

AFTER *DOBBS*: EXPLORING *DOBBS*' IMPACT ON *IN VITRO* FERTILIZATION

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ABSTRACT

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court held that the right to abortion was not protected by the U.S. Constitution, overturning *Roe v. Wade* and its progeny, *Planned Parenthood v. Casey*. As a result, the Supreme Court returned the decision to restrict or prohibit abortion to the states. *In vitro* fertilization (IVF) is a complex series of procedures, involving the removal of fertilized eggs and sometimes the destruction or storage of "extra" fertilized eggs. IVF is used to help prevent genetic problems and assist with the conception of a child for couples experiencing infertility. This paper explores *Dobbs*' impact on IVF. Specifically, whether states can prohibit IVF practices when the state determines that life begins at fertilization. The paper begins with a discussion on the historical issue of abortion leading up to *Dobbs*. Then, the paper will introduce and explain IVF. It focuses on the possibility that states may impose restrictive laws over numerous pregnancy-related procedures, including IVF. Then, I analyze three distinct aspects of restrictive laws on IVF: the potentiality and viability argument, their constitutionality, and their probable impact on the nation. I posit that considering these three facets, along with the state government's burden to meet strict scrutiny, state bans of IVF in their attempt to regulate abortion are unconstitutional because it is in violation of the fundamental right to procreate.

INTRODUCTION

This paper explores and summarizes the relationship between *Dobbs v. Jackson Women's Health Organization* and in vitro fertilization laws. Specifically, this paper will discuss whether states can prohibit IVF practice by determining that life begins at fertilization. I will propose the potential burdens that groups dependent on IVF for procreation have to shoulder as consequences of banning IVF practice.

BACKGROUND

Across the United States, the polarizing topic of abortion poses a profound moral quandary.¹ Some believe life begins at conception, and abortion takes away a human life already conceived. Others believe that any restriction on abortion prevents a woman from having complete control of their body.² Those who take the middle ground often argue that there is a balance between protecting an unborn child and a woman's bodily autonomy.³ Before *Roe v. Wade*,³ each state legislature was allowed to address the moral issue proposed by abortion.⁴ *Roe* held that the Constitution presents a broad

¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2241 (2022).

² *Id.*

³ *Id.*

⁴ *Id.*

right to an abortion implied in the First, Fourth, Ninth, and Fourteenth Amendments.⁵ The Court in *Dobbs* examined *Roe* and *Planned Parenthood v. Casey* by considering whether: (1) the Fourteenth Amendment’s reference to “liberty” protects any specific right; (2) abortion is rooted in U.S. history and tradition; and (3) the right to abortion is a right supported by other precedents.⁶ On June 24, 2022, *Dobbs v. Jackson Women’s Health Organization* held that the right to abortion was not protected under the Constitution because no such right is addressed in the text of the Constitution or U.S. history, overturning *Roe* and *Casey*.⁷ As a result, the Court returned the decision regarding abortion to the states.⁸

Once the Court returned this decision to the states, some states began considering laws stating that life begins at conception. Currently, Kentucky, Missouri, and Oklahoma, have laws declaring that life begins at fertilization.⁹ This impacts not only abortion, but also *in vitro* fertilization.

⁵ *Id.* at 2244.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Varney, Sarah. “When Does Life Begin? as State Laws Define It, Science, Politics and Religion Clash.” *NPR* (August 27, 2022), online at <https://www.npr.org/sections/health-shots/2022/08/27/1119684376/when-does-life-begin-as-state-laws-define-it-science-politics-and-religion-clash> (visited November 30, 2022).

Scientific and ethical challenges, which initially hindered the development of treatments for infertility, have always burdened human reproduction research. Human reproduction research has always been burdened by scientific and ethical challenges that initially hindered treatments and research.¹⁰ However, in the 1960s and 1970s, the understanding of human fertilization evolved, making it possible to fertilize human oocytes and immature egg cells *in vitro*¹¹ In 1978, the first “test tube baby,” Louise Brown, was born. Three years later, the first *in vitro* baby was born in the United States.¹² Today, millions of births worldwide result from *in vitro* fertilization (IVF), accounting for 1-3% of all births in the U.S. and Europe.¹³

In vitro fertilization is a complex series of procedures developed to help prevent genetic problems and assist with the conception of a child.¹⁴ Currently, IVF is the most effective form of assisted reproductive technology, and it is also

¹⁰ Eskew, Ashley M, and Emily S Jungheim. “A History of Developments to Improve *in vitro* Fertilization.” *Missouri Medicine* vol. 114,3 (2017): 156.

