.

151. See *infra* Part III.B.

152. See *infra* Part III.B.1.

153. See *infra* Part III.B.2.

154. Hereinafter referred to collectively as “stakeholders.”

155. See *infra* Part III.B.3.

156. Laurie Sobel et al., *Abortion at SCOTUS: Dobbs v. Jackson Women’s Health*, KFF (July 7, 2022), www.kff.org/womens-health-policy/issue-brief/abortion-at-scotus-dobbs-v-jackson-womens-health [perma.cc/Q3N8-LX55].

Women’s Health Organization.¹⁵⁷ The Court also received amicus briefs from biologists and international scholars that pointed to the lack of a consensus of whether a fetus is a person and has cognizable rights.¹⁵⁸

Indeed, what constitutes a “person” was significant to the debate. For example, the Foundation to Abolish Abortion and other anti-abortion groups argued in their brief that “a preborn human being, no matter how small, is a person under the Fourteenth Amendment.”¹⁵⁹ Briefs submitted by other fringe groups claimed that the viability rule set forth in *Roe* and *Casey* was based on incomplete information concerning prenatal development.¹⁶⁰

In opposition, the brief of the “Society for Maternal-Fetal Medicine and other groups” stated that a fetus’s inability to experience pain before twenty-four weeks of pregnancy is an established idea in science and medicine, and consequently, the viability framework under *Roe* was supported by modern medicine.¹⁶¹ The brief of the “American College of Obstetricians and Gynecologists and other medical organizations” also argued that Mississippi’s fifteen-week ban was not grounded in scientific

157. Ellena Erskine, *We Read All the Amicus Briefs in Dobbs So You Don’t Have To*, SCOTUSBLOG (Nov. 30, 2021, 5:24 PM), www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to [perma.cc/TCH6-9B7W].

158. *Id.*

159. *Id.*

160. Brief of the American College of Pediatricians and the Association of American Physicians & Surgeons as Amici Curiae Supporting Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392). This brief was co-authored by the American College of Pediatricians (ACPeds), a designated hate group promoting extremist and anti-LGBTQ+ beliefs. *American College of Pediatricians*, S. POVERTY L. CTR., www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians [perma.cc/ZR7Q-QXGT] (last visited Mar. 5, 2023). Masquerading as an association of pediatricians, the ACPeds has filed multiple amicus briefs, particularly in the area of LGBTQ+ adoption and marriage equality. *Id.* Other co-author to the brief, the Association of American Physicians & Surgeons, promotes an “Ayn Randian view of the world,” while advocating its antivaccine sentiments and HIV/AIDS denialism. David Gorski, *Association of American Physicians and Surgeons: Ideology Trumps Science-Based Medicine*, SCI.-BASED MED. (June 23, 2008), sciencebasedmedicine.org/the-journal-of-american-physicians-and-surgeons-ideology-trumps-science-based-medicine/ [perma.cc/SD3C-TXQR].

161. In making its argument, the amicus brief pointed to “incontrovertible” evidence and international consensus that a cortex must be developed in order to “achieve conscious awareness and thus experience pain.” Brief of Society for Maternal-Fetal Medicine et al. as Amici Curiae Supporting Respondents at 7, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392). The brief further discussed how the necessary connection between the cortex, sensory nerve fibers, and the spinal cord (which make up the pathway that stimuli use to reach the cortex for pain processing) are not developed until at least 24 weeks into gestation. *Id.* at 11.

evidence.¹⁶² Further, they contended that the state's justification of needing to protect women was unfounded, as the abortion ban would inevitably result in greater physical and psychological harm to the woman.¹⁶³

The Court ultimately declined to comment on when, if at all, prenatal life was entitled to legally cognizable interests, which are typically enjoyed after birth.¹⁶⁴ However, the Court did hold that the Constitution guaranteed no right to abortion.¹⁶⁵ Polls taken shortly after the *Dobbs* decision indicated that the majority of respondents disagreed with the Court's ruling.¹⁶⁶ Specifically, surveys conducted by the Pew Research Center revealed that nearly fifty-seven percent of Americans and sixty-two percent of women opposed the Court's reversal of *Roe*.¹⁶⁷ These polls added to an already contentious conversation about whether the right to abortion or right to life should be preserved.¹⁶⁸

1. *Redefining Fetal Personhood*

While the Court in *Dobbs* decisively stated that the Constitution does not grant a fundamental right to abortion, the question of whether there is a right to life has proved more elusive.¹⁶⁹ The *Dobbs* decision activated "trigger" laws previously enacted by states in the event that *Roe* was overturned.¹⁷⁰ These

162. Brief of American College of Obstetricians and Gynecologists et al. as Amici Curiae Supporting Respondents at 11-15, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

163. Specifically, the brief discussed how women forced to travel across state lines to access abortions would suffer increased risks of complications resulting from delayed medical care; noted how women were likely to attempt self-induced abortion through unsafe methods; and stated that carrying a pregnancy to term carried a fourteen (14) times higher risk of death than an abortion. *Id.* at 15-18; see also David Mendez, *Without Clinics, People Considering Taking Abortions into Their Own Hands, Study Says*, SPECTRUM NEWS NY1 (Sep. 6, 2022, 3:45 PM), www.ny1.com/nyc/all-boroughs/health/2022/09/02/study--without-clinics--people-consider-self-managed-abortions- [perma.cc/X26R-ER8B] (finding that one-third of people would consider attempting self-induced abortion – i.e., by taking medications, using homeopathic herbs, or by physical methods – if they were unable to go to a clinic).

164. *Dobbs*, 142 S. Ct. at 2256, 2261.

165. *Id.* at 2242.

166. *Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022), www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade [perma.cc/H38Q-PYM5].

167. *Id.* (illustrating further that discontent with the court's decision was highest among Democrats – 82% disapproved the overturning of *Roe*).

168. *Id.*

169. *Dobbs*, 142 S. Ct. at 2242; 2256-61.

170. See Carlisle, *supra* note 24 (noting that thirteen states enacted trigger laws as soon as *Roe* was overturned, and others had introduced legislation seeking to ban abortion and/or introduce fetal personhood); see also discussion *supra* note 20.

trigger laws – now effectively abortion bans – claim to preserve the right to life (though in doing so, they require a woman to carry a child to term).¹⁷¹ However, they do not necessarily establish fetal personhood and/or create legally cognizable interests for fetuses.¹⁷²

Part of the debate concerning fetal personhood stems from the interpretation of the Fourteenth Amendment as to the unborn (e.g., person vs citizen distinction).¹⁷³ The Fourteenth Amendment has been subjected to differing interpretations, with some claiming that its protections extend only to citizens that have been born or naturalized in the United States.¹⁷⁴ Others argue that while the Fourteenth Amendment defines citizenship, it does not define personhood, and its protections should not be narrowly read as only applying to U.S. citizens.¹⁷⁵

With the Supreme Court expressly taking itself out of the fetal rights debate, how states approach fetal personhood and whether the laws they pass protecting fetal rights are upheld, will largely depend upon judicial interpretation.¹⁷⁶ Moreover, amongst states recognizing the idea of fetal rights, how deep the law will cut will, again, vary by state.¹⁷⁷ For example, Arizona's Senate Bill 1457

171. See *Tracking the States Where Abortion Is Now Banned*, *supra* note 10 (discussing how laws vary by state, with some states implementing a full ban on abortion, while others ban abortion at either the six-, fifteen-, eighteen-, or twenty-nine-week mark). Whether the law grants exceptions, such as in instances rape or incest, also varies by state. *Id.*

172. See Carlisle, *supra* note 24 (noting that the triggers laws were primarily designed to ban abortion when and if *Roe* were ever overturned).

