HOW ART EXCEPTIONALISM EXPOSES THE PRETENSE OF FETAL PERSONHOOD

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Assisted reproductive technology (ART), which encompasses fertility treatments in which eggs or embryos are handled, is a frontier of family law and reproductive justice, and developments in abortion jurisprudence may shape its borders. Abortion restrictions and other laws regulating pregnant people are often framed with rhetoric emphasizing fetal personhood or fetal rights. Now that abortion is legally unshielded from criminalization, the consequences of Dobbs *will reach, as did fetal-personhood laws before, even those who are not seeking abortions. As commentators have observed, this collateral damage threatens to touch potential parents seeking to use ART. Yet so far, the most abortion-restrictive states tend to carve out protections for ART from their laws regarding fetuses. This Note argues that states touting fetal personhood protect ART users—while persecuting people who partake in a multitude of other types of conduct thought to harm fetuses—because ART furthers the creation of white, affluent families that suit these states' normative values. Fetal personhood, then, is a tool for social control. Advocates of reproductive freedom should surface this truth in efforts to stave off the proliferation of fetal-personhood laws at the state and federal levels.*

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Introduction

Assisted reproductive technology (ART) is a frontier of family law and reproductive justice, and developments in abortion jurisprudence may shape its borders. ART encompasses all fertility treatments in which eggs or embryos are handled.[1] The most prominent form is in vitro fertilization (IVF), which involves the extraction and fertilization of eggs followed by the transfer of the resulting embryos into the uterus.[2] According to the Centers for Disease Control and Prevention (CDC), approximately two percent of all infants born in the United States each year are conceived using ART.[3] Despite the increasing use of ART, laws covering these technologies are still nascent.[4] These methods for creating families are integral to the objective of ensuring a full range of reproductive freedoms for all.[5] They also raise fraught questions about bodily autonomy, property, parentage, and equity.[6]

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1 *ART Success Rates*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/art/artdata/index.html [https://perma.cc/EN8S-FBCH].

2 *Id.*

3 *Id.*

4 The infertility industry is minimally regulated by the federal government, and state legislatures have been slow to make laws on these issues. *See* Erin Heidt-Forsythe, Nicole Kalaf-Hughes & Heather Silber Mohamed, *Roe Is Gone. How Will State Abortion Restrictions Affect IVF and More?*, Wash. Post (June 25, 2022), https://www.washingtonpost.com/politics/2022/06/25/dodds-roe-ivf-infertility-embryos-egg-donation [https://perma.cc/GE48-BD6N] (describing state legislatures as "much slower" to regulate ART and infertility care, compared to abortion).

5 Greer Gaddie, Note, *The Personhood Movement's Effect on Assisted Reproductive Technology: Balancing Interests Under a Presumption of Embryonic Personhood*, 96 Tex. L. Rev. 1293, 1310 (2018) ("Many commentators have argued that, under a broad umbrella right to procreate, noncoital reproduction should be protected just as fiercely as coital reproduction. . . . The right to procreate is grounded in autonomy and freedom of personal choice.").

6 For example, courts have dealt with whether to enforce surrogacy contracts, *see, e.g.*, *In re* Baby M, 537 A.2d 1227, 1240 (N.J. 1988) (concluding that the surrogacy contract at issue was invalid and unenforceable on statutory and public policy grounds); P.M. v. T.B., 907 N.W.2d 522, 530 (Iowa 2018) (holding that the district court properly enforced a gestational surrogacy contract, thus "terminating the presumptive parental rights of the surrogate mother and her husband"), property rights over frozen embryos, *see, e.g.*, McQueen v. Gadberry, 507 S.W.3d 127, 132–33 (Mo. Ct. App. 2016) (affirming the trial court's judgment in a marriage

ART collides with laws that protect putative fetal rights, such as abortion laws, in several ways. IVF involves the fertilization and destruction of multiple embryos per pregnancy,[7] including implanted embryos,[8] and pregnancies involving ART can increase the risk of certain conditions—such as ectopic pregnancy[9]—that can necessitate pregnancy termination. Foreseeably, then, laws restricting abortion would encroach on the availability of these technologies.[10] In its 2021 Term, the Supreme Court decided *Dobbs v. Jackson Women's Health*

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dissolution finding that frozen embryos were "marital property of a *special character*," jointly belonging to both parties), and parentage of children born via ART, *see, e.g.*, Raymond T. v. Samantha G., 74 N.Y.S.3d 730, 731, 735 (N.Y. Fam. Ct. 2018) (finding that the spouse of the biological father in a tri-parent arrangement along with the biological mother had standing to seek custody and visitation with a child conceived through artificial insemination but not deciding the question of parentage). Other issues raised by the prevalence of ART include "the potential exploitation of women, the increased risk of inequities and health disparities, and the socio-cultural implications of genetic technologies." Nat'l Gender, Eugenics & Biotech. Task Force & CWPE Staff, Comm. on Women, Population & the Env't, *Assisted Reproductive Technologies and Reproductive Justice*, *in* Reproductive Justice Briefing Book: A Primer on Reproductive Justice and Social Change 30 (on file with author).

[7] *See* Giulia Carbonaro, Roe v. Wade *Being Overturned Could See IVF Banned in at Least 30 States*, Newsweek (June 14, 2022, 9:16 AM), https://www.newsweek.com/roe-v-wade-being-overturned-ivf-banned-30-states-1715576 [https://perma.cc/MZM4-N88X] (noting that "common practice" in IVF involves the destruction of multiple fertilized eggs); Pregnancy Justice, When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond 25 (2022), https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-personhood-with-appendix-UPDATED-1.pdf [https://perma.cc/SV8S-9K22].

[8] *See* Lisa C. Ikemoto, Opinion, *How IVF Could Be Derailed by Abortion Restrictions*, L.A. Times (July 7, 2022, 3:01 AM), https://www.latimes.com/opinion/story/2022-07-07/ivf-roe-vs-wade-abortion [https://perma.cc/G7MX-NBSP] ("The practice most obviously comparable to abortion, and so potentially a target for IVF restrictions, is selective reduction . . . [which] is used to eliminate some embryos to continue the pregnancy with fewer fetuses.").

[9] *See* Bassem Refaat, Elizabeth Dalton & William L. Ledger, *Ectopic Pregnancy Secondary to In Vitro Fertilisation-Embryo Transfer: Pathogenic Mechanisms and Management Strategies*, 13 Reprod. Biology & Endocrinology, no. 30, 2015, at 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4403912/pdf/12958_2015_Article_25.pdf [https://perma.cc/TBZ4-ZA8L] (noting that the prevalence of ectopic pregnancy after ART ranges from 2.1–8.6%, compared to 1–2% of natural conceptions). Ectopic pregnancy is a life-threatening condition where a fertilized egg grows outside of the uterus—usually in a fallopian tube. *Ectopic Pregnancy*, Am. Coll. of Obstetricians & Gynecologists (July 2022), https://www.acog.org/womens-health/faqs/ectopic-pregnancy [https://perma.cc/AJ45-XJYJ] (stating that over ninety percent of ectopic pregnancies occur in a fallopian tube, which can rupture with growth, and that ectopic pregnancies require medicated termination or surgical removal).

[10] *See* Katharine O'Connell White, Opinion, *POV: Overturning* Roe v. Wade *Will Worsen Health Inequities in All Reproductive Care*, B.U. Today (June 24, 2022), https://www.bu.edu/articles/2022/overturning-roe-v-wade-will-worsen-health-inequities [https://perma.cc/U8E2-BRJW] (noting that abortion restrictions will affect IVF, making it less accessible, while it is already less accessible to Black women than white women).

Organization,[11] overturning *Roe v. Wade*[12] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[13] to revoke the fundamental right to abortion.[14] The dissent written by Justices Breyer, Sotomayor, and Kagan noted, "[T]he Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about . . . [i]n vitro fertilization?"[15]

The dissenters' question is prescient: Given the solicitude of the majority's opinion toward fetal personhood, *Dobbs* has set the United States on a path where the logical end would equate IVF with homicide in at least some cases.[16] "Fetal personhood" refers to the idea that a fetus is a legal person with its own rights—an idea that has gained traction in conservative circles and has been recognized in a growing number of states.[17] Even during the period between *Roe* and *Dobbs*, when the right to abortion stood, lawmakers weaponized fetal personhood to control pregnant bodies.[18] Fetal-personhood rhetoric is a driving force behind much of the anti-abortion agenda.[19] Politicians have already introduced constitutional amendments granting fetal personhood on over 300 occasions in the U.S. Congress;[20] such a constitutional amendment may

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11 142 S. Ct. 2228 (2022).

12 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

13 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

14 *Dobbs*, 142 S. Ct. at 2242 ("We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . .").

15 *Id.* at 2337 (Breyer, Sotomayor & Kagan, JJ., dissenting).

16 *See* Pregnancy Justice, *supra* note 7, at 25–26 (explaining that despite statutory exemptions for ART and eggs pre-implantation, physicians have expressed doubts as to the legality of IVF in practice).

17 As of August 2022, several states including Alabama, Arizona, Georgia, Kansas, and Missouri had fetal-personhood laws, with Georgia's seeming the most aggressive. Jeff Amy, *Explainer: What's the Role of Personhood in Abortion Debate?*, Associated Press (Jul. 30, 2022, 1:51 PM), https://apnews.com/article/abortion-us-supreme-court-health-government-and-politics-constitutions-93c27f3132ecc78e913120fe4d6c0977 [https://perma.cc/W4JX-MMQN].

18 *See infra* Section I.B.

19 *See* Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement After* Planned Parenthood v. Casey, 22 Feminist Formations, no. 2, Summer 2010, at 101, 102 (noting that pro-life activists believe that abortion is equivalent to killing a human being, while pro-choice activists believe a fetus is not a person and thus not entitled to legal protection under the Fourteenth Amendment).

20 *See* Pooja Salhotra, *Does a Fetus Count in the Carpool Lane? Texas' Abortion Law Creates New Questions About Legal Personhood*, Tex. Trib. (Sept. 13, 2022, 5:00 AM), https://www.texastribune.org/2022/09/13/texas-personhood-laws-abortion-law [https://perma.cc/2P6S-SVDY]; *see also, e.g.*, Life at Conception Act of 2021, S. 99, 117th Cong. (2021) (implementing equal protection under the Fourteenth Amendment for each "preborn human person").

ultimately be unnecessary if the U.S. Supreme Court divines a fetal right to life from the Fifth and Fourteenth Amendments and lays the foundation for a national ban on abortion.[21]

While the trends and tensions discussed in this Note would exist between ART and any variety of abortion restriction, this Note focuses on fetal personhood. As the most extreme form of the anti-abortion argument, it most clearly conflicts with ART. It also provides a foundation for anti-abortion lawmakers to ban abortion federally. Until *Dobbs*, *Roe* and *Casey* required lawmakers to counterbalance a pregnant person's health, safety, and dignity with the fetus's.[22] With fetal personhood on the table, carrier and fetus may be considered equipoised under the law, increasing the protection of the latter at the expense of the former. Many anti-abortion states claim to be driven by a belief in fetal personhood and a "state interest" in the fetus[23] but simultaneously protect the use of ART.[24] After the leak of the Supreme Court's *Dobbs* opinion in May 2022, Louisiana moved to pass a new abortion bill, which originally would have criminalized IVF.[25] Against the protests of bill sponsor Representative Danny McCormick, the Louisiana House of Representatives scrambled for a week to rewrite the bill without the language that would endanger IVF.[26] The incompatibility between fetal personhood and protection of IVF or ART pokes a hole in the anti-abortion argument. Why, if the goal is to protect the "unborn human being,"[27] would the State exempt ART patients from liability?

This Note argues that the preservation of ART in abortion-restrictive states is driven by policy preferences that are linked to a nefarious racialized history and that are fundamentally incompatible

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21 Pregnancy Justice, *supra* note 7, at 1 ("This fringe theory now has the ear of the U.S. Supreme Court, with Justice Alito's majority opinion in *Dobbs* laying breadcrumbs for a fetal right to life under the Due Process Clause of the Fifth and Fourteenth Amendments.").

