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The Right to Procreate by Nontraditional Methods

Elizabeth Kreager

COMMENT

THE RIGHT TO PROCREATE BY NONTRADITIONAL METHODS

ELIZABETH KREAGER*

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INTRODUCTION

This Comment explores the legal future of artificial reproductive technologies (ART) and artificial insemination (AI) considering the *Dobbs v. Jackson Women's Health Organization*[1] decision, and questions whether universal procreation is truly a fundamental right.[2] Part I of this Comment identifies ART and AI applications, as well as ethical concerns pertaining to the use of those procedures. Part II surveys historical precedents establishing procreation as a fundamental right. Part III then addresses recent cases that question the extent of that fundamental right. Finally, Part IV and Part V investigate legislative trends and make predictions about the future of ART and AI.

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

2. ART includes all procedures where a physician handles an ovum or preembryo for the purposes of fertility. *What is Assisted Reproductive Technology?*, CTRS. FOR DISEASE CONTROL & PREVENTION (OCT. 8, 2019), https://www.cdc.gov/art/whatis.html#:~:text=According%20to%20this%20definition%2C%20ART,donating%20them%20to%20another%20woman [https://perma.cc/P5DF-V9BX]. AI occurs when "semen [is introduced] into the vagina or cervix of a female by any method other than sexual intercourse." *Artificial Insemination*, BRITANNICA, https://www.britannica.com/science/artificial-insemination [https://perma.cc/3BXV-96QP].

I. REASONS FOR UTILIZING ART AND AI AND THE ETHICAL CONCERNS THEREIN

A. *Procreating Via Nontraditional Methods*

Having children is an unrealized dream for many. Numerous individuals suffer from infertility. Others are same-sex partners who are unable to conceive. Still others are individuals who do not want to navigate the complexity of having a child in a relationship. The Centers for Disease Control and Prevention reports that 19% of heterosexual females, aged 15–49, who have never given birth, experience infertility.[3] Infertility is defined as an inability to conceive after one year of unprotected sexual relations.[4] Additionally, 26% of women in this age group have difficulty carrying the baby to term.[5] A plethora of conditions affecting the uterus, fallopian tubes, and ovaries affect female infertility.[6] Women are not the only ones to experience infertility. Men also experience infertility due to issues with anatomy and physiology, as well as hormonal and genetic disorders.[7]

Medical intervention can ameliorate some causes of infertility. For women, doctors may prescribe drugs to promote mature egg development, stimulate ovulation, lower prolactin levels, or prepare the uterus for implantation.[8] Additionally, the doctors may perform intrauterine insemination (IUI), where washed sperm is inserted into a female's uterus, or assisted reproductive technology, where eggs are handled outside of the body.[9] The most common ART procedure is in-vitro fertilization (IVF).[10] During an IVF procedure, a physician fertilizes a female ovum with a male sperm cell in a petri dish.[11] The sperm utilized in ART, IUI, or intracervical

3. *Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 1, 2022), https://www.cdc.gov/reproductivehealth/infertility/index.htm [https://perma.cc/8HL3-7FG5].

4. *Id.*

5. *Id.*

6. *See id.* (discussing conditions affecting female fertility including polycystic ovarian syndrome, diminished ovarian reserve, functional hypothalamic amenorrhea, premature ovarian insufficiency, fallopian tube obstruction, fibroids, etc.).

7. *See generally id.* (detailing hormonal and genetic disorders, as well as problems related to ejaculatory function, experienced by men).

8. *Id.*

9. *Id.* Note that both ICI and IUI are types of artificial insemination because sperm is inserted into the female by means other than sexual intercourse. *Artificial Insemination*, *supra* note 2.

10. *Infertility FAQs*, *supra* note 3.

11. *Id.*

insemination (ICI)[12] procedures can be from a known donor, partner, or anonymous donor.[13] The egg too may come from the female patient or be donated.[14] Additionally, couples may adopt preembryos;[15] however, agencies often stipulate adoption requirements.[16] Or, a couple may use a surrogate, using either their own gametes, donor gametes, or a combination therein. There are two types of surrogacies: traditional and gestational.[17] Traditional surrogacy uses the surrogate's egg and introduces the sperm either through IVF, ICI, or IUI.[18] Gestational surrogacy uses gametes from the intended parents or donors to create a preembryo through IVF.[19] Unlike traditional surrogacy, gestational surrogacy produces offspring not genetically related to the surrogate.[20]

Single females or female couples can use donor gamete(s) to conceive through AI and ART. These groups may also adopt an embryo or use a surrogate. Conversely, the only way for single males or male couples to create a child, for which they have exclusive parental rights, is by use of a surrogate. Surrogacy laws vary widely.[21] For example, Louisiana requires donor gametes to be from the intended parents, thus eliminating

12. The ICI procedure may be performed, at home or in a doctor's office, by using a needleless syringe to concentrate sperm near the cervix. *What is ICI?*, FAIRFAX CRYOBANK: BLOG (Oct. 7, 2022), https://fairfaxcryobank.com/blog/uncategorized/what-is-ici [https://perma.cc/358K-CJE7].

13. *Infertility FAQs*, *supra* note 3; *What is ICI?, supra* note 12.

14. *Infertility FAQs*, *supra* note 3.

15. This paper uses the term preembryo to describe a fertilized ovum that has not implanted into a woman's uterus. At times, the term embryo is substituted for preembro to coincide with a cited reference's usage.

16. *See Embryo Adoption Process,* SNOWFLAKES EMBRYO ADOPTION PROGRAM, https://nightlight.org/snowflakes-embryo-adoption-donation/embryo-adoption/adopter-process/ [https://perma.cc/4AV5-ADZU] (restricting embryo adoption based on age and length of marriage; though still allowing single females to apply for embryo adoption); *Embryo Adoption Process,* AM. EMBRYO ADOPTION AGENCY, https://embryoadoptionusa.com/embryo-adoption-program/ [https://perma.cc/AK8N-2V7U] (indicating adoption programs usually require a home study for embryo adoption).

17. *The Different Types of Surrogacy: Which One Is Right for You?*, SURROGATE.COM, https://surrogate.com/about-surrogacy/types-of-surrogacy/types-of-surrogacy/ [https://perma.cc/LUF7-DED7].

18. *Id.*

19. *Id.*

20. *Id.*

21. *See The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ [https://perma.cc/7AGS-65UU] (mapping by state the permissibility of surrogacy).

homosexual couples and single individuals from eligibility.[22] Likewise, Texas' relevant statute states that "[t]he intended parents must be married to each other."[23] Thus, the statute seemingly excludes unmarried couples and individuals but allows for married homosexual couples to contract with surrogates. Other states, such as Michigan and Nebraska, outright prohibit surrogacy contracts.[24]

B. *Ethical Concerns Associated with Fertility Treatments*

1. Issues Pertaining to Morality and Religion

Some view the use of ART and AI as controversial. For example, the Catholic Church condemns ART procedures as immoral because fertilization does not occur as a result of the "marital act" and it "do[es] violence to the dignity of the human person."[25] The Catholic Church further highlights other moral issues pertaining to the use of ART—the selection of preembryos based on the probability of success, the destruction of unused preembryos, and the negative health consequences associated with implanting too many preembryos.[26] Currently, the United States does not regulate sex selection of preembryos or the disparate treatment of genetically typical versus genetically atypical preembryos.[27] Additionally, the

22. LA. STAT. ANN. § 9:2720.2(A)(1) (2023).

23. TEX. FAM. CODE ANN. § 160.754.

24. *See* NEB. REV. STAT. ANN. § 25-21,200 (West 2023) ("A surrogate parenthood contract entered into shall be void and unenforceable."); MICH. COMP. LAWS ANN. § 722.855 (West 2022) ("A surrogate parentage contract is void and unenforceable as contrary to public policy.").

25. John M. Haas, *Begotten Not Made: A Catholic View of Reproductive Technology*, U.S. CONF. OF CATH. BISHOPS, https://www.usccb.org/issues-and-action/human-life-and-dignity/reproductive-technology/begotten-not-made-a-catholic-view-of-reproductive-technology [https://perma.cc/65YB-N88D]. *See also* Congregation for the Doctrine of Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day (Donum Vitae)*, VATICAN (Feb. 22, 1987), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html [https://perma.cc/L7Y7-5LSA] [hereinafter *Donum Vitae*] ("Every human being is always to be accepted as a gift and blessing of God. However, from the moral point of view a truly responsible procreation vis-À-vis the unborn child must be the fruit of marriage.").

26. *See Donum Vitae* ("Development of the practice of in vitro fertilization has required innumerable fertilizations and destructions of human embryos."); Haas, *supra* note 25 ("[T]he Bible tells us there are limits to acceptable methods for conceiving a child.").

27. M. Simopoulou et al., *Discarding IVF Embryos: Reporting on Global Practices*, 36 J. ASSISTED REPROD. & GENETICS 2447, 2448 (2019).

Catholic Church condemns AI performed with donor sperm because it occurs outside of the martial act and through masturbation.[28]

Catholics are not the only denomination to raise ethical concerns associated with ART. Evangelical Christians, like Catholics, view life as beginning from conception.[29] They take umbrage with the potential destruction of unused preembryos.[30] Currently, IVF patients left with unused preembryos may keep them cryogenically frozen, place the them up for adoption, donate the them to research, undergo compassionate transfer,[31] or thaw and destroy them.[32] In placing the preembryo up for adoption, the gamete donor(s) must grapple with their children having siblings they may never know, as well as the emotion of shirking their potential parental responsibilities.[33]

However, not all religious groups are so adamantly opposed to ART and AI. Practitioners of the Jewish faith find many ART procedures, including IVF, as a way to fulfill the Talmud's call "to be fruitful and multiply."[34] Further, not all followers are aware of or follow their religious teachings on faith. Overall, in 2013, 46% of Americans said IVF is morally acceptable,

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28. *See Donum Vitae* (condemning artificial insemination where the gametes were procured through masturbation, which "deprives human procreation of the dignity which is proper and connatural to it"); Haas, *supra* note 25 (expressing concern over the practice of creating life via laboratory procedure rather than "an act of love between husband and wife . . . .").

29. Heather Silber Mohamed, *Embryonic Politics: Attitudes About Abortion, Stem Cell Research, and IVF*, 11 POL. & RELIGION 459, 468 (2018).

30. *Id.* at 474.

31. A compassionate transfer is the act of implanting excess preembryos into the woman's uterus at a time in her cycle when she is least likely to become pregnant. *After IVF: What to Do with Frozen Embryos*, LOMA LINDA UNIV. CTR. FOR FERTILITY & IVF, https://lomalindafertility.com/resources/what-to-do-with-frozen-embryos/#:~:text=Following%20a%20fresh%20cycle%20of,lab%20or%20commercial%20storage%20site [https://perma.cc/WY9R-4KPW].