173. The Fourteenth Amendment, Section 1 states that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” U.S. CONST. amend XIV, § 1. The Amendment further states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

174. See Wheeler, *supra* note 27 (referring to the language of the Fourteenth Amendment that establishes citizenship at birth or naturalization).

175. *Id.*; see also Carlisle, *supra* note 24 (referencing the state of Texas's argument in *Roe* that a fetus, which the state argued was a person, “is entitled to all the protections guaranteed under the Fourteenth Amendment”).

176. See Wheeler, *supra* note 27 (explaining that judges are unlikely to accept overly broad definitions of fetal personhood that are unconnected to a given law's purpose; nonetheless, questions of how far liability can carry – for example, in accidents involving miscarriage – are an unknown).

177. *State Legislation Tracker – Major Developments in Sexual & Reproductive Health*, *supra* note 26 (showing that the number of states considering legislation that bans abortion by establishing fetal personhood is currently one – a number that has decreased (from eight) since late 2022/early 2023). Yet, it is unclear whether this drop is due to states' hesitation in recognizing fetal personhood, or whether the abortion bans passed incorporate fetal rights into the state statutes. *Id.*; see also U.S. CONST. art. IV; U.S. CONST. amend X (giving each state the authority to create and enforce its own laws, preempted only by federal law).

defines conception as beginning at the fusion of a sperm and ovum.¹⁷⁸ Similarly, Georgia's LIFE Act defines a person as including any unborn child, but it specifically clarifies that a fertilized egg does not signify personhood.¹⁷⁹ Unprecedentedly, the LIFE Act also allows a pregnant woman to claim a fetus as a tax deduction once it has a detectable heartbeat, permeating into and altering tax law.¹⁸⁰

The *Dobbs* decision will thus lead to a redefining of fetal personhood as states are free to now implement laws that would have been problematic or considered unconstitutional under *Roe*.¹⁸¹ Yet, given the monumental impact of overturning *Roe*, the challenge will be "living in a gray area" until case law or statutes clarify when, if at all, the unborn are granted legally cognizable rights.¹⁸²

B. *The Impact of Dobbs on IVF*

While the impact of the *Dobbs* decision on IVF will largely be state-specific and dependent on specific statutory language in state legislation, the de-recognition of abortion as a fundamental right opens the door to state experimentation in defining personhood.¹⁸³ How states choose to define life or whether they recognize fetal rights can implicate not only the IVF process, but issues far beyond its sphere.¹⁸⁴ These subsections will focus more specifically on the potential effect of *Dobbs* on the IVF process, including access to IVF; inter-state rights and clinic operations; and rights and responsibilities that are created when life is defined as beginning at conception.¹⁸⁵

1. *Whether Redefining Fetal Personhood Will Affect The IVF Process And Access To IVF*

Defining life as beginning at conception could impact the use of IVF.¹⁸⁶ In states with fetal personhood laws that have no

178. Ariz. S.B. 1457.

179. Garbus, *supra* note 139.

180. *Id.* (stating that any pregnant woman who is a Georgia taxpayer is eligible for a \$3,000 tax deduction per fetus, once her fetus has a detectable heartbeat).

181. *See* Will, *supra* note 60, at 575 (expressing the belief that, pre-*Dobbs*, the Supreme Court would have likely struck down a fetal personhood state statute if it infringed on a woman's constitutionally protected right to privacy).

182. *See* Carlisle, *supra* note 24 (describing the uncertainty concerning state recognition of fetal rights, and noting ways that such statutes could be challenged, including assertions that they violate state constitutions or the right to due process).

183. *See Questions and Uncertainties for ART*, *supra* note 21 (arguing that language in state statutes such as "life begins at fertilization" or which recognizes fetal personhood, could directly impact IVF).

184. *Id.*

185. *See infra* Part III.B.1-3.

186. *See Questions and Uncertainties for ART*, *supra* note 21 (discussing the

exemption for IVF (like Georgia’s LIFE Act noted above), “life” would begin as soon as sperm and egg are joined, which, in the IVF process, occurs in a petri dish.¹⁸⁷ This early embryo, now termed a person under the respective state law, would thus have cognizable rights that would affect how it is treated.¹⁸⁸

Fertilized eggs that become viable for uterine implantation (also called blastocysts) do not require immediate implantation.¹⁸⁹ Rather, they can be frozen, or “cryopreserved,” for any number of reasons, including genetic testing, future use, or to minimize the need for subsequent IVF cycles.¹⁹⁰ However, if an embryo is a deemed a person, freezing them could constitute child abuse.¹⁹¹ Considering how common freezing embryos is to the IVF process, a state law criminalizing cryopreservation would significantly limit couple’s choices in family planning.¹⁹²

The passage of fetal personhood laws may further lead to a disparate impact on low-income families by disproportionately limiting their access to IVF.¹⁹³ In each *in vitro* cycle, several ova are removed (e.g., ten to fifteen), which reduces the need for a woman to be subjected to multiple surgeries for subsequent egg retrieval, and minimizes the time delay in creating a viable embryo that can ultimately be implanted.¹⁹⁴ If only one egg can be fertilized at a

“multi-faceted” problems that can arise dependent on how states define embryos, including whether couples could discard, donate, or freeze embryos; and whether clinics and/or physicians could be found liable for the mishandling of embryos or failure of storage equipment); *see also Dobbs*, 142 S. Ct. at 2337 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (expressing concern over how far states may stretch their abortion regulations and citing IVF as a potentially impacted area).

187. *In Vitro Fertilization (IVF)*, *supra* note 1.

188. Jennifer Gerson, *The 19th Explains: How Would Overturning Roe v. Wade Affect IVF?*, THE 19TH (May 27, 2022, 5:00 AM), www.19thnews.org/2022/05/the-19th-explains-how-would-overturning-roe-v-wade-affect-ivf [perma.cc/DW8Z-VBTE].

189. Gerson, *supra* note 188.

190. *Id.* (discussing how the majority of people who undergo IVF decide to freeze any unused embryos). Additionally, freezing embryos allows the couple to opt in for additional testing and evaluation of the embryo to screen for genetically inherited diseases. *Id.*

191. *Id.* (“You can’t put a 2-year-old baby in a freezer, because that would kill it. But an egg fertilized 48 hours ago can go in a freezer and come out just fine.”).

192. *Embryo Freezing (Cryopreservation)*, CLEVELAND CLINIC (Feb. 17, 2022), my.clevelandclinic.org/health/treatments/15464-embryo-freezing-cryopreservation [perma.cc/ZE9N-Z497] (explaining that cryopreservation freezes and stores an embryo for later). Common reasons for cryopreservation include infertility, advancing age, medical concerns, wanting to delay implantation until later, social or personal reasons, military deployment, gender transition, and more. *Id.*

193. *See Carrazana, Shut Out of IVF*, *supra* note 115 (stating that seventy-five percent of IVF patients have annual household incomes exceeding \$100,000).