22 *See* Roe v. Wade, 410 U.S. 113, 153–54 (1973) (holding that the fundamental constitutional right to privacy encompasses a right to obtain an abortion but that this right is to be balanced against certain state interests), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846, 851–52 (1992) (holding that women have a right to choose to have an abortion before viability without undue interference from the State but also recognizing certain legitimate state interests in the pregnancy), *overruled by Dobbs*, 142 S. Ct. 2228.

23 *See* Halva-Neubauer & Zeigler, *supra* note 19, at 112–17 (describing how anti-abortion legislative efforts since *Casey* have relied on fetal personhood).

24 *See infra* Section II.C.

25 *See* Julie O'Donoghue, *Louisiana House Guts Abortion Bill that Could Have Sent Pregnant Patients to Prison*, La. Illuminator (May 12, 2022, 8:37 PM), https://lailluminator.com/2022/05/12/louisiana-house-guts-abortion-bill-that-would-send-pregnant-patients-to-prison [https://perma.cc/NA9P-2VNC].

26 *See id.*

27 *Dobbs*, 142 S. Ct. at 2243 (quoting Miss. Code Ann. § 41-41-191 (2018), at issue in the case, which refers to the "unborn human being").

with a sincere fetal-personhood framework. Other commentators have observed that the possible implications for ART are good reasons not to pass fetal-personhood laws.[28] This Note takes a step further to say that anti-abortion states' inertia on ART in response to this friction exposes the improper incentives behind the State's control over pregnancy and that reproductive justice supporters should leverage that inertia to decelerate fetal personhood. Part I reviews the evolution of the fetal-personhood movement and how *Dobbs* validated it. Part II explores the implications of fetal personhood for ART and reveals how abortion-restrictive states have protected these family-building methods so far. Part III considers how this dissonance calls into question the firmness of the anti-abortionists' purported interest in fetal well-being, explains that the discrepancy reflects enduring patterns of racial and reproductive control, and recommends that political participants on both sides of the abortion debate contain the expansion of fetal-personhood regimes because of these conclusions.

I
Fetal Personhood Then and Now

Many of the most extreme forms of abortion restrictions are framed as being in the best interests of the fetus—a notion steeped in fetal personhood. For example, complete abortion bans, which prohibit the termination of any pregnancy except to save the life of the "mother" (in the language of those statutes),[29] are driven at least nominally by a protective impulse toward the fetus that apparently outweighs the well-being of the pregnant person in almost all cases.[30] Fetal personhood sustains not only strict abortion regulation but also regressive trends in many other areas of the law, from criminal homicide and assault to insurance.[31] Fetal personhood contends that a fetus is a living person and therefore has rights like a person who has been born.[32]

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[28] *See generally* Pregnancy Justice, *supra* note 7, at 26 (observing that ART's political popularity along with concerns about negative impacts to ART access have contributed to electoral defeats of personhood measures); Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 Vand. L. Rev. 1649, 1699–701 (2022) (pointing out the inherent practical contradictions presented by ART in legally defining personhood at conception).

[29] *See infra* notes 138–49.

[30] As discussed *infra* note 43 and accompanying text, *Roe* and *Casey* permitted states to regulate abortion at certain stages of pregnancy for the sake of protecting the fetus, essentially allowing the purported well-being of the fetus to outweigh the needs of the pregnant person.

[31] *See* Pregnancy Justice, *supra* note 7, at 3–36 (providing an overview of the permeation of fetal personhood through state laws).

[32] *Id.* at 1 (contextualizing fetal personhood as "granting fertilized eggs constitutional rights" (quoting Lynn M. Paltrow, *Constitutional Rights for the "Unborn" Would Force*

As a logical consequence, an abortion that takes place even as early as conception is equivalent to premeditated murder. As discussed in this Part, proponents of fetal personhood have been vocal for decades, at least since *Roe* was decided, but, until *Dobbs*, constitutional rights and popular politics impeded them. *Dobbs* may be a dog whistle (or a megaphone, depending on how the majority opinion is read) beckoning fetal personhood as the next line of attack on reproductive justice.

Fetal rights do more than preclude pregnant people from choosing to terminate their pregnancies safely.[33] Infusing our nation's laws with fetal personhood criminalizes large swaths of the population, as this Part will discuss. Now that *Roe* no longer hinders the reach of fetal-protective laws, these laws will lead to the prosecution of even those who do successfully bring pregnancies to term, for behavior thought to endanger their "unborn children." Those who experience pregnancy outcomes other than birth might be suspected of and investigated for wrongdoing with respect to the fetuses they carried.[34] Pregnant people will face obstacles in seeking medical care, as their doctors will be obligated to balance the medical needs of the fetus against the needs and bodily autonomy of the living and breathing pregnant person.[35] Most relevant to this Note, though, are the potential implications of fetal rights for those who rely on ART to build their families. This review of fetal personhood provides the necessary background to understand that, logically, fetal personhood should endanger ART, and fetal-personhood states' impulse to protect it instead is a surprise that reveals an unstated motivation: state control of reproduction.

A. Roe*,* Casey*, and the Fetal-Personhood Campaign*

Before *Roe v. Wade*, fetal interests were not legally significant; the notion that a fetus was a full person under the law was not commonly embraced. Amanda Gvozden recounts how "[a]t early common law, the fetus was not considered alive for somewhere between several days to

Women to Forfeit Theirs, Ms. (Apr. 15, 2021), https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant [https://perma.cc/KR64-JX9D])).

33 In fact, even abortion bans specifically affect far more than the decision to terminate a pregnancy. *See* Brief for Abortion Care Network et al. as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) ("People don't realize that banning or restricting abortion care doesn't just impact abortion . . . . It impacts every aspect of pregnancy care." (quoting Ghazaleh Moayedi)).

34 *See Dobbs*, 142 S. Ct. at 2337 n.12 (Breyer, Sotomayor & Kagan, JJ., dissenting) (explaining that most medical treatments for miscarriage are identical to those for abortions); *see also* Donley & Lens, *supra* note 28, at 1702–11 (explaining how the "blurriness" between pregnancy loss and abortion will increase and result in more intrusive scrutiny of both).

35 *See infra* notes 68–91 and accompanying text.

several months after conception. . . . The killing of a fetus [even after that point] was not homicide unless the fetus had been 'born alive' . . . ."[36] This consensus, Gvozden writes, was "fairly universal."[37] With some narrow exceptions to protect the rights of children after they were born alive—such as in inheritance, parentage, and tort law, for example—the law did not recognize a fetus as separate from the pregnant person.[38] Yet in the years leading to *Roe v. Wade*, Catholics and other anti-abortionists advocated for fetal personhood to justify abortion bans.[39]

The *Roe* Court noted that "the unborn have never been recognized in the law as persons in the whole sense" and that the constitutional right to abortion depended, in part, on that finding.[40] However, *Roe* did not categorically close the door on the idea of fetal personhood. In that opinion, the Court made conclusory statements about the interest in potential life,[41] which have become a textual foothold for abortion-restrictive states and for the *Dobbs* Court.[42] *Roe* left room for the states to legislate in the name of their putative interest in potential life, and *Casey* would later pick up this thread by creating the sui generis "undue burden" standard to allow for restrictions furthering the state's interest in promoting live birth over abortion, so long as they did not create a substantial obstacle to abortion.[43]

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[36] Amanda Gvozden, *Fetal Protection Laws and the "Personhood" Problem: Toward a Relational Theory of Fetal Life and Reproductive Responsibility*, 112 J. Crim. L. & Criminology 407, 414 (2022) (footnotes omitted) (citing 2 Wayne R. LaFave, Substantive Criminal Law § 14.1(c) (3d ed. 2020)).

[37] *Id.*

[38] *See* Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L.J. 599, 600–02 (1986) (stating two exceptions in inheritance and tort law to the historical trend against recognizing legal rights in a fetus); Jennifer Henricks, *What to Expect When You're Expecting: Fetal Protection Laws That Strip Away the Constitutional Rights of Pregnant Women*, 35 B.C. J.L. & Soc. Just. 117, 121–22 (2015) (describing inheritance, parentage, and tort exceptions to the general rule at the time of *Roe* that the unborn were not legally recognized persons).

[39] Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. Times (June 21, 2022), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html [https://perma.cc/C8M6-EC66].

[40] Roe v. Wade, 410 U.S. 113, 161–62 (1973).

[41] *See id.* at 150 ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone."); *id.* at 163–64 ("State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period . . . .").

[42] *See infra* Section I.C.

[43] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2317 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[T]he [*Casey*] Court struck a balance . . . . It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed . . . a State could not impose a

So after *Roe*, momentum began to build for fetal personhood, which has since been "the ultimate ambition of the anti-abortion movement . . . [which] wants a declaration that abortion is a human rights and constitutional rights violation."[44] In the years immediately following *Roe*, the U.S. Senate held hearings about a potential personhood amendment to the Constitution, which would have given fetuses a due process right to life starting at conception.[45] But once that amendment was abandoned, anti-abortion activists turned to more "incremental approaches" to chip away at abortion, relying on the same principles.[46] So through the time of the decision in *Casey*, which arguably made abortion regulation more feasible than before by affirming a state interest, fetal-personhood rhetoric never disappeared.[47]

B. Fetal Personhood After Roe *and Its Harms*

Following *Roe*, the nebulous "state interest in potential life"[48] rationalized harmful laws and judgments. "Potential life" did not have preexisting meaning; just once before *Roe*, a district court had taken "for granted" that the state had a legitimate interest in an embryo with "the potential to become a person."[49] Lawmakers and judges "rarely articulate with any precision . . . the kinds of concerns that comprise the State's interest in potential human life," but since the phrase developed the strength to outweigh constitutional rights, lawmakers have imbued it with a range of different concerns.[50]

Over the past five decades, fetal personhood has cropped up in Congress, administrative policy, and the courts. In 2004, the federal Unborn Victim of Violence Act "recognize[d] an embryo or fetus in utero as a legal victim and define[d] an unborn child as a child in utero,

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'substantial obstacle' on a woman's 'right to elect the procedure' . . . ." (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992))).

44 Zernike, *supra* note 39 (quoting Mary Ziegler).

45 Gaddie, *supra* note 5, at 1294 ("In 1974, just one year after Roe was decided, the Senate held its first set of hearings on what would later become known as a 'personhood' amendment."); Halva-Neubauer & Zeigler, *supra* note 19, at 102 (citation omitted) ("In the decade following . . . *Roe v. Wade*, pro-life activists employed the rhetoric of fetal personhood explicitly by advocating for a constitutional amendment that would define the unborn as persons within the meaning of the Fourteenth Amendment.").

46 Halva-Neubauer & Zeigler, *supra* note 19, at 102.

47 *See id.* at 103 (arguing that while *Casey* validated some abortion regulations, it also gave pro-life advocates room to assert more forcefully a state interest in fetal life).

48 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876 (1992).

49 Dov Fox, *The State's Interest in Potential Life*, 43 J.L. Med. & Ethics 345, 345 (2015) (quoting Corkey v. Edwards, 322 F. Supp. 1248, 1253 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973)).

50 *Id.* at 345–46 (quoting *Casey*, 505 U.S. at 914 (Stevens, J., concurring and dissenting in part)).

or a 'member of the species homo sapiens, at any stage of development, who is carried in the womb.'"[51] Following this model, states enacted fetal-protection laws, which "added separate causes of action for harmed fetuses, enhanced penalties for harm done to pregnant women, and/or defined a fetus as a human life from the earliest stages of development"—as early as fertilization or conception.[52] At the time of Gvozden's writing in 2022, at least thirty-seven states had fetal homicide laws.[53] Georgia's Living Infants Fairness and Equality (LIFE) Act protects fetal personhood beginning at around six weeks of gestation,[54] and conservative groups in the state are petitioning the governor for an amendment to the state constitution to include a right to life beginning at fertilization.[55] Under this law, fetuses are to be counted in the population, so as to influence legislative maps and the distribution of state funds.[56] Even as recently as 2017, Congress considered the Sanctity of Human Life Act, which declared that human life begins with fertilization and boasted thirty sponsors.[57] A Department of Health and Human Services draft strategic plan for 2018–2022 described its mission as protecting life starting at conception.[58] And anti-abortionists continue to argue for fetal personhood in the courts.[59]

While many efforts to establish far-reaching fetal personhood have failed,[60] the concept has perniciously permeated the United States since *Roe*, doing irreversible harm to many people's lives and laying the groundwork for more extreme abortion restrictions. To name a few of these harms, as shown next, notions of fetal personhood have led to the

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51 Gvozden, *supra* note 36, at 414 (quoting 18 U.S.C. § 1841(d)). The American College of Obstetricians and Gynecologists disputes the underlying assertions of this law: that a fetus has a heartbeat after six weeks and can feel pain at twenty weeks. *See* Zernike, *supra* note 39.