32. *Id.*

33. Simopoulou et al., *supra* note 27 (citing Catherine A. McMahon & Douglas M. Saunders, *Attitudes of Couples with Stored Frozen Embryos Toward Conditional Embryo Donation*, 91 FERTILITY & STERILITY 140, 143 (2009)).

34. *See generally* Sherman J. Silber, *Judaism and Reproductive Technology*, 156 CANCER TREAT. RES. 471 (2010) (indicating a prevalent belief that the soul does not enter the embryo until 40 days after conception; therefore, there are few moral restraints on the use of IVF to have biological children). However, many rabbinic authorities, like Catholics, prohibit the use of donor gametes because they come from sources outside the "marital bond." *See generally id.* (discussing how the marital bond in the Jewish faith is sacred).

while 12% said it is morally wrong.[35] Moreover, 36% of Americans said embryonic stem cell research is morally acceptable, while 16% said it is morally wrong.[36]

2. General Ethical Issues

In addition to moral concerns, there are also ethical issues relating to ART and AI. For example, an individual's prolific gamete donation increases the potential for accidental incest.[37] The lack of a comprehensive and continuing medical history of the donor makes treating and anticipating genetic issues problematic.[38] Further, children conceived through these procedures may struggle with developing a fully formed self-identity.[39] As for the donors, there are ethical issues surrounding whether they may remain anonymous, be compensated for their donation, and truly understand all the implications of donating genetic material.[40]

3. Ethical Issues Pertaining to the Number of Preembryos Created and Implanted

Other ethical issues pertain to the number of preembryos created and implanted. Due to the expense of IVF treatment, those undergoing the procedure often consider implanting a greater number of preembryos to improve the probability of achieving pregnancy.[41] However, this action increases the probability of having multiple births resulting in complications

35. *New Survey Analysis on Morality of Abortion, Stem Cell Research and IVF*, PEW RSCH. CTR. (Aug. 15, 2013), https://www.pewresearch.org/religion/2013/08/15/new-survey-analysis-on-morality-of-abortion-stem-cell-research-and-ivf/ [https://perma.cc/HM89-CTEN].

36. *Id.*

37. *See* Jacqueline M. Acker, *The Case for an Unregulated Private Sperm Donation Market*, 20 UCLA WOMEN'S L. J. 1, 26 (2013) ("There is a potential for accidental consanguinity among children of sperm donors, because of such factors as large numbers of offspring produced by single donors, and donor anonymity.").

38. Haas, *supra* note 25.

39. *See Donum Vitae* (stating artificial insemination "deprives him of his filial relationship with his parental origins and can hinder the maturing of his personal identity").

40. *See* Roger Collier, *Disclosing the Identity of Sperm Donors*, 182 CAN. MED. ASSOC. J. 232, 232–33 (2010) ("[M]edical students, and other young men who donated sperm for money, may not have considered the gravity of what they were doing.").

41. *See* Robert Klitzman, *Deciding How Many Embryos to Transfer: Ongoing Challenges and Dilemmas*, 3 REPROD. BIOMED. AND SOC'Y ONLINE 1, 6 (2016) (highlighting expense as a reason why some may desire multiple embryos implanted at once).

for both mother and children.[42] In 2009, Nydya Suleman's delivery of octuplets generated national debate over the number of preembryos that should be implanted per IVF cycle.[43] Twelve preembryos were implanted into Ms. Suleman's uterus; she suffered broken ribs and her children were born underweight.[44] Currently, the medical community only sets forth guidelines and recommendations as to the number of preembryos a physicians should implant, but the number is not legislatively mandated.[45]

This view—that more is better—also generates issues regarding the number of excess preembryos created. Thirty years ago, frozen preembryos were less likely to remain viable "through the freezing and thawing process," and it made sense to fertilize more eggs.[46] Now, with modern techniques, fewer eggs are needed, though many clinics continue fertilizing more eggs than necessary.[47] These unused preembryos create an issue for the intended parent(s), who must decide the preembryo's fate. For some, this decision is too great or the financial burden to store the preembryo is too high, and the embryo is abandoned.[48] There is no firm data on the number of abandoned preembryos, but estimates range from 90,000 to well over 1,000,000.[49] Once the preembryo is abandoned the fertility clinic must determine the fate

42. *See id.* at 2 (increasing the likelihood of preeclampsia and Caesarean delivery in the mother and low birth weight, respiratory complication, and jaundice in the baby when twins are delivered); Am. Soc'y for Reprod. Med. & Soc'y for Assisted Reprod. Techs., *Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, 116 FERTILITY & STERILITY 651, 651 (2021) ("Multiple gestation leads to an increased risk of complications in both the woman carrying the pregnancy and the fetuses.").

43. *See generally* Ashley Surdin, *Octuplet Mom also Gives Birth to Ethical Debate*, NBC NEWS (Feb. 4, 2009, 7:34 AM), https://www.nbcnews.com/id/wbna29009410 [https://perma.cc/J2W8-X6R7] (exposing the lack of IVF regulation in the United States).

44. Adam Popescu, *The Octomom Has Proved Us All Wrong*, N.Y. TIMES (Dec. 15, 2018), https://www.nytimes.com/2018/12/15/style/octomom-kids-2018.html [https://perma.cc/4SJ8-6RYG].

45. *See generally Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, *supra* note 42, at 652 (noting in most situations only one embryo should be implanted).

46. Mary Pflum, *Nation's Fertility Clinics Struggle with a Growing Number of Abandoned Embryos*, NBC UNIVERSAL (Aug. 12, 2019, 3:34 AM), https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806 [https://perma.cc/S9FR-CXQV].

47. *Id.*

48. *Id.* There is no standard definition for "abandoned embryo," but it is generally recognized that an embryo is abandoned when the storage fees are not paid for a set period and the intended parents do not respond to the clinic's inquiries. Storage fees may range from several hundred to over a thousand dollars per annum. *Id.*

49. *Id.*

of the preembryo while considering its potential for life.[50] Because of these ethical concerns, the majority of clinics opt to keep the preembryo frozen—at times having to outsource storage due to limited space.[51] To mitigate this issue, other countries, Germany and Italy for example, limit the number of preembryos that may be created and transferred at one time.[52]

4. Ethical Issues Pertaining to Surrogacy

There are more ethical issues surrounding surrogacy—chiefly the issues of "buying" babies and exploiting the surrogate. Surrogacy laws vary widely in the United States. Both California and New York allow commercial surrogacy, which prompts fears of babies being seen as a commodity.[53] However, even altruistic surrogacy includes ethical issues.[54] The surrogate jeopardizes her life and health to carry a child for the prospective parent.[55] Additionally, surrogacy separates the baby from the gestational host, as opposed to adoption which responds to that situation.[56] These issues are juxtaposed with creating a wanted child.

International surrogacy further complicates the situation—issues of parentage, nationality, and maternal exploitation arise.[57] Far more concerning is the exploitation of surrogates in countries such as India. There, impoverished women are pressured and persuaded into carrying babies for money.[58] Once impregnated the surrogacy broker often abuses the surrogate and coerces her away from her family.[59] As a result, the Indian

50. *See id.* ("Since embryos are eggs that have been fertilized—and therefore have a potential for life—the dilemma over what to do with those that have been abandoned, and who should assume ownership of them, is a thorny one.").

51. *Id.*

52. *Id.*

53. Grace Melton & Melanie Israel, *How Surrogacy Harms Women and Children*, HERITAGE FOUND. (May 5, 2021), https://www.heritage.org/marriage-and-family/commentary/how-surrogacy-harms-women-and-children [https://perma.cc/F8G7-QL4F].

54. *See generally id.* (discussing potential exposure of the gestational mother and child to elevated emotional harm).

55. *Id.*

56. *Id.*

57. Pikee Saxena et al., *Surrogacy: Ethical and Legal Issues*, 37 IND. J. CMTY. MED. 211, 211 (2012).

58. *Id.* at 212.

59. *Id.* ("These women have no right on decision[s] regarding their own body and life.").

government closed its borders to international surrogacy, though other countries with few regulations still allow for international surrogacy.[60]

5. Ethical Issues Pertaining to Emerging Technologies

With advances in medical technology, society must confront the ethics of altering genes. To accomplish gene editing, IVF is combined with modifications to either the nuclear or non-nuclear deoxyribonucleic acid (DNA).[61] The latter case may proceed through either cytoplasmic or mitochondrial transfer.[62] Unfortunately, mitochondrial DNA experiences a higher rate of mutation than nuclear DNA.[63] These mutations can affect the mitochondria's ability to generate the adenosine triphosphate needed by the egg to undergo fertilization and subsequent growth.[64] By transferring donor cytoplasm, containing mitochondria and other organelles, the probability of achieving pregnancy increases.[65] Likewise, mitochondrial transfer may be performed to prevent the passing of genetic diseases associated with the mitochondria.[66] In both cases, the cell is fundamentally changed, though not the resulting fetus.

In contrast, nuclear germline gene alteration proves to be more controversial.[67] This editing technology can prevent the inheritance of genetic diseases, but it can also alter the physical and cosmetic attributes of the offspring.[68] Consequently, the essence of the resulting person is fundamentally changed. The question then becomes to what extent should

60. Melton & Israel, *supra* note 53, at 7. The prohibition against international surrogacy in Nepal, India, and Thailand created new markets for surrogacy, and with it, new opportunities for surrogate exploitation—as is seen in Ukraine. Emma Laberton, *Lessons from Ukraine: Shifting International Surrogacy Policy to Protect Women and Children*, J. OF PUB. & INT'L AFFAIRS (May 1, 2020), https://jpia.princeton.edu/news/lessons-ukraine-shifting-international-surrogacy-policy-protect-women-and-children#:~:text=Child%20Exploitation,disabilities%20(Hawley%2C%202019) [https://perma.cc/K95P-PK7V].

61. Myrisha S. Lewis, *Normalizing Reproductive Genetic Innovation*, 74 ADMIN. L. REV. 481, 490–91 (2022).

62. *See generally* Ales Sobek et al., *Cytoplasmic Transfer Improves Human Egg Fertilization and Embryo Quality: An Evaluation of Sibling Oocytes in Women with Low Oocyte Quality*, 28 REPROD. SCI. 1362 (2020) (explaining a method of transferring mitochondrial DNA into the cytoplasm of a cell).

63. *Id.*

64. *Id.* at 1363.

65. *Id.*

66. Lewis, *supra* note 61, at 490.

67. *See id.* at 491–92 ("Heritable genetic modification involves germ cells (egg and sperm cells) . . . .").

68. *Id.*

one alter a nonconsenting, unborn entity—for cosmetic "improvements"—to prevent disease?