194. Brown, *Rights and Issues*, *supra* note 4, at 610; *see also Carrazana*,

time, this will make the cost of IVF astronomical – instead of one cycle with at least ten eggs removed costing \$23,000, the retrieval of the same ten eggs would cost \$230,000.¹⁹⁵ Such increased costs are certain to place IVF out of the reach of many, but even more significantly, are likely to have the most disparate impact on low-wage women of color.¹⁹⁶

Issues surrounding pregnancy and abortion already disproportionately affect women of color: for example, they experience “unacceptably high” risks of death during childbirth.¹⁹⁷ A 2018 report from the National Partnership for Women and Families found that “Black women are three to four times more likely to experience a pregnancy-related death than White women.”¹⁹⁸ In addition, Black women are more likely than all other racial groups to experience health complications, both throughout the course of their pregnancies and during childbirth, due to poor hospital care.¹⁹⁹

With the overturning of *Roe*, yet another area of reproductive health will be added to this list – access to IVF. About fifty percent of women of color earn below-living wage (i.e., less than \$15/hour) in forty states, and in twenty-three of these states, sixty percent or more of women of color earn less than \$15 an hour.²⁰⁰ Many of these twenty-three states are southern states that have also passed abortion bans and/or fetal personhood laws.²⁰¹ Thus, low-income women of color who already make up a minority when it comes to IVF use, are also more likely to reside in states with abortion

Shut Out of IVF, *supra* note 115 (discussing the ova retrieval and egg fertilization process).

195. See Carrazana, *Shut Out of IVF*, *supra* note 115 (quoting the cost of each IVF cycle at about \$23,000); see also Gerson, *supra* note 188 (noting such process changes would have a significant impact – in 2020, over 300,000 Assisted Reproductive Technologies (ART) treatments, which include IVF, were performed).

196. See Carrazana, *Shut Out of IVF*, *supra* note 115 (defining abortion bans as a social justice issue given their disproportionate impact on low-income women of color).

197. Patty Housman, *Roe v Wade Overturned: What It Means, What's Next*, AM. UNIV. (June 29, 2022), www.american.edu/cas/news/roe-v-wade-overturned-what-it-means-whats-next.cfm [perma.cc/826X-2GWP].

198. *Black Women's Maternal Health: A Multifaceted Approach to Addressing Persistent and Dire Health Disparities*, National Partnership for Women & Families (Apr. 2018), nationalpartnership.org/report/black-womens-maternal-health/ [perma.cc/V6TH-ASM3].

199. See *id.* (citing studies which reveal that hospitals serving predominantly Black communities perform worse than others on twelve out of fifteen birth outcomes, including elective and non-elective births, and maternal mortality).

200. Carrazana, *Women of Color Earn Less*, *supra* note 146.

201. See *Tracking the States Where Abortion Is Now Banned*, *supra* note 10 (tracking states where abortion is legal, banned, and where a ban has been proposed but has been blocked from enforcement).

bans.²⁰² And, beyond such states being more likely to recognize fetal rights (which can result in higher IVF costs as noted above), abortion restrictions may result in insurance providers removing IVF coverage from their plans, thus further limiting the ability of women of color to undergo IVF.²⁰³

Specifically, where a state passes legislation that grants fetal rights beginning at conception, concerns with disposing of non-viable pre-embryos – which, under the state’s definition, may be termed “persons” – will inevitably lead to less egg extraction per IVF cycle, the need for more cycles, and much higher total costs for the entire IVF process.²⁰⁴ With the cost of IVF already out of the reach of many women of color who are already disproportionately earning less than a living wage, the implementation of fetal personhood laws will have a disparate impact on their access to IVF.²⁰⁵ Choosing to, and having the resources to procreate, should not be constrained by race; yet, the recognition of fetal rights can result in just that – in recognizing fetal personhood, states may invariably limit what women or couples have access to family-building technologies, such as IVF.²⁰⁶

2. *The Interplay Of States’ Rights And IVF*

The enactment of fetal personhood rights may further impact IVF by directly implicating inter-state rights. When embryos are not immediately implanted, they are stored in liquid nitrogen inside cryopreservation tanks either onsite at a clinic or at storage facilities.²⁰⁷ If held offsite, clinics generally hire private companies to transport those tanks to facilities within state or across state

202. *Id.*; see also *Infertility and IVF Access in the United States*, *supra* note 107 (citing the median household incomes of Black and Hispanic women as \$40,258 and \$50,486, respectively – these annual wages are less than or just at double of a single cycle of IVF).

203. See Carrazana, *Shut Out of IVF*, *supra* note 115 (quoting infertility advocate, Risa Levine: “What insurance company is going to cover a clinic and a doctor for malpractice or for criminal behavior if they define life as beginning at conception outside of the womb?”).

204. *Id.*

205. See Carrazana, *Women of Color Earn Less*, *supra* note 146. See also Carrazana, *Shut Out of IVF*, *supra* note 115 (discussing how the disparity in existing access to IVF is already being seen by organizations such as Gift of Parenthood, which award quarterly IVF grants to families who demonstrate financial need). The CEO of Gift of Parenthood, Teresa Barbosa, has commented that women of color make up the majority of those seeking financial help, and anticipates that the number of such women needing financial assistance will only continue to rise in the wake of *Dobbs*. *Id.*

206. See Carrazana, *Shut Out of IVF*, *supra* note 115 (discussing how low-income women of color will have their rights limited from both ends – with the *Dobbs* ruling limiting both their abortion access and their ability to procreate).

207. See Carranza & Gerson, *IVF May Be in Jeopardy*, *supra* note 101 (discussing the embryo cryopreservation and storage process).

lines.²⁰⁸ In states with pending fetal personhood laws or abortion laws, clinics have received an onslaught of concerned patients reaching out and inquiring whether their embryos need to be transported.²⁰⁹

The process of cryopreservation requires the embryo to be frozen.²¹⁰ Once frozen, the embryo can be stored for up to ten years.²¹¹ Yet, if fetal rights are granted at conception, freezing an embryo could be considered child abuse or manslaughter.²¹² How states with fetal personhood laws may ultimately treat embryos that are already frozen remains undetermined.²¹³ However, many patients do not want to wait and find out, and have instead opted to move their embryos to an abortion-friendly state.²¹⁴

The concerns with cryopreservation do not end there – if a state outlaws the freezing of embryos, can it outlaw or criminalize the transportation of embryos across state lines?²¹⁵ And if cryopreservation is outlawed, can physicians be prosecuted for assisting with moving the frozen embryos out of state?²¹⁶ Both of these questions come with their own set of unique concerns and complications, as discussed below.

The transportation of frozen embryos often involves private companies, like Cryoport, who specialize in cryopreservation and embryo transport.²¹⁷ Additionally, since *Roe* was overturned, companies like Lilia, a start-up specializing in freezing eggs, have stepped up by launching new services that focus on moving embryos across state lines.²¹⁸ If states do try to limit the transport of frozen embryos, the question then becomes whether such intrusion is

208. *Id.*; see also CryoStork Staff, *Frequently Asked Questions: What You Need to Know About Transporting Frozen Embryos, Sperm, and IVF Samples Safely & Securely with CryoStork*, CRYOPORT SYS. (June 18, 2021), www.mycryostork.com/faq-shipping-frozen-embryos-sperm-safely-cost-insurance [perma.cc/5PQA-HMDJ] (describing the process for moving IVF samples to a new clinic via a dry shipping tank that is pre-treated with liquid nitrogen and able to keep samples safely frozen for up to ten days).