52 *Id.* at 414–17.

53 *Id.*

54 *See* H.B. 481, 2019–2020 Gen. Assemb., Reg. Sess. (Ga. 2019) (attaching legal rights to fetuses based on the presence of "a detectable human heartbeat," asserted to appear as early as six weeks of gestation).

55 *See* Zernike, *supra* note 39.

56 *See id.*; Ga. H.B. 481 (providing that unborn fetuses with a detectable heartbeat "shall be included in population based determinations").

57 Gaddie, *supra* note 5, at 1296.

58 *Id.*

59 *Id.* at 1296–97.

60 *See, e.g.*, Zernike, *supra* note 39 ("Ballot initiatives that would have established fetal personhood laws failed in some of the most anti-abortion states. Voters rejected initiatives twice in South Dakota, in 2006 and 2008, and in Mississippi in 2011."); Gaddie, *supra* note 5, at 1295 (noting that a 2011 proposed fetal-personhood constitutional amendment failed in Mississippi despite majority support in pre-voting polls, in large part because voters were concerned about the possible implications for IVF).

criminalization of medical care and the imposition of non-consensual treatment for pregnant people.[61]

Prosecution of marginalized pregnant women is rampant in the United States[62]—particularly targeting those who engage in certain behaviors perceived as dangerous to the fetus (i.e., using or being near illicit substances).[63] This trend is related to fetal personhood, which bolsters the argument for enforcement and severe punishment at even early stages of pregnancy.[64] Pregnancy Justice reports that several types of statutes "have been key arenas in which fetal personhood has been weaponized to regulate and punish pregnant people and tear families apart."[65] These include "[c]riminal child abuse statutes (spanning a range of offenses including child neglect, child deprivation, chemical endangerment, and delivery of a controlled substance to a minor) and civil child welfare statutes . . . ."[66] Courts in states such as Alabama, Oklahoma, and South Carolina have construed criminal child abuse or endangerment statutes to protect fetuses, risking increased prosecutions of pregnant people who tend to be disproportionately underserved women of color.[67] In one noteworthy example, *Whitner v. State*,[68] the South Carolina Supreme Court held that a viable fetus is a "child" within the meaning of the relevant state child abuse and endangerment statute and upheld Cornelia Whitner's eight-year sentence for ingestion of crack cocaine during her third trimester.[69]

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61 *See, e.g.*, Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 45 (1987) (recounting the 1986 case of a pregnant woman who was arrested and jailed on charges of medical neglect of her fetus); Margo Kaplan, *"A Special Class of Persons": Pregnant Women's Right to Refuse Medical Treatment After* Gonzales v. Carhart, 13 U. PA. J. CONST. L. 145, 169 (2010) (describing a Florida case where the court ordered medical treatment of a pregnant person on the grounds of fetal preservation).

62 While the Note generally uses more inclusive language to represent pregnancy-capable people, the literature reviewed focuses on these effects with respect to women specifically. *See, e.g.*, MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 28–45 (2020) (describing prosecutions and civil incarcerations of pregnant women).

63 *See* Donley & Lens, *supra* note 28, at 1704 (describing rising prosecutions of pregnant people, disproportionately based on drug use during pregnancy).

64 *See* Zernike, *supra* note 39 (describing the potential consequences of state fetal-personhood laws).

65 PREGNANCY JUSTICE, *supra* note 7, at 13.

66 *Id.*

67 *Id.*; Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 814–25 (2020) (discussing how criminalization of drug use during pregnancy has historically targeted poor and Black women but noting that this fact has been complicated by the opioid epidemic); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421–22 (1991).

68 492 S.E.2d 777 (S.C. 1997).

69 *Id.* at 778–79.

Fetal personhood additionally places obstacles between pregnant patients and proper medical care by causing providers to weigh fetal interests against those of the patients. Recognizing a fetus as an entity with separate rights and even providing it legal representation creates perverse incentives for doctors, who are chilled by fear of liability for harming the fetus. A court in Arizona temporarily enjoined the state's fetal-personhood law because of a lawsuit claiming that the law "makes it impossible" for women and their medical providers "to identify whether a vast array of actions may now put them at risk of criminal prosecution or other legal penalties."[70] Such a law could similarly deter doctors and patients from prescribing therapies and undergoing treatments that might have side effects on the fetus or inadvertently terminate the pregnancy.[71]

In some cases, courts appoint guardians *ad litem* or legal counsel for unborn fetuses, creating legal adversity as an obstacle to obtaining desired and necessary healthcare.[72] Advocates of this practice tout its capacity to criminalize pregnant people whose fetuses undergo harm and force unwanted medical treatments and procedures on pregnant people.[73] For example, in *In re Brown*,[74] the trial court appointed a guardian *ad litem* for the fetus to combat the interests of the mother, who refused to undergo a blood transfusion on religious grounds.[75] The appellate court held that the trial court had erred in appointing the guardian *ad litem*,[76] in part because this procedure was invasive, and the Illinois legislature had not defined the fetus as a minor for these purposes.[77] In another example, *University Health Services, Inc. v. Piazzi*,[78] the court assigned a guardian *ad litem* in a dispute about whether to keep a brain-dead pregnant woman on life support long enough for the

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70 Zernike, *supra* note 39 (regarding Isaacson v. Brnovich, 610 F. Supp. 3d 1243 (D. Ariz. 2022)).

71 Yvonne Lindgren, Dobbs v. Jackson Women's Health *and the Post-*Roe *Landscape*, 35 J. Am. Acad. Matrimonial L. 235, 278 (2022) (noting that a health system has paused the prescription of a drug used for arthritis and lupus because it also may be used for abortion and could lead to criminal penalties); Zernike, *supra* note 39.

72 *See generally* M. Todd Parker, Comment, *A Changing of the Guard: The Propriety of Appointing Guardians for Fetuses*, 48 St. Louis U. L.J. 1419 (2004); *see also In re* A.C., 533 A.2d 611 (D.C. 1987), *reh'g granted*, *judgment vacated sub nom.* 539 A.2d 203 (D.C. 1988), *and on reh'g*, 573 A.2d 1235 (D.C. 1990) (deciding a case in which the fetus had been appointed legal counsel separate from the mother's).

73 *See, e.g.*, Mark H. Bonner & Jennifer A. Sheriff, *A Child Needs a Champion: Guardian Ad Litem Representation for Prenatal Children*, 19 Wm. & Mary J. Women & L. 511, 524–30 (2013).

74 689 N.E.2d 397 (Ill. App. Ct. 1997).

75 *Id.* at 399–400.

76 *Id.* at 400, 409.

77 *Id.* at 405.

78 No. CV86-RCCV-464, 1986 WL 1167470 (Sup. Ct. Ga. Aug. 4, 1986).

fetus to become viable, against the wishes of her husband.[79] In the same breath as recognizing the legal interests of the unborn fetus (through the appointment of a guardian *ad litem*), the court also stated, "[T]he privacy rights of the mother are not a factor in this case because the mother is dead . . . ."[80] This dystopian phenomenon, by which the State formally pits a fetus against the person carrying it, is a striking illustration of the problems of fetal personhood.

As the best interests of pregnant people are minimized in medical decisionmaking, hospitals and courts force them to undergo unwanted and potentially harmful treatments.[81] Farah Diaz-Tello has studied how some doctors make unilateral decisions and perform invasive surgery on pregnant patients without their consent for the sake of the "unborn child."[82] For example, one provider bullied and threatened New Yorker Ranat Dray while she was in labor to coerce her to deliver by caesarian section, despite Dray's plans and desire to deliver vaginally.[83] Dray's doctor said that he would obtain a court order to force Dray to undergo surgery and that the State would remove Dray's child if she refused.[84] Articulating the perverse incentives at play in this scenario, the doctor told Dray, "My license is more important than you."[85] The doctor ultimately prevailed in coercing Dray to undergo a caesarian section without providing her with a medical justification.[86]

These effects are just exemplary. Fetal personhood has boundless potential to threaten the well-being of pregnant people and their families. Other concerns include the government's restriction of pregnant persons' lifestyles, tort liability for injuries due to "prenatal negligence," and reinforcement of the stereotype that women are incompetent to make moral decisions in their exercise of autonomy.[87]

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79 *Id.* at *2–3.

80 *Id.* at *4.

81 For example, in *In re* A.C., 533 A.2d 611 (D.C. 1987), *reh'g granted*, *judgment vacated sub nom*. 539 A.2d 203 (D.C. 1988), *and on reh'g*, 573 A.2d 1235 (D.C. 1990), the D.C. Court of Appeals found that the hospital appropriately subordinated the bodily autonomy of the terminally ill mother to the best interests of the fetus in performing an unwanted caesarian section on her. *Id.* at 617. Both mother and child subsequently perished. *Id.* at 612.

82 Farah Diaz-Tello, *Invisible Wounds: Obstetric Violence in the United States*, 24 Reprod. Health Matters 56 (2016).

83 *Id.* at 57–58.

84 *Id.* at 58.

85 *Id.*

86 *Id.* at 57–58.

87 *See* Gallagher, *supra* note 61.

C. *Fetal Personhood and* Dobbs

Roe did more than protect the abortion right: It also created a class of constitutional rights for pregnant people who plan to bring their pregnancies to term.[88] But those protections are gone after *Dobbs*, and the pregnant are left vulnerable to state violence. When abortion was a recognized right, fetal personhood necessarily could not take a broad hold, because this would grant constitutional protection to murder. Now, no recognized federal[89] constitutional right to abortion stands in the way of pervasive fetal-personhood policies.

Restrictive federal abortion legislation is a real possibility that warrants preparation.[90] The very Mississippi statute that the Court blessed in *Dobbs* refers to the fetus as an "unborn human being," and the Court noted that the legislative history of the statute revealed its motivation as protecting unborn human life.[91] Perhaps protesting too much, the *Dobbs* majority asserted its neutrality on the question of fetal personhood and fetal rights.[92] But as the dissent pointed out, neutrality is a fiction when the Court votes to vitiate a fundamental right.[93]

In fact, the Court made much of the state interest in fetal life. Justice Alito posited that the reason *Dobbs* would not endanger other substantive due process precedents such as *Obergefell v. Hodges*[94] and *Loving v. Virginia*[95] was precisely because the abortion cases are sui generis in their involvement with "'potential life' and what the [Mississippi] law . . . calls an 'unborn human being.'"[96] The majority

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88 Lynn M. Paltrow, Lisa H. Harris & Mary Faith Marshall, *Beyond Abortion: The Consequences of Overturning* Roe, 22 Am. J. Bioethics, no. 8, 2022, at 4.

89 Alaska, California, Florida, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Jersey, and Vermont do protect a fundamental right to abortion under their state constitutions. *After* Roe *Fell: Abortion Laws by State*, Ctr. for Reprod. Rts., https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/Q99D-9UX5].

90 *See, e.g.*, Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, S. 4840, 117th Cong. (2022).

91 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243–44 (2022).

92 *Id.* at 2256 ("[O]ur decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests . . . ."); *id.* at 2261 ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth.").

93 *Id.* at 2328 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[E]liminating [the right to self-determination] . . . is not taking a 'neutral' position . . . .").

94 576 U.S. 644 (2015).

95 388 U.S. 1 (1967).

96 *Dobbs*, 142 S. Ct. at 2236; *see also id.* at 2280 ("[R]ights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed 'potential life.'"); *id.* at 2304 (Kavanaugh, J., concurring) ("Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who

even went so far as to criticize the dissent for failing to take the state interest in the fetus seriously enough.[97]

To be sure, the Supreme Court eschewed—at least out loud—the idea that it would ultimately favor fetal personhood. The Court also denied certiorari later in 2022 on the question of whether fetuses are entitled to constitutional rights.[98] But the Court's decision not to decry the concept of fetal personhood in *Dobbs* and, furthermore, its solicitude for the idea as the distinguisher from other substantive due process cases are undeniable.