Additionally, given that this technology has the potential to profoundly improve lives, who is given access? Currently, the answer to that question is no one in the United States.[69] The National Institute of Health does not consider research applications pertaining to procedures altering germlines.[70] And though once available in the United States, cytoplasmic transfer and mitochondrial transfer no longer are available.[71]

Overall, ART and AI present a multitude of moral and ethical concerns. The most pressing of which pertains to the unused potential life created through IVF and the exploitation of gestational mothers, as well as gamete donors. To this point, legislators have largely left decisions concerning these issues up to the individual—with the exception of surrogacy laws.[72] However, this delegation to the individual might not always be the case. The recent *Dobbs* decision called into question the fundamental nature of many associated rights—including the rights of privacy and procreation.[73] Given the ethical and moral concerns associated with ART and AI, the relevant issue becomes to what extent the government can restrict or even prohibit ART and AI procedures. The answer depends on whether one can establish an individual's access to ART and AI as a fundamental right. The next section addresses the constitutional basis for expecting such a right by analyzing (1) precedents pertaining to procreation, (2) the expanding scope of traditional rights to encompass nontraditional acts, and (3) the *Dobbs'* standard for determining unenumerated rights.

69. Consolidated Appropriations Act 2016, H.R. 2029, 114th Cong. § 749 (2015) ("None of the funds made available by this Act may be used to notify a sponsor or otherwise acknowledge receipt of a submission for an exemption for investigational use of a drug or biological product . . . in research in which a human embryo is intentionally created or modified to include a heritable genetic modification.").

70. Lewis, *supra* note 61, at 495.

71. *Id.*

72. *See The United States Surrogacy Law Map*, *supra* note 21 ("The laws are different from state-to-state, and sometimes even from county-to-county.").

73. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2319 (2022) (Breyer, J., dissenting) (noting the right to bodily integrity gave rise to same sex intimacy and marriage rights).

II. PROCREATION—A CONSTITUTIONAL ANALYSIS

A. *Precedents Establishing Procreation as a Fundamental Right and Their Applicability to ART and AI*

Historically, cases establishing procreation as a fundamental right are rooted in one's own ability to reproduce. The United States Supreme Court has yet to rule on the right to reproduce via artificial technology. However, by exploring past precedents, fundamental concepts emerge allowing for predictions as to how the Court might rule regarding the use of AI and ART.

Buck v. Bell[74] occurred during the eugenics movement and was the first case to question the right to reproduce. A 1924 Virginia Act allowed for the forced sterilization of "mental defectives" to foster both the patient's and society's welfare.[75] Pursuant to the Act, the state forcibly sterilized Carrie Buck.[76] Virginia's position was that Ms. Buck, her mother, and her daughter all suffered from mental illness and were a drain on the state.[77] Ms. Buck and her guardian asserted the substantive law authorizing this procedure violated her Fourteenth Amendment right to due process and equal protection.[78]

The Court rejected this constitutional challenge—it extended the law authorizing forced vaccinations to forced sterilization.[79] In doing so, the Court balanced the potential harm to both the individual and state, absent sterilization.[80] Here, the potential negative fiscal impacts for Virginia were of greater concern—the negative impact on a patient's health, less so.[81] Notably, the Court ignored the mental anguish and loss of identity that may result from forced sterilization. Ultimately, the Court decided that the benefit to the state outweighed the benefit to the individual[82]—procreation was not an inalienable right.

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74. Buck v. Bell, 274 U.S. 200 (1927).

75. *Id.* at 205.

76. *Id.*

77. *Id.*

78. *Id.* at 205, 207.

79. *Id.* at 207.

80. *See id.* ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

81. *See id.* ("[S]he may be sexually sterilized without detriment to her general health . . . .").

82. *Id.*

The right to procreate was next addressed in *Skinner v. Oklahoma*.[83] Here, the Court upheld *Buck* but distinguished *Skinner*. At issue was Oklahoma's Habitual Criminal Sterilization Act that allowed for the forced sterilization of criminals convicted of two or more "felonies involving moral turpitude."[84] The Court hinted that the Act might violate the Due Process Clause of the Fourteenth Amendment but declined to offer a definitive opinion as to due process.[85] Instead, the Court concluded the Act violated the Equal Protection Clause of the Fourteenth Amendment.[86] The Act treated crimes of the same quality differently.[87] For example, a person could be sterilized for committing larceny but not for embezzlement—though the two crimes involved the taking of personal property.[88] Thus, this Act discriminated against a class of criminals.[89]

Conversely, Chief Justice Stone asserted that "a state may . . . constitutionally interfere with personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies."[90] He believed the Act might be constitutional if the state severed the offending clause.[91] Despite Chief Justice Stone's assertions, there appears to be an ideological shift in the Court towards protecting the right to procreate. In *Skinner*, unlike in *Bell*, the Court acknowledged the potential for permanent and devastating effects to the individual, as well as the potential for the subjugation of unpopular groups.[92] Additionally, the Court acknowledged that procreation is a basic civil right and is "fundamental to the very existence and survival of the race."[93]

In analyzing both *Bell* and *Skinner*, a fundamental right to procreate through ART and AI, at first glance, appears likely. Genetic testing before implantation allows for the selection of the healthiest preembryos and gametes. And procreation by ART and AI ensures the "survival of the race" by allowing those who would otherwise not procreate the ability so to do.

83. Skinner v. Oklahoma *ex rel* Williamson, 316 U.S. 535 (1942).
84. *Id.* at 536 (quoting OKLA. STAT. ANN. tit. 57, § 171 (West 1935)).
85. *Id.* at 538.
86. *Id.*
87. *Id.* at 541.
88. *Id.* at 541–42.
89. *Id.* at 541.
90. *Id.* at 544 (Stone, CJ., concurring).
91. *Id.* at 545.
92. *Id.* at 541 (majority opinion).
93. *Id.*

Bell further, by inference, supports the use of IVF to alter germlines—improving the resulting baby's genes to decrease its dependence on the state.

However, these two cases pertain to curtailing one's innate ability to procreate, to wit sterilization. ART and AI conversely seek to expand that ability, often overcoming infertility. In so doing, there is a potential to create genetically abnormal preembryos that have the potential for life. No longer is the issue simply the ability to procreate; it becomes comingled with whether the preembryo has a right to an opportunity to be born. Therefore, these cases hint that the government can narrowly limit procreation when—(1) the government's interest is overriding and (2) the law affects similarly situated individuals equally.

Moving from state actions designed to curtail procreation, this Comment now explores how the Court addresses acts by individuals affecting their own procreation. In *Griswold v. Connecticut*,[94] the Court analyzed the constitutionality of a Connecticut statute that prohibited the use of "any drug, medicinal article or instrument for the purpose of preventing conception" by married individuals, or from others abetting couples to commit such an offense.[95] The Court held the statute unconstitutional.[96] Intimate marital relations are protected by the right to privacy, which is a penumbral right established by the extension of the Constitution's First, Third, Fourth, Fifth, and Ninth Amendments.[97] The Court supported its idea of penumbral rights by referencing past precedent.[98] For example, *Pierce v. Society of Sisters*[99] established a parental right to decide where to educate one's child.[100] There the Court held that right is a peripheral part of the First Amendment's protection of the Freedom of Speech, as well as a liberty interest protected by the Fourteenth Amendment.[101] Likewise, *Meyer v. State of Nebraska*[102] deemed the right to teach German in school as an extension of the guarantee of the freedom of speech—"the freedom of inquiry," and the "freedom to teach."[103]

94. Griswold v. Connecticut, 381 U.S. 479 (1965).
95. *Id.* at 480 (quoting CONN. GEN. STAT. §§ 54-196–54-198 (1958)).
96. *Id.* at 485–86.
97. *Id.*
98. *Id.* at 482–83.
99. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).
100. *Id.* at 534–35.
101. *Griswold*, 381 U.S. at 482.
102. Meyer v. Nebraska, 262 U.S. 390 (1923).
103. *Griswold*, 381 U.S. at 482 (citing Wieman v. Updegraff, 344 U.S. 183, 195 (1952)).

Justice Goldberg's concurring opinion in *Griswold* further highlights that not all fundamental rights are enumerated in the first eight amendments.[104] The Ninth Amendment, applied to the states through the Fourteenth Amendment, allows for the existence of additional personal liberties.[105] These liberties are based on the "traditions and [collective] conscience of our people."[106]

Seemingly the majority and concurring opinions in *Griswold* appear to support the idea that the ability to procreate through ART and AI is a fundamental liberty protected by the right to privacy. However, the privacy implicated in the two situations is considerably different. In *Griswold*, a person sought access to contraceptives for the prevention of pregnancy. There, a person maintained the status quo; her decision only affected the married couple. Conversely, utilizing ART or AI to create a child alters the status quo; this decision affects the couple, the future child, the gamete donor, potential stepsiblings, and any unused preembryos.

As to whether Justice Goldberg would consider access to ART and AI to be a liberty interest—possibly, though not probably. Scientifically documented instances of human artificial insemination have occurred since the late seventeen hundreds.[107] And, as the following cases illustrate, historically, the concern is over the prevention of pregnancy, not its creation. Arguably, procreation is a part of the nation's "traditions," and AI and ART facilitate that objective. However, it was only after the introduction of donor sperm and IVF in the latter half of the last century that ART became more common.[108] The claim that these procedures are a part of the Nations' consciousness seems more tenuous from a historical perspective.

Seven years after *Griswold*, the Court held the fundamental right to contraceptives extended to unmarried individuals based on the equal protection guaranteed by the Fourteenth Amendment. In *Eisenstadt v. Baird*,[109] a Massachusetts statute prohibited unmarried individuals from

104. *Id.* at 492 (Goldberg, J., concurring).

105. *Id.*

106. *Id.* at 487 (quoting Snyder v. Massachusetts, 291 U.S. 97 (1934)), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

107. W. Ombelet & J. Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7 FACTS VIEWS & VISION OBGYN 137, 138 (2015).

108. *See id.* at 142 ("[T]he demand for donor sperm increased tremendously.").

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

obtaining contraceptives to prevent pregnancy, but not for disease prevention; there were no such prohibitions for married couples.[110] The Court found no justification for denying access to contraceptives solely based on marital status, as there is no rational basis for distinguishing such classes.[111] Furthermore, the Court noted that couples are composed of individuals; therefore, the rights granted to couples are rooted in the individual.[112] This ruling opened up the right to privacy and expanded this fundamental right beyond the marital bedroom. *Eisenstadt*, like *Skinner*, was decided based on the Equal Protection Clause, and both seem to suggest that single individuals and married couples should be treated the same when accessing ART and AI.