209. See Carranza & Gerson, *IVF May Be in Jeopardy*, *supra* note 101 (discussing how some individuals with frozen embryos have decided to move the embryo to an abortion-friendly state).

210. *Embryo Freezing (Cryopreservation)*, *supra* note 192.

211. *Id.*

212. Gerson, *supra* note 188 (highlighting the illogical application that results from fetal personhood by comparing an embryo's ability to survive being in a freezer, while the same action would kill a child).

213. *Id.*

214. Carranza & Gerson, *IVF May Be in Jeopardy*, *supra* note 101; see also *Move Your Embryos to Safety*, LILIA, www.hellolilia.com/storage-transfer [perma.cc/2HRX-QK4J] (last visited Nov. 20, 2022) (quoting the one-time shipping fee of start-up, Lilia, as \$970, followed by a \$495/year maintenance fee).

215. See Gerson, *supra* note 188.

216. See Carranza & Gerson, *IVF May Be in Jeopardy*, *supra* note 101.

217. *Id.*

218. *Id.*

lawful, or whether it unduly burdens interstate commerce.

The Constitution grants Congress the power to regulate commerce amongst the states.²¹⁹ The Supreme Court has interpreted the Commerce Clause to include an implied constitutional limit on the regulatory power of states – a principle termed the Dormant Commerce Clause.²²⁰ Thus, where a state law discriminates against interstate commerce or unduly burdens it, the law is presumptively unconstitutional.²²¹ While the Supreme Court has developed exceptions to this general rule, they have been limited to cases where the state is itself a market participant.²²²

Yet, for the Dormant Commerce Clause to be implicated, the interstate movement of embryos must be deemed “commerce” – so, effectively, where a state outlaws the movement of frozen embryos across state lines, the frozen embryo must be viewed as “commerce.”²²³ Since the nation’s founding, the Supreme Court has expansively defined what falls under the umbrella of “commerce,” and has found it extends not only to goods, but also to the movement of people.²²⁴ Thus, even when a state defines an embryo as a person,

219. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the right to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

220. *ArtI.S8.C3.7.1 Overview of the Dormant Commerce Clause*, CONSTITUTION ANNOTATED, constitution.congress.gov/browse/essay/artI-S8-C3-7-1/ALDE_00013307 (last visited Mar. 4, 2023).

221. *See* *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1950) (holding that a state statute that discriminates against interstate commerce will be held invalid if there are other less-discriminatory means by which the state legislature can accomplish its objective); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 585 (1986) (holding that New York could only control the sales of liquor in its own state and had no authority to control sales in other states; its attempt to govern interstate sales violated the Commerce Clause); *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2476 (2019) (striking Tennessee’s two-year durational-residency requirement for license applicants for impermissibly burdening out-of-state competition).

222. *See* *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (stating that under the market participant exception, when a state government acts as a market participant rather than a market regulator, it may favor its own citizens in commercial dealings); *cf.* *South Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97-99 (1984) (holding that a state’s imposition of conditions that have a substantial regulatory effect outside of the particular market make the state a market regulator, not participant, and subjects the state to Commerce Clause violations for attempting to control interstate commerce).

223. *See Dobbs*, 142 S. Ct. at 2337 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (noting that the majority’s ruling will implicate other constitutional protections, such as the right to travel, protection of speech, and interstate commerce).

224. Randy E. Barnett & Andrew Koppelman, *The Commerce Clause: Common Interpretation*, NAT’L CONST. CTR., www.constitutioncenter.org/the-constitution/articles/article-i/clauses/752 [perma.cc/LY4L-L7L3] (last visited Dec. 28, 2022) (discussing how the Supreme Court has interpreted “commerce” to include regulation over the trade, transportation, or exchange of people and goods, including agriculture, manufacturing, and other means of production, or

the Dormant Commerce Clause could be raised as a defense and argument against why a state cannot regulate the movement of embryos across state lines.²²⁵

In fact, where an embryo is defined as a person, a state's attempt to limit its movement across states lines would not only implicate the Dormant Commerce Clause, but also the fundamental right to travel.²²⁶ In *Saenz v. Roe*, the Supreme Court held that the "right to travel" includes the right to visit and depart another state without interference; the "right to be treated as a welcome visitor" when temporarily in another state; and the right to move into a new state and be treated equally to any other state resident.²²⁷ If an embryo is defined as a person, then a state's limitation of the embryo's ingress into another state could constitute a direct interference with that embryo's constitutionally protected right to travel.²²⁸

The fundamental right to travel is also likely to be raised in the context of women crossing state lines to obtain an abortion. As of the writing of this article, Idaho is the only state to have passed a ban limiting interstate travel to obtain an abortion.²²⁹ The travel ban, which makes it illegal to help minors obtain abortion pills or travel outside the state for an abortion without parental consent, is currently being challenged in Idaho's state court.²³⁰

any "gainful activity" or social interaction). Ultimately, the Commerce Clause grants Congress the power to regulate economic activity that has a "substantial effect" on interstate commerce. *Id.*

225. Notwithstanding, defining an embryo as property would also implicate the Dormant Commerce clause. In 2020, the number of births in the U.S. totaled 3,613,647. *Births and Natality*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 8, 2023), www.cdc.gov/nchs/fastats/births.htm [perma.cc/W646-8K6M]. The Kaiser Family Foundation Health System Tracker has estimated that each birth runs an average cost of \$18,865, making childbirth a several billion-dollar industry. Nafeesah Allen, *How Much Does It Cost to Have a Baby in America?*, INVESTOPEdia (Jan 4, 2023), www.investopedia.com/how-much-does-it-cost-to-have-a-baby-in-america-6745508 [perma.cc/VZ2T-CDAB]. Limiting an embryo's movement across states, and consequently limiting a women's decisions when it comes to embryo implantation, prenatal care, and childbirth, would constitute a state's direct interference with an economic activity that has a "substantial effect" on interstate commerce; only the federal government (i.e., Congress) has such power of regulation. Barnett & Koppelman, *supra* note 224.

226. *See Dobbs*, 142 S. Ct. at 2337 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (criticizing the majority's decision as putting the Court "at the center of the coming 'interjurisdictional abortion wars'").

227. *Saenz v. Roe*, 526 U.S. 489, 500 (1999).

228. *See Saenz*, 526 U.S. at 498 (holding that while a right to travel is not explicitly found in the Constitution, it is nonetheless "a right. . . so important that it is 'assertable against private interference as well as governmental action'").

229. Sarah Varney, *Idaho AG Sued Over State's Teen Abortion Travel Ban*, CNN HEALTH (July 12, 2023, 9:56 AM), www.cnn.com/2023/07/12/health/idaho-abortion-travel-ban-lawsuit-kff-health-news/index.html [perma.cc/E7CT-3NXXR].