While state laws protecting fetal rights are on the books already, *Dobbs* normatively affirmed them and welcomed similar legislation at the federal level. Republicans in Congress have recently introduced legislation that would recognize a fetal right to child support, for example.[99] In the coming years, we could face the specter of federal legislation prohibiting abortion nationwide, preventing even protective states such as New York from securing abortion access for its residents.[100] So understanding the dangers of fetal personhood (the likely foundation for such legislation) and its tactical vulnerabilities is urgent. The following Parts will show that while the plain meaning of fetal personhood would suggest that ART is verboten, anti-abortion states tend to promote fetal personhood and ART simultaneously, creating a strategic opportunity for reproductive justice advocates.

II
A Threat to Assisted Reproductive Technologies?

In a world where abortion is unshielded from state and federal criminalization, the consequences of *Dobbs* will reach, like fetal-personhood laws before,[101] even to those who are not seeking

seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.").

97 *Id.* at 2261 ("The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life.").

98 Benson v. McKee, 273 A.3d 121 (R.I.), *cert. denied sub nom.* Doe as Next Friend Doe v. McKee, 143 S. Ct. 309 (2022).

99 Zernike, *supra* note 39.

100 *Dobbs*, 142 S. Ct. at 2318 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest."); *see also* Lexi Lonas, *McConnell Says National Abortion Ban 'Possible'*, Hill (May 7, 2022), https://thehill.com/homenews/senate/3480725-mcconnell-says-national-abortion-ban-possible [https://perma.cc/NXD3-L7PG].

101 *See supra* Section I.B.

abortions.[102] As the walls close in around people who need abortion care, medication abortion (the use of mifepristone and misoprostol to induce abortion without surgery)[103] is becoming a more prevalent means of administration.[104] Medication abortions often look like miscarriages,[105] so the State could suspect a formerly pregnant person or their provider of aborting a pregnancy when really the patient has experienced an unintended and traumatic pregnancy outcome. Similarly, the management of ectopic pregnancies, which occur in one in fifty pregnancies and can be fatal, is indistinguishable from abortion, and at least one lawmaker in Missouri has introduced a bill to make an ectopic-pregnancy abortion a felony.[106] Fetal-personhood laws would legitimize the idea that the fetus is a living entity with equal rights to the pregnant person and would justify invasive inquiries into pregnancy-related events, as well as criminal and civil repercussions if the State construes the facts as foul play.

Most relevant to this Note are the implications of fetal personhood after *Dobbs* for those who use reproductive technologies to build their families.[107] The mechanics of ART, described below, logically should be

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[102] *See* Lindgren, *supra* note 71, at 254 (discussing various results and implications of the *Dobbs* decision spanning reproductive technologies, the criminalization of pregnant people, and fetal personhood); Paltrow, Harris & Marshall, *supra* note 88, at 3 ("We posit that an abortion ban would . . . mean that anyone who becomes pregnant, including those who continue a pregnancy and give birth to healthy newborns and those with pregnancy complications or adverse pregnancy outcomes will become newly vulnerable to legal surveillance, civil detentions, forced interventions, and criminal prosecution.").

[103] *Information About Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. Food & Drug Admin. (Mar. 23, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information [https://perma.cc/74YY-CBUV]; *The Availability and Use of Medication Abortion*, KFF (June 1, 2023), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion [https://perma.cc/RCF6-2XNM].

[104] Maggie Koerth & Amelia Thomson-DeVeaux, *As States Banned Abortion, Thousands More Americans Got Pills Online Anyway*, FiveThirtyEight (Nov. 1, 2022, 11:25 AM), https://fivethirtyeight.com/features/medication-abortion-after-dobbs [https://perma.cc/7SRB-A2D2].

[105] Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 Vand. L. Rev. 1649, 1665 (2022).

[106] H.B. 2810, 101st Gen. Assemb., Reg. Sess. (Mo. 2022); *see also* Lindgren, *supra* note 72, at 275–76.

[107] One way in which *Dobbs* affects ART patients has to do with Justice Thomas's concurrence, which argued for the obliteration of most of the substantive due process jurisprudence. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring). If Justice Thomas's view prevails in the future, the Court would foreclose the possibility of establishing a fundamental right to choose or access ART. For a pre-*Dobbs* consideration of a substantive due process right to IVF, see Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 Harv. L. Rev. 2792 (2005). This Note, though, focuses on the fetal-personhood threat as opposed to the broader threat of dismantling substantive due process.

unacceptable under a fetal-personhood regime that gives and protects fetal rights as early as fertilization. This Part discusses how the fact that the most abortion-hostile states continue to embrace ART is unexpected and raises suspicion that the well-being of the fetus is not actually these states' chief concern. Later, Part III argues that instead it is reproductive control.

A. Assisted Reproductive Technology and Reproductive Justice

"Assisted reproductive technology" is defined as fertility treatments that entail the handling of eggs or embryos, focusing specifically on those procedures that "involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman."[108] The Centers for Disease Control and Prevention reports that in 2020, 326,468 ART cycles were performed, resulting in 75,023 live born infants.[109] The use of ART more than doubled between 1999 and 2019.[110] The magnitude and growth of ART use indicate that changes to the ART landscape would affect many people in America.

ART is a key tool in the reproductive justice movement,[111] as it offers reproductive choice and the ability to build a family on one's own terms. People who use ART do so for diverse reasons. For some, ART is a solution to fertility-related challenges.[112] ART also provides an option for same-sex couples who wish to build families biologically.[113] It also creates flexibility and equity for people who want to preserve their reproductive material to build a family in the future.[114] This is

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108 *What Is Assisted Reproductive Technology?*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/art/whatis.html [https://perma.cc/TYY8-9HSA] (last updated Oct. 8, 2019).

109 *ART Success Rates*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/art/artdata/index.html [https://perma.cc/38XB-CBQ7] (last updated Sept. 25, 2023). The language of the source appears here, although people other than women are capable of donating and receiving eggs.

110 *Id.*

111 The Center for Reproductive Rights and If/When/How, organizations that advocate for reproductive rights and reproductive justice respectively, both offer informational materials regarding ART. *Assisted Reproduction*, Ctr. for Reprod. Rts., https://reproductiverights.org/our-issues/assisted-reproduction [https://perma.cc/QAE4-YTTU]; *Issue Brief: Assisted Reproductive Technology*, If/When/How, https://www.ifwhenhow.org/download/?key=h5OT0RHcnCGNYkeInkQhyS2UslkE4QSC1HC7t3aqvdnC5zgwbrNeSMFIsdPcaxbQ [https://perma.cc/L39T-PJ5H].

112 If/When/How, *supra* note 111, at 3.

113 *Id.*

114 *See* Sarah Kroeger & Giulia La Mattina, *Assisted Reproductive Technology and Women's Choice to Pursue Professional Careers*, 30 J. of Population Econ. 723, 724 (2017) ("By potentially expanding the time horizon for childbearing to a later point in a woman's

particularly useful as pregnancy-capable people have become more active in the workforce in the last several decades; the availability of ART frees them to focus on their careers rather than the biological clock.[115]

On the other hand, critiques of ART abound. The Committee on Women, Population and the Environment, for example, has sought to raise awareness of the "potential exploitation of women, the increased risk of inequities and health disparities, and the socio-cultural implications of genetic technologies."[116] The ability to manipulate genetic material implicates concerns about eugenics for some who worry that hopeful parents will prioritize certain traits over others based on genetic testing, reinforcing biases and prejudice.[117] Additionally, ART is primarily accessible to affluent white people, given that it is costly and insurance often does not cover it.[118] Nevertheless, these considerations make clear that the fate of ART is consequential for many Americans.

B. Implications of Fetal Personhood for ART

Fetal personhood directly bears on ART because these procedures involve the manipulation and discarding of embryos[119]—treatment that society would not condone with respect to living humans in most cases.[120] The *Dobbs* majority was dissatisfied with *Roe*'s choice of the viability line as the gestational cutoff for abortion regulation.[121] But this critique begs the question: Where is the proper line? Some states seem to think conception is the right marker for fetal rights,[122] suggesting that early-stage embryos would be fair game for regulation.

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professional career, ART may increase the expected returns to investing in a professional degree with a resulting change in occupational choice.").

115 *See id.* at 746, 758–59 (finding that data suggest mandated insurance coverage for ART increases the probability of a woman being in a professional occupation by 1 to 1.2%, notably driven by an effect among white women).

116 Comm. on Women, Population & the Env't, *supra* note 6, at 30.

117 *Id.*

118 *See* Kroeger & La Mattina, *supra* note 115, at 724 (noting that ART is "extremely expensive" and "generally not covered by insurance"); Tarun Jain, *Racial Disparities and In Vitro Fertilization (IVF) Treatment Outcomes: Time to Close the Gap*, 18 Reprod. Biology & Endocrinology, no. 112, 2020, at 1 ("[I]n the United States, access and outcomes to IVF are not equal. Black and Hispanic women are less likely than white women to access fertility care, and they are also less likely to have a successful IVF cycle.").

119 *See supra* notes 7–10 and accompanying text.

120 Gaddie, *supra* note 5, at 1298–99 ("Redefining 'person' to encompass embryos is likely to have a profound effect on couples using ART to conceive children. . . . The growing number of extracorporeal embryos poses an issue because their legal status is unclear.").

121 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2270 (2022) ("The viability line, which *Casey* termed *Roe*'s central rule, makes no sense.").

122 *See, e.g.*, *infra* notes 150–51 and accompanying text.

Thus, fetal-personhood laws could foreseeably prohibit some forms of ART completely.[123] Medical professionals anticipate resulting hurdles for fertility-care practitioners.[124] For example, selective reduction, which doctors use to ensure that only a safe number of embryos remain implanted,[125] may fall within abortion bans and cease in some jurisdictions.[126] Withholding this procedure increases the likelihood of "loss of the entire pregnancy, premature delivery with concomitant risks of neonatal complications or death, and clinically significant maternal complications."[127] Some providers may stop conducting IVF treatment altogether because of the possibility of embryo loss and fear of legal repercussions.[128] In this way, even unintentionally, laws after *Dobbs* are likely to increase the barriers to and costs of ART.[129]

Furthermore, these effects intersect with the other repercussions of fetal personhood for pregnant people, intensifying the harm. For example, someone who uses ART might face the "double jeopardy"[130] of 1) liability for any harm to the embryos used and 2) the physical and legal danger of conditions like ectopic pregnancy, which present at higher rates in those who use ART[131] and which will go untreated.[132] The expected negative consequences of fetal-personhood policies for ART are plentiful.

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123 *See* Am. Soc'y for Reprod. Med., States' Abortion Laws: Potential Implications for Reprod. Med. 2 (2022) ("Overly broad statutory language and definitions *could*, intentionally or not, implicate and even ban IVF and certain other ART procedures. The *Dobbs* decision and related state actions in its wake have the potential to severely limit the ability to provide high-quality, patient-centered maternal health care."); Lindgren, *supra* note 71, at 279–80 ("[F]ertility treatments . . . could be banned in states that may pass future fetal personhood laws. . . . People storing frozen embryos . . . in abortion restrictive states are considering moving them . . . because of fears that a fetal personhood amendment or a broad interpretation of an abortion ban may prohibit them from destroying unused embryos . . . .").

124 *See, e.g.*, Zernike, *supra* note 39 ("In Mississippi, medical groups campaigned against the fetal personhood amendment in 2011 by warning . . . about the effects on in vitro fertilization . . . . Disposing of unused fertilized eggs, or selectively eliminating implanted eggs, as many aspiring parents do, could result in murder charges.").

125 Lindgren, *supra* note 71, at 279–80.

126 *Id.*; Lisa H. Harris, *Navigating Loss of Abortion Services — A Large Academic Medical Center Prepares for the Overturn of* Roe v. Wade, 386 New Eng. J. Med. 2061, 2063 (2022).

127 Harris, *supra* note 126, at 2063.

128 *Id.*

129 Heidt-Forsythe, Kalaf-Hughes & Mohamed, *supra* note 4.

130 This phrase comes from Frances Beal's groundbreaking essay, Frances Beal, *Double Jeopardy: To Be Black and Female*, *in* Black Women's Manifesto 19 (1969), https://idn.duke.edu/ark:/87924/r3nd7g [https://perma.cc/7DWB-VSPD].

