

ARTICLES

THE NEW ABORTION

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In vitro fertilization (IVF) presents a neglected puzzle. IVF is used to create nearly one in forty babies born in the United States each year. But it remains deeply underregulated and has rarely been subject to the usual wrangling on matters of reproduction. IVF's regulatory vacuum gets chalked up to America's polarization over abortion. Yet for half a century, our laws and politics have treated these practices nothing alike. Abortion's explosive partisan battles and sharp restrictions contrast sharply with the low-key, hands-off approach to IVF. Only since 2024 has IVF become a culture-war flashpoint: condemned by major religious groups and social movements; targeted by federal proposals to restrict or promote it by congressional statute or executive order; and upended by state court decisions to treat frozen embryos like born children. IVF's sudden emergence as a site of roiling controversy and intense contestation makes it what this Article calls "the new abortion."

*This Article resolves the mystery of IVF's half-century retreat from public discourse and its precipitous appearance on the national scene. It presents the first legal history of IVF's relationship to abortion, drawing on original archives from three privately held collections, two historical societies, four universities, and the Library of Congress. This study chronicles complex dynamics between abortion and IVF and analyzes their significance for American life: family, faith, race, sex, medicine, and science. This Article shows how unforeseen forces after the fall of *Roe v. Wade* dislodged the conditions that entrenched IVF's fragile*

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regulatory impasse for decades. This history also uncovers fresh patches of common ground to sustainably govern IVF in ways that enhance clinical transparency, prevent avoidable mishaps, and preserve meaningful access.

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“It would be a sad commentary on the American ethos if federal funds could be used for the taking of human life, that is, therapeutic abortion, but not the creation of human life, that is, therapeutic conception.”

— Sid Leiman, Statement to the Ethics Advisory Board (1978).¹

“IVF destroys more embryonic life every year than Planned Parenthood. If you want to defend children’s right to life, you must recognize that when it comes to the destroying of embryos, the victimization of children, big fertility does that in numbers that far outpace abortion.”

— Katy Faust, North Carolina Family Policy Council (2024).²

1. Ethics Advisory Bd., Dep’t of Health, Educ., & Welfare, Report and Conclusions: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer 52 (1979), https://repository.library.georgetown.edu/bitstream/handle/10822/559350/HEW_IVF_report.pdf [<https://perma.cc/KE7K-XHDU>] (quoting Sid Leiman).

2. Video posted by North Carolina Family Policy Council (@ncfamilypolicy), Instagram (June 13, 2024) <https://www.instagram.com/reel/C8KdXgAu7yD/> (on file with the *Columbia Law Review*) (statement of Katy Faust).

INTRODUCTION

In vitro fertilization (IVF) frees families from devastating disease and makes biological parenthood possible for those who can't get pregnant on their own—that is, for those who can afford it.³ Despite its high price tag, this medicine of miracles is responsible for more than one in fifty babies born in the United States, over 85,000 every year.⁴

IVF goes mostly unregulated,⁵ but it's not the Wild West that headlines routinely portray it as.⁶ The legal landscape of assisted repro-

3. IVF is too expensive for many Americans who might consider it: A single IVF cycle can cost between \$15,000 and \$30,000, with more than one cycle often needed to achieve a pregnancy. Marissa Conrad, *How Much Does IVF Cost?*, *Forbes* (Aug. 14, 2023), <https://www.forbes.com/health/womens-health/how-much-does-ivf-cost/> [<https://perma.cc/8BL8-LKGC>]. Only about half of women who undergo IVF become pregnant after three cycles. *How Many IVF Cycles Are Generally Needed to Achieve Pregnancy?*, Milann: Blog, <https://www.milann.co.in/blogs/how-many-ivf-cycles-are-generally-needed-to-achieve-pregnancy> [<https://perma.cc/42GK-SSPP>] (last visited Aug. 8, 2025). Roughly seven in ten Americans lack any insurance coverage to defray the costs of the procedure, burdens that fall unevenly by race: While the infertility rate for Black women is almost twice as high as that of white women, 75% of IVF patients are white, and more than 80% have household incomes of more than \$100,000. See Lisa Armstrong, *Black Women Are More Likely to Experience Infertility Than White Women. They're Less Likely to Get Help, Too*, *The Guardian* (Dec. 10, 2023), <https://www.theguardian.com/us-news/2023/dec/10/black-women-infertility-causes-treatment-inequity-healthcare> [<https://perma.cc/4PZZ-JP9D>] (explaining that while Black women are twice as likely to experience infertility as white women, they make up only 4.6% of assisted reproductive technology (ART) cycles); see also Ethics Comm., Am. Soc'y for Reprod. Med., *Disparities in Access to Effective Treatment for Infertility in the United States: An Ethics Committee Opinion*, 116 *Fertility & Sterility* 54, 55–56 (2021) (noting that “[t]he majority of patients who undergo IVF in the United States pay out of pocket . . . [and] persons of middle to lower socio-economic status and persons of African-American or Hispanic ethnicity are underrepresented in the population of treated infertility patients”); Katie Watson, *Rethinking the Ethical and Legal Relationship Between IVF and Abortion*, 334 *JAMA* 19, 19 (2025) (drawing a contrast between abortion, where 72% of patients are below the poverty line and 59% are Black or Latinx, to IVF, where the majority of users are white and high income). And neither major political party has addressed the obstacles to IVF access. See *infra* Parts I–II.

4. See Fact Sheet: In Vitro Fertilization (IVF) Use Across the United States, HHS (Mar. 13, 2024), <https://www.hhs.gov/about/news/2024/03/13/fact-sheet-in-vitro-fertilization-ivf-use-across-united-states.html> [<https://perma.cc/5SYR-NS2D>] [*hereinafter* Fact Sheet: IVF Use Across the United States].

5. See Dov Fox, *Birth Rights and Wrongs: Reply to Critics*, 100 *B.U. L. Rev. Online* 159, 161–62 (2020), <https://www.bu.edu/bulawreview/files/2020/07/FOX.pdf> [<https://perma.cc/J53V-8THW>] [*hereinafter* Fox, *Reply to Critics*] (“[O]ne in every fifty kids born in the United States today is conceived in a fertility clinic or petri dish. And yet oversight has long remained shockingly low.” (footnote omitted)); Emi Nietfeld, *America’s IVF Failure*, *The Atlantic* (May 2, 2024), <https://www.theatlantic.com/ideas/archive/2024/05/america-ivf-regulation-failures/678259/> (on file with the *Columbia Law Review*) (explaining how “the industry goes unregulated, leaving prospective parents with few safeguards and even fewer options when things go wrong”).

6. See, e.g., Alexander N. Hecht, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 *Hou. J. Health L. & Pol’y* 227, 228–29, 252–56 (2001) (noting that, while critics characterize assisted reproduction as a regulatory “Wild West,”

duction is shaped by a host of federal, state, and professional measures.⁷ But no authority meaningfully polices IVF providers when, for example, a patient's eggs are fertilized with the wrong sperm, or one couple's embryos are implanted into someone else.⁸ Other developed countries take oversight far more seriously, dedicating national agencies to making assisted reproduction safe and effective.⁹ Much lighter regulation in the United States makes it a global outlier.¹⁰

Scholars have long assumed that America's IVF exceptionalism is explained by political polarization around abortion.¹¹ For more than half a century, however, the governance of IVF in the United States has

some federal statutes and professional guidelines already impose oversight, undermining claims of a total regulatory vacuum). But see Debora L. Spar, *Opinion, Fertility Industry Is a Wild West*, N.Y. Times (Sep. 13, 2011), <https://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/fertility-industry-is-a-wild-west> [https://perma.cc/L42P-SGB8] (“[W]e live in a free market for assisted reproduction, a Wild West of procreative possibilities.”).

7. Federal law requires the testing of sperm and eggs donors for communicable diseases and reporting pregnancy success rates, while states license reproductive endocrinologists to ensure that they've completed a three-year fellowship after a four-year OB/GYN residency. See Dov Fox, *Birth Rights and Wrongs: How Medicine and Technology are Remaking Reproduction and the Law* 26 (2019) [hereinafter Fox, *Birth Rights and Wrongs*]. Private organizations like the College of American Pathologists visit fertility clinics every few years to accredit them. Still, these regulations are relatively light: Compliance requirements are optional and unenforced, and so is compliance with the practice guidelines that professional societies publish. See *id.* at 25–26. And courts are often reluctant to recognize reproductive losses or mix-ups as real or serious harms. See *id.* at 7–8; *infra* notes 308–311 and accompanying text.

8. See, e.g., Naomi R. Cahn, *Test Tube Families: Why the Fertility Market Needs Legal Regulation* 13–28 (2009); Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 Fla. L. Rev. 603, 648–59 (2003).

9. Examples include the United Kingdom's Human Fertilisation and Embryology Authority and the Canadian Assisted Human Reproduction Agency. See Assisted Human Reproduction Act, S.C. 2004, c. 6, § 21(1) (Can.) (establishing the Canadian Assisted Human Reproduction Agency); Human Fertilisation and Embryology Act 1990, c. 37, § 5(1) (U.K.) (establishing the Human Fertilisation and Embryology Authority).

10. See Erin L. Nelson, *Comparative Perspectives on the Regulation of Assisted Reproductive Technologies in the United Kingdom and Canada*, 43 Alta. L. Rev. 1023, 1047 (2006) (describing a “complex web of regulatory approaches” and the absence of a “central ‘oversight’ agency” in the United States, in direct contrast to the United Kingdom's “comprehensive system of regulation”).

11. Conventional wisdom says that IVF was consumed by “the charged political climate that resulted from the US Supreme Court's decision to legalize abortion in 1973.” Margaret Marsh & Wanda Ronner, *The Pursuit of Parenthood: Reproductive Technology From Test-Tube Babies to Uterus Transplants* 7 (2019) [hereinafter Marsh & Ronner, *Pursuit of Parenthood*]. IVF's eclipse by the shadow of abortion politics has crowded out other possible explanations for its underregulation, such as (1) destroying unborn life incidentally, not intentionally, (2) at earlier stages of prenatal development, before there are fingers or heartbeats, (3) by upper-middle-class people who are frequently married and want to have a child. See, e.g., Dena S. Davis, *The Puzzle of IVF*, 6 Hou. J. Health L. & Pol'y 275, 277–78, 290 (2006) (explaining that the process of IVF “is almost guaranteed to produce embryo wastage” and that the “typical couple . . . in need of IVF is older, married, white, educated, and financially well-off” compared to individuals seeking abortion).

contrasted sharply with the nation's sprawling abortion regulations. Since the first successful IVF birth in the late 1970s, IVF access has evaded sustained attention from either the pro-life or pro-choice movements, or the Republican or Democratic Parties.¹² Until very recently, that is: After 2023, IVF emerged for the first time as a rallying cry for reproductive rights and justice advocates, a lightning rod for leading anti-abortion groups, and the object of condemnation by the largest conservative Protestant denomination.¹³

This dramatic shift might seem even more puzzling because IVF and abortion look very different to many Americans across the ideological spectrum. Some who are deeply committed to abortion rights as medically necessary, even lifesaving, deem IVF merely elective. Meanwhile, abortion opponents who view abortion as life-ending often see at least some forms of IVF as creating new life. If IVF and abortion are indeed different, how has IVF made its way to the front line of America's culture wars? And how should this significant change inform the way we think and talk about post-*Roe* conflicts over assisted reproduction, both in legislatures and courts, and outside of them?¹⁴

This Article answers these neglected questions.¹⁵ It undertakes the first legal history of the relationship between abortion and IVF. This

12. See *infra* Part II.

13. See Jamie Ducharme, IVF Changed America. But Its Future Is Under Threat, *Time* (Aug. 7, 2024), <https://time.com/7005892/ivf-under-attack-fetal-personhood/> [<https://perma.cc/7P92-LPEV>].

14. See Right to IVF Act, S. 4445, 118th Cong. (2024) (protecting access to IVF by prohibiting governmental restrictions and preempting conflicting state laws to safeguard fertility care and related services); *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 682–85 (Ala. 2024) (acknowledging the profound societal and ethical questions raised by IVF and how the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* informs the legal status of embryos); Ruth Graham, Southern Baptists Vote to Oppose Use of I.V.F., *N.Y. Times* (June 12, 2024), <https://www.nytimes.com/2024/06/12/us/ivf-vote-southern-baptists.html> (on file with the *Columbia Law Review*) (reporting on the Southern Baptist Convention's vote to oppose the use of in vitro fertilization and its rejection of practices that dispose of unused embryos).

15. Existing scholarship has explored attitudes about infertility, the development of treatments to address it, and the polarization that has obstructed consensus about how to regulate new treatments. A magisterial study by historian Margaret Marsh and gynecologist Wanda Ronner offers an indispensable overview of the science of assisted reproduction and the policy landscape that surrounds its complex web of rules in the United States. See Marsh & Ronner, *Pursuit of Parenthood*, *supra* note 11. They posit that the conflict around *Roe* obstructed a much-needed federal standard. *Id.* at 186 (explaining how “polarization around the interrelated issues of abortion, gender roles, embryo research, and the expansion of the uses of reproductive technology made it more difficult for Congress to develop any sort of consensus”). In the aftermath of *Roe*'s demise, Marsh and Ronner's pathbreaking work raises important new questions: If polarization around abortion impeded consensus around IVF, why did the players in the abortion wars say so little about IVF, and why has that changed recently? These questions invite a fresh look at the origins of IVF's regulatory vacuum and the new era of conflict that has emerged after the Court's decision to overrule *Roe v. Wade*.

Article shows how their evolving relationship is the key to understanding (1) how for decades IVF remained deeply underregulated and rarely politicized, (2) why IVF has suddenly emerged as the locus of social-movement struggle in the aftermath of *Roe*'s reversal, and (3) what specific avenues are now possible to meaningfully regulate IVF—which is more popular than abortion—for the first time in American history.

This Article draws on extensive, original archival research from several sources: three privately held collections, four universities, two historical societies, and the Library of Congress. It traces how the abortion wars informed the laissez-faire fragility of IVF's first half century as well as the modern collapse of that implicit settlement on how to govern assisted reproduction.¹⁶ These insights from IVF's neglected past also reveal hidden sources of potential common ground that point us toward a politically feasible future. Moving beyond partisan binaries and entrenched impasses over assisted reproduction requires acknowledging IVF's moral and social complexities within the political and economic realities of American healthcare and family life. This Article proposes attending to several key regulatory pillars: legality, access, licensing of facilities and procedures, and transparency about competent and effective practice.

For a time, the regulatory vacuum accommodated competing interests on either side of the nation's reproductive divide. Pro-life groups opposed IVF in principle, to the extent that it involved destroying embryos, but struggled to explain how a technique designed to make babies was not pro-life—and worried that making their opposition public would undermine the fight to reverse *Roe*.¹⁷ Pro-choice groups grappled with the extent to which regulations to make IVF safe and effective would

16. Other scholars have studied legal rules governing IVF in making sense of attitudes about infertility. See generally *In-Vitro Fertilization: The Pioneers' History* (Gabor Kovacs, Peter Brinsden & Alan DeCherney eds., 2018) (recounting the global development of IVF through personal anecdotes from its pioneers and addressing the scientific, ethical, and legal dimensions of assisted reproduction); Robin E. Jensen, *Infertility: Tracing the History of a Transformative Term* (2016) (exploring rhetorical shifts in infertility discourse and examining how these narratives shape societal and individual understandings of infertility); *The Palgrave Handbook of Infertility in History* (Gayle Davis & Tracey Loughran eds., 2017) (examining the history of infertility through interdisciplinary perspectives, highlighting how social, political, and cultural discourses have shaped experiences and treatments). Marsh and Ronner have also written a book on the medical breakthroughs that made IVF possible. Margaret Marsh & Wanda Ronner, *The Fertility Doctor: John Rock and the Reproductive Revolution* (2008). Historians have also traced the cultural and political place of IVF in broader histories of reproduction. See generally *Reproduction: Antiquity to the Present Day* (Nick Hopwood, Rebecca Flemming & Lauren Kassell eds., 2018); Mary Ziegler, *Personhood: The New Civil War Over Reproduction* (2025) [hereinafter Ziegler, *Personhood*]. We interrogate a distinct question: How do the intersecting histories of abortion and IVF reveal common ground, block legislative compromise, create new areas of conflict, and identify new areas for potential legislative progress?

17. See *infra* notes 127–132 and accompanying text.

threaten access to not just IVF but also abortion—and struggled with whether IVF advanced reproductive equality or undermined it.¹⁸

This Article shows how this fragile compromise collapsed in the aftermath of the Supreme Court’s decision reversing *Roe*.¹⁹ *Dobbs v. Jackson Women’s Health Organization* did not directly bear on IVF cases or embryo legislation, neither of which generally rely on the federal Constitution. But the political impact of *Dobbs* on debates about IVF was huge. Determined to find a new mobilizing project, pro-life groups embraced the longstanding goal of fetal personhood: the idea that the meaning of *person* in the Fourteenth Amendment and other legal provisions applies the moment an egg is fertilized.²⁰ Activists have specifically taken aim at IVF, mounting a durable campaign to persuade state lawmakers and conservative Protestants to oppose the procedure.²¹ As more Americans have come to rely on IVF to form a family, backlash to these attacks on it reveals a degree of bipartisan agreement that would have been unthinkable in earlier years.²² The time is ripe for a new grand bargain.

This Article draws on these lessons of the past to inform a regulatory regime with meaningful potential to bridge the ideological gulf. Members of Congress have already proposed federal legislation to safeguard IVF access, including the Right to IVF Act,²³ but these bills have stalled because of partisan gridlock.²⁴ This look to the past reveals surprising common ground—among both activists and the public—to promote the safety and dignity of families and resulting children who would be most affected by regulations on IVF. This Article proposes three promising areas that center on federal intervention: legality, licensing, and transparency.²⁵

Legality legislation would preempt state efforts to forbid IVF or achieve its prohibition in practice. Comprehensive licensing would cover fertility clinics, gamete banks, and other entities, along with the procedures they use, oversight for compliance and quality control, and

18. See *infra* sections I.B–.C.

19. See *infra* sections II.A–.B.

20. See Ziegler, *Personhood*, *supra* note 16, at vii–viii (summarizing the conservative theory of fetal personhood as “two core arguments: first, that a fetus is a separate, unique human individual from the moment of fertilization, and second, that because of that biological and moral uniqueness, the Constitution gives (or at least should give) that individual rights”).

21. See *infra* notes 336, 339–334 and accompanying text.

22. See *infra* section II.B.

23. Right to IVF Act, S. 4445, 118th Cong. (2024).

24. Stephen Groves, *Senate Republicans Block Bill on Women’s Right to IVF as Democrats Make Push on Reproductive Care*, AP News, <https://apnews.com/article/senate-ivf-alabama-reproductive-care-460d099153d3faf548e9326ff17dbae6> (on file with the *Columbia Law Review*) (last updated June 13, 2024) (“The overtly political back-and-forth, with no attempt at finding a legislative compromise, showed how quickly Congress has shifted into a campaign mindset . . .”).

25. See *infra* Part III.

approval of clinical research for emerging technologies.²⁶ Meanwhile, transparency measures would collect and publish comprehensive data about reliability and safety and promote truth in advertising and informed consent.²⁷ Licensing and transparency regulations at the national level would work in tandem with guidelines on contested issues such as what kinds of traits to test and select for, payment to gamete donors and surrogates, and determinations of parentage. The proposal set forth in this Article would leave the ultimate authority to make these decisions with the individual states, drawing direction from professional associations and allowing flexibility for individual clinicians.²⁸

The history of IVF teaches that the search for a perfect, all-encompassing federal law has resulted in a regulatory impasse that no longer satisfies anyone. As some rush to fill the regulatory void by eliminating IVF altogether, this Article favors preserving access to IVF while holding its reliable provision to account and enhancing the transparency of a practice that plays a central role in American family life.

Many will bristle at the idea of regulating IVF in ways that make it resemble abortion even more, fearing the violence, partisan rancor, and punitive laws that characterize the American experience around *Roe*. But the history this Article uncovers underscores that it is often better to leave the regulation of both abortion *and* IVF to medical providers and professional organizations, which have more clinical expertise and may be less vulnerable to influence from interest group commitments and political polarization.

What's more, the contemporary social-movement efforts that doomed the Right to IVF Act have fueled concerted campaigns to restrict or ban IVF—either across the board²⁹ or for certain families, such as same-sex couples.³⁰ These political efforts suggest that opening the door to regulation of any kind runs the risk of restricting IVF to the point that it is no longer available or even criminalizing it. Comparing the history of abortion and IVF throws these concerns in sharp relief: Abortion regulations have primarily served as stepping stones toward outright prohibition and the recognition of constitutional fetal rights.³¹ Perhaps,

26. See *infra* section III.A.

27. See *infra* section III.B.

28. See *infra* section III.C.

29. See *infra* sections II.A–B.

30. Project 2025, the conservative initiative to reshape the federal government under President Donald Trump, states, “In the context of . . . reproductive technologies, HHS policies should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them.” See Roger Severino, Department of Health and Human Services, *in* *Mandate for Leadership: The Conservative Promise* 449, 451 (Paul Dans & Steven Groves eds., 2023), https://web.archive.org/web/20231114060804/https://thf_media.s3.amazonaws.com/project2025/2025_MandateForLeadership_FULL.pdf [<https://perma.cc/MQ3S-RZLX>].

31. Pro-life groups themselves describe these efforts as a form of incrementalism that led first to the reversal of *Roe v. Wade* and, perhaps one day, to the securing of constitutional

then, the best available outcome is to preserve the status quo, in which providers are left largely to regulate themselves.

This Article recognizes that regulating IVF poses considerable risk in the current political climate. But the recent transformations it traces reveal that IVF's regulation is likely now inescapable, particularly in state legislatures. The interconnected legal histories of IVF and abortion reveal another lesson, too: After committed social movements launched campaigns to limit and ban abortion, the strategy of avoiding federal involvement and state regulation operated to undermine reproductive liberty rather than reinforce it.³²

Since *Dobbs*, proponents of abortion rights have accordingly proposed codifying some protections into federal law, such as the Women's Health Protection Act.³³ Meanwhile, efforts to enshrine reproductive rights in state constitutions have taken on more profound significance, even in places where abortion is already protected by state statute.³⁴ We see parallels to IVF here too. If the push for state IVF restrictions is under way, and if leaving regulation to medical providers is no longer likely to be a long-term solution, then our task is to design a realistic federal regulation that will avoid foreseeable harms—and set us down a path that will bring greater justice to families that turn to IVF.

This history teaches that IVF could come to more closely resemble abortion in another sense too: If the present bipartisan consensus about the value of protecting IVF falls away, anti-abortion efforts to polarize the issue could pay dividends in state legislatures or even Congress. Some pro-life groups are working hard toward this outcome.³⁵ Meanwhile, Project 2025—an influential conservative political initiative to reshape the federal government under the Trump Administration—has pressed for limits on IVF that would disproportionately affect LGBTQ couples.³⁶ Such

fetal rights. See Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* 91–104 (2015) [hereinafter Ziegler, *After Roe*] (describing pro-life incrementalist strategies); Ziegler, *Personhood*, supra note 14, at xiv–xvi (detailing how fetal personhood has remained the endgame for the anti-abortion movement since the 1960s).

32. See *infra* sections I.B–C, I.E.

33. The Women's Health Protection Act first gained influence as a step to counter state abortion restrictions before *Dobbs*. Representative Judy Chu, one of the bill's key backers, explained that it would provide a federal baseline and ensure that supporters of abortion rights could stop “playing whack-a-mole with each of these states and their laws.” Barbara Sprunt, *The House Passes a Bill to Counter Texas-Style Abortion Bans*, NPR, <https://www.npr.org/2021/09/24/1038931908/house-democrats-abortion-rights-bill> [<https://perma.cc/JRC6-ZG9S>] (last updated Sep. 24, 2021) (internal quotation marks omitted) (quoting Rep. Judy Chu).

34. For an overview of state ballot proposals, see 2023 and 2024 Abortion-Related Ballot Measures, Ballotpedia, https://ballotpedia.org/2023_and_2024_abortion-related_ballot_measures [<https://perma.cc/T7PD-NXHK>] (last visited Aug. 8, 2025).

35. See *infra* section II.A.

36. See Severino, supra note 30, at 451 (calling for HHS to focus on biological parents over “LGBTQ+ equity” (internal quotation marks omitted)).

campaigns suggest a cost to waiting when it comes to federal regulation of IVF, as much as there are potential costs to intervening. It is reasonable to ask whether there are better proposals than the one advanced here. This Article offers it less as an optimal or ideal solution than as a helpful baseline to avoid the worst extremes that could make IVF all too similar to abortion—and as a starting point for discussing the kind of regulation that would make IVF safer and more accessible.

Part I tells the origin story of a regulatory vacuum that emerged in the United States unlike anywhere else in the developed world. Part II analyzes the recent collapse of that fragile compromise. Part III charts a sound future for IVF and for related assisted reproductive practices like surrogacy, donor insemination, and prenatal testing. This path forward is critically informed by a distinctive political history and by IVF's relationship to abortion since *Roe* and after *Dobbs*.

I. THE BIRTH OF IVF

Less than five years after the Supreme Court's decision in *Roe v. Wade*, American newspapers reported on the birth of the first "test-tube baby," Louise Joy Brown, in Oldham, England.³⁷ The announcement provoked headlines about when IVF would become available in the United States, and whether access would produce "monster" babies³⁸ and efforts to create a "master race."³⁹ Almost immediately, Brown's birth also created *legal* debate.⁴⁰ In July 1978, for example, a couple sued a physician at Columbia Presbyterian Medical Center for destroying embryos they had planned to use in IVF.⁴¹ In turn, the doctor claimed that IVF had not been proven safe.⁴² Most crucially, the Department of Health, Education, and Welfare convened an Ethics Advisory Board (EAB) to study questions about regulating and funding research for IVF.⁴³

37. For a sample of coverage, see Lesley Brown, *For Mother, Her Test-Tube Baby Girl Is 'Miracle at End of the Rainbow'*, Chi. Trib., Aug. 22, 1978, at 1; Tony Kornheiser, *Marketing the 'Miracle' of Louise*, Wash. Post, Sep. 26, 1979, at B1; *'Test-Tube' Infant Leaves the Hospital*, N.Y. Times, Aug. 7, 1978, at A18.

38. J.W. Turney, *Public Responses to Experimental Biology: A Study of Public Debate About the Biological Sciences in the Nineteenth and Twentieth Centuries* 28 (1981) (Ph.D. thesis, University of Manchester) (on file with the *Columbia Law Review*).