230. *See Varney*, *supra* note 229 (stating that individuals who violate the

Aside from Idaho, other states have also begun experimenting with the idea of an abortion travel ban. For example, Missouri lawmakers have proposed a bill that would create a cause of action allowing private citizens to sue anyone from in or out of state that assists a woman in obtaining an abortion across state lines.²³¹ Moreover, Texas legislators have threatened companies, such as Citigroup, with legislation that would punish them for covering travel expenses for employees who seek abortions out of state.²³²

If a state were to move forward with an interstate travel ban for women seeking abortions, Justice Kavanaugh's commentary on the issue may be indicative of how the Supreme Court would rule – finding the legal question “not especially difficult as a constitutional matter,” with a state having no right to pass such legislation “based on the constitutional right to interstate travel.”²³³ However, whether Justice Kavanaugh would extend the same reasoning to the interstate travel of embryos termed “persons” under the respective state law, and whether he would garner a majority of the Court to support his views, is far from conclusive.²³⁴

Aside from the effect that fetal personhood laws may have on interstate rights, doctors who operate clinics in states that recognize fetal rights may fear prosecution for assisting in moving frozen embryos out of state.²³⁵ States have not shied away from prosecuting doctors as accessories under state laws controlling reproductive health.²³⁶ In states with pending personhood bills or abortion restrictions, cryopreservation companies have reached out to clinics to express their willingness to facilitate interstate embryo transport, in the event that laws restrict doctors' ability in handling the embryos.²³⁷

travel ban will be charged with “abortion trafficking”).

231. Alice M. Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow*, POLITICO (Mar. 19, 2022, 7:00 AM), www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539 [perma.cc/E529-99WL].

232. Coral M. Marcos, *Texas Lawmaker Warns Citigroup Against Paying for Out-of-State Abortions*, N.Y. TIMES (Mar. 18, 2022), www.nytimes.com/2022/03/18/business/citigroup-abortion-texas-warning.html?searchResultPosition=1 [perma.cc/Y9JK-3ALH].

233. Louis Jacobson, *Can States Punish Women for Traveling Out of State to Get An Abortion?*, POYNTER (July 6, 2022), www.poynter.org/fact-checking/2022/can-states-punish-women-for-traveling-out-of-state-to-get-an-abortion [perma.cc/67C5-PKRM] (quoting J. Kavanaugh). *See also Dobbs*, 142 S. Ct. at 2337 (Kavanaugh, J., concurring) (stating that the constitutional right to travel would bar a state from preventing its residents from traveling interstate to obtain an abortion).

234. *See Dobbs*, 142 S. Ct. at 2256 (declining to define when prenatal life could be granted as a legally cognizable right).

235. *See Carranza & Gerson, IVF May Be in Jeopardy*, *supra* note 101.

236. *See Griswold*, 381 U.S. at 480 (charging two doctors as accessories in violating a Connecticut statute that made it a crime to counsel any person on how to prevent conception).

237. *See Carranza & Gerson, IVF May Be in Jeopardy*, *supra* note 101

Nevertheless, the uncertainty remains, and doctor's fear of prosecution may reasonably lead them to close their practice.²³⁸ Other doctors have begun to consider whether to move their practice to other states, or are analyzing whether or not maintaining an IVF clinic will remain sustainable.²³⁹ Regardless of how doctors decide to move forward, it will inevitably lead to a reduced use of and access to IVF, as parties become less willing to shoulder any civil or criminal liabilities that could result from embryos being granted fetal rights.²⁴⁰

3. *Rights & Responsibilities of IVF "Stakeholders"*

Finally, fetal personhood laws may lead to a blurring of rights and responsibilities among parties with interests in the IVF process (e.g., the state, parents, fetus, and doctor — i.e., the "stakeholders").²⁴¹ Where states have passed or proposed fetal personhood laws, they have recognized fetal personhood as beginning at conception.²⁴² In the context of IVF, such laws mean that life, or personhood, begins in a petri dish (i.e., where the sperm and egg are joined and the egg is fertilized).²⁴³ Thus, at the moment a pre-embryo gains legally cognizable rights, it will be: (1) unable to speak for itself and its own interests; (2) under the care of a clinic or doctor; (3) viewed by its parents as constituting their property; and (4) protected by the state's interest in recognizing it as a "person."²⁴⁴

Past attempts to define what, if any, rights should be granted to embryos have frequently fallen short given the uncertain space that embryos fall into.²⁴⁵ Specifically, while embryos have the capacity to develop into sophisticated organisms, in their present

(discussing that some cryopreservation companies, like Toronto-based start-up, Lilia, have expanded their services from just freezing eggs to also facilitating the inter-state transfer of embryos).

238. Carrazana, *Shut Out of IVF*, *supra* note 115.

239. *Id.* (quoting Doctor Robert K. Hunter II: "For me to become someone that is just making embryos to ship them to Illinois or wherever the closest women-friendly state is — Is that a sustainable business for me?").

240. *Id.*

241. *See infra* Part III.B.3.

242. *See* Ariz. S.B. 1457 (defining "conception" as the fusion between a sperm and ovum); *see also* Garbus, *supra* note 139 (defining a "person" as "any human being, including an unborn child," though exempting some fertilized eggs from this definition).

243. *In Vitro Fertilization (IVF)*, *supra* note 1.

244. *See* discussion *supra* Part III; *infra* Part IV; *see also* Berg, *supra* note 13, at 389 (stating that embryos, themselves, do not have interests, and that the only basis for recognizing their legal personhood would be through "the interests of other currently recognized persons"). Per this reasoning, determining who can speak for an embryo would be invariably tied to that speaker's, and not the embryo's, interests.

245. *See* Berg, *supra* note 13, at 388-92 (questioning what, if any legal rights should be afforded to embryos).

state, they are a “mass of largely undifferentiated cells” lacking any brain or neural system.²⁴⁶ In favor of recognizing fetal personhood, proponents argue that embryos are genetically human and that the Constitution recognizes the rights of any person.²⁴⁷ Yet, this argument loses momentum upon recognition that humans share more than ninety-eight percent of their genetic code with non-human animals, which are not recognized as “persons.”²⁴⁸ Moreover, recognizing fetal rights based on the potential for the embryos to become “persons” opens the door to the potential for life being sufficient to accord legal rights in nearly every realm of law.²⁴⁹

Placing this already complex debate within the IVF context and adding in the rights and responsibilities of other stakeholders further complicates the conversation, and takes the discussion of fetal rights into uncharted territory.²⁵⁰ Specifically, recognizing an embryo’s potential right raises the question of what interests a state should protect against infringement.²⁵¹ This then leads to the question of whether the state can even define an embryo’s best interests without overlaying the interests of other recognized persons, or of the state, as representative of the embryo’s interests.²⁵² In such situations, whose rights should be given priority will be difficult to resolve and will inevitably lead to legal challenges and litigation, taking the battle of recognition of rights to court.²⁵³ For the moment, the Supreme Court has decided to stay out of this contentious space, recently declining to grant certiorari to a Rhode Island Supreme Court case that examined whether the unborn are entitled to constitutional protections.²⁵⁴

Beyond creating competing rights, fetal personhood laws can result in IVF participants unwillingly acquiring certain

246. *Id.* at 389 (defining embryos not as human beings, but rather as “human becomings”).

247. *Id.*; see also U.S. CONST. amend XIV, § 1 (extending Fourteenth Amendment protections to all persons within the meaning of the amendment).

248. See Berg, *supra* note 13, at 390.

249. See *id.* (stating that “if potential to become a full moral person is the basis for legal personhood, then every human skin cell, for example, would have a claim for personhood status”).

250. See Carlisle, *supra* note 24 (discussing the many unanswered questions caused by the Supreme Court’s overruling of *Roe*).

251. *Id.*

252. See Berg, *supra* note 13, at 389 (arguing that embryos do not have legally cognizable interests and do not have the ability to develop such interests).