¹¹ Eskew, “History of Developments,” 156.

¹² *Id.*

¹³ *Id.*

¹⁴ “In Vitro Fertilization (IVF).” *Mayo Clinic* (September 2021), online at <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716> (visited December 22, 2022).

extremely important in the LGBTQ+ community as it is one of the few ways a gay couple may conceive a child.¹⁵ During IVF, mature eggs are retrieved from the ovaries and fertilized by sperm in a lab.¹⁶ The fertilized egg (embryo) or eggs (embryos) are transferred to the uterus.¹⁷ Transferring embryos usually takes around three weeks.¹⁸ It may be done using a couple's own sperm and egg or using sperm or egg from a donor.¹⁹ Most couples have at least three to five embryos frozen to increase their chance of success or use for future IVF cycles.²⁰ For those that do not wish to use their frozen embryos for future IVF cycles, there are four available options: (1) indefinitely freeze and store the embryos; (2) donate the embryos to other couples; (3) donate the embryos to medical research; or (4) allow the embryos to thaw.²¹ If a couple decides to thaw their embryos, the medical clinic will

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Erika. "What Happens to Stored Embryos If I Decide Not to Use Them?" *Reproductive Resource Center Kansas City IVF* (January 13, 2015), online at <https://www.rrc.com/what-happens-to-stored-embryos-if-i-decide-not-to-use-them/> (visited December 3, 2022).

²¹ *Id.*

discard them, and the couple may hold a ceremony to honor the embryos.²²

ANALYSIS

IVF and *Dobbs*

The overturning of *Roe* may prompt political momentum for laws to protect embryos used clinically or for research purposes.²³ Specifically, pro-life activists are most concerned with the destruction of embryos because they believe it entails ending a potential life. As a result, states all over the U.S. are quick to enact abortion laws, whether protecting or restricting abortion.²⁴ As a result, Americans are now seeking to define when life begins.²⁵ Of course, attempting to define life begs the question: Does life begin at conception, the faint pulse of a heartbeat, a first breath, the ability to survive on its own with the help of technology? According to *Dobbs*, the states are given the power to decide when life begins.²⁶ Thus, state legislators are attempting to

²² *Id.*

²³ Greely, Henry T. "The Death of *Roe* and the Future of *Ex Vivo* Embryos." *Journal of Law and the Biosciences*, vol. 9, no. 2, July 2022, p. 9.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Dobbs*, 142 S. Ct. at 2284.

define life in order to set it into legal definitions for abortion rights, birth control, and assisted reproduction.²⁷

As previously noted, states, including Kentucky, Missouri, and Oklahoma, have laws declaring that life begins at fertilization.²⁸ In Kentucky, Ky. Rev. Stat. § 311.772. outlaws abortions and defines pregnancy as “the human female reproductive condition of having a living unborn human being within her body throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth.”²⁹ A recent Oklahoma bill, H.B. 4327, passed on 19 May 2022, bans abortions from the time the egg is fertilized.³⁰ This bill does not mention IVF, and the law does not ban the destruction of embryos, just abortion. Another state, Louisiana, declared that an *in vitro* embryo should be a “juridical person” that cannot legally be destroyed by its parents or the clinic but may be used or donated to another couple.³¹ In fact, Louisiana is the only state that has regulated any IVF activity.³² The Louisiana statute, passed in 1986,

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Greely, “The Death of *Roe*,” 14.

³¹ Dena S. Davis, “The Puzzle of IVF,” 6 *Houston Journal of Health Law and Policy* 275 (Symposium 2006).