After *Eisenstadt*, the Court declared the fundamental right to privacy extends to minor children; constitutional protections apply to minors.[113] In *Carey v. Population Services, Intern,*[114] the Court struck down a statute that (1) prohibited the advertising of nonprescriptive contraceptives and (2) regulated the distribution of contraceptives to those over 16.[115] In invalidating the New York statute, the Court emphasized the right to contraceptives implicates one's individual autonomy regarding "decisions in matters of childbearing,"—that prohibiting access to contraceptives was unconstitutional because it interfered with the exercise of said right.[116] However, the Court also made clear that just because a state regulates contraceptive devices does not make their rule per se invalid. *Carey*, like *Griswold*, includes the possibility that a state may have a compelling interest in regulating the contraceptive industry.[117]

Carey reinforced the declaration of *Griswold* and *Eisenstadt*. It seemingly cements the right to procreate as fundamental. Further, in invalidating the New York law, the Court declared blanket prohibitions are

110. *Id.* at 442.

111. *Id.* at 447.

112. *Id.* at 453.

113. Carey v. Population Servs., Int'l, 431 U.S. 678, 692 (1977) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)).

114. *Id.* at 678 (holding it unconstitutional to prohibit the distribution of information pertaining to contraceptives to minors).

115. *Id.* at 681–82.

116. *Id.* at 688–89.

117. *Id.* at 685–86; Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

unconstitutional.[118] For many, access to ART and AI is the only way to achieve procreation. It stems from *Carey* that a blanket prohibition on accessing ART and AI would be per se unconstitutional.

These cases involving contraceptive use pertain to the rights of individuals before fertilization occurs. They are on point when analyzing access to IUI and ICI, procedures that create the opportunity for a sperm to fertilize an egg, but do not guarantee fertilization. However, these cases do not fully address the added nuance of IVF, the creation of a prembryo. To better understand one's rights regarding access to IVF procedures, it is helpful to look at the Court's treatment of abortion rights involving an embryo—albeit IVF affects a preembryo outside the body and abortion within.

In *Roe v. Wade*,[119] the Court addressed a challenge to a Texas statute prohibiting abortion.[120] There, the Court held the Fourteenth Amendment's protection of personal liberty, including privacy, extended to a woman's decision to terminate her pregnancy.[121] The Court explained that though the Constitution does not define "person," there is no indication that the term applies to prenatal entities; therefore, the unborn do not enjoy Fourteenth Amendment protections.[122] Importantly, the Court declined to determine when life begins, but noted that the definition affects ART and the implantation of embryos.[123] In line with this declaration, the Court allowed the restriction of abortion past the first trimester based on the State's interest in preserving maternal life.[124] As for the State's second compelling interest, protecting the unborn, the Court set the trigger time at the point of fetal viability.[125]

118. *Carey*, 431 U.S. at 694 ("[T]he constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed.").

119. Roe v. Wade, 410 U.S. 113 (1973) (holding abortion is a fundamental right), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), and *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

120. *Id.* at 120–21, 129.

121. *Id.* at 153.

122. *Id.* at 157–58.

123. *Id.* at 159–61.

124. *Id.* at 163.

125. *Id.*

Roe's decision was modified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[126] There, the Court reaffirmed the Fourteenth Amendment guarantees a woman's right to an abortion before viability.[127] However, the Court rejected the trimester timeline for allowing abortion restrictions.[128] The Court reasoned that the trimester framework undervalued and failed to protect the interest of the unborn.[129] Instead, the Court opted to impose an undue burden test as the standard for restricting abortion before the viability of the fetus.[130]

The *Roe* and *Casey* interpretations seem to favor individual autonomy in pursuing IVF without state intervention. First, the only way to accomplish this technical procedure is with the aid of a physician; therefore, fear for the patient's health is not a concern. Second, the *Roe* decision withholds constitutional protection from the unborn until they reach a stage of viability, ability to survive outside the mother's womb. Preembryos created for IVF do not meet that viability test; therefore, applying *Roe* and *Casey*, the state may have a moral interest in protecting the unborn but cannot have a legitimate Constitutional interest in protecting the IVF preembryo. Many preembryos were created based on this expectation—shifting this paradigm creates novel issues for the State and individual. These issues are addressed in Section III.

B. *Extending Traditional Rights to Nontraditional Practices*

Does the State have a legitimate interest in prohibiting ART and AI? This Comment now looks at how the Court treated laws prohibiting unpopular behaviors. Specifically, behaviors deemed as reprehensible, by many, for religious and moral reasons.

In *Lawrence v. Texas*,[131] the Court addressed two main issues: (1) whether the criminalization of intimate sexual behavior based solely on sexual orientation violates Equal Protection guaranteed by the Fourteenth Amendment, and (2) whether criminalization of private,

126. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (upholding the right to an abortion because it is protected by the Fourteenth Amendment; the right may be regulated), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

127. *Id.* at 869.

128. *Id.* at 873.

129. *Id.* at 875–76.

130. *Id.* at 878.

131. Lawrence v. Texas, 539 U.S. 558 (2003) (rejecting the prohibition of certain behaviors that are based solely on moral arguments).

intimate sexual relations, occurring within the home, violates liberty and privacy interests guaranteed by the Due Process Clause of the Fourteenth Amendment.[132] In analyzing these questions, the Court noted an extensive history of prohibiting and criminalizing the act of sodomy regardless of sexual orientation.[133] Conversely, laws targeting specifically homosexual sodomy did not materialize until the 1970s.[134] The Court inferred that these historical prohibitions were grounded in religious beliefs.[135] It dismissed the historical value noting universal liberties should not be narrowly defined by a majority's moral and religious code.[136] Instead, the Court placed weight on the European Court of Civil Rights, which ruled in favor of consensual homosexual activity.[137]

The Court acknowledged, "the petitioners are entitled to respect for their private lives."[138] The government should not interfere in these types of private relationships—they lack a legitimate compelling interest in so doing.[139] In all, the Court concludes that consensual, intimate private relations are part of a person's liberty interest guaranteed by the Fourteenth Amendment.[140] The Court declined to decide the case based on equal protection for fear that legislatures would rewrite sodomy laws to avoid the equal protection issue; however, the infringement upon the liberty interest would remain.[141] Significantly, the Court rejected stare decisis[142]—overruling *Bowers v. Hardwick*.[143] The court granted personal autonomy which implies freedom of expression and specific intimate conduct.[144]

132. *Id.* at 564.

133. *Id.* at 567–69.

134. *Id.* at 570.

135. *Id.* at 571.

136. *Id.*

137. *Id.* at 573 (acknowledging Dudgeon v. United Kingdom, where the Court ruled a British law criminalizing male homosexual acts violated the European Convention on Human Rights).

138. *Id.* at 578.

139. *Id.* at 577.

140. *Id.* at 578.

141. *Id.* at 574–75.

142. *Id.* at 570–71.

143. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding the constitutionality of a Georgia statute prohibiting sodomy regardless of sexual orientation; denying sodomy is included as a part of the fundamental right to privacy), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

144. *Lawrence*, 539 U.S. at 562.

Similarly, *Obergefell v. Hodges*[145] made clear the fundamental right to marry extends beyond the historic definition of marriage as between one man and one woman, to include same sex-marriages. The Court reasoned that, "[t]he history of marriage is one of both continuity and change."[146] The Court particularly emphasized the evolution of marriage precipitated by the change in the status of women.[147] Female emancipation and similar changes are extraneous to what is fundamentally the essence of marriage—a commitment between two individuals.[148] In justifying this conclusion, the Court noted "history and tradition guide" its judicial obligation to interpret the Constitution, but those approaches are not limiting factors.[149] There is no set formula with which to interpret the Constitution.[150]

Without relying on a set formula, the Court justified declaring marriage as a fundamental right between two individuals, regardless of gender, based on four reasons. First, the ability to select one's marriage partner is a fundamental part of individual autonomy, rooted in the *Loving,*[151] *Zablocki,*[152] and *Lawrence* opinions.[153] Second, marriage supports committed individuals as no other means can.[154] Third, marriage "safeguards children and families" and allows them to rear children in an environment conducive to one's beliefs.[155] Fourth, marriage is the foundation of our society.[156] There was no compelling governmental interest in restricting marriage based on sexual orientation.

The Court explains that same sex couples were not seeking to establish a new fundamental right; same sex couples were seeking the justification for

145. Obergefell v. Hodges, 576 U.S. 644 (2015) (granting homosexual couples the right to marry).

146. *Id.* at 659.

147. *Id.* at 660.

148. *See id.* at 660, 665 ("[A] married man and woman were treated by the [s]tate as a single, male-dominated . . . entity.").

149. *Id.* at 663–64.

150. *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

151. Loving v. Virginia, 388 U.S. 1 (1967) (holding Virginia's miscegenation statute unconstitutional for violating Equal Protection and Due Process Clauses of the Fourteenth Amendment).

152. Zablocki v. Redhail, 434 U.S. 374 (1978) (holding a Wisconsin Statute requiring noncustodial parents under a support order to obtain court approval before marriage as unconstitutional because the statute was not narrowly tailored to meet the state's interest).

153. *Obergefell*, 576 U.S. at 665–66 (quoting Lawrence v. Texas, 539 U.S. 558, 574 (2003)).

154. *Id.* at 666.

155. *Id.* at 667–68.

156. *Id.* at 669.

their exclusion from an established fundamental right of marriage.[157] However, despite the fundamental nature of marriage, it does not bar restrictions therein. For example, bigamy is still criminalized.[158] And as a fundamental right, the Court reemphasized that, "[it] may not be submitted to a vote."[159]

Obergefell and *Lawrence* raise many constitutional arguments that are directly applicable to the use of ART and AI as a means to procreate. Like marriage, procreation has a deep history seated in religious convictions. Additionally, like marriage, these convictions are evolving. Where once a woman who gave birth outside of marriage was stigmatized and ostracized by her community, she now finds greater support.[160] Presently, single individuals and married couples, including same-sex couples, are able to adopt.[161]

Shifting societal views and mores prompted this evolution of who is suitable or allowed to parent. *Obergefell* emphasized the lack of historical precedents does not negate a fundamental right when due to popular religious mores. Therefore, it appears the right to procreate, regardless of marital status and sexual orientation, is fundamental to the continuation of society.

The problem is that single females and same sex female couples are unable to procreate without donor gametes, and in the case of single males, sterile females, and same sex male couples, without the use of a surrogate. Here, the holding in *Lawrence* suggests what is done by consenting adults in private is protected as a liberty interest. Therefore, it seems that a female undergoing an ICI procedure at home with donor sperm has a protected liberty interest. Extrapolating from there, the privacy and intimacy of the

157. *Id.* at 671.

158. *See* Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKLEY J. INT'L L. 382, 429 (2009) (surveying bigamy and polygamy statutes in the United States).