131 Am. Soc'y for Reprod. Med., *supra* note 123, at 3.

132 *See supra* note 106 and accompanying text.

C. Protection of ART in Anti-Abortion States

So far, the states waging the hardest war on reproductive freedom seem to be sparing ART. This Section supplements commentators' observation that anti-abortion legislators have protected ART to date[133] with a direct analysis of state laws to show, with primary evidence, how restrictive states' fetal-personhood frames conflict with their own treatment of ART. While several anti-abortion states have not addressed head-on the implications of their laws for ART, some have expressly articulated carveouts to protect ART users from the fate of the criminally pregnant.[134] This state of affairs may reflect broad support for the availability of ART across the country. Based on Pew Research Center data, most Americans who morally object to abortion do not morally object to IVF.[135]

This Section spotlights the states that currently are the most hostile to abortion, discusses the pervasiveness of fetal personhood in their laws, and reveals how they have (or have not) addressed the issue of ART. These particular states have full abortion bans triggered by the *Dobbs* decision. For example, South Dakota's trigger ban states:

> Any person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is necessary to preserve the life of the pregnant female, is guilty of a Class 6 felony.[136]

The statute includes a note that it will become "effective on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy."[137] That date was the day that *Dobbs* came down. Alabama,[138] Arkansas,[139]

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133 *See, e.g.*, Heidt-Forsythe, Kalaf-Hughes & Mohamed, *supra* note 4.

134 *Id.* (reporting that states had introduced or passed eighty-three bills mentioning both abortion and IVF from 2010 to the time of writing, forty-five of which explicitly exempted IVF and ART and none of which explicitly included IVF).

135 *Id.* ("[T]he 2020 Collaborative Multi-Racial Post-Election Survey . . . reveal[s] high support for IVF among a diverse cross-section of the U.S. public. Among individuals who oppose abortion, only 11.7 percent of White respondents and roughly 17 to 18 percent of Black and Latino respondents express moral opposition to IVF.").

136 S.D. Codified Laws § 22-17-5.1 (2005).

137 *Id.*

138 Ala. Code §§ 26-22-2, -23H-2, -23H-4 (2023) (criminalizing abortion except in instances where there is "a serious health risk to the unborn child's mother").

139 Ark. Code Ann. § 5-61-304 (West 2023) (criminalizing abortion "except to save the life of a pregnant woman in a medical emergency").

Idaho,[140] Kentucky,[141] Louisiana,[142] Mississippi,[143] Missouri,[144] Oklahoma,[145] Tennessee,[146] Texas,[147] and West Virginia[148] have enacted similarly broad—and newly federally constitutional—bans. This analysis will show how fetal personhood has pervaded these restrictive states' laws incongruously with those same states' policies on ART.

1. Fetal Personhood in the Hostile States

Abortion-hostile states have incorporated fetal personhood into their statutory schemes in diverse ways. For example, Arkansas has a pervasive policy codified in its constitution, which reads, "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."[149] Missouri similarly has broad statutory provisions stating, "[t]he life of each human being begins at conception," and "[u]nborn children have protectable interests in life, health, and well-being . . . ."[150]

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140 IDAHO CODE ANN. § 18-622 (West 2023) (criminalizing abortion except in cases of rape or incest, or in cases "necessary to prevent the death of the pregnant woman," but excluding cases where the pregnant woman is at risk due to self-harm).

141 KY. REV. STAT. ANN. § 311.772 (West 2023) (criminalizing abortion except "to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman").

142 LA. STAT. ANN. §§ 14:87.7, 40:1061 (2023) (criminalizing abortion except "to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman").

143 MISS. CODE ANN. § 41-41-45 (West 2023) (criminalizing abortion except "in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape").

144 MO. REV. STAT. § 188.017 (2023) (criminalizing abortion and providing an affirmative defense for cases of "medical emergency").

145 OKLA. STAT. tit. 63, § 1-731.4 (2023) (criminalizing abortion except "to save the life of a pregnant woman in a medical emergency"). In *Oklahoma Call for Reproductive Justice v. Drummond*, 526 P.3d 1123, 1132 (Okla. 2023), the Oklahoma Supreme Court held this statute void and unenforceable because "the Oklahoma Constitution . . . protects the right of a woman to terminate her pregnancy in order to preserve her life." Still, the legislative impulse to pass such a ban still reveals state politics that are hostile to abortion.

146 TENN. CODE ANN. § 39-15-213 (2023) (criminalizing abortion unless "the abortion was necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman").

147 TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2023) (prohibiting abortion except where "the pregnant female . . . has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function," provided that the risk of death or harm does not arise from "conduct" that the pregnant person might take to cause such harm).

148 W. VA. CODE ANN. § 16-2R-2, -3 (West 2022) (completely prohibiting abortion except under very narrow exceptions).

149 ARK. CONST. amend. LXVIII, § 2.

150 MO. REV. STAT. § 1.205 (2023).

The chapter of Kentucky's code that governs medical professionals and specifically abortion also states, "'[h]uman being' means any member of the species homo sapiens from fertilization until death."[151] Similarly, South Dakota's abortion laws define "[h]uman being" as "an individual living member of the species of [h]omo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."[152]

Fetal personhood also shows up in states' criminal and civil codes. Oklahoma's criminal homicide law explicitly includes in its definition of "human being" an "unborn child" as defined by the state's abortion law,[153] meaning "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus."[154] Tennessee takes a similar approach, defining "another person" or victim in its criminal homicide statute to include "a human embryo or fetus at any stage of gestation in utero."[155] Kentucky's fetal homicide law defines "unborn child" as "a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency."[156] While this law technically separates fetal homicide from other homicide, the definition shows that a fetus is considered a human being, and first-degree fetal homicide is a capital offense,[157] suggesting an equivalence with life post-birth.

Louisiana incorporates fetal personhood on both the civil and criminal sides. Its criminal laws adopt the definition: "'Person' includes a human being from the moment of fertilization and implantation and also includes a body of persons, whether incorporated or not."[158] On the civil side, "[a]n unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception. If the child is born dead, it shall be considered never to have existed as a person, except for purposes of actions resulting from its wrongful death."[159] Interestingly, Louisiana explicitly grants legal rights to the embryo: "A 'human embryo' for the purposes of this Chapter is an in vitro fertilized human ovum, with certain rights granted by law, composed of

151 Ky. Rev. Stat. Ann. § 311.720 (West 2023).
152 S.D. Codified Laws § 34-23A-1.
153 Okla. Stat. tit. 21, § 691 (2023).
154 Okla. Stat. tit. 63, § 1-730 (2023).
155 Tenn. Code Ann. § 39-13-214 (2023).
156 Ky. Rev. Stat. Ann. § 507A.010 (West 2023).
157 *Id.* § 507A.020 (identifying fetal homicide as a separate offense from other homicide).
158 La. Stat. Ann. § 14:2 (2023).
159 La. Civ. Code Ann. art. 26 (2023).

one or more living human cells and human genetic material so unified and organized that it will develop in utero into an unborn child."[160]

As a point of contrast, California, Massachusetts, and New York do not expressly recognize fetal personhood in their laws. California's definition of murder states, "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought."[161] The disjunctive "or" suggests that "fetus" is distinct from "human being." Massachusetts's criminal code contains no such definition for "fetus."[162] And New York's criminal code defines "person" as "a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality."[163]

2. ART in the Hostile States

The same states that have incorporated fetal personhood into their laws have treated ART in counterintuitive ways. West Virginia explicitly exempts IVF from the acts that constitute abortion under its laws,[164] while other states have addressed the confrontation between fetal personhood and ART in other non-abortion-related areas of their statutory codes. Arkansas's criminal homicide and wrongful death laws explicitly protect from liability those who perform lawful abortions and ART procedures.[165] South Dakota's laws that restrict nontherapeutic research risking harm to an embryo exempt IVF and embryo transfer.[166] Texas expressly exempts ART from criminal conduct against an unborn child[167] and criminal homicide.[168] These exceptions are both an acknowledgment that the states' legal frameworks would otherwise prohibit ART by default and a policy decision that ART furthers some objective that outweighs the sanctity of the fetus.

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160 La. Stat. Ann. § 9:121 (2023).

161 Cal. Penal Code § 187 (West 2023).

162 *See, e.g.*, Mass. Gen. Laws ch. 265, § 1 (2023) (murder); Mass. Gen. Laws ch. 265, § 13 (2023) (manslaughter).

163 N.Y. Penal Law § 10.00 (McKinney 2023).

164 W. Va. Code Ann. § 16-2R-4 (West 2022).

165 Ark. Code Ann. § 5-1-102 (West 2023); Ark. Code Ann. § 16-62-102 (West 2023). A bill pending in the state legislature seems to propose removing these protections, but the fate of this bill remains uncertain. H.B. 1174, 94th Gen. Assemb., Reg. Sess. (Ark. 2023) (striking out the exempting provisions for ART, in vitro fertilization, and legal abortion).

166 S.D. Codified Laws §§ 34-14-16, -17, -19.

167 Tex. Penal Code Ann. § 22.12 (West 2023).

168 *Id.* § 19.06. For a discussion of the tensions between the Prenatal Protection Act and ART and Texas's longstanding insulation of ART, see Jackie Ammons, *Texas' Prenatal Protection Act: Civil and Criminal Fetus Fatality Protection*, 21 Tex. J. Women & L. 267 (2012).

A larger number of trigger-ban states have not expressly rescued ART from fetal personhood, but the presence of other laws on their books recognizing ART implicitly suggests those states may continue to promote it. At the very least, they should anticipate that they will have to address the issue, given the growing popularity of ART.[169] Kentucky's laws are difficult to reconcile but do seem to expose a protective impulse toward ART. Generally, Kentucky lawmakers have contemplated IVF.[170] One law both prohibits public funding for abortion and states that IVF research may be funded publicly if it does not involve the intentional destruction of an embryo.[171] So this law recognizes the need to clarify IVF's status in the shadow of a law about abortion, and it privileges IVF. While the caveat for embryo destruction might seem to reset the primacy of fetal personhood, the meaning of "intentional" is ambiguous. And as discussed above, it is unclear how IVF would fare without any leeway to destroy embryos, so construing the statute as exempting only IVF that does not sacrifice any embryos would not make sense. Certainly, at least, this law shows the need for greater clarity and resolution around these competing interests in Kentucky.

Missouri's laws also contemplate the use of ART without explicitly addressing the tension with its fetal-personhood agenda. Its constitution prohibits the exchange of valuable consideration for stem cells but explicitly exempts from the definition of "[v]aluable consideration . . . the consideration paid to a donor of human eggs or sperm by a fertilization clinic or sperm bank . . . ."[172] Oklahoma has the Gestational Agreement Act, which provides for "private parties to enter into gestational agreements in order to help facilitate the birth of children to parents who are not otherwise able to conceive or carry them . . . ."[173] A provision of Oklahoma's abortion law also exempts procedures meant "to increase the probability of a live birth,"[174] which could include ART-related procedures, but the status of this provision is uncertain after the passing of more extreme prohibitions in 2022.[175] Alabama subscribes to the Uniform Parentage Act,[176] which

169 *See supra* notes 110–11 and accompanying text.

170 *See, e.g.*, Ky. Rev. Stat. Ann. § 311.373 (West 2023) (identifying IVF and the transfer of embryos as a form of ART); *id.* § 199.590 (exempting IVF from a state prohibition on the sale, purchase, or procurement of any child).

171 Ky. Rev. Stat. Ann. § 311.715 (West 2023). Louisiana analogously allows IVF for the purpose of giving birth to a fully developed child but prohibits the intentional destruction of embryos in the process. La. Stat. Ann. §§ 9:122, :129 (2023).

172 *See, e.g.*, Mo. Const. art. III, § 38(d).

173 Okla. Stat. Ann. tit. 10, § 557.1–.25 (West 2023).

174 *Id.* 63, § 1-730.

175 *Id.* 63, § 1-731.4 (criminalizing abortion except to save the life of the mother).