³² Greely, “The Death of *Roe*,” 12.

explicitly protects an *ex vivo* human embryo (an embryo outside the mother).³³ This statute is aimed at protecting embryos created through IVF that the parents have decided to discard.³⁴ As a result, Louisiana clinics have been storing frozen embryos for over 35 years.³⁵ Although the Louisiana statute was enacted prior to the *Dobbs*' decision, the political momentum built by *Dobbs* may lead additional states to follow suit and impose restrictive laws on *in vitro* fertilization, such as requiring *ex vivo* embryos to be stored in a clinic.³⁶

Potentiality and Viability

In many regards, the current debate regarding embryo wastage and experimentation resembles the older debate about abortion.³⁷ IVF accounts for a significant number of destroyed embryos each year.³⁸ While it is difficult to quantify exactly, IVF is almost guaranteed to produce embryo wastage as those not ultimately inserted into a uterus may be

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 10.

³⁷ Singer, Peter, and Karen Dawson. "IVF Technology and the Argument from Potential." *Philosophy & Public Affairs*, vol. 17, no. 2, 1988, pp. 87–104.

³⁸ Davis, "The Puzzle of IVF," 277.

discarded.³⁹ Many pro-life advocates reverently believe that human life begins at conception and insist that embryos are morally equivalent to living persons, and some pro-life organizations have long opposed discarding unused embryos.⁴⁰ In other words, pro-life activists argue for the potentiality of embryos, positing that fertilized eggs have the potential to become humans and thus should enjoy the rights and protections granted to humans.⁴¹ Programs such as the Snowflake program through Nightlight Christian Adoptions sponsor “embryo adoption” efforts to protect unused embryos by allowing families to adopt an embryo or donate their unused embryos.⁴² However, if a fertilized egg constitutes a new human being, then an unfertilized egg and a sperm are just as potentially a new human being.⁴³ The idea that unfertilized eggs and sperms are potential humans has yet to find support among philosophers and ethicists.⁴⁴ Some have

³⁹ Mosbergen, Dominique, and Natalie Andrews. “Fertility Doctors Move Embryos, Expecting Abortion Law Changes.” *The Wall Street Journal* (June 24, 2022), online at <https://www.wsj.com/articles/fertility-doctors-move-embryos-to-other-states-in-case-of-roe-v-wade-impact-11656063000> (visited December 4, 2022).

⁴⁰ Greely, “The Death of *Roe*,” 11.

⁴¹ Harris, John. “In Vitro Fertilization: The Ethical Issues (I).” *The Philosophical Quarterly* (1950), vol. 33, no. 132, 1983, pp. 223-224.

⁴² Greely, “The Death of *Roe*,” 11.

⁴³ *Id.* at 223.

⁴⁴ *Dobbs*, 142 S. Ct. at 2269.

argued that a fetus should not receive protection until it acquires the characteristics of a “person,” such as sentience, self-awareness, or the ability to reason.⁴⁵ By this logic, one can question whether some born individuals, including children and those with mental disabilities, deserve protection as “persons.”⁴⁶ Nevertheless, because of *Dobbs*’, pro-life groups may move to protect *ex vivo* embryos in IVF.⁴⁷

Other enactments by the Tennessee legislature demonstrate that viable fetuses in the womb are not entitled to the same protections as “persons” regarding abortion.⁴⁸ However, as described, it is extremely complicated to mark when “personhood” begins.⁴⁹ In *Webster v. Reprod. Health Servs.*, the court holds that the state has a compelling interest in potential life but only at the point when the fetus is viable.⁵⁰ Still, viability, like personhood, is nearly impossible to define strictly.⁵¹ Viability is heavily dependent on many factors that often have nothing to do with a fetus or an embryo.⁵²

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Greely, “The Death of *Roe*,” 15.

⁴⁸ *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992).

⁴⁹ *Dobbs*, 142 S. Ct. at 2269.

⁵⁰ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 109 S. Ct. 3040 (1989).

⁵¹ *Dobbs*, 142 S. Ct. at 2269.