159. *Obergefell*, 576 U.S. at 677 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

160. *See* Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. 5, 10, 12 (2018), https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/ [https://perma.cc/M5T6-NJCB] (indicating a jump from 35% to 48% "of adults [who] agreed or strongly agreed that single parents could raise children as well as two married parents" from 1994 to 2012).

161. *What to Know About the History of Same Sex Adoption*, CONSIDERING ADOPTION, https://consideringadoption.com/adopting/can-same-sex-couples-adopt/history-of-same-sex-adoption/ [https://perma.cc/L4XN-2UG3].

doctor's office too should be encapsulated in the realm of privacy when pertaining to reproductive procedures. Additionally, the ability of an individual to access technology speaks to one's "individual autonomy" espoused in *Obergefell*;[162] where an unfettered ability to choose the terms of the conception is protected.

However, here again, the rights granted in *Lawrence* affect only the private relationship between a couple, and in *Obergefell*, the couple and the government, whereas the use of ART and AI implicates the rights of numerous individuals. Therefore, the government likely has a legitimate interest in regulating the practice, but likely may not ban the practice all together.

C. *Overruling Past Precedents*

Most recently, in 2022, *Dobbs v. Jackson Women's Health Organization* overruled *Casey* and *Roe* while redefining what were once considered fundamental rights.[163] The Court rejected its previous assertions and found the right to an abortion is neither implicitly nor explicitly protected by the Constitution—nor is it inherent in our nation's history—or "implicit in the concept of ordered liberty."[164] While recognizing that *Roe* used three possible avenues to defend a fundamental right to an abortion, the Court criticized *Roe*'s inability to state an exact constitutional justification.[165] Of the three possible justifications, the Court targeted abortion as a liberty interest protected by the Fourteenth Amendment.[166]

Liberty is a concept that some may say is broad, while others would classify it as vague. The Court, however, established a clear method of

162. *See Obergefell*, 576 U.S. at 663 ("[T]hese liberties extend to certain personal choices central to individual dignity and autonomy . . . .").

163. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (declaring there is no fundamental right to an abortion).

164. *Id.* at 2242 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

165. *See id.* at 2245 (noting the right might be justified (1) through "the Ninth Amendment's reservation of rights to the people;" (2) though either the "First, Fourth, or Fifth Amendment, or in some combination" thereof; or, (3) through the concept of liberty found in the Due Process Clause of the Fourteenth Amendment (quoting Roe v. Wade, 410 U.S. 113, 153 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), and *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022))).

166. *Id.* at 2243.

determining whether a right may be categorized as a liberty interest.[167] The interest must be "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty."[168] The Court found no such historical evidence for abortion.[169] To the contrary, what the Court did find historically rooted in the Nation's history was the legislature's right to decide abortion regulation.[170] Given that the Court deemed people do not have a fundamental "right to an abortion;" abortion legislation no longer receives strict scrutiny analysis.[171] It is now judged using the deferential rational basis review.[172] Therefore, abortion may be regulated to the point of prohibition for any legitimate state interest that is rationally related to its objective.

In using this test for substantive due process, Justice Kavanaugh stressed in his concurring opinion that the Court's decision was not based on morality or policy.[173] The theme in his concurrence is of returning the Court to a position of neutrality.[174] He contends that the Constitution applies in unforeseen cases, but not if it involves creating a new right, as is what happened in *Roe*.[175] In such cases, the appropriate forum is with the legislative body.[176]

With these determinations, questions then arise pertaining to contraceptives, intimate sexual relations, and marriage. These rights were also justified through substantive due process, and arguably, lack the requisite historical entrenchment. The Court specifically does not address these issues.[177] However, "does not" and "will not" are two very different

167. *Id.* at 2246 ("[T]he Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'") (alteration in original) (first quoting Timbs v. Indiana, 139 S. Ct. 682, 687 (2019); then quoting McDonald v. City of Chicago, 561 U.S. 742, 764, 767 (2010); and then quoting *Washington*, 521 U.S. at 721).

168. *Id.* at 2260 (holding the right to physician assisted suicide is not a fundamental right because suicide is not "deeply rooted in this Nation's history and traditions" (first quoting *Washington*, 521 U.S. at 721; and then citing *Timbs*, 139 S. Ct. at 689–90)).

169. *Id.* at 2283.

170. *Id.* at 2242 ("Until the latter part of the 20th century, [an abortion] right was entirely unknown in American law.").

171. *Id.* at 2283.

172. *Id.*

173. *Id.* at 2304 (Kavanaugh, J., concurring).

174. *See generally id.* at 2305–10 ("The Court's decision today properly returns the Court to a position of judicial neutrality . . . .").

175. *Id.* at 2306.

176. *Id.*

177. *See id.* at 2277–78 (majority opinion) ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

statements. It is feasible that the Court rejects stare decisis when deciding these issues based on "substantive due process analysis."[178]

Justice Kavanaugh contends that overruling *Roe* "does not threaten or cast doubt" on other substantive due process issues, and he noted the Court does not specifically overrule those precedents here.[179] Conversely, Justice Thomas, in his concurring opinion, makes it clear that he believes the Due Process Clause "at most guarantees *process*" and "does not secure *any* substantive rights."[180] Therefore, at present the right to marriage, contraceptives, and intimate sexual relations are protected by strict scrutiny; however, it is tenuous to claim this protection will always be the case.

In addition to analyzing abortion as a liberty interest, the Court also addresses its claim as a privacy interest. Here, the Court rejects *Casey*'s assertion that abortion is analogous to "the right to marry a person of the same sex," "the right to engage in private, consensual sexual acts," and "the right to make decisions about the education of one's children."[181] The Court discarded this analogy, finding the concepts distinct.[182] Abortion specifically deals with the destruction of a potential life, whereas decisions regarding marriage, education, and sexual acts do not.[183] Here, the Court intimated there must be a line between what is permissible and what is not.[184] This line is achieved through balancing the issues—the right of woman to abort (with all of its surrounding issues) and the right of the unborn.[185] The Court is sensitive to the fact that people weigh the

178. *See id.* at 2281 ("Each precedent is subject to its own stare decisis analysis, and the factors that our doctrine instructs us to consider . . . .").

179. *Id.* at 2309 (Kavanaugh, J., concurring) (emphasis in original).

180. *Id.* at 2301 (Thomas, J, concurring) (emphasis in original). Though, the Court acknowledges that *liberty* protects fundamental rights from governmental intrusion. Reno v. Flores, 507 U.S. 292, 302 (1993) (foreclosing governmental intrusion into fundamental liberty interest "unless the infringement is narrowly tailored to serve a compelling state interest" (first citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992); then citing United States v. Salerno, 481 U.S. 739, 746 (1987); and then citing Bowers v. Hardwick, 478 U.S. 186, 191 (1986))).

181. *Dobbs*, 142 S. Ct. at 2257–58 (majority opinion) (internal citation omitted) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

182. *See id.* at 2258 (stating "[but] none of [these] decisions . . . involved the critical moral question posed by abortion").

183. *Id.*

184. *See id.* (arguing an unfettered fundamental right to autonomy "could license fundamental rights to illicit drug use, prostitution, and the like" (citing Compassion in Dying v. Washington, 85 F.3d 1440, 1444 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of rehearing en banc))).

185. *See id.* at 2257 ("Ordered liberty sets limits and defines the boundary between competing interests.").

importance of the competing interests differently; however, the right to privacy does not grant a person the automatic right to act on issues central to their autonomy.[186]

Additionally, the *Dobbs* opinion does not decide the issue of when life begins, or when the unborn is entitled to constitutional protections.[187] As such, the dissent highlights the possibility of states banning abortion "from the moment of fertilization," or even the federal government creating a blanket prohibition.[188] The dissent further argues the need for historical evidence to justify substantive due process claims.[189] In this instance the dissent explains that it is illogical due to the fact that only men could vote when the Fourteenth Amendment was enacted up until 1920.[190] However, this assertion proves the majority's point. The establishment of formerly unrecognized rights historically are created through the legislative process. It was the Fourteenth Amendment that granted African Americans citizenship, and the Fifteenth Amendment conferred to African American males the right to vote.[191] Additionally, it was through constitutional amendment that women too were granted the right to vote.[192]

Accordingly, legislatures have been active. Thirteen states—Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming—had trigger laws pertaining to abortion bans that went into effect with the overruling of *Roe*, or with an event tied to such a ruling, depending on the state.[193] Of those laws, three states blocked enforcement pending the outcome of litigation.[194] Additionally, with the leak of the *Dobbs* decision, fourteen states took action, with Indiana explicitly stating "abortion statutes

186. *Id.* at 2257.

187. *Id.* at 2261.

188. *Id.* at 2317–18 (Breyer, J. dissenting).

189. *Id.* at 2324–25.

190. *See id.* ("Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights.").

191. U.S. CONST. amends. XIV § 1, XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race . . . . Congress shall have power to enforce this article by appropriate legislation.").

192. U.S. CONST. amend. XIX § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

193. NICOLE DUBE ET AL., CONN. OFF. OF LEGIS. RSCH., 2022-R-0227, STATE ABORTION LAWS ENACTED POST-DOBBS DECISION 3–6 (2022).

194. *Id.*

do not apply to in-vitro fertilization."[195] Pre and post-*Dobbs*, eleven governors issued executive orders pertaining to abortion.[196] And with the midterm elections, Vermont, California, and Michigan created or amended their state constitutions to include the right to abortion.[197] While Kentucky voters rejected a constitutional amendment "stat[ing] there is no right to an abortion."[198]

D. *How the Holding in Dobbs Potentially Affects Access to ART and AI*

One could argue that ART and abortion are analogous because both have the potential to destroy the unborn. Yet ART is distinguishable—ART creates potential beings. It is only once a being is created that the potential for destruction derives. And the act of destruction is severable from ART. This paper will now use the holding in *Dobbs* to explore substantive due process, privacy, and equal protection's relationship to ART and AI.

1. The Position of ART and AI in the Nation's History

Many have long held the right to procreate as fundamental. However, it, like abortion's status, is founded on the penumbras of the Constitution, the right to privacy, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[199] In analyzing the Due Process Clause, the *Dobbs* decision stressed that a fundamental right must be well settled in the Nation's history.[200] The issue then becomes defining history.

As previously noted, different artificial reproductive technologies have different timelines for introduction and usage.[201] Though artificial insemination has a long history, its use was by no means pervasive at its

195. *Id.* at 8–13.

196. *Id.* at 14.

197. *Abortion on the Ballot: 2022 Election Results*, N.Y. TIMES (Nov. 8, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-abortion.html [https://perma.cc/AM4W-BECV].