176 Ala. Code §§ 26-17-102, -702, -704 (2023).

contemplates the implications of ART for parentage. This suggests that the State expects its residents to use these approaches. Tennessee also contradictorily provides for parentage by embryo transfer[177] but defines the embryo in human terms.[178]

Finally, some of the most abortion-hostile states have not yet legislated on ART at all, as of the time of writing. Specifically, Idaho and Mississippi do not address the use of ART in their laws. But Mississippi's law does vaguely limit its definition of abortion to the termination of a pregnancy "with an intention other than to increase the probability of a live birth."[179] ART-related terminations could be construed as intended to "increase the probability of a live birth" of remaining embryos, making those terminations legal. As noted above, Louisiana accords certain rights to fertilized ova,[180] making the healthcare provider responsible for their safekeeping in some cases.[181] The ovum, though, is only a juridical person until implantation in the womb,[182] which may be a loophole that could protect some ART procedures from fetal-harm-related liabilities. And although at least Representative McCormick (mentioned above) opposed revising Louisiana's abortion law to protect IVF, legislators in the state who did support revision clearly have begun to grapple with the conundrum.[183]

One would expect that the states touting fetal personhood most dogmatically would treat the destruction of embryos as wrong. After all, the states discussed here totally ban abortion. Yet the trend among the states that have addressed the issue has been to protect ART. This logical inconsistency indicates that these states are uncomfortable committing to the full slate of repercussions that fetal personhood brings. Abortion advocates should dig into the source and scope of that discomfort. If these states are willing to make exceptions for certain choices that risk harm to embryos or fetuses, they must have some priorities that prevail over fetal personhood. The next Part argues that the unstated but longstanding priority is reproductive control and that reproductive justice advocates should amplify this truth to bring greater scrutiny to the questionable coherence and desirability of fetal personhood.

177 TENN. CODE ANN. § 36-2-401 (2023).

178 *Id.* § 36-2-402 ("'Embryo' or 'human embryo' means an individual fertilized ovum of the human species from the single-cell stage to eight-week development . . . .").

179 MISS. CODE ANN. § 41-75-1 (West 2023).

180 LA. STAT. ANN. §§ 9:121, :124, :126 (2023).

181 *Id.* § 9:127.

182 *Id.* § 9:123.

183 *See supra* note 26 and accompanying text.

III
Fetal Personhood's Fatal Flaw

Apparently, ART serves some purpose that is so worthwhile to anti-abortion lawmakers and their constituents that it outweighs their concern about endangering the embryos or fetuses that they assert are human beings. What is the difference between the circumstances of ART and those of abortion that warrant the destruction of a putative life only for the former? This Part reasons that when viewed in the historical context of systemic racialized reproductive control in the United States, the different treatment of ART makes sense and that reproductive justice advocates should bring this context to light so that constituents and lawmakers might rethink their allegiance to full-scale fetal personhood.

Anti-abortion advocates' and lawmakers' attempts to articulate why ART is different from other embryo-threatening conduct do not identify a meaningful distinction regarding the embryos—the putative subject of anti-abortion concern—but instead fixate on the actions, choices, and motivations of the pregnant person. This focus reveals how fetal personhood is a selective weapon for social control. For example, on the topic of how Texas's fetal-personhood laws might affect IVF, John Seago, the president of Texas Right to Life, said: "There's . . . no such thing as an abortion outside of a woman's womb, so when you look at what's happening in the laboratory with assisted reproductive technology, that is not destruction of an embryo."[184] Similarly, Tennessee's Attorney General Jonathan Skrmetti has clarified that Tennessee's abortion ban applies only after the embryo is transferred to the uterus, even though he concedes that an embryo would fit the definition of "unborn child."[185] In 2019, Alabama Senator Clyde Chambliss, who had sponsored a blanket abortion ban, noted: "The egg in the lab doesn't apply . . . . It's not in a woman."[186] And Arkansas State Representative Robin Lundstrum, who has sponsored abortion restrictions, said that IVF was not at risk from Arkansas's abortion laws because IVF is "totally the opposite end of

184 *See* María Méndez, *IVF Treatment Can Continue Under Texas' Current Abortion Law, Experts Say*, Tex. Trib. (July 15, 2022), https://www.texastribune.org/2022/07/13/texas-ivf-treatments [https://perma.cc/HBS8-KFRL].

185 *See* Mariah Timms & Melissa Brown, *Tennessee Abortion Ban Would Not Apply to Unused IVF Embryos, AG Says*, Tennessean (Nov. 2, 2022, 10:15 AM), https://www.tennessean.com/story/news/politics/2022/11/01/abortion-ban-tn-attorney-general-unused-ivf-embryos-not-impacted/69611412007 [https://perma.cc/DX68-XGHG] (quoting Skrmetti's opinion that Tennessee's abortion ban does not apply to embryos created outside the womb, even though they may fit the law's definition).

186 *See* Margaret Newkirk, *Why Alabama's Abortion Law Includes an Exemption for Infertility*, Bloomberg Businessweek (May 29, 2019) (on file with author).

the spectrum . . . . It's apples to oranges . . . . Someone going through IVF is desperately trying to get pregnant."[187] These statements do not articulate a difference inherent to the embryos used in ART procedures. They focus solely on the embryo's relationship to the pregnant body and the intentions or values of the pregnant person. The fate of the embryo predominates, for these commentators, only as long as there is a carrier—and not one who is "desperately trying to get pregnant."

Although the statements of various policymakers do not necessarily represent the motivations underlying centuries-old state practices discussed in this Part, they are examples of the thinking of some actors with significant influence over state policies, and they believe that the embryo's welfare is the sole force driving fetal personhood. The inconsistency between these statements and the fetal-personhood refrain is unsurprising because the logic in fact reflects an ongoing history of the State's use of reproductive policy and technology to limit the autonomy of Black and underserved bodies while supporting the choice and procreation of white and affluent ones.[188] ART promotes the growth of white, affluent families, who are the primary beneficiaries of these technologies,[189] and whom the State historically favors. This Part argues that fetal personhood is more a form of social control for the State than a way to protect what the State claims is a person.[190] Doubling down on fetal personhood on a national stage will force lawmakers to reconcile the politically contentious mismatch between fetal personhood and assisted reproduction and let go of the pretense that fetal personhood is really about the fetus. Instead, given the growing popularity of ART, lawmakers should reconsider their commitment to fetal personhood.

A. Political Economy of ART

ART utilization and outcomes in the United States are stratified along racial and socioeconomic lines. Politically powerful contingents—white and affluent married couples—use these technologies at the highest

187 *See* Tess Vrbin, *Arkansas' Abortion Ban Won't Affect In Vitro Fertilization, Though Some Providers Concerned About Future*, Ark. Democrat Gazette (July 4, 2022, 4:19 AM), https://www.arkansasonline.com/news/2022/jul/04/arkansas-abortion-ban-wont-affect-in-vitro [https://perma.cc/Z6QG-X2SV].

188 *See generally* Jill C. Morrison, *Resuscitating the Black Body: Reproductive Justice as Resistance to the State's Property Interest in Black Women's Reproductive Capacity*, 31 Yale J.L. & Feminism 35 (2019) (exploring how contemporary mechanisms of reproductive control are a continuation of attempts to retain property interests over Black bodies).

189 *See supra* note 119 and accompanying text.

190 For background on how American society has wielded reproductive control especially over Black bodies, see Dorothy Roberts, Killing the Black Body (1997).

rates, and the State has historically promoted procreation for these archetypes.[191] States' endorsing ART while ignoring the reproductive needs of marginalized communities is history repeating and reveals that the State is more concerned about controlling reproduction than protecting fetal life. Fetal personhood allows the State to impose laws and control pregnant bodies, as discussed in Section I.B above. If the sanctity of fetal life were really the point, the State would have to reject a concession for this form of family building. But the concession does fit neatly in the historical narrative of reproductive control.

1. Who Uses ART?

Due to the high cost of ART and limited insurance coverage, access is "deeply divided on race and class lines."[192] Even though African-American women experience higher rates of infertility, epidemiological data suggest that white women access ART the most.[193] In a recent paper, Dandison Nat Ebeh and Shayesteh Jahanfar analyzed the influence of maternal race on ART in the United States based on a nationally representative sample from the 2017 CDC Natality Public Use file.[194] In their review of existing literature, they report that racial and ethnic disparities in the United States have "major[ly] influence[d] both the utilization and outcome of infertility services."[195] Even while ART becomes increasingly prevalent, this inequity persists.[196]

The study found that the probability of undergoing ART "is high if the individual is non-Hispanic white, non-Hispanic Asian, and non-Hispanic (mixed race), but less if they are non-Hispanic Black, non-Hispanic [American Indians and Alaska Native], non-Hispanic [Native Hawaiian or Other Pacific Islander], and Hispanic . . . ."[197] Race also has been shown to affect timely access to infertility care.[198] Others who have

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191 *See infra* Section III.A.2.

192 Aziza Ahmed, *Race and Assisted Reproduction: Implications for Population Health*, 86 Fordham L. Rev. 2801, 2806 (2018).

193 *Id.* at 2807; *see also* Iris G. Insogna & Elizabeth S. Ginsburg, *Infertility, Inequality, and How Lack of Insurance Coverage Compromises Reproductive Autonomy*, 20 AMA J. Ethics 1152, 1154 (2018) (discussing how African-American and Hispanic women are less likely than white women to seek infertility care, despite having higher rates of infertility).

194 Dandison Nat Ebeh & Shayesteh Jahanfar, *Association Between Maternal Race and the Use of Assisted Reproductive Technology in the USA*, 3 SN Comprehensive Clinical Med. 1106, 1106–07 (2021).

195 *Id.* at 1106.

196 *Id.*

197 *Id.* at 1111.

198 *Id.*; *see also* Insogna & Ginsburg, *supra* note 193, at 1154 ("After failing to conceive spontaneously, it takes an average of 4.3 years for African American women to present to infertility care centers compared to 3.3 years for their white counterparts.").

studied this issue have postulated that some of these disparities "are attributable by some degree to differences in access to care, economic, educational, as well as cultural factors."[199] The Ebeh and Jahanfar study adds that other confounders such as sociodemographic status and clinical conditions affect infertility treatment.[200] Despite certain limitations to this report (the respondent population covered only 67,554 of 3,864,754 live ART births),[201] it confirms previous findings on the racial disparities in ART use and outcomes.[202] These conclusions mean that the reprieve of ART carveouts from fetal-personhood laws remove the pressure of liability primarily from white people.

2. Race and Reproductive Control

Throughout the course of U.S. history, the State has privileged white procreation while wielding the law to control and capitalize on reproduction in marginalized groups.[203] Through this lens, state protection of ART, concomitant with an otherwise comprehensive embrace of fetal personhood, is a modern iteration of this American

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[199] Ebeh & Jahanfar, *supra* note 194, at 1111; *see also Infertility and BIPOC (Black, Indigenous & People of Color) Women*, Am. Psych. Ass'n, https://www.apa.org/pi/women/committee/infertility-bipoc [https://perma.cc/G775-LCUJ] (explaining that Black and Latina women have been found less likely to seek fertility treatment than white women, that Black women tend to wait longer before seeking fertility treatment than white women, that Black, Asian, and Latina women experience lower live birth rates compared to white women, and that people of color are less likely to be referred for fertility treatment and find that their "providers lack cultural understanding").

[200] Ebeh & Jahanfar*, supra* note 194, at 1112.

[201] *Id.*

[202] *See, e.g.*, Alice J. Shapiro, Sarah K. Darmon, David H. Barad, David F. Albertini, Norbert Gleicher & Vitaly A. Kushnir, *Effect of Race and Ethnicity on Utilization and Outcomes of Assisted Reproductive Technology in the USA*, 15 Reprod. Biology & Endocrinology, no. 44, 2017 (identifying the greatest utilization of ART among non-Hispanic white women and the lowest among non-Hispanic Black women, noting that "non-Hispanic White and Asian women are relatively over-represented and non-Hispanic Black and Hispanic women are under-represented," and contemplating that these disparities are "attributable to differences in access to care and economic, educational, as well as, cultural factors"); Alicia Armstrong & Torie C. Plowden, *Ethnicity and Assisted Reproductive Technologies*, 9 Clinical Prac. (London) 651 (2012) ("In a Society for Assisted Reproductive Technology (SART) database review of 80,390 cycles, 4.6% of the cycles involved African–American women, 85.4% involved Caucasian women and 11.9% involved women of other races."); *Ethnicity and IVF*, HRC Fertility, https://uscfertility.org/ethnicity-ivf [https://perma.cc/4GHN-G6FW] (reporting that based on a retrospective review of 1,135 IVF patients between 1994 and 1998, Caucasians made up 91.5% of patients, while African-American, Asian, and Hispanic patients constituted 4%, 3%, and 1.5% respectively).