39. Ronald Kotulak, *Test Tube Baby Tempest: U.S. Medics Raring to Go*, Chi. Trib., July 30, 1978, at 12 (internal quotation marks omitted); see also David Minthorn, *Hitler's Breeding Experiments Recalled*, L.A. Times, Sep. 17, 1978, at G4 (detailing fears about IVF and eugenic experimentation).

40. See *infra* notes 53–51 and accompanying text.

41. *Childless Couple Is Suing Doctor*, N.Y. Times, July 16, 1978, at 26.

42. See *Del Zio v. Presbyterian Hosp.*, No. 74 Civ. 3588 (CES), 1978 U.S. Dist. LEXIS 14450, at *8 (S.D.N.Y. Nov. 9, 1978) ("[T]he defendants contend that the in vitro experiment presented a substantial possibility of danger to the patient.").

43. See *infra* section I.A.

Section I.A focuses on the debates of the 1970s. It shows that the EAB debates both unearthed uncomfortable truths about the degree to which sex, gender, and even sexuality informed Americans' views of IVF and abortion and opened the possibility of meaningful common ground. Section I.B explores the attempted regulatory revival of the 1980s, when Congress considered possible statutory frameworks for regulating IVF. Section I.C shows how state courts came to fill some of the regulatory gaps created by federal lawmakers and how pro-life and pro-choice leaders both resisted and accommodated these changes. Section I.D explores how struggles over stem cell research destabilized the status quo on IVF, with some abortion foes seeking new restrictions. It then shows how this regulatory push stalled as abortion opponents worried that hostility to IVF would distract from or undermine a fight to overturn *Roe v. Wade*.

A. *The Push to Deregulate*

By the time Louise Brown was born, the debate about IVF within bioethics was already almost a decade old.⁴⁴ In 1971, the Kennedy Foundation hosted a forum on the subject, which featured clashes between Robert Edwards, a pioneering physiologist instrumental to the development of successful IVF techniques, and critics of IVF, including the scientist Leon Kass and Paul Ramsey, a Christian ethicist at Princeton.⁴⁵

After Brown's birth in 1978, however, public debate on the subject exploded.⁴⁶ The *Chicago Tribune* predicted—accurately, it seemed—that the nation's legal scholars and everyday citizens had entered a “[t]est-tube baby tempest.”⁴⁷ The Harris Company conducted a 1978 poll finding that a majority of women not only approved of IVF in the abstract but would consider using it themselves.⁴⁸

As early as 1975, Joseph Califano, Jr., the secretary of President Jimmy Carter's Department of Health, Education, and Welfare (HEW), had promised to convene the EAB to study the possibility of federal regulation of IVF or federal funding for IVF research.⁴⁹ But Louise Brown's birth

44. For examples of these debates, see Thomas Banchoff, *Embryo Politics: Ethics and Policy in Atlantic Democracies* 26–40 (2011) (exploring the early religious, scientific, and political discourse on IVF).

45. Marsh & Ronner, *Pursuit of Parenthood*, supra note 11, at 46–47. For Kass's view, see Leon R. Kass, *Babies by Means of In Vitro Fertilization: Unethical Experiments on the Unborn?*, 285 *NEJM* 1174, 1174–79 (1971) (arguing that IVF experimentation could subject children conceived via IVF to unknown risks without their consent).

46. See infra notes 46–53 and accompanying text.

47. Kotulak, supra note 39, at 12. The term “test-tube baby” was often used by reporters and opponents of IVF in the 1970s notwithstanding the fact that embryos were often created in petri dishes, not test tubes. Tish Davidson, *Medical Firsts: Innovations and Milestones that Changed the World* 176 (2023). The test-tube term was coined to imply that IVF was exotic, unnatural, or experimental. *Id.*

48. ‘Test-Tube’ Babies Get Women OK, *Atlanta Const.*, Sep. 14, 1978, at 2A.

49. Marsh & Ronner, *Pursuit of Parenthood*, supra note 11, at 63–66.

made further delay seem untenable. A week after her birth, a House committee held hearings and put HEW witnesses on the defensive about why the EAB had yet to convene.⁵⁰

Califano finally agreed to convene the EAB in September 1978.⁵¹ While holding a number of private meetings, the EAB also conducted an extraordinarily open dialogue in cities across the nation.⁵² At the very same time, the anti-abortion movement was organizing with the goal of defeating federal funding for IVF research.⁵³

EAB debates primarily concerned the *funding* of IVF research rather than the legality of IVF or the funding of IVF services. Any of the three could raise its own set of issues. Someone could be in favor of keeping IVF legal, for example, but believe that funding it should be a low priority for the federal government—or that paying for IVF research was less important than other spending goals. While funding and legality raised their own distinct set of issues, the EAB debates nevertheless revealed a rich and complex set of perspectives about IVF that cut across racial, religious, and political divides.

That dialogue about IVF revealed a surprising amount of nuance in the views held by Americans across the ideological spectrum—and potential areas of common ground. Those in favor of IVF access or research funding (or both) worried that it would be misused for eugenic purposes⁵⁴ or would be functionally unavailable or harmful to those from marginalized communities.⁵⁵ Abortion opponents at times considered the possibility that IVF might be justifiable if it was not experimental, if IVF was permitted but not funded, or if additional embryos couldn't be destroyed.⁵⁶

Some deployed rights talk to stake out absolutist positions. Patients suffering from infertility overwhelmingly argued that the right to choose

50. *Id.*

51. *Id.*

52. See *id.* at 53.

53. See *infra* section I.B.

54. See Minthorn, *supra* note 39, at G4 (detailing fears about IVF and eugenic experimentation).

55. For concern about the misuse of IVF, see Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting IV, Boston, Massachusetts at 63 (Oct. 13, 1978) (on file with the *Columbia Law Review*) [hereinafter Boston Hearing] (statement of Tabitha Powledge, Hastings Inst. of Soc'y, Ethics & the Life Scis.) (arguing that it "make[s] very little sense, either logistically or morally, to allocate public resources to the creation of new children while at the same time giving short shrift to the sometimes desperate plight of the ones already here"); *id.* at 275 (statement of Samuel Gorovitz, Professor, Univ. of Md.) ("Given the plight of the 40 million or so Americans who have no access to decent medical care, given the large numbers of children who have no families, it is not obvious that research into IVF . . . should be a high priority . . .").

56. See Ethics Advisory Bd., *supra* note 1, at 85–89 (outlining the common objections to IVF).

recognized in cases like *Roe v. Wade*⁵⁷ and *Griswold v. Connecticut*⁵⁸ required that IVF be legal and perhaps even funded.⁵⁹ Witnesses contended that “[i]nfertility withholds the choice to bear children”⁶⁰ or that “infertile couples of the United States [should] be given the same choice that birth control and abortion have given others: The choice of whether or not to have children.”⁶¹ Other supporters of IVF access and funding maintained that IVF was inherently *pro-life* because it would lead to the birth of more babies.⁶² As one witness asserted, “[IVF] is more a pro-life concept rather than an anti-life concept.”⁶³

Most pro-life witnesses stressed that IVF was inconsistent with the idea that the word “person” in the law and the Constitution applied from the moment an egg was fertilized—and that fetuses or unborn children thus had rights under the Fourteenth Amendment.⁶⁴ This argument, which first emerged in the 1960s, had become central to pro-life mobilizing in the 1970s.⁶⁵ After *Roe*, abortion foes rallied around a so-called human life amendment (HLA), an amendment that would change the meaning of the “person” in the Fourteenth Amendment to apply to a zygote the moment an egg was fertilized.⁶⁶

57. 410 U.S. 113, 153–54, 164–66 (1973), overruled by, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

58. 381 U.S. 479, 485–86 (1965).

59. See Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting V, Seattle, Washington at 55 (Nov. 9, 1978) (on file with the *Columbia Law Review*) [hereinafter Seattle Hearing] (statement of Cynthia Bortz, Program Assistant, Univ. Hosp.) (“Since there are no private funds available for research on in vitro fertilization, only a few very wealthy couples could afford this unless federal funding is available.”).

60. Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, Detroit, Michigan at 138 (Dec. 5, 1978) (on file with the *Columbia Law Review*) [hereinafter Detroit Hearing] (statement of Frances Murphy).

61. Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, Kansas City, Missouri at 13–14 (Dec. 4, 1978) (on file with the *Columbia Law Review*) [hereinafter Kansas City Hearing] (statement of Linda J. Borman).

62. See *infra* note 63 and accompanying text.

63. Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, San Francisco, California at 38 (Nov. 14, 1978) (on file with the *Columbia Law Review*) [hereinafter San Francisco Hearing] (statement of Donna Daentl, Doctor, Univ. of Cal., S.F.).

64. See *infra* note 300 and accompanying text.

65. See Ziegler, *Personhood*, *supra* note 16, at 4–22 (“By the mid-1960s, . . . antiabortion advocates would seek to strip away arguments about gender to focus on the fetus and draw attention away from pregnant women altogether—and to reframe the unborn child not just as a biological person but also as a holder of rights.”).

66. Memorandum from Joseph P. Witherspoon, Consultant to Pub. Pol’y Comm., to Nat’l Right to Life Comm. Exec. Comm. 5 (Aug. 14, 1973) (on file with the *Columbia Law Review*) (“What is needed is a Human Life Amendment that prohibits abortions by private persons much as the Thirteenth Amendment prohibits slavery . . .”); see also Memorandum from Bobbie Greene Kilberg, Assoc. White House Couns., to Phil Buchen, White House Couns. (Feb. 6, 1976) (on file with the *Columbia Law Review*) (describing the three types of HLA proposals circulating in Congress).

These advocates articulated these views when religious teachings on IVF were in flux. Catholic theologians would debate the permissibility of IVF for the better part of a decade after Louise Brown's birth (and one of them, Richard McCormick of Georgetown, would play a definitive role in shaping the EAB's proposal to fund and permit IVF).⁶⁷ The Catholic Church would not issue its first official teaching on the subject, *Donum Vitae*, until 1987.⁶⁸ The same was true of a great number of faith communities, whose leaders did not weigh in on IVF until the 1980s or later.⁶⁹

Rather than looking to religious teachings, anti-abortion witnesses at the EAB hearings often drew a direct connection between IVF and personhood,⁷⁰ equating the destruction of embryos with murder.⁷¹ As one witness explained, "Killing a baby is wrong whether it is done in the womb

67. For examples of these debates, see Banchoff, *supra* note 44, at 39–40 (2011) (discussing the "relative openness of the Catholic debate [on IVF] at the time"). Richard McCormick coauthored a piece sympathetic to IVF in 1979 with his Georgetown colleague, André Hellegers, who had become a prominent member of the pro-life movement. See Andre E. Hellegers & Richard A. McCormick, Unanswered Questions on Test Tube Life, 139 *America* 74, 74–78 (1978) (discussing the ethical concerns implicated by IVF). On Hellegers's involvement in the pro-life movement, see Ziegler, *After Roe*, *supra* note 31, at 207.

68. See Congregation for the Doctrine of the Faith, *Donum Vitae: Instruction on Respect for Life in Its Origin and on the Dignity of Procreation* Issued February 22, 1987, Eternal World Television Network, <https://www.ewtn.com/catholicism/library/donum-vitae-2085> [<https://perma.cc/ZAE2-KPZJ>] [hereinafter *Donum Vitae*] (last visited Aug. 9, 2025) (criticizing IVF and reasoning that "the gift of human life must be actualized in marriage through the specific and exclusive acts of husband and wife").

69. See *infra* notes 341–344 and accompanying text.

70. See, e.g., Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, Philadelphia, Pennsylvania at 122–23 (Dec. 6, 1978) (on file with the *Columbia Law Review*) [hereinafter Philadelphia Hearing] (statement of Deborah DeBardeleben, President, Choose L.I.F.E. Am.) (opposing IVF because of the risk it posed to the fetal person); *id.* at 140–42 (statement of Dr. George Isajiw) (arguing that IVF "promot[ed] notions of disposable children"); *id.* at 151 (statement of John Stanton, Vice Chairman, Pro-Life Coal. of Pa.) (calling for pro-life regulatory action to preclude legislation to ban IVF); see also Detroit Hearing, *supra* note 60, at 44–45 (statement of Diane Fagelman, President, Lifespan, Inc.) ("It is bad enough we must have our tax money used to pay for welfare abortions. We do not want to have to pay for more lives lost through in vitro fertilization."); Kansas City Hearing, *supra* note 61, at 22–23 (statement of Ann O'Donnel, Vice President, Nat'l Right to Life Comm.) (opposing IVF on fetal personhood grounds); *id.* at 33 (statement of Albert Moraczewski, President, Pope John XXIII Med.–Moral Rsch. in Educ. Ctr.) (arguing that an embryo used in IVF "is radically a person and therefore has the basic rights—for example, life").

71. See, e.g., Detroit Hearing, *supra* note 60, at 43–44 (statement of Diane Fagelman, President, Lifespan, Inc.) (arguing that IVF involves "the destruction of another human being"); Kansas City Hearing, *supra* note 61, at 74–75 (statement of Mary Pat Miller, Chairperson, E. Kan. Right to Life) (arguing that IVF involved the destruction of "many lives with potential . . . flushed down the drain"). Other abortion opponents made this argument before the board and otherwise. See, e.g., Letter from Paul J. Murphy to Humberto Cardinal Medeiros (Nov. 1, 1978) (on file with the *Columbia Law Review*) (stating the Catholic Church's "clear and uncompromising" position in opposition to IVF).

or in the test tube.”⁷² But these positions raised as many questions as they answered. Did pro-life leaders oppose only the destruction of embryos? Or was the indefinite storage of embryos—or the very creation of embryos in a lab—incompatible with the pro-life movement’s values?

B. *Traditional Family Values*

At the same time, IVF testimony exposed views about sex and gender within the pro-life movement that conflicted with its public focus on civil rights for the unborn—and thus threatened to jeopardize the movement’s public campaign to secure the HLA or reverse *Roe*.⁷³ By the late 1970s, a fractious anti-abortion movement resolutely insisted that it advanced only a single issue: protection of the life of the unborn.⁷⁴

But when it came to IVF, pro-life witnesses often focused on sex roles.⁷⁵ One pro-life witness at the EAB’s hearing in Kansas City advanced a common source of opposition that IVF could be used by both gay couples and lesbians for whom artificial insemination had been at least technologically possible for far longer.⁷⁶ “The lesbians,” this witness asserted, “have decided to seize the test tube baby method . . . to dramatically change the political power of gays in the future.”⁷⁷ Prominent pro-life witnesses argued that IVF was offensive because it promoted promiscuity and undermined traditional gender roles by giving scientists the ability to generate life in a test tube rather than in the womb—and by potentially separating women’s role in gestating a pregnancy from any

72. Kansas City Hearing, *supra* note 61, at 46 (statement of Brenda Waugh).

73. See *id.* at 65 (statement of Jane Clark) (expressing concern that gay and lesbian communities would use IVF to increase their political power).

74. On the movement’s efforts to present itself as a single-issue cause, see Mary Ziegler, *Abortion and the Law in America: Roe v. Wade to the Present* 126–27 (2020) [hereinafter, Ziegler, *Abortion and the Law*].

75. Kansas City Hearing, *supra* note 61, at 65 (statement of Jane Clark) (arguing that reproductive technologies threatened the “basic character values of the majority” by allowing gay and lesbian couples to conceive).

76. See *id.*

77. *Id.* at 65. Concern that gay and lesbian couples would use IVF to build families appeared beyond the EAB hearings. See, e.g., Janet Bataille, *Research in Human Embryos Raises Fear and Hope*, N.Y. Times, Mar. 3, 1980, at A14 (reporting fears about “the hiring of surrogate mothers to provide children to homosexuals”); Margaret O’Brien Steinfelds, *Of Tubes and Motherhood: Hatching Better Babies*, L.A. Times, Jan. 3, 1982, at D3 (arguing that IVF raises concerns about whether it was “a good thing for a child to grow up without a father”). In practice, other reproductive services, including artificial insemination and surrogacy, seemed more valuable to LGBTQ couples seeking to have families, but discomfort about the use of these technologies by LGTBQ families ran high. One study, as the U.S. Congress’s Office of Technological Assessment later explained, found that many physicians were reluctant to offer even artificial insemination to same-sex couples a decade after the EAB debates. Off. of Tech. Assessment, U.S. Cong., OTA-BA-358, *Infertility: Medical and Social Choices* 173 (1988).

genetic relationship to, or even the conception of, an embryo.⁷⁸ “If women permit the laboratory to take from them . . . the very unique and special and powerful, profound manner in which they share in the procreative process,” explained Ann O’Donnel of the National Right to Life Committee, “then they are fools.”⁷⁹

Still others blamed couples struggling with infertility for their plight. “Who really needs test tube babies?” asked one pro-life witness in Boston.⁸⁰ “After all, we are killing countless thousands of babies in our abortion mills.”⁸¹ Another pro-life correspondent later made an even bolder claim: “Research shows that inability for a woman to have a baby has as one of its main causes blockage of the fallopian tubes—and this in turn has as its main causes damage from abortion, use of the ‘Pill’, venereal disease, and direct sterilization.”⁸² She wrote, “So the contraceptive society has created its own health damaging and reproduction-destroying conditions.”⁸³

In many cases, however, areas of potential common ground appeared in witness testimony. Father Richard McCormick, a Jesuit theologian at Georgetown and EAB member, opposed the funding of IVF research but suggested that some IVF procedures could be ethical.⁸⁴ When embryo transplant was the “ultimate purpose” of IVF, McCormick saw less concern with IVF because miscarriage was common, and IVF mimicked the “natural process” of miscarriage.⁸⁵ As McCormick would later explain, he saw the board’s job as striking a balance between those who see a “fertilized ovum as a person with all the claims and rights of persons” and those who see such an ovum “as disposable material.”⁸⁶

Witnesses across the ideological spectrum argued that, in regulating IVF, the government should prioritize better care for low-income families.⁸⁷ Reverend Stanley Stefancic, a Unitarian minister and civil rights

78. Kansas City Hearing, *supra* note 61, at 24–25 (statement of Ann O’Donnel, Vice President, Nat’l Right to Life Comm.).

79. *Id.*

80. Boston Hearing, *supra* note 55, at 77 (statement of Joyce Tuomy, Member, Framingham, Mass. Town Meeting).

81. *Id.*

82. Letter from Kathleen Sommers to Sen. William Proxmire (Apr. 5, 1979) (on file with the *Columbia Law Review*).

83. *Id.*

84. Seattle Hearing, *supra* note 59, at 307.

85. *Id.*

86. Richard A. McCormick, *The EAB and In Vitro Fertilization*, *Hastings Ctr. Rep.*, Dec. 1979, at 4. Today, the overall risk of miscarriage in known pregnancies is approximately 15%, with 75% of all pregnancy losses occurring in the first trimester. Peter Morales-Brown, *What Are the Average Miscarriage Rates by Week?*, *Med. News Today*, <https://www.medicalnewstoday.com/articles/322634#miscarriage-rates-by-week> (on file with the *Columbia Law Review*) (last updated Apr. 22, 2025).

87. Transcript of Department of Health, Education, and Welfare Ethics Advisory Board Meeting, Dallas, Texas at 8 (Dec. 11, 1978) (on file with the *Columbia Law Review*) [hereinafter *Dallas Hearing*] (statement of Desiree Inget, Professor, Univ. of Tex. at Aus.)

activist who had worked closely with the ACLU, argued that it would be a mistake in the IVF context to “favor individual freedom where it can be afforded over equality and distributive justice” and called for more investment in uplifting communities of color and preventing and treating disabilities present at birth.⁸⁸ Dr. Leonie Watson, a pro-life activist representing National Doctors for Life, stressed that IVF funding appeared less “necessary” when “not all Americans receive adequate health care.”⁸⁹

Those with differing views of abortion also expressed concern about the *abuse* of IVF, especially given that the technology had a eugenic potential and might further stigmatize people with disabilities.⁹⁰ James Tayoun, a pro-life city councilor, expressed concern that IVF would be abused to “engineer only the reproduction of certain classes” and prevent the births of biracial or disabled children.⁹¹ Martha Robb of Science for the People, a progressive science organization, worried that IVF might be used to screen out the births of certain persons with disabilities or discriminate against them.⁹² Pro-IVF witnesses agreed on the importance of addressing disability discrimination while insisting that infertility was itself a disability.⁹³

Once both sides had been heard, the hearings concluded with board deliberations, and the EAB issued a report unanimously calling for an end to the moratorium on IVF funding for research.⁹⁴ The board suggested that such research was ethical so long as it was designed to address infertility—and used only by straight, married couples, not gay and lesbian

(“Would we not be better advised to spend the money to facilitate the adoption of existing children . . . ?”). For empirical reason to doubt that greater supply of IVF reduces demand for adoption, see I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 Minn. L. Rev. 485, 577 (2010).

88. Seattle Hearing, *supra* note 59, at 22–25 (statement of Stanley Stefancic, Reverend, E. Shore Unitarian Church).

89. San Francisco Hearing, *supra* note 63, at 107 (statement of Leonie Watson, Exec. Dir., Nat’l Doctors for Life). Pro-IVF witnesses shared these concerns, arguing that without funding, “only a few very wealthy couples could afford” infertility treatment. Seattle Hearing, *supra* note 59, at 55 (statement of Cynthia Bortz, Program Assistant, Univ. Hosp.).

90. Philadelphia Hearing, *supra* note 70, at 127–28 (statement of Malana Petite, President, Women’s Ad Hoc Health Comm.); see also Dallas Hearing, *supra* note 87, at 9–10 (statement of Desiree Inget, Professor, Univ. of Tex. at Aus.) (expressing concern that IVF would lead the “removal or alteration of other socially or politically ‘undesirable’ human attributes”).

91. Philadelphia Hearing, *supra* note 70, at 10 (statement of James Tayoun, Member, Phila. City Council).

92. Boston Hearing, *supra* note 55, at 67–70 (statement of Martha Robb, Member, Sci. for the People).

93. San Francisco Hearing, *supra* note 63, at 88 (statement of Philip Martin) (“There are many people who have disabilities of various kinds. This is simply one disability, and now that there is a way toward solving the problem, we ought to go ahead and do it.”).

94. Ethics Advisory Bd., *supra* note 1, at 106.

couples or individuals who were single or partnered but not married.⁹⁵ The board also concluded, at McCormick's suggestion, that IVF research should also be permitted in the first fourteen days after an embryo's creation.⁹⁶ Permitting IVF funding would be, the report suggested, a prelude to federal legislation permitting, but regulating, IVF.⁹⁷ "[T]he law in this area is confused, at best," the EAB report explained, mentioning questions about parental rights, legality, liability, and compensation to mothers and offspring in cases of medical malpractice.⁹⁸

With the release of the report, Americans United for Life (AUL), a leading anti-abortion group, sprang into action, recruiting activists across the country to write their members of Congress to oppose the funding of IVF research.⁹⁹ Opposition to IVF funding among AUL recruits was obvious, but they seemed more conflicted about how, if at all, the law should regulate the procedure itself.¹⁰⁰

Consider the correspondence to Senator William Proxmire of Wisconsin, a veteran lawmaker, as part of AUL's coordinated campaign, much of which used identical language to that in AUL's literature.¹⁰¹ Some pro-life correspondents and witnesses at the EAB hearings seemed primarily opposed to *funding* IVF research or services, comparing it to abortion funding and arguing that both violated conservative Christians' conscience rights. These arguments drew on one of the anti-abortion movement's signature victories since the decision of *Roe*: the passage of the Hyde Amendment in 1976, an appropriation rider that prohibited Medicaid reimbursement for abortion.¹⁰² Proponents of the Hyde

95. *Id.* at 37.

96. *Id.* at 107.

97. *Id.* at 60–63.

98. *Id.* at 76–77.

99. See, e.g., Group Organizing National Effort Against In Vitro Research, Cath. Nw. Progress, July 13, 1979, at 3 (explaining that AUL had engineered a letter-writing campaign and solicited testimony against IVF); see also Group Claims Victory on Federal Funding of In Vitro Fertilization, St. Louis Rev., Mar. 14, 1980, at 2 (claiming that AUL had secured more than twelve thousand letters and forty thousand signatures in its campaign against IVF funding).

100. See *infra* notes 112–119 and accompanying text.

101. For examples, see Letter from Joan Altmann to Sen. William Proxmire (Mar. 10, 1979) (on file with the *Columbia Law Review*) (arguing that IVF would "expose newly conceived human lives to destruction, abandonment or unnatural risks"); Letter from Edith Hofrichter to Sen. William Proxmire (Mar. 15, 1979) (on file with the *Columbia Law Review*) (same); Letter from Mary Beth Leahy to Sen. William Proxmire (Mar. 9, 1979) (on file with the *Columbia Law Review*) (using identical language).

102. In the immediate aftermath of its passage, the Hyde Amendment prevented approximately 100,000 patients who would otherwise have obtained an abortion from doing so. James Trussell, Jane Menken, Barbara L. Lindheim & Barbara Vaughan, The Impact of Restricting Medicaid Financing for Abortion, 12 Fam. Plan. Persps. 120, 122–30 (1980). The Hyde Amendment also became the blueprint for a new incremental strategy. See Ziegler, Abortion and the Law, *supra* note 74, at 29 (explaining that the "Hyde Amendment . . . helped to change the course of political and constitutional dialogue about abortion").

Amendment argued that requiring taxpayers to subsidize abortion not only violated fetal rights but also made taxpayers themselves complicit in a procedure that went against their most deeply held beliefs.¹⁰³ AUL letter writers echoed this point as to IVF.¹⁰⁴ One of Proxmire's correspondents, for example, primarily stressed his opposition to using "our tax dollars being used for financing the murder of helpless little people" through IVF.¹⁰⁵

Other correspondents seemed primarily concerned with the size of the government or the prospect of a national deficit, not with fetal rights.¹⁰⁶ "We are never going to control inflation until all this funding stops," one wrote to Proxmire.¹⁰⁷ These letters exposed how much was unsettled for anti-abortion leaders. Would the pro-life movement fight for federal and state prohibitions of IVF, or was it enough for the federal government not to fund research? Other correspondents seemed conflicted about whether the problem with IVF was that it was unproven or experimental.¹⁰⁸ Still others seemed genuinely concerned that without IVF, some Americans would be unable to achieve their dream of biological parenthood.¹⁰⁹ "The scarcity of children available for adoption," one pro-life correspondent wrote, "may pose a problem."¹¹⁰

The nuances that surfaced during debates about IVF seemingly convinced the government to prefer inaction: Secretary Califano delayed the release of the EAB report and then added several months for public comment.¹¹¹ Following a reorganization of Califano's department, Patricia Harris, Califano's replacement, simply ignored both the EAB report and pro-life calls for prohibition.¹¹² Under Harris, HEW stressed that "[s]tate responsibilities for regulating the provision of infertility services fall under their general responsibility for safeguarding the health and welfare of

103. On these arguments, see Ziegler, *Abortion and the Law*, supra note 74, at 52–56 (explaining that supporters of the Hyde Amendment recast the abortion debate by invoking taxpayers' moral objections and portraying public funding as an inappropriate use of government resources).