198. *Id.*

199. *See generally* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding the right to privacy exists in the penumbras of the Constitution); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (sterilizing a select groups of criminals violated the Equal Protection Clause); Eisenstadt v. Baird, 405 U.S. 438, 454-455 (1972) (allowing only married women access to contraceptives violated the Equal Protection Clause).

200. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2228, 2260 (2022).

201. *See generally* Ombelet & Robays, *supra* note 107, at 138, 140 (discussing insemination by artificial methods occurred in the 1700s, while IVF began in the 1900s).

inception.[202] Conversely, IVF is a relatively recent innovation, with the first successful procedure occurring in 1978.[203] Currently, IVF's use is widespread with 330,337 new ART cycles producing 83,946 babies in 2019.[204] Arguably, IVF, egg harvesting and sperm collection and freezing are a ubiquitous part of life in our Nation. Notable figures such as former First Lady Michelle Obama, businesswoman Khloe Kardashian, and model Chrissy Teigen all conceived via IVF.[205]

However, the same could be said about abortion. It is estimated that between 630,000 and 930,000 abortions took place in the United States in 2019.[206] Though, there are several important distinctions between abortion and AI and ART, specifically IVF. First, abortion has taken place for millennia, whereas IVF is less than a century old.[207] Second, at the time *Roe* was decided, thirty states banned abortions, whereas no state currently bans IVF.[208] Therefore, it is possible that the Court will hold IVF is "historically rooted in our Nation's history" given its legal status since its inception coupled with its pervasiveness.

2. The Claim of ART and AI as a Privacy Interest That Is a Part of Ordered Liberty

In keeping with the *Dobbs* decision, it appears one must bifurcate the different reproductive procedures available into those that create unborn entities and those that do not. The *Dobbs* decision stressed the distinction between access to contraceptives and to an abortion was the destruction of the unborn.[209] Therefore, procedures including ICI and IUI will fall into one category and IVF into another.

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202. *See id.* at 137–38 (explaining commercialization of sperm increased the frequency AI and ART procedures).

203. *Id.* at 140.

204. *2019 National ART Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/reports/2019/national-ART-summary.html [https://perma.cc/HC6V-HNXN].

205. Lewis, *supra* note 61, at 489.

206. Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (June 24, 2022), https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2/ [https://perma.cc/2VMQ-R5E7].

207. Ombelet & Robays, *supra* note 107, at 140.

208. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022).

209. *Id.* at 2258.

In looking at the first category, it appears that the ICI and IUI procedures using anonymous sperm donors for personal use are still likely protected under the fundamental right to privacy—as the actual procedure does not fertilize an egg, it only allows for potential fertilization. But, for how long will these rights be protected; it is hard to predict. Though the Court stated it was not overruling any other fundamental right other than abortion, it also did not rule out disregarding stare decisis and rejecting the right to privacy in future litigation.

As the name implies, the concept of ordered liberty balances the interests of society and the individual. Regarding AI, the Court might balance the interest of the potential mothers, the sperm donors, the potential life, and the greater society. One main concern involves the exploitation of the gamete donor who may feel enticed to donate gametes for economic reasons without understanding the long-term implications of donating genetic material. However, there are many remedies to protect potential donors without prohibiting all donations. For example, a psychological assessment and counseling could be required to ensure the donor is making an informed decision. Additionally, a waiting period between signing up to donate gametes and donating may provide reflection time and serve as an indicator of the seriousness of the donation.

A second concern pertains to the intentional creation of children destined for single parent households and its wider effect on society. The median income for single mother households in 2020 was $49,124, while marital households boasted a median income of $101,517.[210] And in 2022, 38% single mother households received food stamps.[211] Notably, Ms. Suleman was a single mother receiving public assistance when she conceived via IVF.[212] However, it would be difficult to justify such a state interest in prohibiting these procedures without also enacting legislation to curtail this behavior through traditional methods. Further, given the intimate setting in which these procedures take place, and the fact that potential life is being

210. U.S. CENSUS BUREAU, P60-273, INCOME AND POVERTY IN THE UNITED STATES: 2020 27 tbl.A-1 (2020), https://www.census.gov/library/publications/2021/demo/p60-273.html [https://perma.cc/4CZ3-3L5H].

211. *Single Mother Statistics*, SINGLE MOTHER GUIDE (Mar. 12, 2022), https://singlemotherguide.com/single-mother-statistics/ [https://perma.cc/59EV-VMAT].

212. Kim Yoshino & Jessica Garrison, *Taxpayers Have to Pay Millions for Octuplets' Care*, L.A. TIMES (Feb. 11, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-feb-11-me-octuplets11-story.html [https://perma.cc/NF9K-R895]; Surdin, *supra* note 43.

created as opposed to destroyed, legislatures will likely not limit these types of procedures.

Conversely, the State has a greater incentive to regulate these procedures when they start involving numerous individuals outside of the family unit. In terms of using ICI and IUI for surrogacy purposes, known as traditional surrogacy,[213] states have run the balancing test. Because the surrogate does not only carry the child, but also donates genetic material, she has a greater connection to the child, and many states prohibit this type of surrogacy.[214] The surrogate's rights trump the intended parents' rights.

However, in looking at the second category, ART, the *Dobbs* decision likely allows states to enact wide sweeping legislation. Previously, as the definition implies, abortion legislation only affected implanted embryos.[215] However, post-*Dobbs*, states may grant constitutional protections to the unborn at fertilization, regardless of implantation.[216] Louisiana has defined a viable fertilized human ovum created through IVF as being a juridical person since 1986.[217] And given that designation, Louisiana prohibits the destruction of preembryos, despite lacking a human host—the preembryo must remain cryogenically frozen or be implanted.[218] Now, that once questionable law will withstand constitutional challenges, and other states are free to enact similar regulations.

However, the future of ART may not be as dim as it first appears. Zeal for protecting unimplanted preembryos is not at its zenith. Louisiana State Representative McCormick introduced a bill to expand personhood status to all preembryos regardless of viability—the bill failed.[219] Additionally, the prolife group, Texas Right to Life, expressed concern over the excessive

213. *Traditional Surrogacy*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination . . . and gives birth to a child for another person.").

214. *What is Traditional Surrogacy?*, AM. SURROGACY, https://www.americansurrogacy.com/surrogacy/traditional-surrogacy [https://perma.cc/C9LX-XG3N].

215. *See Abortion*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An artificially induced termination of a pregnancy . . . .").

216. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2317–18 (2022) (Breyer, J., dissenting).

217. LA. STAT. ANN. § 9:129 (2022).

218. *Id.*

219. H.B. 813, 2022 Leg., Reg. Sess. (La. 2022); *HB 813 by Representative Danny McCormick*, LA. STATE LEGIS. (2022), https://legis.la.gov/legis/BillInfo.aspx?i=242732 [https://perma.cc/7YQL-KZ47].

number of embryos created during the IVF process, and the potential destruction of unused embryos.[220] However, this group has no plans to address those concerns during the 2023 Texas Legislative Session.[221] In all, it appears that certain groups are morally opposed to the destruction of preembryos;[222] however, nationwide, there appears to be a lack of momentum pushing for legislation banning the practice of IVF. Data from the Pew Research Center supports these assertions—only 11.7% of respondents believe IVF is morally wrong, as opposed to approximately 53.9% who found abortion morally wrong.[223]

Therefore, the *Dobbs* decision makes it possible for the government to determine when and if preembryos receive constitutional protections. As such, the government must balance the interest of the preembryo with those of the patient. The government may regulate the creation and usage of preembryos, though it will likely not prohibit ART.

3. Challenging Access Restrictions to ART Through Equal Protection Claims

The standard of judicial review depends on the classification of a claim. When statues are challenged based on gender classification, intermediate scrutiny is used.[224] For a statute to pass intermediate scrutiny, it must both promote a governmental interest and "be substantially related to the achievement of an important governmental objective."[225] The Court in *Dobbs* rejected the notion that abortion deserved intermediate scrutiny analysis as abortion does not implicate an equal protection claim by being sex-based.[226] The Court elaborated that just because the restriction applies

220. *See* Maria Mendez, *IVF Can Continue Under Texas Current Abortion Law Experts Say,* TEX. TRIB., (July 13, 2022), https://www.texastribune.org/2022/07/13/texas-ivf-treatments/ [https://perma.cc/7NT5-TQLW] ("Texas Right to Life has concerns about the 'destruction' of 'excessive' embryos. . . .").

221. *Id.*

222. *See* Mohamed, *supra* note 29, at 467, 474 (discussing religious groups viewing life as beginning at conception—Catholics and Evangelical Protestants oppose the destruction of preembryos).

223. *Id.* at 469 (commenting on Pew Research data from 2013). In 2022, the Pew Research Center's survey showed that 36% of Americans believe abortion "should be illegal in all or most cases." Diamant & Mohamed, *supra* note 206.

224. *Intermediate Scrutiny*, BLACK'S LAW DICTIONARY (11th ed. 2019).

225. *Id.*

226. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2228, 2246–47 (2022).

only to one gender, it does not automatically implicate sex-based classification.[227]

Though it is the female body that carries the preembryo, ART and AI implicate both genders, as both an egg and sperm cell are needed to create a baby. Theoretically, states that only allow for gestational surrogacy without the use of a donor egg could possibly see constitutional challenges over equal access from homosexual or single males. However, those restrictions would also limit a sterile female's options as well. Therefore, courts will likely not apply heightened judicial scrutiny to issues concerning ART and AI.

Another avenue for an equal protection challenge is by implicating a protected class, such as race. Where legislation applies to a suspect class, strict judicial scrutiny is applied.[228] Here, there must be a compelling governmental interest that is narrowly tailored to achieve that objective.[229] Clearly, legislation affecting ART is race neutral. The only way to receive such protection would be to create a suspect class of infertile individuals. For example, *Eisenstadt* found an equal protection violation when there was segregated access to contraceptives based on marital status.[230] It is conceivable that a court may attack statutes prohibiting the use of donor eggs in surrogacy. However, even if a court designated infertile people as a suspect class, it would not bar restricting ART. Though ART is utilized by infertile people, both fertile and infertile individuals would have equal access, or if the legislature banned it, denial to it. One "class" is not treated differently than another.

Therefore, the ability to procreate by means of ART and AI is likely a fundamental right established by due process and the right to privacy (though not likely equal protection)—this right may only be curtailed by satisfying strict scrutiny review.

III. UNINTENDED CONSEQUENCES STEMMING FROM THE *DOBBS* DECISION

Like the right to abortion, the federal government is likely to leave regulation of ART to the states—at least initially. This Comment will now

227. *Id.* at 2246–47.

228. *Strict Scrutiny*, BLACK'S LAW DICTIONARY (11th ed. 2019).