⁵² *Id.*

Although the discussion of IVF started well before viability, multiple factors make it more difficult to determine the potentiality for an embryo to be considered a person.⁵³ Specifically, the notion of potential is far more problematic when extended to a laboratory where everything depends on a physician's knowledge, skills, and decisions.⁵⁴

Moreover, while an embryo inside a body has some chance of developing into a child, in IVF, the egg and sperm can develop only if there is a deliberate human act.⁵⁵ In advanced laboratories, fertilization occurs in about 80 percent of the eggs treated. Yet, the probability that an embryo will be transferred and implanted in someone's uterus and led to a pregnancy is typically no higher than 10 percent.⁵⁶ As a result, the potentiality of an embryo resulting in a human being is less likely in IVF than in traditional means. In *Davis v. Davis*, the Supreme Court of Tennessee acknowledged the uniqueness of IVF by stating, "the United States Supreme Court has never addressed the issue of procreation in the context of *in vitro* fertilization."⁵⁷ In this case, the court

⁵³ Singer, "IVF Technology," 88.

⁵⁴ *Id.*

⁵⁵ *Id.* at 89.

⁵⁶ *Id.*

⁵⁷ *Davis*, 842 S.W.2d at 601.

concludes that pre-embryos are neither “persons” nor “property” but occupy an interim category that entitles them to special respect because of their potential for human life.⁵⁸ An embryo is considered a pre-embryo in the first fourteen days after fertilization, at which time embryo implantation is complete.⁵⁹ The IVF process uses pre-embryos and embryos during fertilization and uterine implantation.⁶⁰ Since embryos are more developed, states may argue that embryos carry more weight than pre-embryos in their potential for human life. Regarding the pre-embryos in *Davis*, the court did allow the unused pre-embryos to be destroyed.⁶¹

Similarly, in *J.B. v. M.B.*, a woman living in New Jersey became pregnant through the IVF process but later sought to destroy the excess embryos that were cryogenically frozen after she and her husband divorced.⁶² The husband asserted that his religious beliefs regarding the protection of potential life outweighed the wife’s right not to procreate, which the court ultimately disagreed with and held that the embryos

⁵⁸ *Id.* at 597.

⁵⁹ Jones, D Gareth, and Barbara Telfer. “Before I was an embryo, I was a pre-embryo: or was I?” *Bioethics* vol. 9,1 (1995): 32-49.

⁶⁰ “In Vitro Fertilization (IVF).”

⁶¹ *Id.* at 605.

⁶² *J.B. v. M.B.*, 170 N.J. 9, 783, 711 A.2d 707 (2001).

may be destroyed.⁶³ However, both *Davis* and *J.B.* were addressing contracts regarding embryos and did not base their opinion solely on the potentiality or viability of the embryos.

Impact

Today, over one million embryos are in storage in the United States.⁶⁴ In 2019, around 80,000 of 3.7 million babies born in the U.S. were conceived through *in vitro* fertilization.⁶⁵ Until now, the modern fertility industry has never known a time before *Roe*, with the first IVF baby born after the law's passage.⁶⁶ As discussed, states now have the power to declare when life begins.⁶⁷ When the Supreme Court's ruling overturning *Roe v. Wade* referred to "unborn human beings," it indirectly raised the issue of IVF.⁶⁸ The uncertainty of *Dobbs*

⁶³ *Id.*

⁶⁴ Kowitt, Beth. "If You Can Move Them, Move Them': Fertility Experts Say the End of *Roe* Raises Huge Questions about the Fate of Frozen Embryos in Red States." *Fortune*, *Fortune* (June 25, 2022), online at <https://fortune.com/2022/06/24/roe-v-wade-abortion-ivf-embryos-red-states/> (visited December 4, 2022).

⁶⁵ Person, "Fertility Doctors Move Embryos."

⁶⁶ Kowitt, "Move them."

⁶⁷ *Dobbs*, 142 S. Ct. at 2269.

⁶⁸ Polo, Michelle Jokisch. "Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment." *NPR* (July 21, 2022), online at <https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment> (visited December 3, 2022).

and the debate of when life begins leaves many people uncertain. Will there be limits on the number of embryos that doctors can create during IVF? Will patients be forced to donate or implant their embryos? Will disposing of embryos become a criminal act?⁶⁹ Additionally, some individuals question whether an embryo is a person and if IVF practices will continue to be allowed because certain standard practice in a laboratory in the course of IVF is deemed to be harmful to an embryo.⁷⁰ For example, unused embryos may be frozen and stored for future use. If states consider embryos as “people,” would it be legal to freeze them? While the frozen embryos are not dead, they are also not allowed to live and develop and thus could be considered harmed. David Sable, a former fertility doctor, stated that his colleagues had contacted him asking if they should relocate their patient’s embryos stored in Texas and Louisiana.⁷¹ Another doctor voiced his concern, stating that strict abortion bans could force many providers to close practice in states deeming that life starts at fertilization.⁷²

⁶⁹ Kowitt, “Move Them.”