104. Memorandum from Julius Richmond, Assistant Sec'y for Health & Surgeon Gen., Dep't of Health, Educ. & Welfare, to Patricia Harris, Sec'y, Dep't of Health, Educ. & Welfare 3 (Feb. 13, 1980) (on file with the *Columbia Law Review*).

105. Letter from Anthony J. Young to Sen. William Proxmire (Mar. 12, 1979) (on file with the *Columbia Law Review*).

106. Marsh & Ronner, *Pursuit of Parenthood*, supra note 11, at 76–77.

107. Letter from Mrs. William Kaun to Sen. William Proxmire (Mar. 19, 1979) (on file with the *Columbia Law Review*).

108. See, e.g., Letter from Mr. and Mrs. Hugo Kleckner to Sen. William Proxmire (Feb. 28, 1979) (on file with the *Columbia Law Review*) (describing IVF as "experimentation with no respect for our humanness and our spirituality"); Letter from Karen Shelveik to Sen. William Proxmire (Mar. 14, 1979) (on file with the *Columbia Law Review*) (arguing that Americans would not permit similar experimentation on a newborn baby).

109. Letter from Mary Beth Leahy to Sen. William Proxmire, supra note 101.

110. *Id.*

111. Marsh & Ronner, *Pursuit of Parenthood*, supra note 11, at 65.

112. *Id.*

their citizens.”¹¹³ Questioned by the press about whether corporate interests could transform IVF practice without legislation, Harris was prepared to admit that HEW would “do little to prevent such activities.”¹¹⁴

Promising that HEW was considering the creation of model legislation to regulate IVF, Harris actually began considering whether to do anything.¹¹⁵ In a confidential memo, HEW staff acknowledged that acting on the EAB’s recommendations could help hundreds of thousands of couples and could serve as the prelude to regulations that could “protect women from disappointment and their potential offspring from harm.”¹¹⁶ On the other hand, the staffer wrote, “[p]ublic protest” would be inevitable, as would an “[u]nfavorable congressional reaction,” especially given the controversy surrounding abortion and its apparent tie to the disposition of embryos.¹¹⁷ Harris’s concern about controversy evidently took precedence: She neither took action based on the EAB’s recommendations nor reconstituted another advisory board.¹¹⁸

The upshot: IVF was neither prohibited nor formally permitted, neither regulated nor funded.¹¹⁹ It wasn’t just that anti-abortion groups lobbied against funding for IVF research.¹²⁰ Advocates on both sides of the nation’s abortion divide saw the virtue in an emerging regulatory vacuum that allowed them to avoid confronting the complicated questions that IVF raised—from access for those at society’s margins to misuse against people with disabilities.¹²¹ Like Harris, politicians and bureaucrats feared political backlash and felt no pressure from either pro-life or pro-choice activists to act, in part because neither movement had fully settled what the law should do about IVF in the first place.¹²²

At first, this vacuum may well have reflected the fact that IVF was relatively new—and that any number of pro-choice and pro-life Americans were uncertain about what to make of it, legally or otherwise. Over time, however, the IVF regulatory gap sometimes came to suit those on either side of the nation’s wars over reproduction.¹²³

113. Memorandum from Laurie Feinberg, Pol’y Coordinator, Dep’t of Health, Educ. & Welfare, to Patricia Harris, Sec’y, Dep’t of Health, Educ. & Welfare (Apr. 14, 1980) (on file with the *Columbia Law Review*).

114. *Id.*

115. *Id.*

116. Memorandum from Julius Richmond, Assistant Sec’y for Health & Surgeon Gen., Dep’t of Health, Educ. & Welfare, to Patricia Harris, Sec’y, Dep’t of Health, Educ. & Welfare 3 (Feb. 13, 1980) (on file with the *Columbia Law Review*).

117. *Id.*

118. Marsh & Ronner, Pursuit of Parenthood, *supra* note 11, at 65.

119. *Id.*

120. See *supra* text accompanying notes 99–107.

121. See *supra* notes 106–112 and accompanying text.

122. See *infra* notes 124–137 and accompanying text.

123. See *infra* section I.C.

C. *An Impasse Entrenched*

When Elizabeth Carr, the first baby born in the United States as the result of IVF, was delivered in 1981, the political background surrounding IVF's legal vacuum had changed significantly.¹²⁴ Two years earlier, when the EAB released its final report, neither political party had staked out a clear position on questions of reproductive rights.¹²⁵ But President Ronald Reagan, who had been inaugurated the year of Carr's birth, ran as a clearly pro-life candidate, believing that such an approach could win over social conservatives who had conventionally sided with the Democratic Party.¹²⁶

Some anti-abortion groups hoped that the GOP could be convinced to endorse bans on both IVF *and* abortion.¹²⁷ As early as 1979, Americans United for Life defended a model anti-abortion law in Illinois that addressed "in vitro fertilization for the first time," a law that AUL leaders called "the most comprehensive and potentially the most effective abortion legislation in the United States."¹²⁸ Some of the new Republican lawmakers who came into Congress in the 1980 Republican wave seemed open to the idea of federal IVF restrictions.¹²⁹ For example, Senator Orrin Hatch, a conservative Republican from Utah, responded to Carr's birth and the spread of private IVF clinics by floating the idea of a federal ban on the opening of new IVF clinics until Congress could hold hearings on the matter.¹³⁰

But Hatch, like other anti-abortion politicians, believed that efforts to ban IVF had to come second to the fight to criminalize abortion and introduced a constitutional amendment that would permit, but not require, states to criminalize abortion.¹³¹ Meanwhile, the National Right to Life Committee issued a three-year plan focused on passage of the HLA.¹³²

124. For information on Carr's birth, see Walter Sullivan, "Test-Tube' Baby Born in U.S., Joining Successes Around World, N.Y. Times, Dec. 29, 1981, at C1 (discussing the increased success of IVF at the time Carr was born).

125. See Ziegler, After *Roe*, supra note 31, at 220–40 (stating that "competing social movements had to navigate the realignment of both major political parties").

126. On Reagan's use of social issues like abortion to appeal to blue-collar voters, see Rick Perlstein, *Reaganland: America's Right Turn 1976–1980*, at 33, 67 (2020).

127. 'Most Comprehensive' Abortion Law in U.S., *St. Louis Rev.*, Nov. 9, 1979, at 2 (describing the AUL's attempt to limit IVF via anti-abortion legislation).

128. *Id.* (internal quotation marks omitted) (quoting Thomas Marzen, Att'y, *Ams. United for Life*).

129. See Stephenie Overman, *Virginia Pro-Lifers Protest U.S. Test-Tube Baby Project*, *St. Louis Rev.*, Jan. 11, 1980, at 1 (reporting on Senator Orrin Hatch's opposition to the development of a Virginia IVF clinic).

130. *Id.* (discussing Senator Hatch's concerns about the "ethical, moral, and legal questions surrounding [a clinic]" (internal quotation marks omitted) (quoting Sen. Orrin Hatch)).

131. On the Hatch Amendment, see Ziegler, After *Roe*, supra note 31, at 116–24 (discussing the Republican party's promotion of a "fetal-protective amendment").

132. Nat'l Right to Life Comm., *NRLC Three-Year Plan: Legislation* (1980) (on file with the *Columbia Law Review*).

But, because of the apparent popularity of IVF, abortion-rights groups made IVF an argument *against* the HLA and other anti-abortion proposals. For example, Jane Wells-Schooley of the National Organization for Women testified before Congress in 1981 that HLA should be rejected partly because it would “severely restrict[] in vitro fertilization.”¹³³

Calls for bans on IVF, it seemed, could become a political and legal liability for the anti-abortion movement. As important, some of the movement’s new allies in the GOP did not relish the idea of new IVF regulations¹³⁴—and rank-and-file pro-lifers disagreed about whether IVF should be regulated and how much.¹³⁵

It was against this backdrop that Senator Al Gore of Tennessee held hearings on potential regulations for IVF in 1984.¹³⁶ By then, the HLA campaign had stalled, with Hatch’s last effort narrowly failing in a Senate vote the year before.¹³⁷ IVF was still rare, but less so than before, and few laws, state or federal, regulated its practice.¹³⁸

But while Republicans generally called for less government, Democrats, who seemed more interested in regulating (and legitimizing) IVF, had their own qualms about how new technologies, like surrogacy, would be used.¹³⁹ Opening the door to federal regulations might invite limits—or set a precedent for the federal government to regulate abortion. And taking on a complex and potentially divisive issue like IVF might not have held much appeal in an election year—especially with Democrats worried (correctly) that they would take a drubbing in the 1984 presidential race and Republicans seeking to gain control of the House and Senate.¹⁴⁰

133. Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcomm. on the Const. of the S. Comm. on the Judiciary, 97th Cong. 1125 (1981) (statement of Jane Wells-Schooley, Vice President, Nat’l Org. for Women).

134. See Marsh & Ronner, Pursuit of Parenthood, *supra* note 11, at 116–19 (explaining that Republicans were skeptical of federal regulation because they “looked to the states, not the federal government, to address legal issues pertaining to family life”).

135. See *supra* section I.A.

136. See Marsh & Ronner, Pursuit of Parenthood, *supra* note 11, at 119–21.

137. The final roll call vote for the amendment was 49-50. Senate’s Roll-Call on Abortion Plan, N.Y. Times, Jun. 29, 1983, at A16.

138. See Marsh & Ronner, Pursuit of Parenthood, *supra* note 11, at 119–20.

139. *Id.* at 143. The connection between abortion and IVF drawn by some anti-abortion groups may also have had a chilling effect. See *supra* note 101 and accompanying text (detailing AUL’s opposition to IVF). AUL continues to oppose IVF today. See Chris Massoglia, AUL’s 2024 State Policy Report, Ams. United for Life (Dec. 30, 2024), <https://aul.org/2024/12/30/auls-2024-state-policy-report/> [<https://perma.cc/4TUX-CT8P>] (noting that the AUL is “fighting on various fronts beyond abortion, such as in-vitro fertilization (IVF)”).

140. On the 1984 congressional races, see Gary C. Jacobson & Jamie L. Carson, The Politics of Congressional Elections 126, 134, 215 (10th ed. 2020). On the 1984 presidential election, see Jack W. Germond & Jules Witcover, Wake Us When It’s Over: Presidential Politics of 1984 (1985).

Some states considered breaking the logjam after Mario and Elsa Rios, a couple who had created two embryos for implantation and stored them in Melbourne, Australia, died in a plane crash in Chile in 1983.¹⁴¹ After studying the matter, a group of Australian scholars recommended in 1984 that the embryos be destroyed, suggesting that any other disposition would require the consent of the embryos' creators.¹⁴²

Horrified by the Rios story, State Senator Tom Casey, a Republican from New Orleans, proposed an ultimately successful state bill designating embryos created through IVF "legal persons," a complex designation that disallowed the destruction of such embryos during the IVF process (and raised questions about whether they could be stored in the state).¹⁴³ Cutting in the opposite direction, a more liberal group of states legislated to ensure insurance coverage for infertility treatment.¹⁴⁴

The same year the New Orleans bill passed, there was a fresh congressional attempt at regulation led by Representative Bruce Morrison, a Democrat from Connecticut.¹⁴⁵ Larger groups on either side of the abortion issue, which had gained greater influence in national elections, mostly stayed away from the issue altogether—and with good reason. In the 1986 decision of *Thornburgh v. American College of Obstetricians and Gynecologists*, only five justices voted to strike down a set of Pennsylvania abortion restrictions.¹⁴⁶ Abortion rights organizations became convinced that the courts would no longer reliably protect reproductive rights and began developing strategies to build political support to take extrajudicial action with a potential "pro-choice [legislative] majority."¹⁴⁷

141. David Margolick, Legal Rights of Embryos, N.Y. Times, June 27, 1984, at A12.

142. Panel in Australia Urges that Orphaned Frozen Embryos Be Destroyed, N.Y. Times, Sep. 4, 1984, at C6.

143. State Senate OKs Test-Tube Embryos Bill, The Times (Shreveport, La.), May 15, 1986, at 15A. For more on the meaning of a judicial person under Louisiana's law, see June Carbone & Naomi Cahn, Embryo Fundamentalism, 18 Wm. & Mary Bill Rts. J. 1015, 1038–41 (2010). Louisiana's law remains in place, but families using IVF have worked around it by storing additional embryos out of state. See Chelsea Brasted, How Louisiana IVF Clinics Have Worked Around an Embryo Destruction Ban for 40 Years, Axios (Mar. 6, 2024), <https://www.axios.com/local/new-orleans/2024/03/06/louisiana-ivf-treatment-clinics-embryo-law-alabama> (on file with the *Columbia Law Review*).

144. See Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 128–31 ("At the turn of the century, only five states—Connecticut, Illinois, Maryland, Massachusetts, and Rhode Island—mandated more or less comprehensive coverage for infertility treatment, including at least a limited number of cycles of IVF."). Today, sixteen states mandate Medicaid coverage for infertility treatment or services. Mandated Coverage of Infertility Treatment, Kaiser Fam. Found., <https://www.kff.org/womens-health-policy/state-indicator/infertility-coverage/> [<https://perma.cc/7JFB-YGGW>] (last visited Aug. 7, 2025).

145. Marsh & Ronner, Pursuit of Parenthood, supra note 11, at 111–13.

146. 476 U.S. 747, 751 (1986), overruled by, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

147. Nat'l Abortion Rts. Action League, Agenda (Mar. 8, 1989) (on file with the *Columbia Law Review*); see also Memorandum from Jackie Blumenthal, Podesta Assocs., to

The National Abortion Rights Action League (NARAL) and its coalition partners settled on a message focused on “every woman’s right to make her own decision . . . free from the dictates of government.”¹⁴⁸ This message had two primary dimensions: (1) a resolutely single-issue focus on choice and (2) a critique of government regulation of reproduction. The former strategy was intended to maximize support for a right to choose from likely voters, who may disagree about “civil rights, feminism, labor issues, etc.”¹⁴⁹ The latter strategy, NARAL leaders hoped, would appeal to independents and swing voters suspicious of “big government.”¹⁵⁰ Addressing IVF regulation also would have created a source of potential division for an abortion-rights movement looking to craft the largest possible coalition.

IVF proved even more divisive for those in the pro-choice coalition because of concerns about who used it. In the 1980s, the cost of the procedure and the limits imposed by most IVF programs ensured that it was unavailable to all but the most privileged Americans.¹⁵¹ Infertility rates among Black women ran 1.5 times higher than those of white women in the early 1980s.¹⁵² And yet, as prominent critical scholar Dorothy Roberts noted, most of those who used IVF services were “white, highly educated, and affluent.”¹⁵³

Further questions about whether reproductive technologies did significant harm were raised by *In re Baby M*, a case that was breathlessly followed by American reporters in 1987.¹⁵⁴ Mary Beth Whitehead had entered into a contract to serve as a surrogate for William and Elizabeth Stern, whose multiple sclerosis made it dangerous for her to carry a pregnancy to term.¹⁵⁵ Following the birth of a baby girl, Whitehead

Nikki Heidepriem (Mar. 13, 1989) (on file with the *Columbia Law Review*) (describing a campaign to mobilize a pro-choice constituency).

148. Ziegler, *Abortion and the Law*, supra note 74, at 102 (internal quotation marks omitted) (quoting Hickman-Maslin Research).

149. Memorandum from Hickman-Maslin Research to NARAL (Mar. 22, 1989) (on file with the *Columbia Law Review*).

150. Ziegler, *Abortion and the Law*, supra note 74, at 101; see also William Saletan, *Bearing Right: How Conservatives Won the Abortion War* 108–10 (2004) (explaining how NARAL’s “Who Decides?” campaign was developed to appeal to conservatives, who were suspicious of government interference in individual liberties).

151. See F.P. Haseltine et al., *Psychological Interviews in Screening Couples Undergoing In Vitro Fertilization*, 442 *Annals N.Y. Acad. Scis.* 504, 507 (1985) (showing that 95% of women seeking IVF at one fertility clinic were white and 55% were professionals).

152. Laurie Nsiah-Jefferson & Elaine J. Hall, *Reproductive Technology: Perspectives and Implications for Low-Income Women and Women of Color*, in *Healing Technology: Feminist Perspectives* 93, 108 (Kathryn Strother Ratcliff, Myra Marx Ferree, Gail O. Mellow, Barbara Drygulski Wright, Glenda D. Price, Kim Yanoshik & Margie S. Freston eds., 1989).

153. Dorothy E. Roberts, *Race and the New Reproduction*, 47 *Hastings L.J.* 935, 939 (1996).

154. See Courtney G. Joslin, (Not) Just Surrogacy, 109 *Calif. L. Rev.* 401, 411 (2021) (explaining that the *Baby M* case “garnered considerable public and media attention”).

155. *In re Baby M*, 537 A.2d 1227, 1235–36 (N.J. 1988).

changed her mind and fought for custody.¹⁵⁶ The seven-week trial that followed prompted a wave of new regulation of surrogacy.¹⁵⁷ When the case reached the New Jersey Supreme Court, the judges invalidated the surrogacy contract between the Sterns and Whitehead, but it left the trial court to determine issues of child custody and visitation. The trial court eventually awarded custody to the Sterns while ordering that Whitehead be allowed visitation.¹⁵⁸

IVF and surrogacy were in some ways very different: Traditional surrogacy of the type at issue in Whitehead's case did not involve IVF at all, and IVF rarely involved using a gestational carrier who was not an intended parent.¹⁵⁹ What's more, the issues that tied surrogacy and IVF sometimes parted ways. Traditional surrogacy, used by the parties in *Baby M*, raised concerns not clearly present in IVF—for example, about the commodification of pregnancy, the potential bond between a gestating and genetic parent and a child they had committed to relinquishing, and the potential exploitation of surrogates participating in reproductive labor that they were not fully comfortable with.¹⁶⁰

Nevertheless, *Baby M* painted a picture of assisted reproductive technologies that could raise shared concerns about IVF and surrogacy. Was IVF, like surrogacy, exploiting the reproductive labor of people with fewer resources, while remaining functionally unavailable to low-income families? Would IVF too have unintended psychological consequences of the kind that surfaced in the *Baby M* litigation?

In this environment, support for IVF—or any specific regulations of it—seemed likely to create more division for a pro-choice coalition that desperately wanted to avoid conflict. At the same time, Democrats like Morrison were interested in *regulating* IVF—a step that would have been awkward for a movement stressing the importance of keeping reproduction “free from the dictates of government.”¹⁶¹

156. Id. at 1236–37.

157. See Susan Markens, *Surrogate Motherhood and the Politics of Reproduction* 38–42 (2007) (“[M]ost of the bills introduced in California during the 1987 and 1988 legislative sessions sought to discourage and/or prohibit the practice of surrogacy, an almost complete turnaround from the legislative response prior to the *Baby M* case.”).

158. *In re Baby M*, 537 A.2d at 1262–64. On the final disposition of visitation and custody, see *In re Baby M*, 542 A.2d 52, 55 (N.J. Super. Ct. Ch. Div. 1988).

159. Gestational carriers were first introduced in the 1980s. Even between 1999 and 2013, gestational carriers comprised only 2.5% of all assisted-reproduction cycles. Ethics Comm., Am. Soc’y for Reprod. Med., *Consideration of the Gestational Carrier: An Ethics Committee Opinion*, 110 *Fertility & Sterility* 1017, 1017–18 (2018); see also John L. Yovich, T. D. Hoffman & Ian S. Fraser, *IVF Surrogacy and Absent Uterus Syndromes*, 332 *Lancet* 331, 331–32 (1988) (discussing an early use of IVF surrogacy).

160. See Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, 21 *Theoretical Med. & Bioethics* 153, 161 (2000) (noting that surrogates are primarily motivated by money, drawing comparisons to prostitution).

161. Ziegler, *Abortion and the Law*, supra note 74, at 102 (internal quotation marks omitted) (quoting Hickman-Maslin Research).

Consensus on IVF also seemed further out of reach as some religious faiths hardened their teachings against it. In March 1987, the Catholic Congregation of the Doctrine of the Faith issued *Donum Vitae*, which condemned IVF on the same grounds it did contraception: While birth control allowed married people (and many others) to have sex without procreating, IVF and other assisted reproductive technologies impermissibly allowed people to procreate without having sex.¹⁶² Anti-abortion leaders also cemented their opposition to funding IVF research.¹⁶³

The failure to reach consensus on IVF regulation in some ways suited the anti-abortion movement as well, which had played down personhood in its bid to see *Roe* overturned.¹⁶⁴ The reason for steering clear of questions about personhood—including those connected to IVF—became clear during oral argument in *Webster v. Reproductive Health Services*, a case involving a multirestriction Missouri abortion law.¹⁶⁵ The law included a preamble stating that life began at conception—one that many expected to significantly undermine the right to choose abortion.¹⁶⁶

Frank Susman, the attorney representing the clinic challenging the Missouri law, argued that the preamble of the law would effectively “prevent in vitro fertilization,” which would “[c]learly . . . be murder under this section.”¹⁶⁷ The state solicitor general responded that the statute would have no such effect—and that the preamble simply stated abstract support for the idea of fetal personhood.¹⁶⁸ Susman’s strategy—to suggest that reversing *Roe* would lead to the recognition of personhood, and that personhood would transform the law on IVF—promised to endanger what abortion foes viewed as an otherwise-promising *Roe* reversal strategy.

162. See *Donum Vitae*, supra note 68 (criticizing IVF and reasoning that “the gift of human life must be actualized in marriage through the specific and exclusive acts of husband and wife”).

163. See Medical and Social Choices for Infertile Couples and the Federal Role in Prevention and Treatment: Hearing Before the Subcomm. on Hum. Res. & Intergovernmental Rels. of the H. Comm. on Gov’t Operations, 100th Cong. 178 (1988) (statement of Rep. Hyde) (on file with the *Columbia Law Review*) (“As currently practiced IVF poses several threats to the sanctity of human life.”); Press Release, U.S. Conf. of Cath. Bishops, Bishops’ Spokesman Asks Reconsideration of In Vitro Decision (July 15, 1988) (on file with the *Columbia Law Review*) (opposing IVF because of the “abortifacient character of this procedure”).

164. On the shift in focus away from an HLA, see Mary Ziegler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment* 69–75 (2022) (describing a dampening in the HLA narrative due to, among other factors, internal conflicts among pro-life factions and a trend in public opinion increasingly regarding anti-abortion narratives as misogynistic and antidemocratic).

165. 492 U.S. 490, 501 (1989).

166. *Id.*

167. Transcript of Oral Argument at 49–50, *Webster*, 492 U.S. 490 (No. 88-605).

168. *Id.* at 51–52 (arguing that the preamble was nothing more than a statement of policy).

Finally, in 1992, Congress did pass IVF legislation,¹⁶⁹ pushed through by Representative Ron Wyden, who expressed concern about the risks that the IVF market posed for unsuspecting consumers.¹⁷⁰ The law responded to the wildly exaggerated claims about the chances of taking home a baby that many fertility practices splashed across their promotional materials and misrepresented in conversations with patients.¹⁷¹ The Wyden bill, as it was initially known, mandated that IVF clinics report their success rates.¹⁷² In some ways, the bill was a major accomplishment: As the CDC graph below demonstrates, fertility clinics' reporting rates had been disastrously low prior to the Wyden bill.¹⁷³ The Wyden bill normalized reporting and encouraged industry self-regulation, which became a prominent feature of fertility practice in the statute's wake.¹⁷⁴

169. Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified at 42 U.S.C. § 263a-1 (2018)).

170. See Consumer Protection Issues Involving In Vitro Fertilization Clinics: Hearing Before the Subcomm. on Regul., Bus. Opportunities & Energy of the H. Comm. on Small Bus., 101st Cong. 4 (1989) (statement of Rep. Wyden) (discussing an IVF survey released to aid couples in their assessment of clinics); Consumer Protection Issues Involving In Vitro Fertilization Clinics: Hearing Before the Subcomm. on Regul. & Bus. Opportunities of the H. Comm. on Small Bus., 100th Cong. 11–12 (1988) (statement of Bill Eckhardt & Vicki Eckhardt) (discussing the lack of objective information about IVF available to couples considering the procedure).

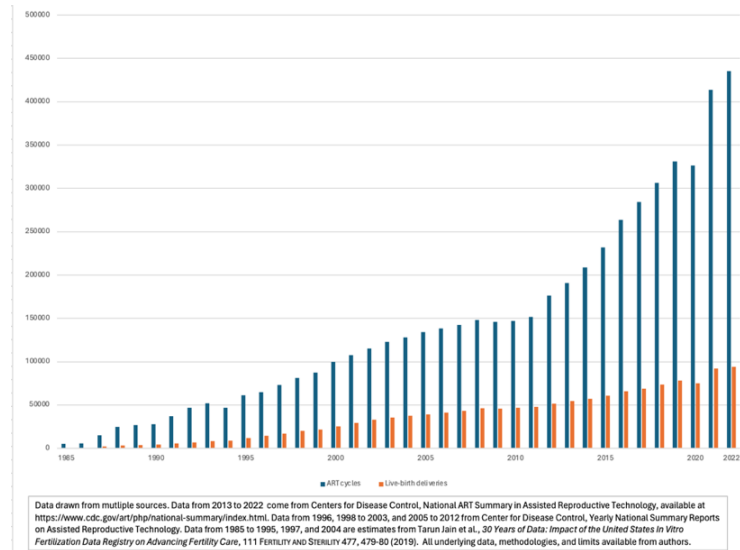
171. See Andrea Preisler, Assisted Reproductive Technology: The Dangers of an Unregulated Market and the Need for Reform, 15 DePaul J. Health Care L. 213, 218 (2013) (“[The FCSRCA] was intended to combat the problem of clinics exaggerating pregnancy success rates and to ensure that consumers are properly informed and knowledgeable about pregnancy success rates.”).

172. 42 U.S.C. § 263a-1(a)(1) (requiring the reporting of “pregnancy success rates achieved by such program through each assisted reproductive technology”).