[203] *See* Ahmed, *supra* note 192, at 2801 n.4 (noting that the State has long managed race and reproduction for many reasons spanning economic to public health to "preserving a sense of nationhood and belonging"); *supra* note 191.

compulsion and a clue that fetal personhood is more social control than earnest protectionism.

The narrative of the State's insidious manipulation of minority groups' reproductive lives dates back to enslavement. Enslavers and the U.S. economy as a whole had an interest in enslaved women's reproduction, especially once the United States had phased out the international slave trade.[204] Enslaved women's reproductive capacity was essential to their status as property.[205] Conversely, enslaved persons were motivated to control their reproduction because they lacked sexual autonomy and knew they would not be entitled to enjoy secure familial relationships if they did birth children.[206] Enslavers endeavored to "deter and punish efforts to prevent or terminate pregnancies" in order to protect their property interests.[207]

When the economy shifted to wage labor after Abolition, the State had a "renewed interest in race, reproduction, and abortion" to grow the labor force.[208] New legislation criminalized abortion, prohibited distribution of abortifacients, and censored information about them.[209] Physicians who drove the campaign to criminalize abortion out of professional self-interest framed the issue in terms of demographic concerns.[210] Panic had grown about "demographic reordering" when birth rates among white women fell and birth rates among immigrants and nonwhite populations rose.[211] Criminalizing abortion was part and parcel of efforts to maintain white power.[212]

In parallel, eugenics was taking root in the United States as another rationalization for promoting white reproduction.[213] Margaret Sanger, a

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204 Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2025, 2033–34 (2021).

205 Morrison, *supra* note 188, at 49.

206 Murray, *supra* note 204, at 2034 (citing Roberts, *supra* note 191, at 26, 46–47); Morrison, *supra* note 189, at 49 ("Enslaved parents lived with the reality that their children might be taken from them at any time, with the threat of family separation often used as the ultimate punishment.").

207 Murray, *supra* note 204, at 2035.

208 *Id.* at 2035.

209 *Id.*

210 *See id.* (noting physicians aimed to delegitimize Black and Indigenous midwives by deeming their practices "unsafe" and "irregular").

211 *Id.* at 2036.

212 *Id.* (citing Reva Siegel & Duncan Hosie, *Trump's Anti-Abortion and Anti-Immigration Policies May Share a Goal*, TIME (Dec. 13, 2019, 4:35 PM), https://time.com/5748503/trump-abortionimmigration-replacement-theory [https://perma.cc/Q5Q7-SEJB]); *see also* Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, 69 Am. Socio. Rev. 498, 498–99 (2004) (arguing that in the nineteenth century, the American abortion debate was about Anglo-Saxon control and dominance).

213 *See* Murray, *supra* note 204, at 2037 (describing the evolution of the eugenics movement and its racial undertones).

controversial champion of the contraception movement, allied herself with eugenicists to garner support for access to birth control.[214] In response, some Black leaders became concerned about demographics and viewed contraception as a threat to Black survival.[215] Viewpoints were diverse and complex, though, and Black feminists advocated for reproductive rights.[216]

Today, laws restricting reproductive choice take up the mantle of oppressing Black bodies.[217] Public health advocates argue that as modern restrictions on abortions have proliferated, they have led to health concerns disproportionately for poor women, many of whom are women of color.[218] For example, the Hyde Amendment, which prohibits public funding for abortion care, was felt most by poor women and women of color.[219] Some have even argued that the Hyde Amendment was an attempt to compel Black women to submit to sterilization.[220] At the same time that abortion restrictions were tightening and white women faced obstacles even to electively tying their fallopian tubes, Black women both could not obtain safe abortions and were non-consensually sterilized.[221]

Throughout American history, the "reproductive capacity [of women of color] has constituted both a key engine for white power and wealth . . . and a touchstone for those who want to distinguish the 'value' of women's reproductive bodies by race,"[222] and ART is another theatre where this dynamic materializes. Beyond the inequitable access and medical outcomes discussed in Section III.A.1, ART is also a mechanism with "population-level effects that mirror broader racial disparities in health[,] . . . represent[ing] a new mode of governing the family that facilitates and encourages the formation and creation

214 *Id.* at 2039.

215 *See, e.g.*, *id.* at 2040–41; Morrison, *supra* note 188, at 38.

216 *See* Murray, *supra* note 204, at 2043–45 (comparing Black activist groups' stances on abortion and contraception with respect to Black genocide and reproductive autonomy); Morrison, *supra* note 188, at 39 ("Despite the controversy over the use of abortion and contraception by Black women, prominent individuals and organizations supported both measures as a tool for women's empowerment.").

217 *See, e.g.*, Morrison, *supra* note 188, at 51–55 (discussing "Family Caps" and the prosecution of pregnant addicted women as two such mechanisms of control).

218 Murray, *supra* note 204, at 2046.

219 *Id.* at 2051.

220 *Id.* ("[T]he Committee for Abortion Rights and Against Sterilization Abuse (CARASA) argued that the restriction was not simply aimed at preventing poor women and women of color from accessing abortion, but rather was part of an antinatalist effort to force poor women and women of color to submit to sterilization.").

221 Loretta J. Ross & Rickie Solinger, Reproductive Justice: An Introduction 51 (2017).

222 *Id.* at 11; *see also* Morrison, *supra* note 188, at 43 ("[R]eproductive oppression was essential to maintaining the system of slavery . . . .").

of monoracial families."[223] ART service providers are complicit in promoting monoracial family creation in the advice that they give to patients contemplating infertility treatment.[224]

The resulting "pressure to form racially homogenous families has structural implications."[225] R.A. Lenhardt writes about *Cramblett v. Midwest Sperm Bank, LLC*,[226] in which a white couple who had given birth with the help of ART sued their provider for erroneously using a sample from a Black donor rather than the white donor they had selected. Lenhardt notes that Cramblett's complaint treats Blackness as an injury and whiteness as a property right.[227] ART here operates as a mechanism for expressing and replicating deeply internalized notions of race.[228] These patterns privilege specifically white monoraciality because, as established above, white people most commonly use the technologies and because of the high demand for white gamete donors.[229] And inequitable utilization of ART has significant domino effects beyond the fundamental impediments to reproductive justice. For example, unequal access to ART may exacerbate racial disparity in disease burden and morbidity because these technologies and services are often gateways for genetic screening for life-threatening hereditary diseases such as breast cancer.[230]

Anti-abortion states' affinity for ART fits conspicuously well into the story of race in America. Lenhardt observes:

> Facilitating race selection . . . and prioritizing race concordance . . . have helped to make ART . . . a primary new site for the "social construction of race," for ascribing meaning to "human bodies" and the phenotypical characteristics associated with racial difference. It shores up a racial hierarchy that pre-dates American slavery.[231]

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223 Ahmed, *supra* note 192, at 2802.

224 *Id.* at 2803; R.A. Lenhardt, *The Color of Kinship*, 102 Iowa L. Rev. 2071, 2079 (2017) (noting that physicians' and clinics' "practices prioritize race-concordance and discourage kinship outcomes that transgress norms pertaining to family monoraciality").

225 Ahmed, *supra* note 192, at 2805.

226 *See* Complaint for Wrongful Birth and Breach of Warranty, Cramblett v. Midwest Sperm Bank, LLC, No. 201 4-L010159 (Ill. Cir. Ct. Sept. 29, 2014), 2014 WL 4853400; Lenhardt, *supra* note 224, at 2073–74.

227 Lenhardt, *supra* note 224, at 2074.

228 *See id.* at 2078 ("[R]eproductive technologies . . . have enabled rather recent changes in family formation, but the race-making function that they serve and the meanings about race that they reinforce have deep historical roots.").

229 *Id.* at 2079.

230 *See* Ahmed, *supra* note 192, at 2806–10.

231 Lenhardt, *supra* note 224, at 2080 (footnotes omitted).

This revelation sheds a new light on the states' selectively permeable devotion to fetal rights—one that highlights its social-control contours.

A. Alternative Explanations for ART Exceptionalism

Supporters of fetal personhood might attempt to justify the ART distinction in other terms. They might say that states still are adapting to the post-*Dobbs* landscape so calling out inconsistencies is premature, that ART really is special because any damage to one embryo is done to promote the life of another, or that allowing exceptions to the broad rule against harming a fetus is a practical or political concession that does not negate the centrality of protecting the fetus. But these justifications expose that alternative explanations to the racial and reproductive control theory of this Note involve illogical and arbitrary line-drawing. Offering no unified vision of fetal personhood, these kinds of counterarguments further prove that the State's impulse to control pregnant bodies is really at play in fetal personhood. Even lawmakers who favor abortion restrictions would be better off retreating from full-fledged fetal personhood than struggling to defend these ineffective arguments.

Fetal-personhood advocates might counter that states accomplish their goals piecemeal and that incremental lawmaking does not invalidate the legitimacy of a law. Perhaps these states have not yet identified all the legal inconsistencies created by the new *Dobbs* framework, and they need time to reconcile the effects. At least for the states that have directly legislated to protect ART from fetal-personhood laws, this argument does not hold water, as their sheltering of ART is considered and deliberate.

Another rationale might be that the legislative impulses to consecrate fetal personhood and protect ART are reconcilable because the harm to fetuses in the ART context is a byproduct of enhancing the chances of another fetus's live birth. But this confuses two concepts: the protection of fetal life as an abstract principle and the protection of a particular fetus as a human being (as fetal-personhood laws would have it). Generally, society does not condone the deliberate killing of one child to promote the survival chances of another, so if the fetus is a human, this argument fails. Even if this utilitarian argument made sense on a philosophical level, the math would ruin it. The ratio of embryos that are destroyed or "wasted" in ART to embryos that implant and lead to live births is high.[232]

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[232] Sanaz Ghazal & Pasquale Patrizio, *Embryo Wastage Rates Remain High in Assisted Reproductive Technology (ART): A Look at the Trends from 2004–2013 in the USA*, 34 J.

Finally, perhaps constituents hold diverse viewpoints, and compromising among varied priorities is within the remit of the legislature. There is nothing suspect, they might say, about accommodating a political majority's particular preferences, even at the expense of other deeply held convictions. Abortion laws have always included exceptions in recognition of individual rights (exceptions to save the life of the pregnant person, for example), and this is just another exception in recognition of fetal rights. The concession for ART, a democratically popular resource, should not paint the State's concern for the fetus as pretextual but rather as reflecting that the interest in the fetus is not absolute and can bend with the democratic will.

But whenever a reader attempts to analyze or understand the legislative intent behind a law, the reader necessarily operates under the fallacy that the drafters shared a cohesive objective to which they tailored the means that the law prescribes. In applying the same assumption of cohesion, it is reasonable to take issue with logical inconsistencies in a state's code. If a state declares a commitment as extreme as fetal personhood, it must actually deal with the consequences. Something has got to give: If voters want ART, then lawmakers must soften their stance on fetal personhood, which is inherently absolute.

Furthermore, even if the ART exclusion facially seems like an appropriate and ordinary consequence of political plurality, the choice of exemption discloses a value judgment—one that allows an affluent family to procreate with impunity, come what may to the embryos, but requires a single mother who is already responsible for multiple children and unable to afford another to bring a pregnancy to term. If states can frame ART as a life-promoting phenomenon that justifies the death of some early-stage "life," what about other life-promoting rationales, like the well-being of the pregnant person or any children they may already have? The answer seems inextricably linked to the State's longstanding eagerness to bolster the reproductive success of some racial groups while trampling over the reproductive needs of others.

Kentucky Senator Whitney Westerfield, who has sponsored anti-abortion measures, is vocal in his belief that an embryo is a human life, even in a petri dish, and that he doesn't "like the idea of discarding any of those human lives."[233] And yet he is a proponent of IVF, has used it

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Assisted Reprod. Genetics 159, 162 (2017) (concluding from statistics on the prior decade that "the vast majority of embryos (80%) produced during IVF and chosen for transfer still fail to implant or to result in a liveborn infant").