⁷⁰ Polo, “Infertility Patients Fear.”

⁷¹ Kowitt, “Move Them.”

⁷² Polo, “Infertility Patients Fear.”

The growing concerns regarding IVF restrictions are extremely troublesome as the need for *in vitro* fertilization is especially prevalent today. In the United States, about one in five heterosexual women between the ages of 15 and 49 years who have not previously given birth are infertile.⁷³ About one in four women in this group struggle to get pregnant or carry a pregnancy to term.⁷⁴ Many men also experience infertility, including at least 10% of the male population in the U.S..⁷⁵ Moreover, gay couples may rely on IVF to have a child. In 2017, 1,451 women in a same-sex relationship received IVF, which is expected to increase as time passes.⁷⁶

Restrictions on IVF place a significant burden on the many couples that rely on IVF to have children. One example is how the Michigan Act 328 of 1931 Michigan bans abortion, which may also jeopardize IVF treatments.⁷⁷ If courts interpret Michigan law to criminalize the disposal of embryos,

⁷³ “Infertility.” *Centers for Disease Control and Prevention*, Centers for Disease Control and Prevention (March 1, 2022), online at <https://www.cdc.gov/reproductivehealth/infertility/index.htm> (visited November 29, 2022).

⁷⁴ *Id.*

⁷⁵ “Male Infertility: Causes and Treatment.” *Cleveland Clinic*, online at <https://my.clevelandclinic.org/health/diseases/17201-male-infertility> (visited December 6, 2022).

⁷⁶ Meads, Catherine, et al. “Why Are the Proportions of in-Vitro Fertilisation Interventions for Same Sex Female Couples Increasing?” *Healthcare (Basel, Switzerland)*, U.S. National Library of Medicine, 30 Nov. 2021.

⁷⁷ Polo, “Infertility Patients Fear.”

a Michigan resident's only options will be to pay an embryo storage fee ranging anywhere from \$350 to \$600 a year or to transfer the embryos back to her uterus.⁷⁸ Finally, if states ban IVF treatments, experts warn that requiring patients to travel would make IVF even more inaccessible than it already is, with the average IVF baby costing \$40,000 to \$60,000.⁷⁹ As a result, the ability to grow a family will only become accessible to those who have money, connections, and racial privilege.⁸⁰

Constitutionality

It is undisputed that there is a fundamental right to procreation and becoming a parent. *Skinner v. Oklahoma* is clear when Justice Douglas identifies the right to procreate as “one of the basic civil rights of man” and fundamental to humanity’s very existence.⁸¹ Again in *Eisenstadt v. Baird*, the Court holds, “if the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to

⁷⁸ *Id.*

⁷⁹ Kowitt, “Move Them.”

⁸⁰ Polo, “Infertility Patients Fear.”

⁸¹ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

bear or beget a child.”⁸² “Where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interest and must be narrowly drawn to express only those interests.”⁸³ Because the right to procreate is well-established as being a fundamental right, the law must meet a strict scrutiny standard when determining whether or not this right can be infringed upon.⁸⁴ In order to meet the strict scrutiny standard, the government must have a compelling interest, and its law must be narrowly tailored to fit that interest.⁸⁵

The Constitution protects a person’s decisions regarding fundamental rights, including marriage, procreation, contraception, family relationships, and education.⁸⁶ However, “no U.S. courts have ruled that IVF, in full or in part, is an aspect of the liberty protected by the federal Constitution, whether inside the federal constitutional right or parallel to it—but then, no courts have had to face this

⁸² *Eisenstadt v. Baird*, 405 U.S. 438, 453 92 S. Ct. 1029 (1972).