173. See, e.g., Tarun Jain, David A. Grainger, G. David Ball, William E. Gibbons, Robert W. Rebar, Jared C. Robins & Richard E. Leach, 30 Years of Data: Impact of the United States In Vitro Fertilization Data Registry on Advancing Fertility Care, 111 Fertility & Sterility 477, 479 fig.1 (2019) (charting the number of IVF clinics reporting data in the United States between 1985 and 2015).

174. Professional self-regulation extends to other means of assisted reproduction beyond IVF, most commonly intrauterine insemination and intracytoplasmic sperm injection. See Don Chalmers, Professional Self-Regulation and Guidelines in Assisted Reproduction, 9 J.L. & Med. 414, 421 (2002).

FIGURE 1. ART CYCLES INITIATED AND NUMBER OF LIVE-BIRTH DELIVERIES, 1985–2022



At the same time, the bill's narrowness helped to explain its passage: It said nothing about who could donate genetic material or act as a surrogate, nothing about how many embryos could be implanted, and nothing about whether IVF had to be funded or even remain legal.¹⁷⁵ The bill contained carve-outs for industry and was passed with input from prominent players in the fertility market.¹⁷⁶

The Society for Assisted Reproductive Technology, a nongovernmental group responsible for inspecting and certifying laboratories, denied membership to anyone who refused to comply with the statute,¹⁷⁷ but the bill had no clear enforcement mechanism, and physicians could still practice reproductive medicine without complying with it.¹⁷⁸

175. 42 U.S.C. § 263a-1.

176. For discussion of the role of industry, see 138 Cong. Rec. 8210–11 (Apr. 3, 1992) (statement of Rep. Wyden) (explaining the influence “professional societies,” including the American Fertility Society).

177. Join SART, Soc’y for Assisted Reprod. Tech., <https://www.sart.org/professionals-and-providers/join-sart/> [<https://perma.cc/VDN9-WALF>] (last visited Aug. 9, 2025) (reporting current membership requirements, including “submission of cycle-specific clinic outcome data”).

178. See Marsh & Ronner, Pursuit of Parenthood, *supra* note 11, at 186 (“Nevertheless, it remains true that there are no legal penalties for IVF clinics or programs choosing not to provide that information. There is considerable peer pressure from the Society for Assisted Reproductive Technologies for compliance, but peer pressure is not the same thing as legal repercussions.”).

Critically, the bill did not regulate access to IVF or funding for it.¹⁷⁹ The regulatory vacuum that emerged in the 1970s remained. Or rather, the absence of meaningful statutory regulation left the governance of assisted reproduction to enforcement through property law, family law, and tort law.¹⁸⁰ Unsurprisingly, these existing theories of civil liability proved ill-suited to the distinctive character of these reproductive harms.¹⁸¹ Claims for medical malpractice or emotional distress require showing some physical or economic harm that procreation plaintiffs couldn't always readily demonstrate.¹⁸² Some of these actions were jarring, as when they called a child's birth or life "wrongful."¹⁸³ For example, in a 1995 IVF case that made national headlines,¹⁸⁴ the closest common-law analogy that judges could locate for being robbed of the chance of biological parenthood was a basement flooding that caused the "discomfort and annoyance" of being denied the use of one's home.¹⁸⁵

By the 1990s, the growth of fertility clinics in the United States exploded, growing from a handful to a few hundred with the capacity to extract eggs, fertilize them with sperm, grow embryos, and implant them to initiate a pregnancy.¹⁸⁶ Still, IVF remained largely unregulated, accommodating the interests of groups that took very different positions on abortion. On the one hand, abortion-rights supporters invoked IVF to oppose abortion bans. On the other, scholars and activists raised serious concerns about whether IVF, as conventionally practiced, contradicted principles of equity that ought to animate the project of reproductive rights.¹⁸⁷ Anti-abortion groups were of two minds too: sometimes convinced that IVF practice enabled the destruction of rights-holding embryos, while aware that many Americans viewed it as a life-creating technology—and that targeting IVF could jeopardize the fight to undo *Roe*

179. *Id.*

180. See Michele Goodwin, *A View From the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 *Emory L.J.* 1039, 1073 (2010) ("Congress's hands-off approach to reproductive technologies gives clinics a pass on data submission that could prove highly relevant to the CDC, women's health organizations, childrens' health care advocates, and prospective ART patients.").

181. See Fox, *Reply to Critics*, *supra* note 5, at 160–66 (analyzing tort principles in the context of reproductive harm); see also *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So.3d 678, 680 (Ala. 2024) (failing to find an exception to Alabama's Wrongful Death of a Minor Act for "extrauterine children").

182. Fox, *Reply to Critics*, *supra* note 3, at 163.

183. See *id.* at 166–68 (discussing "wrongful birth suits").

184. See *Fertility Clinic Is Sued Over the Loss of Embryos*, *N.Y. Times*, Oct. 1, 1995, at A26.

185. *Frisina v. Women & Infants Hosp. of R.I.*, Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at *8–9 (R.I. May 30, 2002) (citing *Hawkins v. Scituate Oil*, 723 A.2d 771 (R.I. 1999)).

186. See Ashley M. Eskew & Emily S. Jungheim, *A History of Developments to Improve In Vitro Fertilization*, 114 *Mo. Med.* 156, 157 (2017) (describing the increasing demand for fertility treatment).

187. See *supra* text accompanying notes 146, 167, 180.

v. Wade.¹⁸⁸ Even as conflict about abortion intensified, the ambivalence about IVF that characterized both movements left no major push to regulate it—neither to restrict nor protect it.

D. *The Judicial Stopgap*

For a time, it did seem that state courts would fill IVF's regulatory gap—at least when it came to matters of embryo destruction, if not sexual morality and gender roles. In 1992, the divorce case of Junior and Mary Sue Davis made national headlines.¹⁸⁹ *Davis v. Davis*, like *Baby M*, did not squarely address the legality or regulation of IVF, instead focusing on how additional embryos created as part of IVF would be dealt with in the event of their procreators' divorce.¹⁹⁰ Nevertheless, *Davis* surfaced some of the questions that both pro-life and pro-choice groups found difficult. Junior, a maintenance worker from a small town near Knoxville, and his wife had struggled with infertility before turning to IVF.¹⁹¹ The two went through six attempts at IVF, all of them unsuccessful, and ultimately divorced with seven unimplanted embryos stored at the Knoxville clinic where they received treatment.¹⁹² Mary Sue, who testified that she viewed the embryos as life, initially wished to use the embryos herself—and argued that destroying them would be “murder.”¹⁹³ Junior, who opposed this request, framed the case as one involving the “equal rights [of] men,” arguing that he had a right not to become a genetic parent against his will.¹⁹⁴

In September 1992, W. Dale Young, the trial judge, ruled that the embryos qualified as children and proceeded to apply a best-interests-of-the-child analysis, ultimately concluding that “human life begins at conception.”¹⁹⁵ Personhood proponents asked the court to name a guardian ad litem to ensure that the “seven ‘children in vitro’s’ lives will [not] be irretrievably lost.”¹⁹⁶ The Tennessee Court of Appeals reversed that decision in 1990, reasoning that to force either party into parenthood would be “repugnant and offensive to constitutional principles.”¹⁹⁷

With the case headed to the Tennessee Supreme Court in 1992, *Davis* served as a reminder that the issue of IVF had not become much easier for

188. See *supra* text accompanying notes 140–142.

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

190. *Id.* at 589.

191. *Id.* at 589–93.

192. Frozen Embryos Decision Now Rests With Judge, *Elizabethton Star* (Elizabethton, Tenn.), Aug. 11, 1989, at 16 (on file with the *Columbia Law Review*).

193. *Id.* (internal quotation marks omitted) (quoting Mary Sue Davis).

194. *Id.* (internal quotation marks omitted) (quoting Junior Davis).

195. Judge Gives Estranged Wife Custody of Embryos, *L.A. Times*, Sep. 21, 1989, at A2 (internal quotation marks omitted) (quoting Judge W. Dale Young). For the court's decision, see *Davis v. Davis* (*Davis I*), No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct. Sep. 21, 1989), *rev'd*, (*Davis II*), No. 180, 1990 WL 130807 (Tenn. Ct. App. Sep. 13, 1990).

196. Brief of Law at 8, *Davis I*, 1989 WL 140495.

197. *Davis II*, 1990 WL 130807, at *2–3.

those on either side of conflicts about reproductive rights. There was an additional wrinkle when Mary Sue remarried and no longer wanted to use the embryos herself, instead requesting that they be donated to another couple.¹⁹⁸

Mary Sue's request placed a high value on embryos but did not sit well with all abortion opponents, some of whom had objected to IVF because it permitted intended parents to separate genetic parenthood and gestation, or because it separated procreation from heterosexual sex.¹⁹⁹ "We know what Mr. Davis wants," wrote the Catholic columnist Father William Maestri, "We know what the former Mrs. Davis wants. However, we do not seem to care about what the unborn child needs."²⁰⁰

The *Davis* decision also underscored the drawbacks of assigning complex decisions about IVF to courts. The EAB dialogue of 1978 allowed a range of experts to gather testimony from across communities and states to put together a nuanced proposal.²⁰¹ The *Davis* court, by contrast, was limited to considering the filings of the parties in the case. And yet because of the persistent federal vacuum surrounding IVF, it was state courts like the one in *Davis* left to weigh on complex questions like the status of embryos.

Compounding the issue was the anti-abortion movement's focus on men's rights. Starting in the late 1980s, the National Right to Life Committee mounted an ambitious campaign complaining about the lack of *fathers'* rights in abortion.²⁰² In cases like *Smith v. Doe*, attorneys James Bopp, Jr., and Richard Coleson argued that even under *Roe*, men had a fundamental interest in procreating and parenting their unborn children—and that, at least in some cases, that interest should trump women's decision to have an abortion.²⁰³ In *Smith*, Bopp and Coleson argued that the putative father's interests in his unborn child were greater than what they characterized as the trivial interests of Smith's estranged lover, such as wishing to appear attractive or not gain weight.²⁰⁴ In another case, the two argued that a father had a right to "care, custody, companionship, and control" of an unborn child, even when a woman was

198. Duncan Mansfield, Legal Fight Over Fate of 7 Frozen Embryos May Go to High Court, *The Tennessean* (Nash., Tenn.), Nov. 25, 1992, at 2-B.

199. See *infra* notes 210–215 and accompanying text.

200. William Maestri, No Easy Solution to the Frozen Embryos Case, *The Clarion Herald* (New Orleans, La.), Sep. 27, 1990, at 12.

201. See *supra* section I.A.

202. See Ziegler, *Abortion and the Law*, *supra* note 74, at 89–125 (explaining how anti-abortion attorneys, in aiming to directly challenge *Roe*, used fathers' rights cases to argue abortion harmed men emotionally and was sought by women for unjustifiable reasons).

203. Petition for Writ of Certiorari at 8, 16, *Smith v. Doe*, No. 88-1837 (U.S. May 10, 1989) (on file with the *Columbia Law Review*).

204. *Id.*

seeking an abortion.²⁰⁵ Cases like *Davis* made it harder to pursue the anti-abortion movement's new men's rights agenda.

At the same time, the Tennessee Supreme Court's decision did not sit well with anti-abortion leaders either. The court had held that the embryos were neither persons nor property but something in between and that Junior Davis's desire to avoid unwanted genetic parenthood trumped Mary Sue's desire to donate the embryos.²⁰⁶ After *Davis*, fertility clinics around the country had patients and their partners sign forms about what they wanted to happen to their embryos in the event of separation, divorce, or death—the main options being implantation, storage, destruction, or contribution to scientific research.²⁰⁷ *Davis* suggested that a tie goes to the person seeking to avoid the attribution of parenthood.²⁰⁸ David O'Steen of the National Right to Life Committee complained that “[whichever] party is seeking to destroy the unborn child prevails.”²⁰⁹

If *Davis* created political headaches for the anti-abortion movement, abortion opponents had a more urgent priority: the decision of *Planned Parenthood v. Casey*, a Supreme Court case that seemed likely to be the one to reverse *Roe*.²¹⁰ The Court in *Casey*, to the shock of many, preserved what it called the essential holding of *Roe*—that there was a right to choose abortion before viability.²¹¹ At the same time, the Court replaced *Roe*'s trimester framework with the undue-burden standard, which made it much easier for the states to regulate abortion.²¹² In the short term, *Casey* meant that states would not be able to recognize fetuses as rights-holding

205. Petition for Writ of Certiorari at 8–27, *Conn. v. Conn.*, 488 U.S. 955 (1988) (No. 88-347), 1988 WL 1093818; see also Letter from Rich Coleson to Paul Lewis (July 28, 1988) (on file with the *Columbia Law Review*) (“I believe the key is to show that *Roe* did not settle the matter . . . and show that [the elements mentioned in *Roe*] are not present or do not outweigh the father's interest in his child.”).

206. See Cindy Yao, Isabella Payne, Sela Carrington, Alison Hagani & Payton Gannon, Assisted Reproductive Technologies, 25 *Geo. J. Gender & L.* 345, 352 (2024) (discussing the various legal approaches courts use to decide frozen embryo disposition disputes and noting that most courts give greater weight to the party seeking to avoid procreation).

207. See *Davis v. Davis*, 842 S.W.2d 588, 595–97 (Tenn. 1992) (presuming the validity of agreements specifying the disposition of embryos in contingencies such as death, divorce, or abandonment of the program).

208. See I. Glenn Cohen, The Right Not to Be a Genetic Parent?, 81 *S. Cal. L. Rev.* 1115, 1130, 1134 (2008) (“[T]he ‘gamete providers . . . have primary decision-making authority regarding preembryo’ implantation.” (internal quotation marks omitted) (quoting *Davis*, 842 S.W.2d at 597)).

209. Ronald Smothers, Court Gives Ex-Husband Rights on Use of Embryos, *N.Y. Times*, June 2, 1992, at A1 (internal quotation marks omitted) (quoting David O'Steen, Exec. Dir., Nat'l Right to Life Comm.).

210. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), overruled by, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

211. See *id.* at 846 (concluding that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed”).

212. *Id.* at 874.

persons, at least for the purpose of abortion. But *Casey* did not resolve questions within the reproductive-rights movement about IVF.

These divisions resurfaced during the litigation of *Johnson v. Calvert*, a case about gestational surrogacy,²¹³ a practice in which the intended parents are gamete donors and the party gestating the pregnancy has no genetic tie to the embryo. Gestational surrogacy, too, raised its own set of issues beyond those related to IVF: for example, whether carriers suffer psychological harm from such arrangements²¹⁴ and whether gestational surrogacy was a form of involuntary servitude or at the very least exploitative.²¹⁵ But the *Johnson* case underscored potential ties between IVF and gestational surrogacy and served as a reminder about the concerns about IVF's inaccessibility and disparate racial history.²¹⁶

Anna Johnson, a Black nurse and single mother, had agreed to serve as a gestational carrier for Mark and Crispina Calvert.²¹⁷ But the agreement broke down during Johnson's pregnancy, and after the birth of a son, she pursued parental rights.²¹⁸ Johnson's race and class drove home concerns among some supporters of reproductive rights that IVF and other reproductive technologies reinforced existing status hierarchies.²¹⁹

213. 851 P.2d 776 (Cal. 1993) (en banc).

214. Later research has suggested that gestational surrogates do not experience substantial adverse reactions in most cases. See, e.g., Annie Yau, Rachel L. Friedlander, Allison Petrini, Mary Catherine Holt, Darrell E. White, Joseph Shin, Sital Kalantry & Steven Spandorfer, Medical and Mental Health Implications of Gestational Surrogacy, 225 Am. J. Obstetrics & Gynecology 264, 264–69 (2021) (finding no substantial adverse medical or psychological outcomes for gestational carriers or the children born through surrogacy when rigorous screening and support are provided). The current state of medical evidence had not yet come into view at the time of *Calvert*.

215. See Deborah R. Grayson, Mediating Intimacy: Black Surrogate Mothers and the Law, 24 Critical Inquiry 525, 539–40 (1998) (discussing how gestational surrogacy risks replicating historical patterns of involuntary servitude and exploitation of Black women by conflating their reproductive labor with physical labor and perpetuating racialized control over motherhood).

216. See Dov Fox, Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection, 104 Corn. L. Rev. Online 114, 125–26 (2019), <https://publications.lawschool.cornell.edu/lawreview/wp-content/uploads/sites/2/2020/07/Fox-essay-final.pdf> [<https://perma.cc/BC4A-MWKH>] (extending a Thirteenth Amendment framework to abortion, surrogacy, and race selection and noting surrogacy's ties to historical racial hierarchies).

217. Crispina Calvert, a nurse born in the Philippines, was Filipina, but was cast as “white” in the binary drama of American racial discourse. See Jay Mathews, California Surrogate Stirs Dispute: Birth Mother Seeks to Share Custody, Wash. Post, Sep. 21, 1990, at A8 (reporting on the racial dynamics of the dispute, with Mr. Calvert insisting “[h]e’s a Caucasian baby” (internal quotation marks omitted) (quoting Mark Calvert)).

218. *Calvert*, 851 P.2d at 789.

219. For an overview of these concerns, see Khiara M. Bridges, *Windsor*, Surrogacy, and Race, 89 Wash. L. Rev. 1125, 1132–34 (2014) (explaining that critics see surrogacy as reinforcing race, class, and gender hierarchies by commodifying women's bodies and exploiting economically disadvantaged women).

For example, the National Organization Against Surrogacy stressed that IVF and surrogacy, under decisions like *Johnson*, would make it easier for the wealthy to “solicit black and brown women” as “breeders.”²²⁰ The legal philosopher Anita Allen denounced the *Johnson* decision as “whites owning Black women’s wombs.”²²¹ Other progressives saw the Calverts’ victory—and the very phenomenon of gestational surrogacy—as an example of reproductive liberty.²²² If “[m]ales can sell their semen,” the Calverts’ lawyer argued, “[t]hen why can’t women as a matter of law have the right to become a nine-month foster mother by carrying another couple’s child?”²²³

It was certainly true that IVF was not equally available to all Americans. Feminists objected to the limits many clinics placed on access to IVF in the 1990s, such as requirements that intended parents be heterosexual and married.²²⁴ Professor Dorothy Roberts maintained that the government could do more to equitably battle infertility by addressing its root causes, such as “occupational and environmental hazards, diseases, and complications following childbirth and abortion.”²²⁵

These criticisms notwithstanding, in the 1990s, most fertility programs required that clients be married to access IVF.²²⁶ This was a time when the rate of Black women who had not been married by age forty-five was nearly twice as high as that of white women.²²⁷ The cost of IVF—which in 1994

220. Catherine Gewertz, Genetic Parents Given Sole Custody of Child, L.A. Times (Oct. 23, 1990) <https://www.latimes.com/archives/la-xpm-1990-10-23-mn-2958-story.html> (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Jeremy Rifkin, Co-Chairman, Nat’l Coal. Against Surrogacy).

221. Anita L. Allen, The Black Surrogate Mother, 8 Harv. Blackletter J. 17, 17 (1991) (citing Alice Walker, What Can the White Man . . . Say to the Black Woman, *The Nation*, May 22, 1989, at 691); see also Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 210 (1995) [hereinafter Roberts, The Genetic Tie] (arguing that surrogacy reflects the fact that “America is obsessed with creating and preserving white genetic ties”).

222. See Gewertz, *supra* note 220 (summarizing a pro-surrogacy argument that the decision “upholds the principle that women are entitled to do what they choose with their reproductive powers”).

223. *Id.* (internal quotation marks omitted) (quoting Christian R. Van Deusen, Att’y).

224. Roberts, *The Genetic Tie*, *supra* note 221, at 241; see also Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* 233 (1989) (describing surrogacy as a process which was limited to couples with “sperm and money,” thus creating barriers for lesbian couples or poor couples).

225. Roberts, *Race and the New Reproduction*, *supra* note 153, at 948.

226. While other nations explicitly restricted IVF to married, heterosexual couples, limits in the United States often arose from clinics “gatekeeping in an attempt to safeguard child safety and welfare.” Crystal Liu, Note, Restricting Access to Infertility Services: What Is a Justified Limitation on Reproductive Freedom?, 10 Minn. J.L. Sci. & Tech. 291, 318 (2009); see also Andrea D. Gurmankin, Arthur L. Caplan & Andrea M. Braverman, Screening Practices and Beliefs of Assisted Reproductive Technology Programs, 83 Fertility & Sterility 61, 65 (2005) (showing that clinics were more likely to turn away patients who were single or in a same-sex partnership).

227. Diana B. Elliott, Kristy Krivickas, Matthew W. Brault & Rose M. Kreider, Historical Marriage Trends From 1890–2010: A Focus on Race Differences 14 (U.S. Census Soc., Econ.

ran to nearly \$70,000 for a single cycle, according to a study published in the *New England Journal of Medicine*—also put IVF financially off limits to many families of color.²²⁸ *Johnson* reinforced the impression that IVF and other assisted reproductive technologies tended to benefit white or Asian families but did not always confer the same advantages on anyone else.

At the same time, IVF and the legal changes it helped to inspire struck some progressives as having emancipatory potential.²²⁹ Traditionally, the law relied on a genetic or gestational bond to determine parenthood, disqualifying LGBTQ parents, stepparents, and a variety of other caretakers.²³⁰ Together, IVF and gestational surrogacy made this metric unworkable because, as in *Johnson*, the gestational and genetic parents were not the same individual.²³¹ *Johnson*, for example, held that parental rights attached primarily based on parental intent rather than genetics, gestation, or marriage alone—a result that could create a more egalitarian vision of parenthood for those who were unmarried, in same-sex unions, or not genetically related to their children.²³² Given divisions over how—or whether—IVF should be regulated, supporters of reproductive rights had difficulty overcoming obstacles to reform.

Nevertheless, the reasons for regulation had certainly not gone away. To maximize the chances of a successful pregnancy, some clinics implanted multiple embryos, which led to a sharp increase in multiple births: The rate of high-order multiple births in the United States tripled between 1971 and 1996, with accompanying rises in gestational risks, pre- and

& Hous. Div., Working Paper No. 2012-12, 2012), www.census.gov/content/dam/Census/library/working-papers/2012/demo/SEHSD-WP2012-12.pdf [https://perma.cc/2RG4-LS9W].

228. See Peter J. Neumann, Soheyla D. Gharib & Milton C. Weinstein, The Cost of a Successful Delivery With In Vitro Fertilization, 331 NEJM 239, 241 (1994) (“Under the assumptions for the base case, it costs \$66,667 per delivery for couples undergoing their first cycle of treatment and rises to \$114,286 per delivery for couples attempting their sixth cycle.”). The story received attention from the press. Cost of Test Tube Babies Averages \$72,000, N.Y. Times (July 28, 1994), <https://www.nytimes.com/1994/07/28/us/cost-of-test-tube-babies-averages-72000.html> (on file with the *Columbia Law Review*). This estimate accounted for several related costs for a successful IVF delivery and ran significantly higher than what clinics charged. See Ann Wozencraft, It’s a Baby, or It’s Your Money Back, N.Y. Times (Aug. 25, 1996), <https://www.nytimes.com/1996/08/25/business/it-s-a-baby-or-it-s-your-money-back.html> (on file with the *Columbia Law Review*).

229. Roberts, Race and the New Reproduction, *supra* note 153, at 948.

230. See *Johnson v. Calvert*, 851 P.2d 776, 781–82 (Cal. 1993) (en banc) (“[W]hile gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal rights.”).

231. See Courtney Megan Cahill, The New Maternity, 133 Harv. L. Rev. 2221, 2270–71 (2020) (arguing that *Johnson* assumed to have identified an ambiguity “surrounding motherhood that had always existed” (emphasis omitted)).

232. See, e.g., Douglas NeJaime, The Nature of Parenthood, 126 Yale L.J. 2260, 2306 (2017) [hereinafter NeJaime, The Nature of Parenthood] (offering *Johnson* as an example of how “sex-equality principles animated the rejection of reproductive biology as a justification for gender-differentiated parental recognition”).

postnatal complications, and medical costs.²³³ In 1996, responding to a report by the National Institutes of Health on embryo research, Congress passed the Dickey–Wicker Amendment, an appropriations rider proposed by Representatives Jay Dickey and Roger Wicker that prohibited federal funding for research that destroyed an embryo, which Dickey called “lethally experimenting with a life.”²³⁴ But no further regulations were forthcoming.²³⁵

As the 2000s began, courts had stepped in to fill part of the regulatory gap that had defined IVF for so many families.²³⁶ But these judicial stopgaps fell far short of meaningful reform. Courts lacked the institutional capacity to consider every facet of an increasingly complex issue,²³⁷ and varying decisions across jurisdictions only complicated matters for patients.²³⁸ And neither pro-choice nor pro-life leaders were willing to prioritize legislation to radically change the status quo.

E. *Stem Cells and Embryo Protection*

Following his 2000 election, President George W. Bush limited funding for research on new embryonic stem cell lines and convened the President’s Council on Bioethics, chaired by longtime IVF critic Leon Kass, to advise him on related questions.²³⁹ But Bush’s move quelled debate

233. Shari Roan, *How Many Babies Is Too Many?*, L.A. Times (May 14, 1996), <https://www.latimes.com/archives/la-xpm-1996-05-14-mn-3989-story.html> (on file with the *Columbia Law Review*).

234. John E. Yang, *House Panel Approves Ban on Human Embryo Research*, Wash. Post, June 26, 1996, at A4 (internal quotation marks omitted) (quoting Rep. Jay Dickey).

235. Nicholas Riley, *Comment, Reconstructing Embryos: The Legal Ramifications of iPSC Technology and the Dickey–Wicker Amendment*, 2022 U. Chi. Legal F. 365, 370–73 (explaining that the Dickey–Wicker amendment was the final word on IVF regulation until the Obama Administration).

236. See *supra* text accompanying notes 207–223.

237. See, e.g., *Doe v. Irvine Sci. Sales Co.*, 7 F. Supp. 2d 737, 741–43 (E.D. Va. 1998) (dismissing a claim for emotional damages after the defendant’s negligent contamination of fertilized embryos resulted in a failed pregnancy on the grounds that the plaintiff suffered no physical injury); *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 28–30 (App. Div. 2000) (holding that, when a fertilized embryo was implanted in the gestational mother by mistake, she lacked standing for custody as the child’s parent); *Creed v. United Hosp.*, 600 N.Y.S.2d 151, 151–52 (App. Div. 1993) (dismissing a negligence claim brought after a doctor implanted a fertilized ovum in the wrong woman on the grounds that the plaintiff suffered only emotional damages); *Frisina v. Women & Infants Hosp. of R.I.*, Nos. CIV. A. 95-4037, CIV. A. 95-4469, CIV. A. 95-5827, 2002 WL 1288784, at *9–10 (R.I. Super. Ct. May 30, 2002) (holding that the defendant’s negligent destruction of the plaintiff’s embryos constituted property damage); *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 72 (Utah 1998) (dismissing an infliction of emotional distress claim brought after a doctor fertilized a woman’s ovum with the wrong man’s sperm on the grounds that the plaintiffs suffered only the inability to believe that the children were biologically their own).