253. See Carlisle, *supra* note 24 (noting that while fetal personhood is much more likely to be enforceable now than pre-*Dobbs*, fetal personhood laws will presumably face legal challenges, including being challenged for violating the right to due process and other provisions of state constitutions).

254. Nate Raymond, *U.S. Supreme Court Rebuffs Fetal Personhood Appeal*, REUTERS (Oct. 11, 2022, 9:28 AM), www.reuters.com/legal/us-supreme-court-rebuffs-fetal-personhood-appeal-2022-10-11 [perma.cc/CN2Q-M8G2]; see also *Doe v. McKee*, 143 S. Ct. 309 (2022) (denying certiorari of a Rhode Island case touching on fetal personhood).

responsibilities. If an embryo is a person, then child endangerment laws can come into play.²⁵⁵ Specifically, a clinic with pre-embryos at its facility would be held to a higher standard of responsibility, and physicians could be charged with manslaughter for disposing of an embryo, freezing an embryo, or generally mishandling an embryo.²⁵⁶

In the interest of preserving the potential life of a child, states may enact additional legislation or regulation that ensures the pre-embryo, and its rights, are protected. Yet, recognizing the government's interest in pre-embryos would clash with Supreme Court holdings that the government has no affirmative obligation to protect children from the conduct of private actors.²⁵⁷ Further, recognition of embryos as persons would come at the expense of other parties, whose already existing legally cognizable interests would need to bend to permit government recognition of fetuses as "persons."²⁵⁸

In sum, the Supreme Court's decision in *Dobbs* will have far-reaching effects as it leads states to re-think how to define "persons" and how such definitions may affect other aspects of civil life, including IVF.²⁵⁹ Within the IVF context, the recognition of fetal personhood could disrupt the IVF process completely, or at the very least, limit who has IVF access.²⁶⁰ Moreover, a broadening of fetal rights may implicate embryo storage, cryopreservation, and movement of embryos across state lines.²⁶¹ Finally, broadening the definition of "persons" to include embryos will invariably lead to conflicts amongst various parties over the rights and responsibilities that can be attributed to each IVF stakeholder.²⁶²

255. See Carlisle, *supra* note 24 (noting that such laws could be used to criminalize women, control what they can or cannot eat or drink, or even force them to have a caesarean).

256. See Gerson, *supra* note 188 (discussing the concerns and impracticalities with states treating frozen embryos as persons).

257. In *DeShaney v. Winnebago Cnty. Dep't of Soc. Services*, the Court looked at a case where a child's father beat him consistently, excessively, and to such an extent that by the age of four, the boy was so severely brain damaged, that he would spend the rest of his life in an institution for the mentally incapacitated. *DeShaney v. Winnebago Cnty. Dep't of Soc. Services*, 489 U.S. 189, 191-93 (1989). The Court held that the government has no obligation to protect children from the conduct of private actors. *Id.* at 203; see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (holding that a husband's violation of a restraining order against his wife and children and his kidnapping of the children does not create in the government an affirmative obligation to act).

258. See Berg, *supra* note 13, at 391 (asserting that a grant of fetal personhood would conversely limit "the rights of those who more clearly fit [within] the [personhood] framework").

259. See *supra* Part III.A.

260. See *supra* Part III.B.1.

261. See *supra* Part III.B.2.

262. See *supra* Part III.B.3.

IV. PROPOSAL

As more states move to pass fetal personhood laws, the negative impact that such laws can have on IVF will become all the more acute. Where states implement laws such as Arizona's Senate Bill 1457, which grants fetal personhood rights beginning at the moment of conception, the issues of IVF access, interstate rights, and conflicting rights and responsibilities are sure to arise.²⁶³ As such, states should implement either of the two proposed alternatives for applying fetal personhood laws to IVF: (1) state legislatures can carve out an exception for IVF, stating that embryos procured through IVF do not constitute persons; or (2) where the state law broadly defines all unborn as persons, state courts should redefine embryos procured through IVF as property.²⁶⁴ Part A will discuss the former approach, while Part B will focus on the latter.²⁶⁵

A. Creating an Exception for IVF in Fetal Personhood Laws

In states where fetal personhood laws have not yet been passed, state legislatures can act proactively to avoid conflicts between their statute and IVF. Specifically, legislatures can have the statute include an exception for IVF, including the process itself, and any later storage or transportation of frozen embryos. In drafting this exception, legislatures can specifically state that embryos procured through IVF do not constitute "persons" within the meaning of the statute. For drafting such a provision, states can turn to Georgia's LIFE Act.²⁶⁶

The LIFE Act comes with its own set of potential issues, including whether the ability to claim a tax deduction for a fetus is practicable, or whether the state can meet its promise of extending due process and equal protection under the law to fetuses.²⁶⁷ In that vein, can a state grant equal protection to a fetus? The Fourteenth Amendment prohibits states from abridging the "privileges and immunities of citizens," and it defines citizens as all persons "born or naturalized in the United States."²⁶⁸ The ability of a State to define "person" from the moment of conception and override the plain language reading of the Fourteenth Amendment is certainly contentious.

263. Ariz. S.B. 1457. *See also supra* Part III.B.

264. *See infra* Parts A-B.

265. *See infra* Part IV.A-B.

266. *See* Garbus, *supra* note 139 (examining the language and repercussions of Georgia's LIFE ACT); *see also* discussion *supra* Part II.C.

267. *Id.* (questioning the sensibility in due process and equal protection rights for embryos – "why would a fetus need a public defender?").

268. U.S. CONST. amend XIV, § 1.

Moreover, in July 2022, Georgia extended fetal rights to embryos whose mothers may not yet realize they are pregnant.²⁶⁹ Undeniably, this policy extension pins the rights of the woman against that of the embryo and can lead to increased criminalization of women during pregnancy.²⁷⁰

Despite its flaws, the LIFE Act does considerably simplify its application to one area of reproductive health – IVF. The LIFE Act states that “not all fertilized eggs signify personhood,” and embryos that are created through assisted reproductive technology, such as IVF, do not fall under the Act’s provisions.²⁷¹ If states implement fetal personhood laws, including language similar to Georgia’s LIFE Act, it would protect constituents’ continued access to IVF technologies.²⁷² Moreover, states can go even further by specifying that embryos created through IVF at any stage of pre-implantation are not subject to fetal personhood laws. Doing so would remove any gray area as to whether an embryo can be frozen once it has been created, or whether non-viable embryos can be disposed of. Thus, legislatures that act proactively to exempt embryos procured through IVF from fetal personhood laws could limit the types of issues arising in the area of reproductive rights. An IVF exemption clearly defined in the law would also reduce the need for future litigation to define permissible boundaries, unlike the solution noted below.

B. Defining Embryos as Property

As the area of fetal rights continues to develop in the post-*Dobbs* landscape, some states will undeniably define what constitutes a person more broadly.²⁷³ States that pass fetal personhood laws granting all unborn persons legally cognizable rights as of the moment of conception will need to determine how such laws affect various facets of civic and private life, including IVF. And, where legislatures do not exempt IVF from the statutes, much of this debate is sure to occur in the courtroom.²⁷⁴ Sub-section 1 will consider and reject the defining of an embryo as a person

269. Garbus, *supra* note 139.

270. *See id.* (analyzing the 2020 blocking of the LIFE Act by District Judge Steve C. Jones for concerns over its reach, including its potential to criminalize women for having an eating disorder while pregnant, or a physician for failing to report when a pregnant woman resides with an abusive partner); *see also supra* Part II.C.