⁸³ *Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Carey*, 431 U.S. at 685.

issue, as no states have passed such laws.”⁸⁷ Nevertheless, IVF and the associated decisions regarding embryos embody “one of the basic rights of man”: procreation.⁸⁸ In this case, states which declare life begins at fertilization must prove that their interest in protecting the potential life of an embryo outweighs a person’s fundamental right to “bear or beget a child.” While the Court acknowledged in *Dobbs* that the government might have a compelling interest in protecting a fetus, it also acknowledged the circular argument associated with determining the viability of a fetus because there is no clear answer.⁸⁹ Hence, it is nearly impossible to make a compelling argument for or against an embryo’s potentiality, viability, or personhood due to the lack of proper definitions for these terms.⁹⁰ Because of the fragility of an embryo and the inability to determine viability status, it would be extremely difficult for states to provide a genuine “compelling” government interest in ending IVF practices to protect an embryo versus a well-established constitutionally protected right to procreation. However, while it is unlikely a

⁸⁷ Greely, “The Death of *Roe*,” 9.

⁸⁸ *Skinner*, 316 U.S. at 536.

⁸⁹ *Dobbs*, 142 S. Ct. at 2269.

⁹⁰ *Id.*

state has a compelling interest in ending IVF practices altogether, a state could have a compelling interest in preventing physicians from discarding unused embryos by asserting that life begins at fertilization. Again, this would constitute an infringement of the right to have a child, given the nature of IVF. As stated, the process of IVF leads to the creation of embryos that do not have the potential to develop into a person unless there is some deliberate human act, and even in the best circumstance, will most likely not develop into a person.⁹¹ This is apparent in the Louisiana statute, which has led to doctors and agencies freezing thousands of embryos in storage to avoid discarding them for over 35 years.⁹²

However, even in the unlikely event that the states present a compelling government interest, their laws must be narrowly tailored to fit that interest.⁹³ In *Griswold*, the Court holds that the Constitution does not permit a State to forbid a married couple from using contraceptives.⁹⁴ Similarly, the Constitution would not permit a State to forbid people from

⁹¹ Singer, "IVF Technology," 90.

⁹² Greely, "The Death of *Roe*," 12.

⁹³ *Carey*, 431 U.S. at 686.

⁹⁴ *Griswold v. Connecticut*, 381 U.S. 479, 485 85 S. Ct. 1678 (1965).

receiving IVF and clinics practicing it as this would not be narrowly tailored to fit the government's interest. Thus, it is likely that states may attempt to limit IVF through laws banning the destruction of any IVF embryos or through laws limiting parental embryo selection practice.⁹⁵ The Louisiana statute already provides an example to states that wish to prohibit the destruction of viable embryos, fresh or frozen.⁹⁶

Rather than this broad effort to ban the disposal of embryos produced for IVF, pro-life supporters may attempt to ban prospective parents from “using certain reasons to choose particular embryos to be discarded and destroyed—notably, discrimination based on sex, race, disability, ‘cosmetic’ traits, or for enhancement purposes.”⁹⁷ Already, at least 11 states have passed laws banning abortion on the basis of sex.⁹⁸ Mostly these statutes made it a crime for a healthcare professional to abort a fetus when the professional knew that the “sole” reason for the abortion was the fetus's association with one of these protected classes.⁹⁹ However,

⁹⁵ Greely, “The Death of *Roe*,” 11.

⁹⁶ *Id.* at 13.

⁹⁷ *Id.* at 16.

⁹⁸ *Id.*

⁹⁹ *Id.*

these laws are difficult to enforce.¹⁰⁰ In IVF, the parents may have the opportunity to choose between several embryos and be asked by doctors which ones they want to be transferred into the uterus.¹⁰¹ Regarding race, it is reasonable to assume that if the embryos came from a couple's own eggs and sperm, they would know what race or races the embryos would develop into.¹⁰² In this case, it is difficult to prove the "sole purpose" for a couple's choice regarding a particular embryo unless they choose based on an embryo's sex.¹⁰³ Unlike racial discrimination, on average, half the embryos produced through IVF will be male and half female.¹⁰⁴ Therefore, unless all of a couple's embryos are one sex or the other, there will always be sex-based discrimination.¹⁰⁵ Again, proving the couple's sole purpose to discard one embryo of another because the couple may not want one gender is nearly impossible unless that couple comes in repeatedly, for multiple embryos.¹⁰⁶