238. See, e.g., *supra* text accompanying notes 211–219; *infra* notes 260–256.

239. Gilbert Meilaender, *On Bioethics in Public*, New Atlantis, Fall 2009/Winter 2010, at 39, 39; Samuel Philbrick, *President George W. Bush’s Announcement on Stem Cells*, 9 August 2001, *Embryo Project Encyclopedia* (Nov. 19, 2011), <https://embryo.asu.edu/>

about neither stem cell research nor IVF. The Bioethics Council attributed the “relatively laissez-faire approach to regulation” to enduring and “deep disagreement” about the moral status of human embryos.²⁴⁰ Some anti-abortion groups attacked other pro-life activists for not making IVF enough of a priority.²⁴¹ “It is discriminatory,” wrote the American Life League in its *Declaration on Truth and Life*, “to treat those created through in vitro fertilization or other such manipulations as less deserving of respect and dignity as human persons.”²⁴²

At the time, leading anti-abortion groups were focusing on criminalizing *later* procedures, their central campaign a push to criminalize so-called partial-birth abortion, a term applied to the dilation and extraction procedure.²⁴³ In promoting these bills, anti-abortion groups stressed that their opponents—both the abortion-rights movement and the Democratic Party—were well outside the political mainstream.²⁴⁴ James Bopp, Jr., and Thomas Marzen of the National Right to Life Committee, for example, praised the partial-birth abortion campaign in a funding request as the most effective means over at least the last decade to “educate the voting public [about] the radical nature of the abortion liberty.”²⁴⁵ Seeking to prohibit IVF, by contrast, could allow abortion-rights supporters to paint their opponents as the true extremists. Bush, too, seemed to want to express support for personhood without calling for IVF restrictions, and he did so by announcing a program of block grants to facilitate embryo adoption, a process by which patients could donate additional embryos to other couples.²⁴⁶

The National Right to Life Committee responded by reframing its concerns about IVF as a demand that stem cell research not receive federal funding—and, in 2004, the only question related to IVF that appeared in the group’s candidate questionnaire asked about funding for stem cell

pages/president-george-w-bushs-announcement-stem-cells-9-august-2001 [https://perma.cc/5W5Z-2V9N].

240. President’s Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies* 8 (2004).

241. See Judy Peres, *In-Vitro New Front in Embryo War: Right-to-Life Battle Lines May Be Shifting to Fertilized Frozen Embryos, Which Have Helped Millions of Women Conceive*, Chi. Trib., July 6, 2005 (illustrating the dispute between different pro-life groups regarding IVF).

242. Am. Life League, *Declaration on Truth and Life* (n.d., c. 2001) (on file with the *Columbia Law Review*).

243. On the partial-birth abortion campaign, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L.J. 1694, 1707-33 (2008).

244. Ziegler, *Abortion and the Law*, supra note 74, at 183–84 (alteration in original) (internal quotation marks omitted) (quoting James Bopp, Jr. and Thomas Marzen).

245. Id. at 176 (alteration in original) (internal quotation marks omitted).

246. Laura Meckler, ‘Embryo Adoption’ Getting Push From \$1 Million Awareness Drive, Chi. Trib., Aug. 21, 2002, at 9. The status of these donations as adoptions was contested, dividing those who saw embryos as something less than persons from those who embraced full embryonic personhood.

research.²⁴⁷ By 2005, however, some anti-abortion groups were considering pushing state restrictions of IVF.²⁴⁸ Kentucky lawmakers considered a proposal, like Louisiana's,²⁴⁹ that permitted the implantation of only one embryo.²⁵⁰ But these state efforts went nowhere.²⁵¹

State courts continued intervening to fill the gap. In 1998, the New York Court of Appeals stressed that prior written agreements by the parties to IVF, including clinic consent forms, could be understood as enforceable contracts regarding the disposition of additional embryos.²⁵² In 2003, the Iowa Supreme Court developed an alternative approach, freezing the status quo unless the parties to IVF reached a mutual, contemporaneous agreement about the disposition of embryos.²⁵³ Other courts gave priority to the party favoring implantation if the embryos represented that person's last procreative chance.²⁵⁴ Jurisdictions offered different responses about how to understand the worth of embryos and to devise rules governing their disposition.²⁵⁵ Other matters—like the number of embryos transferred—were left to the private market to determine.²⁵⁶

Nevertheless, after the Supreme Court upheld the Partial-Birth Abortion Ban Act in 2007 in *Gonzales v. Carhart*,²⁵⁷ several forces ensured that neither the abortion-rights nor anti-abortion movement pushed for a cohesive federal approach to IVF. Leading anti-abortion groups had to contend with an effort to amend state constitutions to recognize fetal personhood, an effort that commenced in Colorado because of Kristi

247. Nat'l Right to Life Comm., Inc., 2004 Congressional Candidate Questionnaire (on file with the *Columbia Law Review*).

248. See Peres, *supra* note 241 ("A spokesman for Americans United for Life said his group is researching model legislation for states that want to regulate reproductive technologies.").

249. See *supra* note 143 and accompanying text.

250. *Id.*

251. For an overview of contemporary regulation, see Legislation to Watch, Resolve, <https://resolve.org/take-action/our-issues/current-legislation> [<https://perma.cc/HZT6-8VL3>] (last visited Aug. 7, 2025).

252. *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) ("Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them." (citations omitted)).

253. *In re Marriage of Witten*, 672 N.W.2d 768, 780 (Iowa 2003).

254. See, e.g., *Szafranski v. Dunston*, 34 N.E.3d 1132, 1162–63 (Ill. App. Ct. 2015) ("Karla's interests in using the pre-embryos to have a biologically related child—given her ovarian failure and inability to create any more pre-embryos with her own eggs, prevail over Jacob's interests in not using them."); *Reber v. Reiss*, 42 A.3d 1131, 1140–42 (Pa. Super. Ct. 2012) ("[B]ecause Husband and Wife never made an agreement prior to undergoing IVF, and these pre-embryos are likely Wife's only opportunity to achieve biological parenthood and her best chance to achieve parenthood at all, . . . the balancing of the interests tips in Wife's favor.").

255. See *infra* notes 254–256 and accompanying text.

256. See *supra* sections I.A–C.

257. 550 U.S. 124 (2007).

Burton, a homeschooled, conservative, Christian activist.²⁵⁸ Burton's effort attracted support from absolutists across the country, leading to the formation of a national organization, Personhood USA.²⁵⁹ Larger anti-abortion groups worried that such an amendment would be struck down by the Supreme Court and quite possibly give the Court an opportunity to strengthen abortion rights.²⁶⁰

As important, groups like National Right to Life Committee worried that personhood amendments were *political* losers because they arguably would affect laws well beyond regulations of abortion.²⁶¹ In Colorado, for example, opponents of Burton's proposal argued that it would prohibit IVF, or at least the creation of additional embryos that would not immediately be implanted.²⁶² Burton dismissed these arguments as a scare tactic,²⁶³ but the debate made it difficult for anti-abortion leaders to air existing concerns about IVF, much less seek to regulate or prohibit it—especially after Colorado's proposal was soundly defeated at the polls.²⁶⁴

In 2008, when voters rejected Burton's proposal, roughly half-a-million frozen embryos were in storage across the United States.²⁶⁵ There were signs that IVF was still controversial: On his way out of office, President George W. Bush unveiled a so-called right-to-refuse rule that permitted doctors, hospitals, and even receptionists and volunteers in medical experiments the right to refuse involvement in medical treatments they found objectionable, including IVF.²⁶⁶

258. Ziegler, *Abortion and the Law*, supra note 74, at 183–84.

259. *Id.*

260. See Julie Rovner, 'Personhood' Divides Anti-Abortion Groups, NPR (Nov. 9, 2011), <https://www.npr.org/sections/health-shots/2011/11/09/142184556/personhood-divides-anti-abortion-groups> [<https://perma.cc/7CQE-84ZW>] (reporting on Mississippi's failed personhood amendment and anti-abortion advocates' frustrations that the Supreme Court "has . . . indicated an interest in reformulating the right to abortion to make it even more extreme" (internal quotation marks omitted) (quoting James Bopp, Jr., Gen. Couns., Nat'l Right to Life Comm.)).

261. *Id.*

262. *Id.*

263. *Id.*

264. See Colorado Amendment 48, Definition of Person Initiative, Ballotpedia, https://ballotpedia.org/Colorado_Amendment_48_Definition_of_Person_Initiative_%282008%29 [<https://perma.cc/N95T-BG9K>] (last visited Aug. 9, 2025).

265. Shari Roan, *On the Cusp of Life, and of Law*, L.A. Times (Oct. 6, 2008), <https://www.latimes.com/archives/la-xpm-2008-oct-06-he-embryos6-story.html> [<https://perma.cc/97ZZ-HW3L>].

266. Bush first unveiled conscience rules regarding abortion, see Stephanie Simon, *Rules Let Health Workers Deny Abortions*, Wall St. J. (Aug. 22, 2008), https://www.wsj.com/articles/SB121934377810560987?gaa_at=eafs&gaa_n=ASWzDAheHj94_17EzPmw0hZHsCSAkCBsZ2AkmrXaD0wAHIN5SeTDuBw8Jbii&gaa_ts=68c8aab4&gaa_sig=h_acznME1_ODVG2dt8LPzkAqltnPSTGGze4Bvhizp7rXEzKc9RoSTCXfdaOKwHarMHD24tkVTinfTKyPvik_yg%3D%3D (on file with the *Columbia Law Review*), but then expanded the right-to-refuse rule. See David G. Savage, *Conscience Rule Unveiled*, Chi. Trib., Dec. 19, 2008, at 1. For the rule itself, see 45 C.F.R. § 88 (2025).

The following year, Nadya Suleman, whom the press would gleefully dub “octo-mom,” gave birth to octuplets following IVF.²⁶⁷ At times, protestors gathered outside Suleman’s home, arguing that Suleman and her children would depend on public assistance because Suleman lacked the means to support her children.²⁶⁸

Both Georgia and Missouri pushed proposals to limit the number of embryos implanted, seemingly driven by personhood concerns.²⁶⁹ Georgia Right to Life, which had broken away from the National Right to Life Committee over the question of personhood amendments, framed the new legislative proposals as an extension of the personhood campaign, calling them a way of recognizing embryos “as living human beings and not as property.”²⁷⁰ But state implantation limits stalled, and personhood amendments gave leading anti-abortion groups reason to steer clear of potential IVF regulations. For example, when Personhood USA and affiliated groups pushed an amendment in Mississippi, the state believed to be among the most likely to approve such a measure, opponents of the strategy insisted that it would criminalize IVF, and Joseph Latino, Roman Catholic Bishop of Jackson, Mississippi, spoke out against it because of his fear that it would “ultimately harm . . . efforts to overturn *Roe v. Wade*.”²⁷¹ The fact that 58% of voters in Mississippi rejected the proposal hardly changed the calculus.²⁷²

Much more attention centered on abortion following the confirmation of Justice Brett Kavanaugh in 2018, when states began pushing more aggressive abortion bans with the expectation that the Supreme Court

267. For contemporary news coverage of Suleman, see Goodwin, *supra* note 180, at 1041 (describing how Suleman became a celebrity “as the infamous ‘octo-mom’ for giving birth to octuplets through a sophisticated medical procedure involving forty-six doctors and extensive medical treatments for her infants”).

268. See, e.g., Jessica Garrison, Kimi Yoshino & Catherine Ho, Public Fury Overtakes Awe After the Birth of Octuplets, *L.A. Times* (Feb. 7, 2009), <https://www.latimes.com/archives/la-xpm-2009-feb-07-me-octuplets7-story.html> (on file with the *Columbia Law Review*); Steve Gorman, Threats Send California Octuplets Mom Into Hiding, *Reuters* (Feb. 11, 2009), <https://www.reuters.com/article/domesticNews/idUSTRE51A7R020090211/> (on file with the *Columbia Law Review*).

269. Betsy McKay, In-Vitro Fertilization Limit Is Sought, *Wall St. J.* (Mar. 3, 2009), https://www.wsj.com/articles/SB123603828823714509?gaa_at=eafs&gaa_n=ASWzDAgIwZzjIKRsK2cw3gvESSi2b1w6w9Nlb7zeWOdkA7deMwKQxYdqzvqs&gaa_ts=68c8ad90&gaa_sig=Q46zXJeuueLi8oNU9eaHyHB6nBpVjn35Pi2jUpZFEaR3OTET-zWRdrMNJMYjrXYrjhsmu8YwYCVK113U0amw%3D%3D (on file with the *Columbia Law Review*).

270. *Id.* (internal quotation marks omitted) (quoting Daniel Becker, President, Ga. Right to Life).

271. Richard Fausset, 1 State Personifies Personhood Push, *Chi. Trib.*, Nov. 6, 2011, at 1 (internal quotation marks omitted) (quoting Joseph Latino, Roman Cath. Bishop of Jackson, Miss.).

272. Frank James, Mississippi Voters Reject Personhood Amendment by Wide Margin, *NPR* (Nov. 8, 2011), <https://www.npr.org/sections/itsallpolitics/2011/11/08/142159280/mississippi-voters-reject-personhood-amendment> [<https://perma.cc/C2YX-6NEE>].

would uphold them.²⁷³ Some state laws gestured explicitly to personhood.²⁷⁴ Ten states had statutes or constitutional amendments purporting to define persons across different areas of law to include fetuses or unborn children.²⁷⁵ Other states defined the word “person” in their criminal codes as including a fetus or unborn child or punished conduct during pregnancy as abuse or neglect.²⁷⁶

IVF’s regulatory vacuum had proven remarkably persistent. Since the 1990s, states had classified not-yet-implanted embryos as genetic property

273. See Elizabeth Nash, Lizamarie Mohammed, Olivia Cappello & Sophia Naide, *State Policy Trends 2019: A Wave of Abortion Bans, but Some States Are Fighting Back*, Guttmacher Inst. (Dec. 10, 2019), <https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back> [<https://perma.cc/SSQ8-XPQG>] (“[S]upporters of the new wave of abortion bans have made it clear that they are seeking to give the U.S. Supreme Court multiple opportunities to undermine or overturn long-standing constitutional protections for individuals seeking an abortion.”).

274. Megan Messerly, ‘Scratching Their Heads’: State Lawmakers Take a Closer Look at Personhood Laws in Wake of Alabama Ruling, *Politico* (Feb. 29, 2024), <https://www.politico.com/news/2024/02/29/states-fetus-personhood-alabama-ivf-00143973> [<https://perma.cc/NQB3-F8R7>].

275. See Ala. Const. art. I, § 36.06 (“This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.”); Ariz. Rev. Stat. Ann. § 1-219(A) (2025) (“The laws of this state shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state . . .”); Ga. Code Ann. § 1-2-1(b) (2025) (“‘Natural person’ means any human being including an unborn child.”); Kan. Stat. Ann. § 65-6732(c)(2) (West 2025) (defining “unborn child” as “all unborn children or the offspring of human beings from the moment of fertilization until birth at every stage of biological development” (internal quotation marks omitted)); Ky. Rev. Stat. Ann. § 311.720 (West 2025) (“‘Human being’ means any member of the species *homo sapiens* from fertilization until death . . .”); Mo. Ann. Stat. § 1.205 (2025) (“The life of each human being begins at conception . . .”); Mont. Code Ann. § 50-20-102(2)(c) (2023) (stating that the state interest in protecting human life applies “to unborn persons in order to extend to unborn persons the inalienable right to defend their lives and liberties”); 18 Pa. Stat. and Cons. Stat. Ann. § 3202(c) (2025) (“In every relevant civil or criminal proceeding in which it is possible to do so without violating the Federal Constitution, the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws . . .”); Tenn. Code Ann. § 39-15-214(a)(6) (2025) (“The state has a legitimate, substantial, and compelling interest in protecting the rights of all human beings, including the fundamental and absolute right of unborn human beings to life, liberty, and all rights protected by the Fourteenth and Ninth Amendments to the United States Constitution . . .”); Utah Code § 76-7-301.1(1) (2025) (“[U]nborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.”); Utah Code § 78B-3-109(1) (2025) (“The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition, or dependency, including all persons with a disability and all unborn persons.”).

276. See *Pregnancy Just., When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond 6* (2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/05/fetal-personhood-with-appendix-UPDATED-1.pdf> [<https://perma.cc/2ALR-Y6YV>] (describing states that define “person,” “individual,” or “human being” to include a fetus).

subject to agreements among the individuals they came from and went to and the facilities that helped to create and store them.²⁷⁷ In the 2000s, anti-abortion groups had promoted embryo adoption laws and even considered restrictions on IVF itself.²⁷⁸ But support for IVF—which abortion-rights supporters invoked in the fight against personhood amendments—gave pro-lifers pause: Perhaps attacking IVF would undermine the fight to reverse *Roe*.²⁷⁹ Leaving IVF off the radar continued to make sense, even for the most ardent supporters of fetal personhood.

What any of this meant for IVF was not immediately obvious in early 2022. After all, even the most ardent abortion opponents, like Kristi Burton, had dismissed the supposed connection between IVF and personhood laws.²⁸⁰ And yet within a year of the leak of the *Dobbs* decision, the longstanding political compromise that had sustained IVF's regulatory vacuum collapsed. Part II turns next to the reasons for its demise.

II. REMAKING NORMAL

When *Politico* obtained a leaked copy of the Supreme Court's opinion in *Dobbs* in the spring of 2022,²⁸¹ 2.5% of all births were attributable to IVF.²⁸² IVF remained financially inaccessible for low-income families,²⁸³ and Black and Latinx families were less likely than white families to be able to afford IVF and less likely to achieve a successful pregnancy when they managed to access it.²⁸⁴ And the IVF industry, of course, was more complicated than a "Wild West."²⁸⁵ The CDC had published surveillance

277. See Mary Ziegler, Beyond Balancing: Rethinking the Law of Embryo Disposition, 68 Am. U. L. Rev. 515, 522 (2018) (describing various approaches to embryo disposition, including the mutual, contemporaneous agreement approach).

278. See *supra* notes 246–250 and accompanying text.

279. See *supra* notes 268–272 and accompanying text.

280. See *supra* note 263 and accompanying text.

281. Josh Gerstein & Alexander Ward, Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows, *Politico* (May 2, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> (on file with the *Columbia Law Review*) (last updated May 3, 2022).

282. See Press Release, Am. Soc'y for Reprod. Med., US IVF Usage Increases in 2023, Leads to Over 95,000 Babies Born (Apr. 23, 2025), <https://www.asrm.org/news-and-events/asrm-news/press-releasesbulletins/us-ivf-usage-increases-in-2023-leads-to-over-95000-babies-born/> [<https://perma.cc/A7KP-SEQN>] (reporting that 91,771 of approximately 3.6 million babies were born from IVF in 2022).

283. The cost of IVF can still easily exceed \$40,000 per cycle. Fact Sheet: IVF Use Across the United States, *supra* note 4.

284. Tarun Jain, Racial Disparities and In Vitro Fertilization (IVF) Treatment Outcomes: Time to Close the Gap, *Reprod. Biology & Endocrinology*, Nov. 19, 2020, at 1, 1.

285. See Spar, *supra* note 6.

summaries of assisted reproductive technologies, including IVF, since 1997.²⁸⁶ But scarce funds and staff hamstrung data collection.²⁸⁷

The American Society for Reproductive Medicine (ASRM) published ethics and practice guidelines,²⁸⁸ while its sister organization, the Society for Assisted Reproductive Technology (SART), certified and monitored laboratories and provided data to the CDC.²⁸⁹ Professional membership has always been voluntary, however, with no mechanism either to validate the information that SART pulls together or to discipline providers for failing to comply with ASRM recommendations.²⁹⁰

Meanwhile, the federal government, state medical boards, and common law all policed IVF less rigorously than comparable areas of medical practice like obstetrics and gynecology, radiology, and oncology.²⁹¹ The two organizations that accredited most fertility clinics often kept the details of investigations private.²⁹² Private equity firms, which one study found owned a larger proportion of fertility clinics than any other medical practice, created sprawling chains and drove a focus on profitability.²⁹³ Lawsuits that followed catastrophic failures—such as the implosion of a cryopreservation tank in San Francisco or the failure of another tank in Cleveland—typically settled before trial and were subject to nondisclosure agreements.²⁹⁴ And courts were reluctant to recognize

286. For the most recent report, see National ART Summary, CDC (Dec. 10, 2024), https://www.cdc.gov/art/php/national-summary/?CDC_AAref_Val=https://www.cdc.gov/art/reports/2021/summary.html [<https://perma.cc/6W8N-CCNY>]. The CDC has gathered such reports since 1997. See Saswati Sunderam, Dmitry M. Kissin, Yujia Zhang, Amy Jewett, Sheree L. Boulet, Lee Warner, Charlan D. Kroelinger & Wanda D. Barfield, Assisted Reproductive Technology Surveillance—United States, 2018, *Morbidity & Morality Wkly. Rep.*, Feb. 18, 2022, at 1, 2.

287. See Alicia Ouellette, Arthur Caplan, Kelly Carroll, James W Fossett, Dyrleif Bjamadottir, Darren Shickle & Glenn McGee, Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States, 31 *Am. J.L. & Med.* 419, 424–27 (2005).

288. Practice Guidance, *Am. Soc’y for Reprod. Med.*, <https://www.asrm.org/practice-guidance/> [<https://perma.cc/24QJ-HXHQ>] (last visited Aug. 8, 2025).

289. What Is SART?, *Soc’y for Assisted Reprod. Tech.*, <https://www.sart.org/about-us/what-is-sart/> [<https://perma.cc/GBM5-BTGA>] (last visited Aug. 8, 2025).

290. See Judith Daar, Emerging Reproductive Technologies: Regulating Into the Void, in *Case Studies in the Ethics of Assisted Reproduction* 13, 21 (Louise P. King & Isabelle C. Band eds., 2023) (explaining that there is not one uniform way for providers to comply with ASRM recommendations).

291. See Steve P. Calandrillo & Chryssa V. Deliganis, In Vitro Fertilization and the Law: How Legal and Regulatory Neglect Compromised a Medical Breakthrough, 57 *Ariz. L. Rev.* 311, 329–30 (2015) (explaining that “the fertility industry is subject only to very limited state and federal regulation”).

292. Lenny Bernstein & Yeganeh Torbati, Inside the Opaque World of IVF, Where Errors Are Rarely Made Public, *Wash. Post* (Apr. 28, 2024), <https://www.washingtonpost.com/health/2024/04/28/ivf-errors-fertility-clinics-regulation/> (on file with the *Columbia Law Review*).

293. *Id.*

294. *Id.*

intangible reproductive injuries in the first place, leaving these harms to fall through the cracks of available protections under contract, property, or tort law.²⁹⁵

Despite dissatisfaction with the state of the law, the regulatory vacuum surrounding IVF seemed to have survived miraculously intact for decades. Then came *Dobbs v. Jackson Women's Health Organization*. The dissenters called out “[i]n vitro fertilization” as “medical care most people view as quite different from abortion,” the regulation of which could be expected to confront the Court with new questions about how *Dobbs* applies.²⁹⁶ But the majority opinion said nothing about IVF. And its holding that a woman has no right to abortion doesn’t bear in any direct or necessary way on the creation, use, or destruction of embryos in the laboratory before there’s a pregnancy in the first place. So why did *Dobbs* lead to the demise of the enduring compromise that had sustained IVF’s regulatory vacuum?

Section II.A explores the social-movement developments that undermined the IVF regulatory vacuum. Section II.B examines the legal developments that supercharged a new social-movement push to restrict IVF—and new reproductive-rights mobilization in favor of *preserving* access to reproductive health. This Article shows that these developments have highlighted real threats to IVF access—and that backlash to those threats has revealed widespread, bipartisan support for IVF. Section II.C briefly discusses new religious alignments that have sustained a new polarized legal climate around IVF.

A. *The New North Star*

While fulfilling decades of hope and carefully planned strategy, *Dobbs* created a sort of crisis for the pro-life movement. Personhood had been the goal for which most dedicated right-to-lifers had mobilized, but more casual supporters had seen the movement’s priority as the destruction of *Roe v. Wade*.²⁹⁷ It was the overruling of *Roe* that protestors demanded each year at the preeminent anti-abortion rally, the March for Life, which took

295. The Tennessee Supreme Court summed up this legal state of affairs in a 2015 case, explaining that the “law does not recognize disruption of family planning as either an independent cause of action or an element of damages.” *Rye v. Women’s Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 271 (Tenn. 2015).

296. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2337 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

297. See, e.g., Elaine Godfrey, What Winning Did to the Anti-Abortion Movement, *The Atlantic* (Jan. 19, 2023), <https://www.theatlantic.com/politics/archive/2023/01/march-for-life-anti-abortion-movement-after-roe/672761/> (on file with the *Columbia Law Review*) (arguing that the pro-life movement’s next goal after the reversal of *Roe* was not obvious and had caused uncertainty and disruption); see also Abigail Abrams, The Battle Over the Future of the Anti-Abortion Movement if the Supreme Court Overturns *Roe v. Wade*, *Time* (Mar. 25, 2022), <https://time.com/6160143/anti-abortion-roe-wade-supreme-court/> [<https://perma.cc/48CN-SH24>] (describing the divisions exposed by the expected reversal of *Roe* and the search for a new mobilizing goal).

place in front of the Supreme Court.²⁹⁸ The fall of the right to choose abortion also threatened the loss of donors and activists who would feel that the pro-life movement's ambitions had already been achieved.²⁹⁹

Claims that the Fourteenth Amendment already recognized personhood from the moment of fertilization struck many leaders of a fractious movement as a natural substitute for the fight against *Roe*.³⁰⁰ The movement's commitment to personhood was deeply entrenched—evidenced, among other things, by ongoing references to personhood in the Republican platform.³⁰¹ As important, in recent years, a once-troubled

298. It was only after *Dobbs* that the March for Life ended at the Capitol, reflecting the claim that the center of gravity post-*Roe* had moved to legislatures. Veronica Stracqualursi, Anti-Abortion Activists Attend First March for Life 'With Fresh Resolve' Post-*Roe*, CNN, <https://www.cnn.com/2023/01/20/politics/march-for-life-2023-abortion/index.html> [https://perma.cc/4ZH2-DRP5] (last updated Jan. 20, 2023).