271. Garbus, *supra* note 139.

272. Nonetheless, access to IVF may become limited in states with abortion bans for other reasons, such as insurers removing IVF coverage in states that ban abortions. Carrazana, *Shut Out of IVF*, *supra* note 115.

273. Ariz. S.B. 1457 (granting fetal rights from the moment of conception).

274. *See* Carlisle, *supra* note 24 (stating that wider effects of the *Dobbs* decision will not be understood until states clarify their statutes and more case law develops applying the various issues).

within the context of IVF.²⁷⁵ Sub-section 2 will discuss the preferred alternative of defining an embryo as property.²⁷⁶

1. *Why Defining Embryos as Persons Within the Context of IVF Is Not Viable*

As an initial matter, categorizing an embryo as a person is not practicable in the IVF context. Pre-*Dobbs*, courts were generally reluctant to classify embryos as persons.²⁷⁷ While the Supreme Court's overturning of *Roe* has and will continue to affect what limitations states place on abortion, limiting access to abortion is not synonymous with extending fetal personhood rights, or much less, redefining the language of the Fourteenth Amendment to include the unborn.²⁷⁸

Yet, should more states move to pass fetal personhood laws, drafting the laws so that embryos are defined as persons (even in the context of IVF) will lead to inevitable conflicts. For example, states will need to determine whether a mother's or the embryo's rights should prevail if the two are in conflict; whether the IVF process will need to be limited to extracting one egg at a time; whether accidental or negligent acts against an embryo by a mother, couple, physician, or third party can be criminalized; whether embryos can be frozen or if doing so could be prosecuted as child abuse; and whether couples, physicians, and third-parties could be prosecuted for moving embryos across state lines.

How states answer these questions could severely limit who, if anyone, has access to IVF. Specifically, limits on egg extraction would astronomically increase the cost of IVF, while more stringent regulations could result in physicians or third-party providers closing their practice after determining that it is no longer a good

²⁷⁵. See *infra* Part IV.B.1.

²⁷⁶. See *infra* Part IV.B.2.

²⁷⁷. Defining an embryo as a person is not common and has met resistance. Tracy J. Frazier, *Of Property and Procreation: Oregon's Place in the National Debate over Frozen Embryo Disputes*, 88 OR. L. REV. 931, 936-37 (2009). For example, in *Miller v. Am. Infertility Grp. (Miller I)*, No. 02L7394, 2005 WL 6298935, at *1-2 (Ill. Cir. Ct. Feb. 4, 2005), *rev'd sub nom. Miller v. Am. Infertility Grp. of Ill. (Miller II)*, 897 N.E.2d 837, 838 (Ill. App. Ct. 2008), two parents who underwent in vitro fertilization sued a clinic for its failure to freeze their embryos. The parents argued that Illinois' Wrongful Death Act, which creates a cause of action for death caused by wrongful act, neglect, or default, allowed them recovery for the loss of the embryo. *Miller I* at 2005 WL 6298935, at *1, *3. The circuit court held that a "pre-embryo is a 'human being' within the meaning of Sec. 2.2 of the Wrongful Death Act and that a claim lies for its wrongful destruction whether or not it is implanted in its mother's womb." *Id.* at *10. However, on appeal, the ruling was overturned. *Miller II*, 897 N.E.2d at 846.

²⁷⁸. Carlisle, *supra* note 24; U.S. CONST. amend XIV, § 1; see also discussion *supra* Part III.A.

business venture.²⁷⁹ Moreover, if state law prohibits the freezing of embryos, IVF may become an unpracticable option for couples trying to conceive.²⁸⁰ Though most IVF procedures produce several embryos, only one or two are transferred at a time – transferring multiple embryos is unsafe as it increases the risk of a “higher-order multiple pregnancy” (i.e., triplets or quadruplets).²⁸¹ Given the significant limitations that fetal personhood laws would have on IVF, defining an embryo as a person is not viable or reasonable, and is not an approach that states should take if they expand fetal rights.

2. *In the IVF Context, States Should Define Embryos as Property*

Categorizing an embryo as a person rather than property can lead to vastly different legal obligations – while persons are granted the protections of certain fundamental rights, property is not.²⁸² Yet, categorizing embryos as property is not a foreign idea; nor does it go against the confines of science.²⁸³

If a fetus cannot feel pain until twenty-four weeks into pregnancy, as affirmed by modern medicine, it certainly cannot feel pain when it is frozen as an embryo shortly after fertilization.²⁸⁴ For a pregnancy commenced the traditional way, through *in vivo* fertilization,²⁸⁵ fertilization occurs at week three, so an embryo implanted after being frozen would still be months away from

279. See Carrazana, *Shut Out of IVF*, *supra* note 115 (noting that each IVF cycle costs about \$23,000 and involves the extraction of ten to fifteen eggs, as well as discussing concerns of physicians and whether maintaining an IVF clinic in an anti-abortion state will remain sustainable); *Infertility and IVF Access in the United States*, *supra* note 107 (discussing disparities in access to IVF in the U.S., particularly for people of color, low-income households, people with disabilities, and LGBTQ+ communities); Carrazana, *Women of Color Earn Less*, *supra* note 146 (discussing disparities in wages of women of color across states); Gerson, *supra* note 188 (examining how outlawing cryopreservation could affect the movement of embryos by third-party vendors across states lines).

280. Rachel Gurevich, *Frozen Embryos Transfer (FET) Procedure*, VERYWELL FAMILY (Apr. 8, 2022), www.verywellfamily.com/frozen-embryo-transfer-fet-procedure-and-success-rates-4153582 [perma.cc/B86F-JWC4] (explaining how it is safe to only implant one or two embryos at a time, so the majority of embryos obtained through IVF are frozen).

281. *Id.*

282. See Gerson, *supra* note 188.

283. See discussion and cases cited *infra* Part IV.B.2

284. See Brief of Society for Maternal-Fetal Medicine et al., *supra* note 161, at 7 (explaining that the lack of cortical and spinal structures, which are not fully developed until the twenty-fourth week of pregnancy, prevents a fetus from experiencing pain).

285. See Brown, *Rights and Issues*, *supra* note 4, at 607-08 (discussing the difference between *in vivo* fertilization which occurs within the body of a woman – i.e., “natural reproduction” – and *in vitro* fertilization, which occurs outside of the women’s body).

developing its pain centers.²⁸⁶ Moreover, as raised by the amicus briefs in support of Jackson's Women Health Org. (in *Dobbs*), a fetus does not develop an organized nervous system until at least the twenty-fourth week of pregnancy.²⁸⁷ It is only at or after the twenty-fourth week, once connections have developed between a fetus' cortex, sensory nerve fibers, and the spinal cord, that a fetus is able to develop a conscious awareness.²⁸⁸ Thus, any arguments to the contrary, claiming that freezing an embryo or disposing of unviable embryos obtained through IVF is inhumane, are simply not backed by scientific data.