¹⁰⁰ *Id.* at 18.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 19.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Some may also push states to ban disposing of embryos based on their disability status.¹⁰⁷ This motivation is likely stronger for some disabilities than others, such as Down Syndrome versus Tay-Sachs.¹⁰⁸ In fact, many states have passed legislation banning abortion based on the potential for a child to be born with Down Syndrome; in at least one of them, Ohio, the law has gone into effect.¹⁰⁹ Unlike Down Syndrome, Tay-Sachs is a disease that causes children to rapidly decline and die around the ages of three and four.¹¹⁰ It is also possible that states may place bans on cosmetic traits or “enhancements.”¹¹¹ Currently, there is almost no evidence about DNA variations that can create enhancements, but there are ways a parent can predict some cosmetic traits, such as hair and eye color, with reasonable accuracy.¹¹² As a result, statutes banning embryo selection for cosmetic traits may be politically attractive to more than just pro-embryo groups as it is likely that the majority of the U.S. population will be against “designer babies” or “super babies.”¹¹³

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 16.

¹¹⁰ *Id.* at 20.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 21.

While a state may have a compelling interest in protecting the unused embryos, it would be unconstitutional for states to place limits such as preventing patients from discarding based on sex, race, or disability; reducing the number of embryos created during IVF; forcing patients to donate or implant their embryos; or criminalizing disposing of embryos because all impose a significant burden on the right of individuals to bear or beget a child. Despite *Dobbs* overturning *Casey*, it could be argued that any limitation on IVF clinics is placing an “undue burden” on a person’s fundamental right to procreation. For instance, forcing a patient to keep an embryo with a severe disability would place a substantial mental and financial burden on them. Additionally, as noted by an IVF physician, strict abortion bans may force many providers to close practices in states deeming life begins at fertilization.¹¹⁴ Like the prohibition of contraceptive use in *Griswold*, restricting the number of IVF facilities in the U.S. renders IVF considerably less accessible to the public, reduces the privacy for those struggling with infertility, and lessens the possibility of price competition.¹¹⁵

¹¹⁴ Polo, “Infertility Patients Fear.”

¹¹⁵ *Griswold*, 381 U.S. at 503.

If states prohibit or enforce a significant burden upon *in vitro* fertilization, they risk a violation of the Equal Protections clause of the Fourteenth Amendment. IVF aims to provide infertile people, transgender people, and gay couples with an opportunity to conceive a child. *Eisenstadt* decided, under the Equal Protection Clause, that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.” Similarly, it is a fundamental right for all to procreate. Again, in *Skinner*, the Court struck down an Oklahoma law that allowed the state to sterilize persons “convicted two or more times for crimes amounting to felonies involving moral turpitude.” The Court determined that this Oklahoma law violated the Equal Protection Clause of the Fourteenth Amendment because it infringed upon the fundamental “right to have offspring.”¹¹⁶ Therefore, states which ban IVF are violating the Equal Protection Clause of the Fourteenth Amendment because it infringes upon the fundamental “right to have offspring.”¹¹⁷

¹¹⁶ *Skinner*, 316 U.S. at 536.

¹¹⁷ *Id.*

CONCLUSION

States that determine life begins at fertilization are not likely to ban IVF because the right to procreate is a fundamental right, and in order to infringe upon that right, the government must meet the standard of strict scrutiny. There is no compelling government interest where protecting the potential life of an embryo would outweigh the risk of infringing on the well-established right to procreate. Additionally, any government interest would prove extremely difficult for the states to narrowly tailor the prohibition of IVF practice to their interest in protecting the fragile potential life of an embryo while ensuring that they are not placing a substantial burden on couples. The States would also risk violating the Equal Protection Clause, as IVF aims to provide all persons, especially gender and sexual minorities, with the opportunity to procreate. As a result, attempts to ban IVF practice on the notion that life begins at fertilization would be an unconstitutional violation of the fundamental right to procreate.