299. Clear fundraising disparities among political action committees and in ballot initiative campaigns evidenced these struggles. Anti-abortion PACs Susan B. Anthony List, National Right to Life, and the National Pro-Life Alliance raised a mere \$2.1 million between June 2022 and the first quarter of 2023, compared with more than \$19 million raised by abortion rights PACs Planned Parenthood, Emily's List, and NARAL Pro-Choice America. And PAC spending on state abortion ballot initiatives in 2022 favored the pro-choice side by more than a two-to-one margin. Alison Durkee & Darreonna Davis, *Roe v. Wade Overturned One Year On: Here's Where the Money's Going*, *Forbes* (June 24, 2023), <https://www.forbes.com/sites/alisondurkee/2023/06/23/roe-v-wade-overturned-one-year-on-heres-where-the-moneys-flowing-abortion/> [https://perma.cc/JED2-JPVD].

300. Tonya Mosley, Abortion Opponents Push for 'Fetal Personhood' Laws, Giving Rights to Embryos, NPR (Apr. 4, 2024), <https://www.npr.org/2024/04/04/1242774406/abortion-opponents-push-for-fetal-personhood-laws-giving-rights-to-embryos> [https://perma.cc/R9ZN-LZBU] (explaining that "[t]here is a movement among some anti-abortion activists that the 14th Amendment . . . should also apply to fetuses because the framers of that amendment did not explicitly say that this doesn't apply to born persons" (quoting Carter Sherman, Reporter, *The Guardian*)).

301. Until 2024, the platform included a reference to the Human Life Amendment. See Republican Party Platform of 1980, Am. Presidency Project (July 15, 1980), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980> [https://perma.cc/DM5X-4TLQ] ("While we recognize differing views on this question among Americans in general—and in our own Party—we affirm our support of a constitutional amendment to restore protection of the right to life for unborn children."); 2016 Republican Party Platform, Am. Presidency Project (July 18, 2016), <https://www.presidency.ucsb.edu/documents/2016-republican-party-platform> [https://perma.cc/4V2Q-7ND6] ("We support a human life amendment to the Constitution and legislation to make clear that the Fourteenth Amendment's protections apply to children before birth."). In 2024, the GOP replaced this language with a more muddled reference to the idea that the Fourteenth Amendment already protects fetal personhood. See 2024 Republican Party Platform, Am. Presidency Project (July 8, 2024), <https://www.presidency.ucsb.edu/documents/2024-republican-party-platform> [https://perma.cc/S6XM-U6WT] (stating that the party "stand[s] for families and Life" and stressing that "the 14th Amendment to the Constitution of the United States guarantees that no person can be denied Life or Liberty without Due Process"); see also Sarah McCammon & Steve Inskeep, How Language Around Abortion Rights Features in the New Republican Party Platform, NPR (July 16, 2024), <https://www.npr.org/2024/07/16/nx-s1-5035029/how-language-around-abortion-rights-features-in-the-new-republican-party-platform> [https://perma.cc/43XN-JAXR] (detailing how pro-life groups believed that the platform referred to fetal personhood); Julianne

relationship between the conservative legal movement and anti-abortion movement had grown far closer,³⁰² and prominent pro-life scholars had foregrounded originalist arguments for personhood.³⁰³

In June 2023, a coalition of twenty-six pro-life groups issued a letter they called the New North Star, insisting that the Fourteenth Amendment already recognized fetal personhood from the moment of fertilization and called on the federal and state governments “to secure equal protection for the child in the womb.”³⁰⁴ The New North Star letter also created plans for a new kind of pro-life incrementalism—the sort of slow, step-by-step plan that had successfully imposed limits on access to abortion while diluting the very idea of a right to choose.³⁰⁵ The letter set forth a parallel strategy: demanding the recognition of fetal personhood in areas of the law unrelated to abortion.³⁰⁶

The more that other legal rules recognized rights for zygotes, embryos, and fetuses, the more of an outlier the nonrecognition of constitutional fetal personhood would seem. A key incremental proposal involved the regulation of IVF and restrictions dictating that “embryos in cryopreservation are not legal property or quasi-property under state law and cannot simply be discarded and destroyed.”³⁰⁷ With the movement’s commitments to fetal personhood newly in the open, a more direct and focused attack on IVF was underway.

McShane, RNC Official: Nothing in Our Platform Says We Won’t Ban Abortion Nationwide, Mother Jones (July 15, 2024), <https://www.motherjones.com/politics/2024/07/rnc-platform-ed-martin-abortion-ban-softening-gop/> [<https://perma.cc/SL2A-WM88>] (discussing Ed Martin, a member of the GOP platform committee, and his explanation of references to fetal personhood).

302. On the changing relationship between the anti-abortion movement and the conservative legal movement, see generally Ziegler, Personhood, *supra* note 16.

303. See, e.g., Brief of Amici Curiae Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners at 5–23, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3374325 (discussing nineteenth-century commentators on the right to life); Michael Stokes Paulsen, The Plausibility of Personhood, 74 Ohio St. L.J. 13, 14–68 (2013) (making the originalist case for fetal personhood that the original meaning of “person” encompassed fetuses); Joshua Craddock, Note, Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortions? 40 Harv. J.L. & Pub. Pol’y 539, 539–52 (2017) (same); Josh Craddock, Our Pro-Life Constitution, Nat’l Rev. (Dec. 21, 2023), <https://www.nationalreview.com/magazine/2024/02/our-pro-life-constitution/> (on file with the *Columbia Law Review*) (same).

304. The New North Star (c. Jun. 2023) <https://www.liveaction.org/assets/1747757030-equal-protection-coalition-letter.pdf> (on file with the *Columbia Law Review*) [hereinafter New North Star Letter].

305. See *id.* (recommending seven policy changes that reflect this effort). On the evolution of anti-*Roe*, anti-abortion incrementalism, see generally Ziegler, *After Roe*, *supra* note 31, at 90–123.

306. See New North Star Letter, *supra* note 304 (listing potential policy areas to establish fetal personhood in, such as child endangerment laws or tax credits).

307. *Id.* (emphasis omitted).

B. *Fetal Personhood and Backlash*

The new attack on IVF exposed existing limits on IVF access and underscored the possibility that further limits could be placed on it in the future. At the same time, the more real those risks seemed, the more Americans across the ideological spectrum expressed support for IVF. The combination of threats to IVF access and ensuing backlash, this Article argues, might open opportunities to overcome the legislative impasse that has plagued IVF for decades.

In February 2024, the Alabama Supreme Court's decision in *LePage v. Center for Reproductive Medicine, P.C.* ensured that IVF would be a critical political issue in and beyond the 2024 election.³⁰⁸ The case involved a clinic in Mobile, Alabama, which operated within the same building as the local hospital.³⁰⁹ A hospital patient managed to access the cryopreservation tank and accidentally destroyed several embryos.³¹⁰ The three families affected by the loss of the embryos filed suit.³¹¹ Some of their legal theories were commonplace, like emotional distress damages for the clinic's negligence.³¹² But the families also argued that the state's Wrongful Death of a Minor Act defined persons to include frozen embryos, qualifying their destruction as wrongful deaths,³¹³ deaths no different than if a child had been killed by a drunk driver.³¹⁴

Before *Dobbs*, courts in Arizona and Ohio had squarely rejected this idea that fertility patients could sue for wrongful death when a clinic negligently lost, contaminated, or destroyed their embryos.³¹⁵ Two years after *Dobbs*, however, the Supreme Court of Alabama held that plaintiffs could recover as surviving "parents" of "extrauterine children" who "had been kept alive in a cryogenic nursery while they awaited implantation" before they were "killed" by the clinic's failure to secure the laboratory where they were being stored.³¹⁶ The Chief Justice wrote a separate opinion quoting extensively from the Bible, explaining that "human life cannot be wrongfully destroyed without incurring the wrath of a holy God."³¹⁷

308. See 408 So.3d 678, 680–82 (Ala. 2024) (acknowledging the major policy questions raised by the case but declining to provide clear answers or guidance).

309. *Id.* at 681.

310. *Id.*

311. *Id.* at 680–81.

312. *Id.*

313. *Id.* at 682–83.

314. Ala. Code § 6-5-391 (2025).

315. See *Jeter v. Mayo Clinic Ariz.*, 121 P.3d 1256, 1267 (Ariz. Ct. App. 2005) (holding that defining embryos as persons for purposes of wrongful death suits is a decision best left to the legislature); *Penniman v. Univ. Hosps. Health Sys., Inc.*, 130 N.E.3d 333, 337 (Ohio Ct. App. 2019) (finding that personhood in the context of a wrongful death claim requires viability).

316. *LePage*, 408 So.3d at 680–82.

317. *Id.* at 693 (Parker, J., concurring specially).

LePage did not prohibit IVF, but its holding opened the possibility that the accidental destruction of an embryo could lead to ruinous liability, and fertility clinics across the state paused operations in the aftermath of the court's decision, grinding IVF to a halt.³¹⁸ The decision elicited powerful backlash. The Alabama legislature, dominated by socially conservative Republicans, passed a law shielding IVF providers and other defendants from liability.³¹⁹ Given widespread support for IVF documented in polls, Republicans quickly distanced themselves from the ruling and declared their support for IVF, including in the 2024 GOP platform.³²⁰ President Donald Trump repeatedly endorsed IVF on the campaign trail, even proclaiming himself the "fertilization president" early in his second term.³²¹ One month after reclaiming the White House, Trump issued an executive order to develop "a list of policy recommendations on protecting IVF access and aggressively reducing out-of-pocket and health plan costs for IVF treatment."³²²

The announcement sparked swift backlash from the anti-abortion movement, however.³²³ And right-to-life activists did not change their position. Students for Life, for example, drafted talking points on the party platform, arguing that "[t]he science has far outpaced a conversation with broader society about how to protect life and whether it's a good idea to trade human lives and enslave women's bodies in a contract."³²⁴ The Heritage

318. See Janice Hopkins Tanne, *University in Alabama Halts IVF Treatments After Court Rules Embryos Are Children*, *Brit. Med. J.*, Feb. 22, 2024, at 1, 1 (discussing the cessation of IVF treatments in the largest medical center in Alabama).

319. Emily Cochrane, *Alabama Passes Law to Protect I.V.F. Treatments*, *N.Y. Times* (Mar. 6, 2024), <https://www.nytimes.com/2024/03/06/us/politics/alabama-ivf-law.html> (on file with the *Columbia Law Review*).

320. See 2024 Republican Party Platform, *supra* note 301 ("We will oppose Late Term Abortion, while supporting mothers and policies that advance Prenatal Care, access to Birth Control, and IVF (fertility treatments).").

321. Nathaniel Weixel & Alejandra O'Connell-Domenech, *HHS Layoffs Undercut Trump's Pledge to Be 'Fertilization President'*, *The Hill* (Apr. 26, 2025), <https://thehill.com/policy/healthcare/5266568-ivf-access-trump-reproductive/amp/> [<https://perma.cc/C5TL-89GU>] (internal quotation marks omitted) (quoting President Donald Trump).

322. Exec. Order No. 14,216, 90 Fed. Reg. 10451, 10451 (Feb. 18, 2025). Within weeks after that executive order, however, the Administration made significant cuts to maternal health and reproductive medicine programs at HHS that included eliminating the CDC's six-person Assisted Reproductive Technology Surveillance team responsible for reporting on pregnancy outcomes for fertility patients at IVF clinics nationwide. Weixel & O'Connell-Domenech, *supra* note 321.

323. Tyler Arnold, *Pro-Life Advocates Decry Trump Executive Order Expanding IVF Access*, *Nat'l Cath. Reg.* (Feb. 18, 2025), <https://www.ncregister.com/cna/pro-life-advocates-decry-trump-executive-order-expanding-ivf-access> [<https://perma.cc/PYZ5-WGLG>]; Suzanne Blake, *Trump's IVF Executive Order Sparks Republican, Anti-Abortion Backlash*, *Newsweek* (Feb. 19, 2025), <https://www.newsweek.com/trumps-ivf-executive-order-sparks-republican-pro-life-backlash-2033288> [<https://perma.cc/PEK8-JJLF>].

324. Kristi Hamrick, *What to Expect When You're Expecting to Talk About Invitro Fertilization (IVF)*, *Students for Life of Am.* (Feb. 23, 2024), <https://studentsforlife.org/>

Foundation circulated new talking points and policy proposals endorsing restrictions on IVF, including limits on the number of embryos created and implanted and prohibitions against prenatal genetic testing.³²⁵ Of course, promoting limits on the number of embryos that could be implanted was not itself a radical idea: Nations from Germany to Japan had introduced regulations of this kind, and advocates with little interest in criminalizing abortion or IVF had proposed similar rules in the United States.³²⁶ Nevertheless, the new proposals advanced by pro-life groups had a different purpose, one inextricably tied to their suspicion of IVF and opposition to abortion.³²⁷

LePage also helped to solidify the place of IVF as an issue of reproductive rights. Reproductive Freedom for All launched a media campaign centered on IVF calling on its advocates to support reproductive rights “from abortion to IVF.”³²⁸ Planned Parenthood of Greater New York declared that “Protecting IVF is Part of Protecting Reproductive Freedom.”³²⁹ SisterSong Reproductive Justice Collective, a preeminent group in the movement for reproductive justice, had begun hosting conferences on infertility and its treatment in communities of color—involving prizes for some attendees that included IVF and other

2024/02/23/what-to-expect-when-youre-expecting-to-talk-about-invitro-fertilization-ivf/ [https://perma.cc/2QYS-2JHC].

325. Emma Waters, *Why the IVF Industry Must Be Regulated*, Heritage Found. (Mar. 19, 2024), <https://www.heritage.org/life/report/why-the-ivf-industry-must-be-regulated> [https://perma.cc/6242-8GW4].

326. See Sheila Jasanoff & Ingrid Metzler, *Borderlands of Life: IVF Embryos and the Law in the United States, United Kingdom, and Germany*, 45 *Sci., Tech. & Hum. Values* 1001, 1015–27 (2020) (providing an overview of IVF policies in Germany, the United Kingdom, and the United States); Kirstin RW Matthews & Daniel Morali, *National Human Embryo and Embryoid Research Policies: A Survey of 22 Top Research-Intensive Countries*, 15 *Regenerative Med.* 1905, 1911 (2020) (reviewing IVF policies in countries that invest heavily in science and technology).

327. See Jill Filipovic, *The Anti-Abortion Movement Is Coming for Fertility Treatments*, *Ms. Mag.* (Feb. 20, 2024), <https://msmagazine.com/2024/02/20/fertility-ivf-alabama-supreme-court-anti-abortion/> [https://perma.cc/AGK3-LJVG] (“Many of the [anti-abortion] movement’s leaders have indicated that they would like to outlaw [IVF], and . . . abortion opponents have never stopped at simply (‘simply’) banning abortion. They want full control over reproduction, and over women specifically.”); Jessica Winter, *The Fight Over I.V.F. Is Only Beginning*, *New Yorker* (Mar. 3, 2024), <https://www.newyorker.com/science/annals-of-medicine/the-fight-over-ivf-is-only-beginning> [https://perma.cc/R4QP-MRCS] (“Henry, of Johns Hopkins and the University of Maryland, believes that *LePage* will make it easier for states with anti-abortion laws to criminalize pregnancy and miscarriage.”).

328. Press Release, *Reprod. Freedom for All*, *Reproductive Freedom for All Responds to Senate GOP Again Blocking Democrats’ Efforts to Protect IVF* (June 13, 2024), <https://reproductivfreedomforall.org/news/reproductive-freedom-for-all-responds-to-senate-gop-again-blocking-democrats-efforts-to-protect-ivf/> [https://perma.cc/Y5N6-KM9Z].

329. Gabriela Aguilar, *Protecting IVF Is Part of Protecting Reproductive Freedom*, *Planned Parenthood of Greater N.Y.: Blog* (Mar. 5, 2024), <https://www.plannedparenthood.org/planned-parenthood-greater-new-york/blog/the-dangerous-criminalization-of-reproductive-freedom-starts-with-ivf> [https://perma.cc/UY97-UVZB].

treatments at respected area fertility clinics.³³⁰ Even some prominent Republicans went on record to defend IVF amid the backlash to *LePage*.³³¹

With Trump in the White House, the tensions exposed by *LePage* remain visible: Republicans continue to proclaim support for IVF yet offer little clarity about the concrete steps that they will take to protect it, while pro-life groups continue to mount a campaign to oppose IVF and restrict access to it.³³²

In May 2025, President Trump said he had several policy recommendations to make IVF more accessible under consideration—but a month later, none of them had been made public, and no reason was given to explain why.³³³ With Republicans in control of both houses of Congress, 2025 has seen no progress on the bill that the GOP championed in 2024 pledging to block harmful IVF restrictions in the states.³³⁴ And pro-life groups and lawmakers continue to wage war on IVF, despite Trump’s support for it.³³⁵ Students for Life issued a press release condemning Trump’s position on IVF and asserting that it “kills more children than abortion.”³³⁶

330. Black Infertility Awareness Week, SisterSong, <https://www.sistersong.net/black-infertility-awareness-week> [<https://perma.cc/HSB2-S4EL>] (last visited Aug. 6, 2025); Image posted by SisterSong (@sistersong_woc), Instagram, We’re Awarding Over \$40,000 (July 26, 2024), <https://www.instagram.com/p/C95tCnMPYk/> [<https://perma.cc/RER8-PF26>].

331. See Megan Messerly & Alice Miranda Ollstein, Republicans Are Rushing to Defend IVF. The Anti-Abortion Movement Hopes to Change Their Minds, *Politico* (Apr. 1, 2024), <https://www.politico.com/news/2024/04/01/anti-abortion-movement-ivf-war-00149766> [<https://perma.cc/82CR-ADHG>] (noting that lawmakers, including Republican representatives, “have, by and large, been reluctant” to support IVF restrictions).

332. See *infra* notes 356–350 and accompanying text.

333. In May 2025, reports focused on the deliberations within the White House about forthcoming IVF recommendations. See Caroline Kitchener, Inside the I.V.F. Deliberations at the White House as Key Report Nears, *N.Y. Times* (May 17, 2025), <https://www.nytimes.com/2025/05/17/us/politics/ivf-policy-white-house.html> (on file with the *Columbia Law Review*) (last updated May 18, 2025) (detailing debates about potential IVF proposals); see also Christine Fernando, White House Says Trump Is Reviewing IVF Policy Recommendations Promised in Executive Order, *AP News*, <https://apnews.com/article/trump-ivf-recommendations-fertility-clinic-bombing-1e7a626e88d7d7a120b0c4a7ba6f8314> [<https://perma.cc/ZR44-6SYU>] (last updated May 20, 2025) (same). By June, a delay left some experts wondering whether Trump would make good on his promises. Cecelia Smith-Schoenwalder, Advocates Anxiously Ask: When Will Trump Release IVF Recommendations?, *U.S. News & World Rep.* (June 9, 2025), <https://www.usnews.com/news/national-news/articles/2025-06-09/advocates-clinics-anxiously-ask-when-will-trump-release-ivf-recommendations> (on file with the *Columbia Law Review*).

334. The Republican bill, sponsored by Senators Ted Cruz and Katie Britt, would deny Medicaid funding to any state that prohibited IVF. Caitlin Yilek, Republicans Ted Cruz and Katie Britt Introduce Bill to Protect IVF Access, *CBS News* (May 20, 2024), <https://www.cbsnews.com/news/ted-cruz-katie-britt-ivf-access-bill/> [<https://perma.cc/GMV2-JYPH>].

335. See Kitchener, *supra* note 333 (“[M]any in the Trump administration are eager to combat infertility But that goal is complicated by dueling interests within Mr. Trump’s base.”).

336. Jordan Butler, Trump Holds Many Pro-Life Wins, But His IVF Executive Order Ain’t One: The Truth About the Anti-Life IVF Industry, *Students for Life of Am.* (Feb. 20,

Despite Trump's stated position, the Heritage Foundation continues to promote model legislation limiting the number of embryo transfers performed in IVF procedures.³³⁷ And the Ethics and Public Policy Center, a socially conservative think tank, released a plan that makes two main arguments: (1) IVF should be restricted because it leaves "embryonic children frozen for decades in fertility clinics, [requires] genetic screening tests picking winners and losers based on the embryos' sex, health, or IQ, and [ensures] the widespread destruction of embryos either intentionally or through neglect,"³³⁸ and (2) IVF should be replaced by "natural" methods to "restore" women from "reproductive dysfunction" by tracking the female menstrual cycle and hormonal changes by using observable signs or biomarkers like menstrual bleed, cervical mucus, and urinary hormones—this "restorative approach" notes that male-factor infertility is "beyond its scope."³³⁹ Self-proclaimed abolitionist Republicans have also proposed personhood bills that would limit or criminalize IVF.³⁴⁰ The back-and-forth between the pro-choice movement, the pro-life movement, and both political parties has continued.

LePage and *Dobbs* revealed longstanding connections between the fight for fetal personhood and support for restrictions on IVF. Groups already opposed to the legal recognition of fetal personhood—because of its potential impact on abortion access or even the criminalization of behavior during pregnancy—increasingly came to see IVF as a similar issue: one involving the freedom to make critical healthcare decisions or navigate the equality- and status-related burdens tied to pregnancy.³⁴¹

2025), <https://studentsforlife.org/2025/02/20/trump-holds-many-pro-life-wins-but-his-ivf-executive-order-aint-one-the-truth-about-the-anti-life-ivf-industry/> [<https://perma.cc/7EYJ-SM78>] (emphasis omitted).

337. Model Legislation: IVF Embryo Transfer Limit, Heritage Found., <https://www.heritage.org/model-legislation/ivf-embryo-transfer-limit> [<https://perma.cc/S843-P9TX>] (last visited Aug. 9, 2025).

338. Natalie Dodson & Emma Waters, Treating Infertility: The New Frontier of Reproductive Medicine, Ethics & Pub. Pol'y Ctr. (Mar. 18, 2025), <https://eppc.org/publication/treating-infertility-the-new-frontier-of-reproductive-medicine/> [<https://perma.cc/8B6K-7HZK>].

339. Natalie Dodson, Introduction to Ethics & Pub. Pol'y Ctr. & Heritage Found., Treating Infertility: The New Frontier of Reproductive Medicine 1, 1–2 (2025) <https://eppc.org/wp-content/uploads/2025/08/10-FINAL-Treating-Infertility-The-New-Frontier-of-Reproductive-Medicine.pdf> [<https://perma.cc/JWQ6-49N9>] [hereinafter Treating Infertility]; Marguerite Duane, An Overview of Restorative Reproductive Medicine, *in* Treating Infertility, *supra*, at 6, 7; Craig Turczynski & Phil Boyle, Putting All Our Eggs in One Basket, *in* Treating Infertility, *supra*, at 12, 14.

340. For an example, consider a recent bill proposed in Ohio. See Jessie Balmert, Ohio Republican Bill Would Treat Abortions as Homicide, Ban All Abortions in State, Columbus Dispatch (June 17, 2025), <https://www.dispatch.com/story/news/politics/2025/06/17/new-ohio-gop-bill-would-ban-all-abortions-treat-abortion-as-homicide/84239311007/> [<https://perma.cc/4ZJE-KJ6Y>] (last updated June 18, 2025).

341. Earlier initiatives witnessed a similar dynamic. See Jonathan F. Will, Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice, 39 Am. J.L. & Med. 573, 580, 598 (2013) (explaining the conservative push to define "personhood" as

LePage produced a backlash that created new legislative opportunities, perhaps even in Congress itself. But the decision also hardened the commitment of anti-abortion groups to attacking IVF—a campaign that won new allies in powerful religious communities.

C. *Religious Realignments*

Within religious hierarchies opposed to abortion, the Catholic Church had stood out for its opposition to IVF.³⁴² Views among other religious denominations varied considerably. Hindu and Buddhist teachings on IVF were strikingly liberal.³⁴³ Judaism also broadly takes a liberal view on IVF, while Orthodox, conservative, and reform Jews disagree about related techniques, including surrogacy.³⁴⁴ Muslim religious teachings are also relatively permissive: Since the 1980s, Sunni religious leaders have issued fatwas, or religious rulings, and guidelines permitting IVF when used by married, heterosexual couples, and Shi'a teachings have reached a similar conclusion.³⁴⁵ Eastern Orthodox churches condemned IVF, while most Christian denominations, including some Baptists, Methodists, Lutherans, Mormons, Episcopalians, and Seventh Day Adventists, tolerated IVF, at least when used by married couples.³⁴⁶ By contrast, evangelical Protestant leaders, who had increasing influence in the pro-life movement, had remained comparably silent.³⁴⁷

Surveys show that roughly the same number of white evangelical Protestants know someone who has used assisted reproductive technology as do members of other faith communities, and a spring 2024 Pew Research Center survey indicated that 63% of white evangelicals surveyed

beginning within “twenty-four hours after the sperm penetrates the egg,” which implicates not only abortion, but IVF and certain forms of contraception).

342. On Catholic resistance to IVF, see Marsh & Ronner, *Pursuit of Parenthood*, supra note 11, at 151, 169.

343. H.N. Sallam & N.H. Sallam, *Religious Aspects of Assisted Reproduction*, 8 *Facts Views & Vision ObGyn* 33, 44–45 (2016).

344. See Sherman J. Silber, *Infertility, IVF and Judaism*, in *Infertility and Assisted Reproduction* 728, 728–31 (Botros R.M.B. Rizk, Juan A. Garcia-Velasco, Hassan N. Sallam & Antonis Makrigiannakis eds., 2008) (explaining that while IVF is generally encouraged for Jewish couples dealing with infertility, there is a debate among Jewish sects as to whether donor gametes are allowed).

345. See Marcia C. Inhorn, *Making Muslim Babies: IVF and Gamete Donation in Sunni Versus Shi'a Islam*, 30 *Culture Med. & Psychiatry* 427, 427–450 (2006) (comparing how IVF works in practice in Sunni Egyptian communities and Shi'ite Lebanese communities, given that both sects allow IVF, but only Shi'ism expressly permits the use of donor gametes).

346. See Cynthia B. Cohen, *Protestant Perspectives on the Uses of the New Reproductive Technologies*, 30 *Fordham Urb. L.J.* 135, 145 (2002) (arguing that the “underlying Protestant view” is “a general acceptance of the use of IVF,” especially in light “of the problems and anguish experienced by many who desperately hope that their loving union will be blessed with children”).