Moreover, courts have in the past defined embryos as property.²⁸⁹ In *Dahl v. Angle*, the Oregon Court of Appeals faced a case on first impression concerning the rights of a marital couple to frozen embryos.²⁹⁰ The couple had decided to undergo IVF, which proved unsuccessful.²⁹¹ Soon after, the couple filed for divorce.²⁹² As part of their marital dissolution, the question arose of who had the right to the frozen embryos.²⁹³ The court held that the embryos constituted "personal property," and that absent any countervailing policy interests, the disposition of the embryos should adhere to the agreement executed between the couple at time of IVF commencement.²⁹⁴

The Oregon case is not a sole example of courts defining embryos as property. In *In re Marriage of Rooks*, the Colorado Supreme Court laid out a list of factors that lower courts within the state should examine when determining to whom an embryo should be awarded in the event of a divorce.²⁹⁵ None of these factors considered the rights of the embryo.²⁹⁶ By looking at the embryos as property, and not persons, both the Oregon and Colorado courts were able to apply concepts pertaining to property law, which

286. Mayo Clinic Staff, *Fetal Development: The 1st Trimester*, MAYO CLINIC, www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/prenatal-care/art-20045302 [perma.cc/4NZK-7UTB] (last visited Nov. 20, 2022).

287. Brief of Society for Maternal-Fetal Medicine et al., *supra* note 161, at 7.

288. *Id.*

289. See discussion *infra* p. 39-40 and n.295.

290. *Dahl v. Angle*, 194 P.3d 834, 838 (Or. Ct. App. 2008).

291. *Id.* at 836.

292. *Id.*

293. *Id.* at 836-37.

294. *Id.* at 839-42.

295. See *In re Marriage of Rooks*, 429 P.3d 579, 595 (Colo. 2018) (setting forth the factors the court used in its analysis as: the intended use of the pre-embryos; whether a party had the ability to become a genetic parent through means other than the disputed pre-embryos; each party's reasons for undertaking IVF; a party's emotional, financial, or logistical hardship; any demonstrated evidence of bad-faith in using the pre-embryos as a bargaining chip during the divorce proceedings; and other considerations specific to the situation).

296. *Id.*

focused on determining who, from the couple that underwent the IVF process, had the stronger claim to the property (i.e., the embryo).

Defining an embryo as property would not depart from the existing treatment of body fluids versus body parts under the law.²⁹⁷ More specifically, body parts (e.g., kidneys) are not defined as property and therefore create no property rights for their holder.²⁹⁸ However, some human body fluids, such as blood, have been accorded characteristics of property, and can be sold and taxed.²⁹⁹ While the legal status of sperm still remains undeveloped, it is, by definition, a bodily fluid, and it can be legally sold for profit.³⁰⁰ Moreover, an egg, which also can be legally sold, is, by definition a large cell, similar to blood.³⁰¹ Thus, eggs and sperm fit closer to the definition of blood and its designation as a bodily fluid – a logical extension would therefore entail conferring similar property characteristics onto sperm and eggs, or the embryos that they together create.³⁰²

States with fetal personhood laws may understandably be reluctant to define embryos as property.³⁰³ However, defining an

297. KINDREGAN & MCBRIEN, *supra* note 110, at 83.

298. *Id.*; *see also* Morky v. Univ. of Texas Health Sci. Ctr., 529 S.W.2d 802 (Tex. App. 1975) (holding that a person had property interest in his removed eyeball).

299. KINDREGAN & MCBRIEN, *supra* note 110, at 83; *see also* Green v. Comm’r, 74 T.C. 1229 (1980) (permitting a woman to earn a living by selling her rare AB-negative blood).

300. KINDREGAN & MCBRIEN, *supra* note 110, at 83; *see also* The Editors of Encyclopaedia Britannica, *Semen*, BRITANNICA (Aug. 8, 2023), www.britannica.com/science/semen [perma.cc/BTS9-KCBK] (defining “semen,” which is also called seminal *fluid*, as “*fluid* that is emitted from the male reproductive tract and that contains sperm cells”) (emphasis added).

301. *See* Naveen, *supra* note 113 (defining an egg (ovum) as a female reproductive cell); *Facts About Blood and Blood Cells*, MEMORIAL SLOAN KETTERING CANCER CENTER (Dec. 17, 2001), www.mskcc.org/cancer-care/patient-education/facts-about-blood-and-blood-cells [perma.cc/2YQG-FZET] (stating that blood is composed of red blood cells, white blood cells, platelets, and plasma); *see also* KINDREGAN & MCBRIEN, *supra* note 110, at 44 n.16 (noting that egg donors, in rare cases, have been compensated up to \$80,000).

302. Understandably, embryos do differ from body fluids in that they are comprised of unique DNA codes that are created upon the joining of egg and sperm. *DNA and Genetic Variation*, CHARLOTTE LOZIER INST., <https://lozierinstitute.org/dive-deeper/dna-and-genetic-variation/> [perma.cc/X97W-5UAD] (Oct. 21, 2022). However, unlike a liver, which is limited in count and whose removal would adversely affect the body, a sperm, egg, and even embryo can be created used and/or sold, and then regenerated by the body.

303. Moreover, the lack of comprehensive legislation generally governing Assisted Reproductive Technology (ART), including IVF, is partially a “political problem” given the continued moral, religious, or social misgivings that people continue to have about ART (and IVF). KINDREGAN & MCBRIEN, *supra* note 110, at 12.

embryo as property – at pre-implantation, when it is still months shy of being able to feel any pain – will better protect couples’ access to IVF and keep the state from favoring the rights of one person (e.g., mother vs couple vs embryo vs physician) over another.

Sitting within the idea of defining an embryo as property, states may find yet a third option – adopting an “amalgamated life-property model.”³⁰⁴ Under this approach, an embryo is still defined as property, but “property that triggers special respect and constitutional protection.”³⁰⁵ More specifically, courts applying this approach would have more leeway in determining which rights belong to the embryo and which to the embryo’s “owners;” yet, they would perform this analysis within the confines of property law.³⁰⁶ The amalgamated-life property model approach may seem less abrasive to courts that find the property approach incompatible with the state’s views on morality or its legislature’s purpose. Yet, states that adopt this approach will need their higher court to clearly define and delineate how lower courts are to apply this model to controversies.³⁰⁷

Undoubtedly, defining embryos as property raises its own set of concerns, such as how to obtain proper, informed consent of the parties undergoing IVF, who gets control over the embryos in the event of a divorce, and what happens to any frozen embryos when all of its “owners” have passed away. These questions may be better viewed through the lens of contract law and are beyond the scope of this comment.

V. CONCLUSION

The Supreme Court’s decision in *Dobbs* will undoubtedly lead to significant debate over what constitutes a person and when a fetus can be granted legally cognizable rights. Yet, the passage of fetal personhood laws has a uniquely rich and complex application in the IVF context, given that, in IVF, “life” begins in a petri dish. The way that states approach the drafting of fetal personhood laws, whether they will include exceptions, and how courts choose to classify embryos can have far reaching consequences on individuals’ access to assisted reproductive technologies, such as IVF.

So, going back to the beginning – can (and should) a frozen embryo inherit a dead couple’s estate? Not if it is considered property, and definitely not if created via IVF.

304. See Frazier, *supra* note 277, at 938 (noting how the amalgamated life-property model is favored by individuals who believe that defining an embryo as property “undermines its true nature”).

305. *Id.* at 938-39.

306. *Id.*

307. *Id.* (noting that the amalgamated-life property model provides the least guidance on how lower courts should handle disputes).