233 Jess Clark, *Kentucky's Blocked Abortion Ban Casts a Shadow on the Future of IVF*, Louisville Pub. Media (July 15, 2022, 9:57 PM), https://www.lpm.org/news/2022-07-15/kentuckys-blocked-abortion-ban-casts-a-shadow-on-the-future-of-ivf [https://perma.cc/8CHY-P8QC].

personally, and has no intention to regulate it.[234] He has the luxury of an exception to the otherwise steadfast veneration of the fetus. Senator Westerfield's views illustrate how one might believe in the importance of protecting the unborn but also understand that there are important values that justify the threatening conduct anyway. If individual lawmakers can so easily adopt this life-promoting rationale, then why reject others? Again, a clear and available answer is that government actors are accustomed to the use of State power to manipulate reproduction in a way that prioritizes white, affluent reproduction while restraining the reproductive autonomy of marginalized groups.

Fetal-personhood regimes do not display a pure commitment to protecting fetal life; they pick and choose to exert racialized social control that rewards affluence and punishes poverty. No matter what arguments lawmakers might advance to defend their choices with respect to ART, as they contort to differentiate abortion from fertility services, they will have to draw "complicated lines about personhood and who can and should have access to reproductive care."[235] These gymnastics will expose a vulnerability in the fetal-personhood project and force its crusaders to reconsider the extent of their loyalty to it.

C. Complicating the Fetal-Personhood Campaign

With Republicans in Congress already pushing a federal abortion ban,[236] the next phase of the war for reproductive rights will be fought over preserving access in abortion-protective enclaves, such as New York. States that have codified fetal personhood with one hand and shielded ART with the other have an interest in appeasing the constituencies who most use these technologies. As Section III.A established above, these are predominantly white and affluent people, who tend to have political capital. Staunch and theoretically consistent fetal personhood is not paramount. So reproductive justice advocates should latch onto this reticence in arguments against the prudence of fetal personhood, and lawmakers should consider the conflict between fetal personhood and ART before driving the concept further to the point where they will have to thread the needle. Specifically, lawmakers should take seriously the political favorability of ART before committing to a

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234 *Id.*

235 Heidt-Forsythe, Kalaf-Hughes & Mohamed, *supra* note 4.

236 Maggie Jo Buchanan, *What You Need to Know About the Bill to Ban Abortion Nationwide*, CAP (Sept. 16, 2022), https://www.americanprogress.org/article/what-you-need-to-know-about-the-bill-to-ban-abortion-nationwide [https://perma.cc/6VJJ-BA3Y]; Nicole Narea, *Republicans Are Eyeing a Nationwide Abortion Ban. Can They Pull It Off?*, Vox (June 25, 2022, 1:20 PM), https://www.vox.com/policy-and-politics/2022/6/25/23182779/nationwide-abortion-ban-roe-republicans [https://perma.cc/X6CP-ZJV3].

federal fetal-personhood platform. And reproductive justice advocates should convey to voters across the country that fetal personhood is fundamentally at odds with free use of ART and should draw out how other rationales for reproductive freedom are equally imperative.

Critics have long observed hypocrisies among the anti-abortion camp belying the purported concern over protecting life. These critiques tend to focus on the anti-abortionists' lack of support for programs that provide resources for children once they are born.[237] Recognizing the inconsistency in how states talk about fetal personhood and their fundamental moral aims as implied by their treatment of ART has expressive force and should compel those who support fetal personhood at the expense of pregnant people to question the sincerity of states' putative interests. It should also make us question whether the otherwise absolutist anti-abortion frameworks of these hostile states really reflect the democratic will of their constituents. Beyond the moral force of these questions, though, logical flaws like the one exposed in this Note could help to combat the advancement of anti-abortion policies on a national scale.

Developments in the law governing state and federal legislative authority diminish the doctrinal significance of the knot identified in this Note.[238] States have plenary police powers which they may use to legislate to protect public health, safety, and morals, and they are not subject to the same legislative restrictions as Congress.[239] Therefore,

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237 Leah A. Plunkett & Michael S. Lewis, *The Wages of Crying Life: What States Must Do to Protect Children After the Fall of* Roe, 2022 Pepp. L. Rev. 14, 19–20 (2022) (noting that in order to act rationally, a state banning abortion must be consistent in its "pro-life" beliefs and protect young children after birth as well); *The Hypocrisy of the "Pro-Life" Movement*, NARAL Pro-Choice Am., https://www.prochoiceamerica.org/campaign/the-hypocrisy-of-the-pro-life-movement [https://perma.cc/755Q-CQVG] ("For decades, the anti-choice movement has attempted to brand itself as 'pro-life,' but it's not hard to see through their charade. . . . [T]his is the exact same Republican party that is hellbent on harming women and families with their regressive policies."); Elaine Godfrey, *America Is About to See Just How Pro-Life Republicans Actually Are*, The Atl. (June 26, 2022), https://www.theatlantic.com/politics/archive/2022/06/anti-abortion-movement-dobbs-roe-overturned/661393 [https://perma.cc/X9BB-YLUG] ("The places in America with the strictest abortion laws are also places where suspicion of state involvement runs deep, and investing millions more in government services is a political nonstarter.").

238 For example, the Supreme Court upheld the Controlled Substances Act under the Commerce Clause in *Gonzales v. Raich*, 545 U.S. 1 (2005), even though that statute was motivated at least in part by moral values rather than economic concerns. *See Gonzales*, 545 U.S. at 26 ("Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality." (citing United States v. Morrison, 529 U.S. 598 (2000))).

239 16A Am. Jur. 2d *Constitutional Law* § 344, Westlaw (database updated May 2023); Torres v. Lynch, 578 U.S. 452, 457–58 (2016) (stating that state legislatures need not keep to the same enumerated powers as Congress).

courts tend to defer to state legislatures under rational basis review.[240] After *Dobbs*, states will probably enjoy the long leash of rational basis review for laws that restrict abortion and prioritize the fetus.[241] Similarly, Congress has already legislated on abortion-related issues (for example, Congress used the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act of 1994 and the Partial-Birth Abortion Ban Act of 2003),[242] and developments in Commerce Clause jurisprudence do not offer a clear route to leverage the ART contradiction in a way that would persuade courts to invalidate a new federal abortion law.[243]

Yet amplifying conflicts—as in this Note—could sound the alarm about the potential implications of fetal personhood and the kinds of tangles that lawmakers will have to navigate to appease their constituents while maintaining the façade that fetal personhood is a cohesive and legitimate reform. Some evidence already suggests that the politics of this issue are potent. The revisions of the Arkansas statutes discussed in Part II, which clarify that ART is not the killing of an "unborn child," may have been driven by political compromise (but this is speculation based on legislative history). The criminal homicide

240 *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993) (discussing the deferential rational basis standard in the context of equal protection challenges).

241 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2317 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational States will feel free to enact all manner of restrictions."); KEVIN J. HICKEY & WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10787, CONGRESSIONAL AUTHORITY TO REGULATE ABORTION 1 (2022) ("After *Dobbs*, such state abortion regulations will generally be sustained by federal courts so long as they have a rational basis."). *But see* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 *passim* (2018) (arguing that rational basis review has been oversimplified and discounted by conventional wisdom and that the doctrine could provide meaningful opportunities to disrupt the status quo given the variable application of the standard in state and federal district courts). Theoretically, one could argue that a statute codifying fetal personhood is not rationally related to a legitimate government interest because protection of ART shows that the real underlying government interest is related to morality (not the protection of a purportedly human life), so the extreme consequences of the statute (e.g., criminalization and withholding adequate healthcare) make it too loosely tailored to that interest.

242 *See* HICKEY & NOVAK, *supra* note 241, at 2–6 (describing potential routes that Congress could use to legislate on abortion, namely, under the Commerce Clause, the Spending Clause, and Section Five of the Fourteenth Amendment).

243 One could potentially try to distinguish pro-abortion from anti-abortion legislation under *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000) by drawing on contradictions like the ART one identified in this Note to argue that fetal-personhood legislation is purely moral in character, whereas pro-abortion legislation is actually motivated, for example, by an objective of facilitating the delivery of healthcare in interstate commerce. But such an argument may not be persuasive to the Supreme Court and is beyond the scope of this Note.

and wrongful death laws were amended in 2013 to redefine "person."[244] Previously, "person" was defined as a fetus at least twelve weeks old.[245] The amendment altered this to include "offspring of human beings from conception until birth" and replaced the word "fetus" with "unborn child" throughout the statutes.[246] The original version of the 2013 bill had not included any mention of ART, but the month after Senator Hendren (a Republican)[247] introduced the bill, it was amended to include protections for deaths related to ectopic pregnancy, contraception, and ART.[248] Simultaneously, Representative Steel (a Democrat)[249] became a cosponsor.[250] The revisions to Arkansas's fetus-protective laws, as well as Louisiana's (discussed above), to differentiate ART show that there is some play in the joints when it comes to designing abortion laws that accommodate politically popular exceptions.

The constituents who want access to ART evidently are politically powerful and sympathetic enough for anti-abortion states to add ART protections to their laws. Given the high cost of these therapies,[251] their users are generally affluent, making them politically powerful, but the burdens of nationally restricted access to ART would still be high for these users. Successful treatments typically require several cycles,[252] each of which lasts multiple weeks,[253] and therefore would require repeated trips abroad for the birth of one child. ART's popularity is growing,[254] and fetal-personhood advocates should pay attention to this trend. At the same time, opponents of fetal personhood can leverage inconsistencies like the one between fetal personhood and ART to galvanize segments of the public that may currently support fetal personhood but might balk when they understand the logically necessary conclusion that ART would not survive a coherent fetal-personhood regime. Ideally, newly

244 *See* S.B. 417, 89th Gen. Assemb. (Ark. 2013).

245 *Id.*

246 *Id.*

247 *Senator Jim Hendren*, Ark. State Legislature, https://www.arkleg.state.ar.us/Legislators/Detail?member=J.+Hendren&ddBienniumSession=2013%2F2013R [https://perma.cc/L7YS-CC7Z].

248 Ark. House J., 89th Gen. Assemb., Reg. Sess. No. 61 (Ark. 2013) (describing the amendments for the bill, S.B. 417).

249 *Representative Nate Steel*, Ark. State Legislature, https://www.arkleg.state.ar.us/Legislators/Detail?member=Steel&ddBienniumSession=2013%2F2013R [https://perma.cc/3ZKZ-ZKQF].

250 *See supra* note 249.

251 *See supra* note 119 and accompanying text.

252 Andrew D.A.C. Smith, Kate Tilling, Scott M. Nelson & Debbie A. Lawlor, *Live-Birth Rate Associated with Repeat In Vitro Fertilization Treatment Cycles*, 314 JAMA 2654, 2656–60 (2015).

253 *In Vitro Fertilization (IVF)*, Mayo Clinic (Sept. 1, 2023), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/E6R2-QU73].

254 *See supra* notes 110–11 and accompanying text.

mobilized voters will come to realize that pregnant human beings are justified when they prioritize personal goals and values—like, but not only like, family building—over the security of a particular fetus.

Conclusion

Affirmed by the highest Court in the land, proponents of fetal-personhood and anti-abortion laws are strategizing with renewed vigor on how to control the reproductive choices of pregnancy-capable people across the country. As abortion-restrictive policies proliferate in state legislatures and Congress, the importance of understanding the faults in the anti-abortion project grows. Fetal personhood has wreaked havoc on the pregnant and parenting population for decades in the ramp-up to *Dobbs*, with incalculable consequences in the criminal, medical, and social spheres. Fetal personhood will also probably be the theoretical foundation for bills that seek to ban abortion nationwide. States' protection of ART from the logical repercussions of fetal personhood reveals that those states carrying the banner for the fetuses' well-being have another agenda. Advocates, voters, and lawmakers should pay attention to what fetal personhood really means and consider its boundlessness before it reaches Congress. All people should be able to access available technologies to realize their reproductive goals and build the families that they want. Laws that prevent this will be unpopular. Laws that permit only this, while illegalizing other broad categories of human conduct and ruining lives, are illegitimate.