347. See *id.* at 135 (explaining how Protestant denominations do not have a central teaching authority concerning conceiving and bearing children through IVF).

saw IVF as a “good thing.”³⁴⁸ But critical figures, such as R. Albert Mohler, Jr. of the Southern Baptist Theological Seminary, had argued against IVF for more than a decade.³⁴⁹

The aftermath of *Dobbs* created an important opportunity for Mohler and his colleagues. The Southern Baptist Convention (SBC) had generally moved to the right on abortion, with a significant plurality calling for the passage of an “Abolishing Abortion” amendment calling not only for the recognition of fetal personhood but also insisting that fetal personhood would require the punishment of women.³⁵⁰ The *LePage* decision publicized theological arguments that the recognition of fetal rights was incompatible with IVF as currently practiced.³⁵¹ So when R. Albert Mohler, Jr., and Andrew Walker, a young theology professor from Louisville, proposed a resolution condemning IVF,³⁵² the SBC chose to pass it, with Mohler calling IVF “an engineered system whereby multiple embryos are created only for most of them, assuredly, to be destroyed.”³⁵³

Even as IVF tends to remain popular among rank-and-file believers, the alliance between conservative Catholics and Protestants that had sustained the anti-abortion cause could now take new aim at IVF.³⁵⁴ In the

348. Gabriel Borelli, Americans Overwhelmingly Say Access to IVF Is a Good Thing, Pew Rsch. Ctr. (May 13, 2024), <https://www.pewresearch.org/short-reads/2024/05/13/americans-overwhelmingly-say-access-to-ivf-is-a-good-thing/> [<https://perma.cc/H253-BED9>].

349. For an early example, see Christian Morality and Test Tube Babies: Part I, Albert Mohler, <https://albertmohler.com/2005/09/29/christian-morality-and-test-tube-babies-part-one-2/> [<https://perma.cc/9TUK-ZESA>] (last visited Aug. 10, 2025) (arguing that Christian morality militates against the use of IVF).

350. On abolitionism within the SBC, see On Abolishing Abortion, S. Baptist Convention (June 21, 2021), <https://www.sbc.net/resource-library/resolutions/on-abolishing-abortion/> [<https://perma.cc/7AAK-RMLC>]. On the debate prompted by the resolution, see Lisa Misner, SBC Resolution on Abortion Creates Strategy Debate Among Pro-Life Baptists, Ill. Baptist News (June 30, 2021), <https://illinoisbaptist.org/sbc-resolution-on-abortion-creates-strategy-debate-among-pro-life-baptists> [<https://perma.cc/8YND-KJPY>].

351. See *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 680–82 (Ala. 2024) (holding that embryos are “children” within the Wrongful Death of a Minor Act, such that IVF clinics can be held liable for the destruction of embryos).

352. Mark Wingfield, SBC’s 1,000-Word Resolution Covers Nine Hot Topics, Baptist News Glob. (June 11, 2025), <https://baptistnews.com/article/sbcs-1000-word-resolution-covers-nine-hot-topics/> [perma.cc/68TG-Z4RZ] (“The 1,000-word statement was drafted by the [Southern Baptist] convention’s Resolutions Committee, chaired by Andrew Walker, a scholar who works for Al Mohler . . . All nine of the social and ethical issues embodied in the omnibus resolution are frequent talking points of Mohler . . .”).

353. Bob Smietana, Southern Baptists Pass Resolution Calling for Strictures to Curb IVF, Ministry Watch (June 14, 2024), <https://ministrywatch.com/southern-baptists-pass-resolution-calling-for-strictures-to-curb-ivf/> [<https://perma.cc/M86X-VRY8>] (internal quotation marks omitted) (quoting R. Albert Mohler, Jr., President, S. Baptist Theological Seminary). For the full text of the resolution, see S. Baptist Convention, Proposed Resolutions (2024), <https://sbcanualmeeting.net/wp-content/uploads/2024/06/Final-Resolutions-2024.pdf> [<https://perma.cc/B7GP-TUYK>] (putting forth a resolution “On the Ethical Realities of Reproductive Technologies and the Dignity of the Human Embryo”).

354. See Kristen Soltis Anderson, Opinion, I.V.F. Is a Miracle. For Republicans, It Is a Land Mine., N.Y. Times (Feb. 27, 2024), <https://www.nytimes.com/2024/02/27/opinion/>

public imagination, this religious realignment links IVF to other culture war issues, from abortion to same-sex marriage. For example, in denouncing IVF as immoral, Mohler stressed that same-sex couples used it.³⁵⁵

Mohler's attention to the use of IVF by same-sex couples is representative: A range of social conservative groups have argued that IVF should be available only to heterosexual, married couples. Project 2025 argued for an overhaul of IVF practices to reflect the claim that "a married mother, father, and their children are the foundation of a well-ordered nation and healthy society."³⁵⁶ With regard to IVF and other "current and emerging reproductive technologies," Project 2025's *Mandate for Leadership* asserts that "HHS policies should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them," implying that for same-sex couples to use IVF to have and raise children runs contrary to the idea of a "well-ordered nation."³⁵⁷

The social movements warring over reproductive rights—and some of the faith communities aligned with them—have made IVF a point of conflict.³⁵⁸ At the same time, the backlash to *LePage* was widespread and cut across religious, ideological, and partisan lines in ways that suggest

ivf-alabama-republicans.html (on file with the *Columbia Law Review*) (presenting a conservative Christian's defense of IVF and expressing fear that some Christians want to ban it).

355. For Mohler's claim, see Liam Adams, Southern Baptists to Debate Measure Opposing IVF Following Alabama Court Ruling, *The Tennessean* (Nash., Tenn.), <https://www.tennessean.com/story/news/religion/2024/06/07/southern-baptists-to-debate-measure-opposing-ivf-at-annual-meeting/73999757007/> (on file with the *Columbia Law Review*) (last updated June 7, 2024).

356. Severino, *supra* note 30, at 450–51.

357. *Id.* at 451. This position dovetails with the conclusions drawn by a variety of conservative organizations—and with the campaign against IVF led by the Heritage Foundation, which argues that "children have a right to know their biological parents." Waters, *supra* note 325. Other socially conservative organizations have staked out a similar position. See, e.g., IVF: Moral and Ethical Considerations, Focus on the Fam., <https://www.focusonthefamily.com/family-qa/ivf-moral-and-ethical-considerations/> [<https://perma.cc/54M4-ECLJ>] (last visited Aug. 9, 2025) ("The meaning of marriage and child identity can be preserved when IVF is used *only* by a married man and woman with no third-party involvement (no donor sperm, donor eggs, or surrogacy)."). The influential Alliance Defending Freedom has also flagged these concerns in its own writing on IVF. See, e.g., Denise Burke, In IVF Case, Alabama Supreme Court Protects Life From Conception, *All. Defending Freedom* (Mar. 4, 2024), <https://adflegal.org/article/ivf-case-alabama-supreme-court-protects-life-conception/> (on file with the *Columbia Law Review*) (last updated Mar. 18, 2024).

358. See *supra* notes 340–348 and accompanying text; see also Leigh Ann Caldwell & Theodor Meyer, Republicans' Complicated Relationship With IVF, *Wash. Post* (Feb. 27, 2024), <https://www.washingtonpost.com/politics/2024/02/27/republicans-complicated-relationship-with-ivf/> (on file with the *Columbia Law Review*) (detailing how, after the *LePage* ruling, Republicans, despite expressing some support for IVF, "were hard[] to pin down" on the question of what should be done with unused embryos).

support for IVF is both broader and deeper than in earlier years.³⁵⁹ Polls show that support for IVF exceeds even the longstanding backing for legal abortion.³⁶⁰

America's IVF moment is thus one of great opportunity and great risk. Past hurdles to a federal compromise seem less insurmountable. At the same time, the threat of state prohibitions—or even national limits—can no longer be dismissed. If the governance void for IVF is not long for this world, what should replace it? Drawing on the legal history that has brought us to this point, Part III outlines a new regulatory regime that might prove acceptable to those with divergent views about IVF and the many legal and ethical questions tied to it.

III. THE PROMISE OF REGULATORY CONCILIATION

The fall of *Roe v. Wade* has broken up the uneasy arrangement that has governed IVF for over half a century.³⁶¹ IVF is responsible for helping thousands to form the happy families that they would not have been able to without it. Yet a new push to prohibit or heavily restrict IVF has gained momentum.³⁶² And legislative progress seems impossible. The federal Right to IVF Act has failed in more than one vote.³⁶³ None of this seems likely to change in the near term.³⁶⁴

359. See Henry T. Greely, *The Death of Roe and the Future of Ex Vivo Embryos*, J.L. & Biosciences, July–Dec. 2022, at 1, 15–16 (predicting that IVF's popularity will tend to afford it political refuge from legal restriction).

360. Borelli, *supra* note 348; Colleen Long & Amelia Thomson-Deveaux, *More Than 6 in 10 Americans Support Protecting Access to In Vitro Fertilization*, AP-NORC Poll Finds, PBS News (July 12, 2024), <https://www.pbs.org/newshour/health/more-than-6-in-10-americans-support-protecting-access-to-in-vitro-fertilization-ap-norc-poll-finds> (on file with the *Columbia Law Review*). Opinion on IVF may be more complex than some of these polls capture. For example, a May 2024 Gallup poll found Americans much more divided on the question of whether it was moral to destroy additional embryos. Jeffrey M. Jones, *Americans Back IVF; Divide on Morality of Destroying Embryos*, Gallup (June 13, 2024), <https://news.gallup.com/poll/646025/americans-back-ivf-divide-morality-destroying-embryos.aspx> [<https://perma.cc/6TLZ-83M5>].

361. See, e.g., Editorial, *IVF Protections Should Be a Priority for Both Parties*, Bloomberg (Mar. 6, 2024), <https://www.bloomberg.com/opinion/articles/2024-03-06/ala-bama-ivf-law-shows-that-compromise-is-within-reach> [<https://perma.cc/R3N3-4SHP>] (discussing how, after *Dobbs*, courts are imposing liability on IVF providers under laws meant to restrict abortion).

362. See *supra* sections II.B–C.

363. Deirdre Walsh, *Senate Republicans Block IVF Bill, as Democrats Elevate Issue Ahead of November Election*, NPR (Sep. 17, 2024), <https://www.npr.org/2024/09/17/g-s1-23414/senate-republicans-block-ivf-legislation> [<https://perma.cc/98MD-EC59>].

364. On these votes, see Clare Foran, Morgan Rimmer & Ted Barrett, *Senate GOP Blocks IVF Bill Again as Democrats Spotlight Issue Ahead of Elections*, CNN, <https://www.cnn.com/2024/09/17/politics/senate-ivf-bill-vote/index.html> [<https://perma.cc/3RYU-GA7U>] (last updated Sep. 17, 2024); Groves, *supra* note 24.

But the history of IVF illuminates how Americans have come together around the safety and efficacy of IVF despite their disagreements about how to value or treat embryos, the scope or moral status of reproductive rights, and these rights' implications for faith, gender, race, and class.³⁶⁵ We take these shared concerns as the starting point for a new federal baseline that would centralize matters of legality, licensing, and transparency.

Our proposals below do not amount to our theoretical ideal. If IVF didn't provoke such profound cultural divisions, we'd go beyond funding or safety measures and enhance reliable access up front, while securing meaningful causes of action for victims of negligent misconduct whose claims fall through the cracks of contract, property, and torts like medical malpractice or informed consent.³⁶⁶ The proposals that we advance here are relatively modest by comparison because they are designed to recover political common ground.

For those who see profound value in assisted reproduction, leaving industry and medical providers to set the rules about it might seem safer than imposing federal legislation, especially in light of deepening opposition to IVF within the pro-life movement and some faith communities. Opening assisted reproduction to meaningful government oversight could lead IVF down a path like abortion's: subject to punitive laws and even less available to those at society's margins.³⁶⁷ The ethical objections that some social conservatives express about the use of reproductive technologies by same-sex couples make these concerns particularly acute.³⁶⁸

These are real dangers. But leaving IVF to the states poses risks too. In the wake of *Dobbs* and *LePage*, IVF's religious and social-movement realignment has made the last half century of nonregulation increasingly unsustainable. In the post-*Roe* era, state and federal lawmakers are bound to intervene on IVF. The question is no longer *whether* to regulate but *how*. For example, will there be a federal baseline that preempts extreme state restrictions? Or will states be free to prohibit IVF altogether—or for those in certain communities?

In this political moment of relative consensus across the ideological spectrum, we believe that the kind of regulation that's apt to command support today would be more likely to help families and deescalate conflict—in particular, as compared with regulation down the road, when today's pro-life efforts to stigmatize IVF could start bearing fruit. Accordingly, we advance three strands of regulation at the federal level, designed to promote IVF's legality, licensing, and transparency.

365. See *supra* sections II.B–C.

366. See *infra* text accompanying note 378.

367. See, e.g., Kimberly Mutcherson, *Regulating Reproductive Medicine in a World Without Roe*, 388 *NEJM* 289, 291 (2023) (discussing how punitive abortion laws may be transferred to IVF regulation).

368. See *supra* notes 356–350 and accompanying text.

Legality measures would preempt state laws prohibiting IVF outright or introducing incremental restrictions on IVF whose purpose or effect is to leave access out of reach. *Licensing* would cover fertility-adjacent facilities and the procedures that such entities use. It would also cover monitoring for compliance, quality control, and approval of clinical research for emerging technologies.³⁶⁹ *Transparency* measures would seek to collect and publish comprehensive data about reliability and safety and promote truth in advertising and informed consent.³⁷⁰

Congressional authority to regulate the private fertility industry would most plausibly fall under the Commerce Clause power to enact federal legislation that substantially affects interstate commerce.³⁷¹ While American fertility medicine used to take form in mostly stand-alone clinics and academic programs that operated within a single state, private investment firms have recently undertaken mergers and acquisitions, consolidating fertility practice within large corporate enterprises that operate in entities across state lines, which routinely involves moving patients, medical supplies, and reproductive materials across those borders.³⁷²

Congress could accordingly regulate assisted reproduction in a couple of ways. First, it could delegate power to an agency like the FDA, building out that agency's existing scope enough to reach that specialty

369. See J.P.W. Vermeiden, Laboratory-Related Risks in Assisted Reproductive Technologies, in *Assisted Reproductive Technologies: Quality and Safety* 127, 128–29 (Jan Gerris, François Olivennes & Petra De Sutter eds., 2004) (outlining quality control measures for assisted reproduction technology); Matts Wikland & Cecilia Sjöblom, The Application of Quality Systems in ART Programs, 166 *Molecular & Cellular Endocrinology* 3, 5 (2000) (discussing the implementation of a quality control program in a clinic for assistive reproductive technology).

370. See Naomi Cahn & Sonia M. Suter, The Art of Regulating ART, 96 *Chi-Kent L. Rev.* 29, 40 (2021) (finding that fertility clinics face no consequences for failing to report on their success rates under federal law).

371. U.S. Const. art. I, § 8, cl. 3. For discussion, see Abbe R. Gluck & Nicole Huberfeld, What Is Federalism in Healthcare for?, 70 *Stan. L. Rev.* 1689, 1707 (2018) (“[T]he courts confirmed that healthcare could largely be handled . . . as a national, rather than a state or local, problem. In 1944, the U.S. Supreme Court ruled that insurance was national commerce and could be regulated by Congress as such.”).

372. See Pasquale Patrizio, David F. Albertini, Norbert Gleicher & Arthur Caplan, The Changing World of IVF: The Pros and Cons of New Business Models Offering Assisted Reproductive Technologies, 39 *J. Assisted Reprod. & Genetics* 305, 308–10 (2022) (illustrating three business models in the IVF industry and providing case studies of clinics shifting from physician-owned practices to private-equity-backed national network). Less likely sources of authority come from the constitutional spending power, or conditions of Medicare or Medicaid participation—few beneficiaries seek to get pregnant, and accreditation doesn't cover IVF except in states that include fertility care under their definition of “family planning services.” See Anna Reed, Cruel Dilemmas in Contemporary Fertility Care: Problematizing America's Failure to Assure Access to Fertility Preservation for Trans Youth, 29 *Mich. J. Gender & L.* 95, 107–09 (2022) (explaining that while states have the authority to require that insurance plans cover infertility treatment, there are administrative and financial barriers to doing so).

area.³⁷³ The only federal law that meaningfully regulates assisted reproduction to date declines to grant the FDA the authority to regulate reproductive technologies other than ones like gene editing that manipulate human cells.³⁷⁴ Expanding the Agency's power to regulate fertility "products," from donors to embryos, could consolidate and enforce compliance in matters like reporting, screening, testing, and reliability that are currently made voluntary and spread across the CDC, Centers for Medicare and Medicaid Services, and Clinical Laboratory Improvement Act.³⁷⁵ This reimagining of the FDA's jurisdiction would likely require going beyond present roles and expertise by staffing or seeking outside assistance from relevantly qualified personnel.³⁷⁶

Professors Naomi Cahn and Sonia Suter point to another way forward: creating a new government entity dedicated to oversight of assisted reproduction, including fertility clinics, sperm and egg vendors, and human embryo laboratories.³⁷⁷ Models abroad include the United Kingdom's Human Fertilisation and Embryology Authority and the

373. See Dov Fox, *Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking*, 2005 Mich. St. L. Rev. 1135, 1160–64 (explaining FDA approval, advisory, and off-label oversight as part of the Agency's regulatory scope).

374. Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (codified at 42 U.S.C. §§ 263a-1 to 263a-7 (2018)). The Agency has so far weighed in only to discourage research on next-generation advances like mitochondrial transfer, human cloning, and germline embryo editing. See Myrisha S. Lewis, *How Subterranean Regulation Hinders Innovation in Assisted Reproductive Technology*, 39 Cardozo L. Rev. 1239, 1269 (2018) (describing the FDA's decision to regulate mitochondrial transfer and other advanced forms of ART). So, for example, the FDA rejected as beyond its scope a 2018 petition to rein in some of the biggest regulatory loopholes for American sperm banks. Sperm banks aren't required to track the births per donor, which is how those numbers (as revealed by ancestry sites) get into the hundreds. See Citizen Petition (FDA Jan. 1, 2017), <https://donorsiblingregistry.com/attachment/74/show> [<https://perma.cc/BB4H-5XUL>] (urging the FDA to regulate cryobanks by requiring standardized genetic testing, mandatory reporting of births, and limits on the number of children per donor, citing examples of sibling groups numbering in the hundreds); Letter from Peter Marks, Dir., Ctr. for Biologics Evaluation & Rsch., to Wendy Kramer, Dir., Donor Sibling Registry (2018) (on file with the *Columbia Law Review*) (denying the petition's requests as being outside of the FDA's mandate to "make and enforce . . . regulations . . . necessary to prevent the introduction, transmission, or spread of communicable diseases" (quoting 42 U.S.C. § 264(a) (2018))). Nor are American sperm banks required to run background checks on donors or test them for fatal disorders their kids might inherit. These institutions don't even have to share actionable medical updates that they learn about donors with the families who are raising kids at risk of a debilitating condition that could be mitigated. See *id.* (rejecting proposals to enhance FDA requirements to include background checks and post-conception medical updates).

375. See, e.g., 42 U.S.C. § 263a (requiring federal certification of laboratories and setting standards for reporting, screening, and testing).

376. See Dov Fox, *The Regulation of Biotechnologies: Four Recommendations*, 38 Hastings Ctr. Rep. 57, 57 (2008) (arguing that FDA committees should include ethical representatives because the Agency's present staff cannot reasonably be expected to master the necessary ethical methodology and literature).

377. Cahn & Suter, *supra* note 370, at 71–72.

Canadian Assisted Human Reproduction Agency.³⁷⁸ Both consult professional organizations and members of the public to incorporate their voices and perspectives in devising regulatory decisions and uniform practice guidelines for the safety and well-being of patients and other affected parties.³⁷⁹

A federal board could regulate assisted reproduction in the United States, subject to legality baselines that prevent that board from imposing onerous and pretextual “quality” restrictions on clinics designed to drive them out of business, the way that some states have for abortion providers.³⁸⁰ It’s unreasonable to expect the nationwide approaches in the United Kingdom and Canada could simply be replicated in America, where any compromise on IVF would have to account for distinctive dimensions in matters of healthcare financing, free-market enterprise, scientific progress, reproductive freedom, and government regulation.³⁸¹ And it ought to leave to the states many of the more divisive questions that would not shut down IVF, provided that they do not seek a de facto IVF ban and do not discriminate against patients based on protected classifications like race, marital status, and sexual orientation.³⁸² The Uniform Laws Commission should lay out a range of options with proposed legislative language about matters from legal parentage to the disclosure of information about gamete donors.³⁸³

378. See Human Fertilisation and Embryology Act 1990, c. 37 (U.K.); Assisted Human Reproduction Act, S.C. 2004, c. 6 (Can.).

379. Either approach—expand the FDA or create a new agency—would call for diverse membership of scientists, professionals, and patients. See Erik Parens & Lori P. Knowles, Reprogenetics and Public Policy: Reflections and Recommendations, in *Reprogenetics: Law, Policy, and Ethical Issues* 253, 266–67 (Lori P. Knowles & Gregory E. Kaebnick eds., 2007) (explaining that the previously distinct fields of genetic and reproductive sciences are becoming increasingly related such that any regulation would require an interdisciplinary approach).

380. See, e.g., Linda Greenhouse & Reva B. Siegel, *Casey* and the Clinic Closings: When “Protecting Health” Obstructs Choice, 125 *Yale L.J.* 1428, 1444–46 (2016) (drawing a distinction between abortion regulations that help women make informed decisions and regulations that do not serve health-related ends and instead obstruct access to abortion).

381. See, e.g., Ouellette et al., *supra* note 287, at 422–23 (noting that unlike the United Kingdom, the United States has only limited, voluntary regulation of ART and no central authority).

382. See *N. Coast Women’s Care Med. Grp., Inc. v. S.D. Cnty. Super. Ct.*, 189 P.3d 959, 962 (Cal. 2008) (holding that physicians must comply with California’s Unruh Civil Rights Act, which prohibits discrimination based on sexual orientation, despite religious objections).

383. See Walter P. Armstrong, Jr., A Century of Service: A Centennial History of the National Conference of Commissioners on Uniform State Laws 12 (1991) (explaining how the Uniform Laws Commission serves to alleviate confusion and contradiction among state laws); About Us, *Unif. L. Comm’n*, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/37QY-2L7F>] (last visited Aug. 10, 2025) (providing an overview of the Uniform Law Commission and its mission to bring stability through well-drafted legislation); National Conference of Commissioners on Uniform State Laws (NCCUSL), *Corn. L. Sch. Legal Info. Inst.*, https://www.law.cornell.edu/wex/national_conference_of_commission

This measure of discretion for state intervention leaves space for states to overlook a range of concerns. More progressive states might pay little heed to the commercialization of reproduction, for example, or weigh short-term savings on IVF funding against the long-term expenses associated with treating health risks that result from multiple gestations.³⁸⁴ States that lean conservative may in turn neglect the gendered consequences of pregnancy, class disparities in access to fertility care, and the social meaning that prenatal testing can have for people with disabilities.³⁸⁵

Public resistance might be anticipated from several groups—from abortion opponents who seek outright prohibition to avoid destruction of human life at any stage for whatever purpose; from clinics, clinicians, and the trade groups that represent them, that oppose any regulation of assisted reproductive medicine; and from social progressives and reproductive justice advocates who frame IVF as a positive right. Our solution will not satisfy all stakeholders. And yet the threat of the dissolving status quo looms greater still, enough, we hope, to overcome such resistance.

A. *Licensing, Monitoring, and Compliance*

In other areas of healthcare, states make hospitals monitor and report major avoidable errors such as mismatched blood transfusions or surgery on the wrong body part.³⁸⁶ They call these errors “never events” because they’re things that should never happen: extremely harmful, simple enough to stop, with no value in preserving.³⁸⁷ Some states accordingly require investigations, record-keeping, and preventive measures.³⁸⁸

But no agency or authority tracks or polices this kind of substantial and needless error in assisted reproduction. Reproductive “never events” include the negligent loss, destruction, or contamination of samples, as well as mix-ups and switches, such as fertilizing eggs with the wrong sperm

ers_on_uniform_state_laws_(nccusl) [https://perma.cc/C7WV-ECCP] (last visited Aug. 10, 2025) (same).

384. See Kimberly M. Mutcherson, Procreative Pluralism, 30 Berkeley J. Gender L. & Just. 22, 69 (2015) (explaining the potential adverse impacts of different proposed state regulations on populations with limited family-building choices).

385. See Kimberly M. Mutcherson, Transformative Reproduction, 16 J. Gender, Race & Just. 187, 197–200 (2013) (discussing policies that “elevate[] the reproductive acts of those with race, class, and sexual orientation privilege above the reproductive acts of those who lack any or all such privileges”).

386. See UC Davis PSNet Editorial Team, Never Events, Patient Safety Network (Sep. 15, 2024), <http://psnet.ahrq.gov/primer.aspx?primerID=3> [https://perma.cc/7K2X-HJMG] (outlining a list of particularly shocking medical errors termed “never events”).

387. *Id.*

388. See *id.* (discussing how many states have adopted similar policies aimed at eliminating never events completely).

or implanting the wrong embryo into patients.³⁸⁹ The facts of *LePage* are a case in point: Deficient security measures enabled unauthorized personnel to walk into a clinic laboratory, access people's stored materials, and drop a test tube that represented families' dreams of biological parenthood.³⁹⁰ Other causes include "outmoded procedures, uncalibrated equipment, unsanitized laboratories, and unreliable quality controls that range from screening specimens prone to erroneous results to paper-and-pen labeling."³⁹¹

When victims like the plaintiffs in *LePage* try to take badly behaving professionals to court, however, their claims almost always get dismissed under existing causes of action.³⁹² For example, suits for breach of contract fail because fertility clinics don't promise any concrete results and make patients sign liability waivers.³⁹³ Medical malpractice suits often fall away when courts require patients to prove bodily harm, which can be lacking even in devastating cases of reproductive negligence.³⁹⁴ Negligence torts and informed consent are thwarted by the absence of tangible injury that these actions require.³⁹⁵ The absence of these other legal remedies was in fact a big reason that the justices in *LePage* used to justify authorizing a wrongful death action that treats frozen embryos as born children.³⁹⁶

Reproductive never events are a point of departure from which people who see things very differently are more likely to find common ground in support of a system of warnings, disclosures, and reporting.³⁹⁷

389. See Dov Fox, Transparency Challenges in Reproductive Health Care, in *Transparency in Health and Health Care in the United States* 286, 287–93 (Holly Fernandez Lynch, I. Glenn Cohen, Carmel Shachar & Barbara J. Evans eds., 2019) [hereinafter Fox, Transparency Challenges] (overlooking ART never events like the mishandling, destruction, or contamination of genetic materials).