229. *Id.*

230. Eisenstadt v. Baird, 405 U.S. 438, 438, 447 (1972).

explore how the states have treated products of ART in litigation, as well as, discuss potential challenges that may require future federal intervention to solve.

A. *Divorce Litigation*

The treatment of IVF created preembryos in divorce highlights the disparate treatment of preembryos between the states that is also seen in abortion regulation.

One of the most extensively litigated cases occurred between Sofia Vergara and Nicholas Loeb.[231] After their separation, Loeb wished to use the preembryos he created with Vergara from when the two were romantically involved.[232] Initially Loeb sued for custody in California, where the preembryos were created and stored, but he later dismissed the suit.[233] Before dismissing it, he created a trust in Louisiana for two viable embryos.[234] Louisiana classifies the products of IVF procedures as human embryos, and affords viable embryo's specific rights.[235] There, the embryos are not considered property and as such the gamete doners owe the embryo "a high duty of care and prudent administration."[236] And, disputes regarding the embryo should be resolved in favor of the "best interest of the [IVF] ovum."[237]

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231. *See* Hum. Embryo #4 HB-A v. Vergara, No. CV 17-1498, 2017 WL 3686569, at 3 (E.D. La. Aug. 25, 2017) (creating a Louisiana trust that allowed the embryos created through IVF standing to sue); Loeb v. Vergara, 326 F. Supp. 3d 295, 300, 307 (E.D. La. 2018) (remanding case seeking custody of embryos through the Uniform Child Custody and Enforcement Act back to the state); Loeb v. Vergara, 2020-0261 (La. App. 4th Cir. 1/27/21); 313 So. 3d 346, (holding the Uniform Child Custody Jurisdiction and Enforcement Act did not apply to IVF created embryos), *writ denied*, 2021-00314 (La. 4/20/21); 313 So. 3d 1257; Vergara v. Loeb, No. B313234, 2022 WL 4393915 (Cal. Ct. App. Sept. 22, 2022) (unpublished decision) (awarding custody of the preembryo to the plaintiff and declaring a pre-implantation agreement valid despite failing to meet statutory requirements).

232. *Hum. Embryo #4 HB-A*, 2017 WL 3686569, at *2.

233. *Id.* at *3.

234. *Id.*

235. *See* LA. STAT. ANN. § 9:121 (2022) (defining the product of IVF as a human embryo when, "composed of one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child"); *id.* § 9:125 (granting the IVF embryo entity status); *id.* § 9:123 (declaring an IVF human ovum to be a juridical person); *id.* § 9:124 (granting the embryo standing to sue and be sued).

236. *Id.* § 9:130 (stating gamete donners owe their viable IVF created embryos a "high duty of care and prudent administration" that can be renounced in favor of adoption).

237. *Id.* § 9:131.

Loeb strategically selected Louisiana as the state in which to create the trust for his embryos and brought suit against Vergara in that forum.[238] Vergara removed the case to federal court and also filed a motion to dismiss.[239] The court dismissed the case for lack of personal jurisdiction over Vergara.[240] Because the court lacked personal jurisdiction, the court did not need to address the subject matter jurisdiction; however, it acknowledged the complexity of the subject matter jurisdiction: (1) assessment of the preembryo's value "to determine the amount in controversy;" (2) determination if Louisiana law extends to embryos not created or stored within that state; and (3) ruling as to the preemption of federal law over Louisiana law granting rights to IVF embryos.[241]

However, litigation continued. Loeb became a resident of Louisiana and filed against Vergara for custody of the embryos using the Uniform Child Custody Jurisdiction and Enforcement Act.[242] Vergara removed the case to federal court.[243] There Loeb asserted that state court was the proper venue to hear custody disputes.[244] Further, Louisiana was the proper venue over California, where the embryos were created and stored, because California viewed the embryos as property and would not assume jurisdiction over them.[245] The court agreed and remanded the case noting that with the amended complaint, no federal question existed.[246] That case was eventually stayed pending the outcome of the California suit filed by Vergara.[247]

Prior to Loeb filing in Louisiana, Vergara filed suit in California, which was appealed.[248] The ordeal between Vergara and Loeb finally concluded with an order that enjoined Loeb from unilaterally using the embryos.[249]

238. *Hum. Embryo #4 HB-A*, No. CV 17-1498, 2017 WL 3686569 at *3.

239. *Id.*

240. *Id.* at *7.

241. *Id.* at *4.

242. Loeb v. Vergara, 326 F. Supp. 3d 295, 300 (E.D. La. 2018).

243. *Id.*

244. *Id.* at 301.

245. *Id.* at 301–02.

246. *Id.* at 306–07.

247. Loeb v. Vergara, 2020-0261 p. 37 (La. App. 4 Cir. 1/27/21); 313 So. 3d 346, 371–72, *writ denied,* 2021-00314 (La. 4/20/21); 313 So. 3d 1257.

248. Vergara v. Loeb, No. B286252, 2019 WL 337817, at *1 (Cal. Ct. App. Jan. 28, 2019) (affirming the breach of contract while reversing the denial of the special motion to strike the malicious prosecution claim).

249. Vergara v. Loeb, No. B313234, 2022 WL 4393915, at *14 (Cal. Ct. App. Sept. 22, 2022) (unpublished decision).

These cases highlight the numerous challenges experienced by litigants when different states define and treat preembryos differently.

Here, California treated the preembryos as property and decided the case based on contract law, while Louisiana treated the embryos as persons.[250] However, some courts apply a middle ground between treating preembryos as property and giving them personhood status.[251] For example, in *Davis v. Davis*,[252] the court determined that absent an agreement between the parties for the disposition of the embryos, the court should employ a balancing test.[253] In employing such a test, the court should apply the greatest weight to party whose interest is to avoid embryo use—except when one party lacks a viable alternative to achieve procreation.[254]

Pre-*Dobbs* decision, there appeared to be three major approaches to addressing the disposition of preembryos at divorce: (1) contract theory,[255] (2) mutual contemporaneous consent theory,[256] and (3) balancing theory.[257] Post-*Dobbs*, the question then becomes: will more states emulate Louisiana's approach and grant personhood status to the in vitro embryo? Arizona

250. Hum. Embryo #4 HB-A v. Vergara, No. CV 17-1498, 2017 WL 3686569, at *3 (E.D. La. Aug. 25, 2017); *Loeb*, 326 F. Supp. 3d at 299, 302.

251. *See* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992), *on reh'g in part,* No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992) (concluding preembryos "occupy an interim category that entitles them to special respect because of their potential for human life"); *In re* Marriage of Katsap, No. 2-21-0706, 2022 WL 3038429, at **13, 16 (Ill. App. Ct. Aug. 2, 2022) (using the balancing approach to award the embryos to the ex-wife).

252. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *on reh'g in part,* No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

253. *Id.*

254. *Id.*

255. A court will enforce unambiguous agreements between the parties. *See* Roman v. Roman, 193 S.W.3d 40, 54–55 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (classifying frozen embryos as marital property and enforcing an agreement to destroy the embryos in the event of the couple's divorce); Kass v. Kass, 663 N.Y.S.2d 581, 590 (1997), *aff'd*, 91 N.Y.2d 554 (1998) (utilizing the contract approach to determine the disposition of embryos).

256. The mutual consent approach requires both parties to reach a mutual decision pertaining to the embryos before altering the status quo—often regardless of any prior agreement between the parties. *See* McQueen v. Gadberry, 507 S.W.3d 127, 158 (Mo. Ct. App. 2016) (holding preembryos were "marital property of a *special character*" whose status quo could only be altered by mutual consent of the parents) (emphasis in original); *In re* Marriage of Witten, 672 N.W.2d 768, 772 (Iowa 2003) (holding the cryogenically frozen embryos could not be used or destroyed "without the consent of the other party").

257. *In re* Marriage of Katsap, No. 2-21-0706, 2022 WL 3038429, at 13 (Ill. App. Ct. Aug. 2, 2022).

enacted a personhood statute pre-*Dobbs*,[258] however, a post-*Dobbs* challenge resulted in injunctive relief barring authorities presently and retroactively from enforcing the law.[259] Though the statute explicitly states no cause of action exists against "a person who performs [IVF] procedures," it is unclear if a presumed parent who directs the preembryos to be thawed may be criminally indicted.

The *Dobbs'* decision leaves it to the states to fashion abortion laws.[260] Impliedly, this conclusion includes the ability to define when an entity gains constitutional protections. As such, it is predictable for different states to fashion differing abortion laws, as well as, ART regulations. However, this unveils another issue: to what extent may one state's laws affect access to another state's laws?

The *Vergara* case peeked at this issue without reaching a conclusion to that which implicated it. Feasibly, litigants may gain control over embryos through the Uniform Child Custody Jurisdiction and Enforcement Act if a state subscribes to the personhood theory.[261] That statute defines "child" as any "person under the age of eighteen."[262] This definition sets a ceiling for the age, but no floor. States recognizing fetal personhood may apply this statute from conception. A state may gain jurisdiction if "no other State would have jurisdiction," and "it is in the best interest of the child."[263] If the state in which the embryo is frozen lacks a personhood statute or declines jurisdiction, a foreign state with personhood statute, in some cases, may assert jurisdictional authority over the embryos.

This embryo appropriation brings about numerous ethical and constitutional questions pertaining to the control over one's genetic material and the parental ability to decide what is in the best interest of the embryo. Without federal intervention, there is uncertainty over the ownership and use of unused preembryos. This uncertainty could lead to a chilling effect which would pressure the federal government to either (1) enact federal

258. ARIZ. REV. STAT. ANN. § 1-219 (2022) (granting unborn children personhood status from the moment of fertilization; however, stating no cause of action exists against those performing IVF procedures).

259. Isaacson v. Brnovich, 610 F.Supp.3d 1243, 1257 (D. Ariz. 2022) (enjoining the enforcement of a fetal personhood statute until the issue of vagueness is resolved).

260. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (returning the power to legislate abortion back to the states).

261. 28 U.S.C. § 1738A.

262. *Id.* § 1738A(b)(1).

263. *Id.* § 1738A(c)(1); (c)(2)(B).

ART legislation to preempt contrary state legislation or (2) enact a uniform embryo custody jurisdiction act.

B. *Restricting the Travel Rights of Cryogenically Frozen Embryos*

Conversely, a state may enact legislation to prevent embryos from leaving the state for the purpose of destruction. Texas enacted legislation creating a civil cause of action against those who aid and abet women in procuring an abortion,[264] as well as against physicians who perform an abortion once a fetal heartbeat is detected.[265] Currently, this law likely does not extend to those who help or counsel a woman in procuring an abortion across state lines, nor does it apply to IVF created embryos.[266] However, legislators could redefine physician to include physicians licensed anywhere. And admittedly, the breadth with which "aiding and abetting" is interpreted makes a difference. With a broad reading of a redefined statute, any Texan who helps any abortion provider connect with a pregnant female to abort a fetus could face a civil action suit (though this change would likely be successfully challenged in court). This interpretation is important. Conceivably, a fetal personhood state may enact this type of legislation to coerce citizens from moving preembryos out of state for the purpose of destruction.[267]

As per the efficacy of the Texas law, several suits were brought against a physician for performing an abortion.[268] Only one suit made it before a

264. TEX. HEALTH & SAFETY CODE ANN. § 171.208.

265. *Id.* § 171.204.

266. *Id.* § 171.201 (defining "physician" as only including those "licensed to practice medicine in [Texas]").

267. However, state legislation that restricts the right on an individual to travel to and partake in the legal activity of another state would likely be successfully challenged in court for violating the Dormant Commerce Clause, a state's sovereignty, and the right to travel. *See* Louis Jacobson, *Can States Punish Women for Traveling Out of State to Get an Abortion?*, POYNTER (July 6, 2022), https://www.poynter.org/fact-checking/2022/can-states-punish-women-for-traveling-out-of-state-to-get-an-abortion/#:~:text=%E2%80%9CFor%20example%2C%20may%20a%20state,constitutional%20right%20to%20interstate%20travel.%E2%80%9D [https://perma.cc/MH5N-3ZYB] (discussing the viability of a state banning a woman from seeking an abortion in another state). Though the enacting state could counter that it is harmed by depriving it of a potential future citizen (an extremely tenuous and speculative argument) and the law affects people who are subject to the laws of the enacting state.

268. Eleanor Klibanoff, *Texas State Court Throws Out Lawsuit Against Doctor Who Violated Abortion Law*, TEX. TRIB. (Dec. 8, 2022), https://www.texastribune.org/2022/12/08/texas-abortion-provider-lawsuit/ [https://perma.cc/9J4M-SRWR].

court; it was thrown out for lack of standing.[269] There, Judge Haas, of the 285th District Court, noted that the plaintiff was neither injured nor had a connection to the case.[270] Though this ruling does not overturn the Texas Heartbeat Act, it does appear to limit who has standing to bring a suit.[271] In terms of procreation, such a law would likely not infringe on that fundamental right. Here, a person is allowed to create the unborn children—the person is just not allowed to destroy the preembryos created. The law could create a slight chilling effect—potential users of IVF may avoid the procedure lacking funding to store unused embryos indefinitely and not desiring their adoption. Additionally, IVF users may experience greater costs from needing to undergo additional procedures if the patient selects to limit the number of embryos created to avoid storing unused embryos. The law may also encourage IVF users to travel out of state to undergo the procedure with fewer regulations. Conversely, such a law would infringe on the embryo's fundamental right to travel.[272]

The *Dobbs* decision made clear there is no fundamental right to an abortion.[273] It noted that abortion resulted in the destruction of potential life.[274] Similarly, preembryos created through ART also have the potential for life. As such, rules pertaining to and classification of preembryos should be left to the states and elected representatives. And differing rules among the states may result in a need to fashion a law similar to Texas'.

IV. A FEDERAL PERSPECTIVE

Obama's Executive Order 13505 removed the Bush-era restrictions that limited researchers to working with "stem cell lines already in existence."[275] This order allows for the donation of unused preembryos created through IVF for use in research.[276] The order also "expand[ed] federal funding of

269. *Id.*

270. *Id.*

271. *See generally id.* (dismissing the suit for lack of personal injury).

272. *See* United States v. Guest, 383 U.S. 745, 757–58 (1966) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.").

273. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (returning the power to legislate abortion back to the states).

274. *Id.* at 2258, 2261 (differentiating abortion from other rights based in privacy due to the potential life involved).

275. Doe v. Obama, 631 F.3d 157, 159 (4th Cir. 2011).

276. *See id.* (describing the relationship between human embryonic stem cell research and unused IVF embryos).

[human embryonic stem cell] research."[277] Admittedly, with every new president, there is a possibility of an issuance of a new executive order supplanting the previous one.[278] However, at present, the federal government supports destruction of preembryos.

Contemporaneously, legislative traction for regulating ART may be increasing. In 2017, Congressmen Mooney of West Virginia and Hice of Georgia, and Senator Paul of Kentucky introduced bills declaring life begins at conception—none of the bills were enacted.[279] In 2021, the Life at Conception Act started with 57 co-sponsors and ended with 150—1 Democrat and 149 Republicans.[280] In 2021 the Life at Conception Act ended with 166 co-sponsors, all Republicans.[281] Likewise, in 2021, Senator Paul introduced the Life at Conception Act to the Senate.[282] Significantly, Paul's bill explicitly expresses it does not prohibit IVF.[283] The number of co-sponsors to his bill also increased from 11 in 2017 to 18 in 2021.[284]

This increasing number of co-sponsors may indicate an increasing support for defining life as beginning at conception. Depending on the definition of conception, the passage of any similar bill may have an immediate impact on ART procedures. If conception is defined as the point of implantation, then the law would likely not affect ART. However, if

277. *Id.*

278. *See What is an Executive Order?*, ABA (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/ [https://perma.cc/R438-NLNU] ("Only a sitting U.S. President may overturn an existing executive order . . . .").

279. Life at Conception Act, H.R. 681, 115th Cong. § 3 (2017); Sanctity of Human Life Act, H.R. 586, 115th Cong. § 2 (2017); Life at Conception Act of 2017, S. 231, 115th Cong. § 3 (2017).

280. Life at Conception Act, H.R. 681, 115th Cong. § 3 (2017); *Cosponsors: H.R.681—115th Congress (2017-2018)*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/681/cosponsors [https://perma.cc/X394-WBN6].

281. Life at Conception Act, H.R. 1011, 117th Cong. (2021); *Cosponsors: H.R.1011—117th Congress (2020-2021)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/1011/cosponsors [https://perma.cc/TMQ6-V7P6].

282. Life at Conception Act of 2021, S. 99, 117th Cong. (2021).

283. *Id.* § 2.

284. Life at Conception Act of 2017, S. 231, 115th Cong. § 3; *Cosponsors: S.231—115th Congress (2017-2018)*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/231/cosponsors [https://perma.cc/ANB8-B872]; Life at Conception Act of 2021, S. 99, 117th Cong.; *Cosponsors: S.99—117th Congress (2021-2022)*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/99/cosponsors [https://perma.cc/9JBQ-MXHH].

conception is defined as fertilization, the legislation would greatly impact ART procedures (though not likely prohibit them). The preembryo created in the petri dish would have constitutional protections from the moment the ovum is fertilized. This new definition would impact the ability to discard preembryos, regardless of likely viability. And additional legislation would likely be needed to: (1) define how long a cryogenically frozen preembryo is considered a person; (2) require the creation of a trust fund to support the preembryo's storage fees; and (3) limit the number of preembryos created per IVF cycle due to lack of storage space.

Despite these possible restrictions on ART, such legislation would likely pass constitutional scrutiny. Such a law does not prohibit alternative procreation, it simply regulates it. Opponents may argue that the regulations impose a prohibitive burden on ART. For example, fees for indefinite storage are too high.[285] Further, opponents may argue the state's interest in protecting the unborn is not legitimate. Genetic testing may indicate a preembryo has severe abnormalities that would preclude it from being viable if implanted. Additionally, the majority of embryos "die" within two months of conception.[286] Therefore, at most, such a law would likely only constitutionally apply to preembryos appropriate for implantation.

V. FINAL THOUGHTS AND PREDICTIONS

Procreation has long been declared a fundamental right—human existence cannot continue without it. ART and AI help facilitate the creation of wanted children. For many, these procedures are the only way to conceive. They allow individuals the ability to overcome anatomical and

285. Assuming a storage fee of $500 per annum, it would cost fifty thousand dollars per cycle to keep the preembryos frozen for one hundred years. Marissa Conrad, *How Much Does IVF Cost?*, FORBESHEALTH (Aug. 4, 2023, 7:04 AM), https://www.forbes.com/health/family/how-much-does-ivf-cost/#:~:text=Embryo%20storage%3A%20%24350%20to%20%24600,short%20for%20preimplantation%20genetic%20testing [https://perma.cc/95VL-YRSY] (stating preembryo storage fees range from $350 to $600 per annum).

286. Thomas Douglas & Julian Savulescu, *Destroying Unwanted Embryos in Research*, 10 EMBRYO REPS. 307, 308 (2009) ("More than 50% of embryos die within eight weeks of conception . . . .") (citing HENRI LERIDON, HUMAN FERTILITY: THE BASIC COMPONENTS 500 (Judith F. Helzner trans. (1978)); Charles E. Boklage, *Survival Probability of Human Conceptions from Fertilization to Term*, 35 INT. J. FERTILITY 75 (1990)).

physiological impediments to start or expand a family.[287] However, these procedures also raise ethical, moral, and religious concerns.

Historically, procreation has been protected as a privacy interest covered by the penumbras of the Constitution and as a liberty and privacy interest protected by due process.[288] However, the recent *Dobbs* decision held these unenumerated substantive rights must be "deeply rooted in the Nation's history and tradition," as well as "implicit in the concept of ordered liberty."[289] Procreation adheres to that construct. AI and ART's essence is to facilitate procreation. Falling under the umbrella of procreation, ART and AI are fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. Therefore, governmental restriction on ART and AI must pass strict scrutiny.

Per AI, the government's interest extends to protecting gamete donors and receivers. Here, the government has a strong interest in regulating to prevent the spread of disease and the exploitation of donors. Regulations pertaining to medical testing, genetic testing, donor compensation, donor identification, and donor rights would likely pass a constitutional challenge, assuming the interest is narrowly tailored to meet the government's objective. However, regulation to the point of prohibition is likely unconstitutional.

The above governmental interests also apply to ART, but here, the government has further concern in protecting the unborn preembryo. Initially, regulating ART will likely be left to the states to balance the interests of the preembryo and the prospective parent. However, interstate conflicts will likely necessitate federal guidance. Despite needed regulation, a complete prohibition of ART procedures is likely unconstitutional.

Therefore, access to ART and AI is likely a fundamental right.

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287. *See generally Infertility FAQs*, *supra* note 3, https://www.cdc.gov/reproductivehealth/infertility/index.htm [https://perma.cc/8HL3-7FG5] (explaining ART increases the likelihood that the sperm will fertilize the egg).

288. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) ("*Roe* held that the abortion right is part of a right to privacy that springs from the First, Fourth, Fifth, Ninth and Fourteenth Amendments." (citing Roe v. Wade, 410 U.S. 113, 152–53 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), and *holding modified by* Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833 (1992))).

289. *Id.* at 2242 (citing Washington v. Glucksburg, 521 U.S. 702, 721 (1997)).