390. *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So.3d 678, 680–82 (Ala. 2024).

391. Fox, Transparency Challenges, *supra* note 389, at 287.

392. See Dov Fox, Reproductive Negligence, 117 Colum. L. Rev. 149, 153–54 (2017) (“[O]ur legal system does not recognize a conception of injury that accommodates the disruption of reproductive plans apart from any unwanted touching, broken agreement, or damaged belongings.”).

393. See *id.* at 163 (“Contract claims are unavailing . . . because specialists take care to avoid promising any specific result of the reproductive care they provide; they usually secure liability waivers for implied breach too.”).

394. See *id.* at 165–66 (“[T]he malpractice tort usually affords recovery only in cases like this one, in which a plaintiff suffers physical injury. Medical malpractice actions in particular tend to require proof of bodily harm that is missing in many devastating cases of reproductive negligence.”).

395. See *id.* at 171 (explaining that standard limitations on recovery for mental harm limits the efficacy of negligence torts and informed consent suits in the reproductive context).

396. See *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So.3d 678, 682–83 (Ala. 2024) (explaining that to deny that embryos were covered by the Wrongful Death of a Minor Act would deprive parents of any civil remedy for the destruction of their embryos).

397. See Dov Fox, Making Things Right When Reproductive Medicine Goes Wrong: Reply to Robert Rabin, Carol Sanger, and Gregory Keating, 118 Colum. L. Rev. Online 94, 96 (2018), https://columbialawreview.org/wp-content/uploads/2018/04/Fox_Making-

People may be able to hold conflicting beliefs about the moral status of frozen embryos, for example, and still come together on reliability measures designed to keep them safe.³⁹⁸ They can disagree about when life begins or whether it should be selected and yet see eye-to-eye on a basic clinic certification system that would address deficient standards of care and conflicts of interest to minimize errors and preserve access without chilling innovation.³⁹⁹

Key functions would involve monitoring fertility clinics and related entities, conducting longitudinal studies of existing practices, maintaining safety standards, and enforcing them.⁴⁰⁰ We can see from the history of early debates about IVF that Americans across the ideological spectrum shared concern about the safety and efficacy of IVF. Addressing reproductive never events would have commanded broad support then, and we should not expect a different result today.⁴⁰¹ To keep spiraling costs from being passed down to consumers, the federal government could subsidize the cost of implementing measures like additional staff, compliance officers, and reliable safety alerts.

The federal government needn't reinvent the wheel.⁴⁰² A licensing system could draw on existing laboratory accreditation and other programs developed by professional societies and practitioners with strong institutional competence and expertise.⁴⁰³ There are indeed (just) two

Things-Right-When-Reproductive-Medicine-Goes-Wrong.pdf [https://perma.cc/8PRG-Q6LQ] (“Sterilization, surrogacy, and embryo selection—these all are mired in complex controversies about sex, pregnancy, and family life that cut across partisan divides. The[se] ideological tensions obscure the electoral risks of regulation, even in jurisdictions that are reliably red or blue.” (footnote omitted)).

398. See Rachel Cohen Booth, *Why IVF Looks Different in the US Than in the Rest of the World*, Vox (Mar. 26, 2024), <https://www.vox.com/policy/2024/3/26/24104638/abortion-ivf-duckworth-regulation-reproductive-technology> (on file with the *Columbia Law Review*) (explaining how both Republicans and Democrats support certain regulations for IVF clinics, but both parties approach the issue from different angles).

399. See Dov Fox, *Family Planning and Its Limits*, 23 J. Contemp. Legal Issues 87, 112–13 (2021) (overviewing academic debates on how to best regulate IVF clinics).

400. See Jennifer Merchant, *Assisted Reproductive Technology (ART) in the United States: Towards a National Regulatory Framework?*, 20 Journal International de Bioéthique [J. Int'l de Bioéthique], no. 4, 2009, at 55, 57 (Fr.) (providing examples of IVF regulation in the United Kingdom and France and discussing how these practices could be used in the United States).

401. See Dov Fox, *Redressing Future Intangible Losses*, 69 DePaul L. Rev. 419, 427 n.41 (2020) (looking at how two states, Virginia and Florida, moved to a no-fault compensation scheme for birthing related harms).

402. See Michelle Bercovici, *Biotechnology Beyond the Embryo: Science, Ethics, and Responsible Regulation of Egg Donation to Protect Women's Rights*, 29 Women's Rts. L. Rep. 193, 206–07 (2008) (outlining existing solutions in the field of ART that could help mold a comprehensive regulatory framework).

403. See Delores V. Chichi, Note, *In Vitro Fertilization, Fertility Frustrations, and the Lack of Regulation*, 49 Hofstra L. Rev. 535, 546 (2021) (noting that the Fertility Clinic Success Rate and Certification Act allows for accreditation of clinics by one of three nonfederal laboratory accreditation programs).

outlier states—Louisiana and Arkansas—that already require medical facilities to meet professional guidelines, which are currently voluntary, with no penalty for noncompliance.⁴⁰⁴ The American College of Obstetricians and Gynecologists and especially the ASRM publish regular reports on best practices.⁴⁰⁵

Baseline standards for safety and well-being would be enforced by national certification for any clinics and clinicians seeking to provide assisted reproduction.⁴⁰⁶ For example, sperm banks ought to be required to test donors for nontrivial risks of heritable health disorders they could pass along to dozens of offspring.⁴⁰⁷ The government ought to implement inspections and approvals to prevent the kinds of failures and breaches that lead to uncontroversially bad outcomes.⁴⁰⁸ The American market would otherwise determine matters of supply, demand, price, and compensation for the services they offer, while preserving the space that doctors have now to exercise discretion in treating patients according to their individual circumstances.⁴⁰⁹

An illustration: Multiple-birth deliveries are associated with worse maternal and infant outcomes, including preterm birth, low birth weight, increased risk of ovarian cancer, neurological impairments, and death, compared to singletons. So ASRM advises limiting the number of embryos that get transferred at once to initiate a pregnancy as a matter of women's and children's health.⁴¹⁰

Rather than hard-capping the number of embryos, we would offer government incentives to reinforce evidence-based recommendations like these—for example, up to two embryos for women under thirty-five, while

404. Ark. Code Ann. § 23-85-137 (2025); La. Stat. Ann. § 9:128 (2025).

405. Parens & Knowles, *supra* note 379, at 15.

406. See I. Glenn Cohen, *The Right(s) to Procreate and Assisted Reproductive Technologies in the United States*, in *The Oxford Handbook of Comparative Health Law* 1009, 1019 (David Orentlicher & Tamara K. Hervey eds., 2022) (noting that in most countries, government regulation guides reproductive practice).

407. The regulation of sperm banks at the state level is limited. Colorado limits the number of families a donor may sell their sperm to and entitles donor-conceived persons to request their donor's medical history and identifying information once they turn eighteen. Colo. Rev. Stat. §§ 25-57-106, -109 (2025).

408. See Anne Drapkin Lyster, *Marking the Fine Line: Ethics and the Regulation of Innovative Technologies in Human Reproduction*, 11 Minn. J.L. Sci. & Tech. 685, 704 (2010) (noting that the United Kingdom's Human Fertilisation and Embryo Authority licenses and monitors fertility clinics).

409. See Elizabeth Chloe Romanis, *Assisted Gestative Technologies*, 48 J. Med. Ethics 439, 440–41 (2022) (describing the great extent to which the experience of pregnancy varies by individual circumstances, such as hormonal changes and cultural norms).

410. See Am. Soc'y for Reprod. Med., *Oversight of Assisted Reproductive Technology* 9 (2021), https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/oversiteofart.pdf [<https://perma.cc/TR59-GKYT>] ("The ASRM Guidelines . . . recommend that when treating women under age 35 consideration should be given to transferring only one embryo at a time and no more than two embryos should be transferred for women of this age range in order to reduce the number of higher-order multiple pregnancies.").

leaving the ultimate decision to be made by highly trained specialty physicians in light of their clinical judgment and the patient's age, health, medical history, financial resources, and personal values.⁴¹¹ These guidelines would also make clear that decisions will be monitored and physicians will be subject to discipline or license revocation for failing to exercise reasonable judgment.⁴¹² These regulatory proposals in the IVF context can be readily distinguished from the abortion context, in which many of the state laws bar doctors from exercising their medical judgment about whether an emergency exception to an abortion ban should apply.⁴¹³

B. *Data-Gathering, Transparency, and Communication*

In the past, those across the ideological spectrum hesitated about funding IVF research because its risks were unknown, and because its misuses might not be exposed.⁴¹⁴ Reproductive never events have long gone largely undisclosed.⁴¹⁵ And there remain no systematic or reliable disclosures about IVF errors or failures, adjusted for risk—or any reporting of success rates associated with specific diagnoses and treatments—to avoid skewing data of patients with more favorable medical projections from the outset.⁴¹⁶ Such measures toward greater transparency could reclaim common ground today. Accurate disclosures would encourage insurers to bring the most sound and effective providers into their network for coverage. This information system would also be designed to help patients obtain better reproductive care by steering them away from error-prone providers, while discouraging misconduct and identifying areas for clinical improvement in ways that try to avoid provoking defensive deviations from sound practice.

411. See *id.* at 11 (preferring clinical judgment, coupled with case-by-case analyses and evidence-based national guidelines, over simple legal restrictions on the number of embryos transferred).

412. See, e.g., Rong-Gong Lin II & Jessica Garrison, California Medical Board Revokes License of 'Octomom' Doctor, *L.A. Times* (June 2, 2011), <http://articles.latimes.com/2011/jun/02/local/la-me-0602-octomom-doctor-20110602> [<http://perma.cc/L2BQ-WE4U>].

413. See Greer Donley & Caroline Kelly, Abortion Disorientation, 74 *Duke L.J.* 1, 68 (2024) (describing states that do not recognize any health exceptions to their ban on abortion and those precluding certain medical judgments); Dov Fox & William Ortman, Cliff Running, 103 *Wash. U. L. Rev.* 155, 165–77 (2025) (explaining how certain state laws reframe good faith medical decisions as “unreasonable” in the abortion context).

414. See *supra* text accompanying notes 38–39.

415. See, e.g., Fox, *Birth Rights and Wrongs*, *supra* note 5, at 26–28 (describing the lack of both federal and state oversight of medical negligence at reproductive stages).

416. See Jennifer F. Kawwass, Dmitry M. Kissin, Aniket D. Kulkarni, Andreea A. Creanga, Donna R. Session, William M. Callaghan & Denise J. Jamieson, Safety of Assisted Reproductive Technology in the United States, 2000–2011, 313 *JAMA* 88, 90 (2015) (cautioning that findings on the maternal death rate may be biased due to underreporting of ex ante patient compilations).

As fertility patients navigate their reproductive journeys, greater transparency might be expected to help them identify competent doctors in their areas.⁴¹⁷ Ratings and reviews must include the subjective experiences of patients, individually and aggregated, including nonintrusive background information about their reproductive health—in other words, data well beyond objective measures like how many IVF cycles to achieve a live birth. That’s because reporting outcomes alone fail to account for factors such as which patients were able to access care and what chances they had to have a baby in the first place. Focusing too closely on outcomes even gives shrewd providers reason to try gaming the system by cherry-picking patients who are more likely to have a successful pregnancy. Reliable data could also enhance IVF access for minority communities to the extent that this information sharing acknowledges long-standing inequalities, including those related to infertility, maternal morbidity, and mortality, among women of color, low-income patients, and queer populations.⁴¹⁸

Also, medical services like IVF aren’t exempt from consumer protection claims for deceptive or misleading activity.⁴¹⁹ The history of deceit in IVF illuminates the importance not only of discouraging misleading practices but also of disclosing risks that disproportionately affect the most vulnerable. Before patients engage a reproductive professional in the first place, national standards ought to rein in the marketing claims that feed medical misimpressions. Consider the false hope that young women will face zero health risks or that they’ll be guaranteed the ability to have biological children later in life if they freeze their eggs for themselves, sell them to others, or carry a child as a surrogate.⁴²⁰ Another example: “Polygenic” embryo screening, marketed directly to consumers, is overhyped to fertility patients, encouraging them to “choose your healthiest embryo” and “protect your future child from

417. See, e.g., FertilityIQ, <https://www.fertilityiq.com/fertilityiq/providers> [<https://perma.cc/Z6HX-3CMV>] (last visited Aug. 9, 2025) (providing basic biographic information on fertility doctors in the user’s area).

418. See Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 6 (1997) (explaining how “scientific racism” has permeated reproductive policing); James F. Smith et al., *Socioeconomic Disparities in the Use and Success of Fertility Treatments: Analysis of Data From a Prospective Cohort in the United States*, 96 *Fertility & Sterility* 95, 99 (2011) (explaining how household income and education correlate with access to quality reproductive treatment).

419. See *Karlin v. IVF Am., Inc.* 712 N.E.2d 662, 666–68 (N.Y. 1999) (“[W]hen [physicians] choose to reach out to the consuming public at large in order to promote business . . . they subject themselves to the standards of an honest marketplace . . .”).

420. See, e.g., Naomi Cahn & Jennifer Collins, *Fully Informed Consent for Prospective Egg Donors*, 16 *AMA J. Ethics* 49, 51–53 (2014) (detailing the lack of regulation ensuring informed consent in the egg donor industry); Seema Mohapatra & Dov Fox, *The Moral Economy of Fertility Markets: Hope and Hype, History, and Inclusion*, 48 *J.L. Med. & Ethics* 765, 765 (2020) (“But misleading claims risk preying on the dreams that egg freezing can make possible, leaving too many with overblown expectations and no legal recourse.”).

genetic risks,” neither of which the technology is capable of doing in any reliable way.⁴²¹

The federal government ought to hold providers to truthful promotion of assisted reproductive practices on websites, blogs, and social media platforms, as well as in other public statements.⁴²² The new agency should have the power to regulate false advertising by imposing consequences for distorted or exaggerated messaging, subject to the free speech limits corresponding to First Amendment rights conferred on clinics.⁴²³ The Federal Trade Commission is authorized in theory to prohibit unfair and deceptive practices and the dissemination of misleading claims regarding medical services—but in practice, it has rarely exercised this power in meaningful ways.⁴²⁴

In the course of fertility treatment, national standards for informed consent would afford patients with readily comprehensible information about side effects and probable outcomes while also communicating the fact of their for-profit nature and any potential conflicts of interest, for example, to the extent that seeking higher pregnancy and birth rates is at odds with the principal concern for the health and well-being of fertility patients and resulting children.⁴²⁵ Federal oversight of the informed consent process would seek to empower fertility patients to make decisions with knowledge of the relevant risks and benefits. The materiality doctrine of informed consent is not enough: Causation is hard to prove, the requisite tangible injury is often missing, and compensation is limited.⁴²⁶

421. See Dov Fox, Sonia M. Suter, Meghna Mukherjee, Stacey Pereira & Gabriel Lázaro-Muñoz, Choosing Your “Healthiest” Embryo After *Dobbs*: Polygenic Screening and Distinctive Challenges for Truth in Advertising and Informed Consent, 38 Harv. J.L. & Tech. 463, 464 (2024) (internal quotation marks omitted) (first quoting Genomic Prediction, LifeView, <https://lifeview.com> (on file with the *Columbia Law Review*) (last visited Oct. 20, 2025); then quoting Mitigate More Risks With the World’s Most Advanced Whole Genome Screening for Embryos, Orchid, <https://orchidhealth.com> (on file with the *Columbia Law Review*) (last visited Oct. 20, 2025)) (explaining how marketing often misleads consumers about the medical risks of polygenic embryo screening).

422. See Fox, Transparency Challenges, *supra* note 389, at 295 (suggesting a patient-driven solution to the “absence of transparency in reproductive medicine”).

423. See *Am. Fin. Servs. Ass’n v. Fed. Trade Comm’n*, 767 F.2d 957, 970 n.12 (D.C. Cir. 1985) (discussing potential First Amendment issues in regulating commercial advertisement).

424. See Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, 2185 (codified at 15 U.S.C. § 2301 (2018)) (regulating warrantors in the interest of preventing deceptive market practices).

425. See Sonia M. Suter, The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making, 39 Am. J.L. & Med. 7, 14 (2013) (explaining the expectations and limitations of informed consent requirements).

426. See Dov Fox, “Fertility Fraud” Legislation—A Turning Point for Informed Consent?, 387 NEJM 770, 771–72 (2022) (“[T]he requirement that patients show evidence of tangible harm to prove a breach of informed consent has largely closed the courthouse doors to people who have been subject to misconduct that can be classified as procreation deprived, imposed, or confounded.”).

New standards would aim to ensure that patients have the capacity to make educated decisions about their healthcare and treatment options.⁴²⁷

Courts have understood the legal doctrine to require disclosure of material information most relevant to risks, benefits, and alternative courses of action.⁴²⁸ IVF providers and commercial entities alike would be expected, for example, to convey estimated risks and gains in absolute and relative terms together with relative uncertainty in the form of tables, figures, and other easy-to-understand materials.⁴²⁹

Again, federal rules for informed consent needn't start from scratch: Professional guidelines and individual state requirements could be adjusted to be implemented nationally.⁴³⁰ Indeed, patient access to accurate information is the sole issue that already prompted regulation at the national level, following congressional hearings in the late 1980s to address the overblown success rates advertised by many IVF providers.⁴³¹ That 1992 Wyden bill was hamstrung, however, by the influence of lobbying by the fertility industry, which erased carrots for disclosures and sticks for misrepresentations.⁴³² IVF's history teaches that the new regulatory landscape after *Dobbs* makes space for more robust information-forcing legislation that responds to the deficiencies of past legislation.⁴³³

C. Access, Funding, and Parentage

A more ambitious federal statute (and our ideal solutions) would tackle matters well beyond legality, transparency, and licensure, such as rights to sue in the event of misconduct and meaningful access, including funding subsidies and guarantees of who should have a chance to enjoy parental rights after a child is born in the absence of genetic or gestational

427. See Dov Fox, *Medical Disobedience*, 136 Harv. L. Rev. 1030, 1066, 1085–86 (2023) (positing that a “professional enterprise centered on patient interests” requires that the doctor disclose risks and benefits accurately and the patient understand the effects and alternatives).

428. See *Kass v. Kass*, 696 N.E.2d 174, 181 (N.Y. 1998) (honoring the informed consent document signed by the parties in their later dispute over the custody of their pre-zygotes).

429. See Jody Lynée Madeira, *The ART of Informed Consent: Assessing Patient Perceptions, Behaviors, and Lived Experience of IVF and Embryo Disposition Informed Consent Processes*, 49 Fam. L.Q. 7, 14–18 (2015) (finding that patients were best able to understand forms that were not “too technical,” “presented [the procedure] in a logical way,” and quantified the potential risks by separating them into “things that are likely to go wrong versus the things that [are] remotely likely to happen” (second alteration in original) (internal quotation marks omitted) (quoting study participants)).

430. See, e.g., Cal. Const. art. XXXV, § 5 (establishing the right to conduct research on stem cells derived from in vitro fertilization treatments when donated under “appropriate informed consent procedures”).

431. See *supra* notes 169–174 and accompanying text (providing an overview of the passage of the Wyden bill).

432. See 42 U.S.C. § 263a(i)(1)–(2) (2018) (authorizing only a suspension of a laboratory's license as punishment for a violation).

433. See *supra* notes 165–176 and accompanying text.

ties.⁴³⁴ But the history of disputes over IVF counsels that a broader statute might not command a broad enough consensus to pass in the near term. For this reason, we propose leaving a range of other issues to the states for the time being. These include, for example, whether and how research can be conducted on human embryos, what if any limits ought to govern their selection, and who can serve as a gamete donor.⁴³⁵

The story we tell about commercial surrogacy and abortion bans after *Dobbs* highlights the significant risks of a federalist model that leaves reproductive access to a laboratory of the states.⁴³⁶ And many of the unscrupulous, profit-driven practices that go unregulated in assisted reproduction resemble accusations that abortion opponents level against clinicians who end pregnancies.⁴³⁷ Letting states that are hostile to IVF regulate it would enable them to adopt the same incrementalist playbook that they ran in the abortion context during the era of *Roe*.⁴³⁸ The government should at least provide or require a measure of insurance coverage for more expensive parts of assisted reproduction, the way that many other developed countries do, as Donald Trump proposed during his presidential campaign in fall 2024.⁴³⁹ Senate Democrats had the summer before introduced legislation to require many health plans to cover IVF, but Senate Republicans blocked the bill from moving forward.⁴⁴⁰ Since then, the picture has been mixed. One month after taking office, Trump issued an executive order directing his Administration to study ways to expand IVF access and reduce treatment costs;

434. See I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 *Stan. L. Rev.* 1135, 1139–41 (2008) (laying out a model of reproductive rights that disaggregates parental rights into gestational, genetic, and legal parenthood).

435. See Cahn, *supra* note 8, at 26 (explaining how “reproductive technology reflects our deepest . . . desires to have a child and touches on highly politicized issues” about “access based on race and class and family form”); Dov Fox, *Interest Creep*, 82 *Geo. Wash. L. Rev.* 273, 352 (2014) (observing that disputed matters of reproduction are “a site of contestation about the . . . relationship between men and women, parents and children, individuals and government, humans and nature”).

436. See *supra* notes 33–33 and accompanying text.

437. See, e.g., Heritage Found., *Why The IVF Industry Must Be Regulated* 1 (2024), <https://www.heritage.org/sites/default/files/2024-03/FS268.pdf> [<https://perma.cc/82TD-6LGP>] (arguing that “[t]he well-being of children, not profit margins, should be the top priority when it comes to IVF and embryonic cryopreservation”).

438. See *supra* note 305 and accompanying text.

439. See Dasha Burns, Abigail Brooks & Alexandra Marquez, *Trump Says He Wants to Make IVF Treatments Paid for by Government or Insurance Companies if Elected*, NBC News (Aug. 29, 2024), <https://www.nbcnews.com/politics/donald-trump/trump-says-wants-make-ivf-treatments-paid-government-insurance-compani-rcna168804> [<https://perma.cc/6XBT-XVYS>].

440. See Right to IVF Act, S. 4445, 118th Cong. (2024); Maya C. Miller, *Senate G.O.P. Blocks I.V.F. Access Bill as Democrats Press for Political Edge*, N.Y. Times (June 13, 2024), <https://www.nytimes.com/2024/06/13/us/politics/ivf-access-bill-republicans.html> (on file with the *Columbia Law Review*) (last updated June 17, 2024).

then, in April, as part of broader cuts to the HHS, the Administration eliminated a team at the CDC tasked with monitoring IVF outcomes.⁴⁴¹

Coverage mandates risk driving up insurance premiums across the board in ways that simply pass the cost down to patients, leaving access to IVF not any meaningfully better than before. Insurance requirements could mitigate this risk in a number of ways, for example, by limiting the number of IVF cycles that are covered or by limiting the number of embryos covered for implantation to initiate a single pregnancy—and, in either case, perhaps varying those limits in principled ways that do not end up crowding out access based on age or reproductive health.⁴⁴²

Twenty-one states currently require some measure of private insurance coverage of IVF and fertility preservation, and sixteen mandate certain practices to be included under Medicaid.⁴⁴³ That's still not much, over and above the handful of big Silicon Valley firms and large companies in major metropolitan cities that subsidize fertility treatment as a medical benefit of employment.⁴⁴⁴ Any federally funded program would require Congress to pass new laws, while adding IVF to the benefits covered under the Affordable Care Act would involve convincing the relevant panel of doctors that oversees that program that it counts as a preventive health service.⁴⁴⁵ However funding or insurance mandates might be operationalized, IVF ought to be available to everybody for whom assisted reproduction might be clinically viable, in line with the courts that have held that infertility is a disease and so should be covered for anyone.⁴⁴⁶

441. Exec. Order No. 14,216, 90 Fed. Reg. 10,451 (Feb. 18, 2025). The April cuts involved the Assisted Reproductive Technologies Surveillance Team, which was charged with monitoring success rates and adverse outcomes tied to IVF. Berkeley Lovelace Jr. & Abigail Brooks, CDC's IVF Team Gutted Even as Trump Calls Himself the 'Fertilization President', NBC News (Apr. 2, 2025), <https://www.nbcnews.com/health/health-news/cdcs-ivf-team-gutted-even-trump-calls-fertilization-president-rcna199261> [<https://perma.cc/F8A5-ZFBV>].

442. See, e.g., Ariz. Rev. Stat. Ann. § 25-318.03(A)(1) (2025) (awarding control in embryo disputes to the party seeking implantation); La. Stat. Ann. § 9:121 (2025) (defining embryos as having "certain rights granted by law, composed of one or more living human cells and human genetic material . . . so unified and organized that it may develop in utero into an unborn child").

443. See Mandated Coverage of Infertility Treatment, *supra* note 144.

444. See Kathryn Mayer, More Employers Offering Fertility, Adoption Benefits, Soc'y for Hum. Res. Mgmt. (Sep. 27, 2024), <https://www.shrm.org/topics-tools/news/benefits-compensation/more-employers-offering-fertility-adoption-benefits> [<https://perma.cc/N35J-PRTN>] (reporting the recent increase in employers offering fertility and adoption benefits).

445. 42 U.S.C. § 300gg-13(a) (2018) (requiring support by the United States Preventive Services Task Force or Health Resources and Services Administration to classify certain preventive health services).

446. See *Egert v. Conn. Gen. Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990) (holding that Connecticut General Insurance acted arbitrarily and capriciously when it denied claims for IVF); *Witcraft v. Sundstrand Health & Disability Grp. Benefit Plan*, 420 N.W.2d 785, 790 (Iowa 1988) (affirming that IVF treatment is an expense related to an illness and thus covered by the plaintiff's insurance plan). For discussion of patchwork state laws around

And religiously affiliated clinics could still seek exemptions under federal or state versions of the Religious Freedom Restoration Act.⁴⁴⁷

Other matters that may be better regulated at the state level include determinations of parentage, payment for surrogates and egg or sperm donors, prenatal screening, embryo testing, and the genetic selection of offspring traits.⁴⁴⁸ Some states will adopt a permissive approach in the name of reproductive freedom to freely contract and form families.⁴⁴⁹ Others may limit screening for genetic health because it can serve as a proxy for disability discrimination, stigmatizing deserving would-be parents, and risks reinforcing stereotypes about people deemed to have impairments.⁴⁵⁰ Still other states might restrict these practices by voiding contracts, capping prices, or banning them altogether.⁴⁵¹ Half of states forbid malpractice suits for botched diagnoses for inherited disease before or during pregnancy.⁴⁵² Offspring selection for nonmedical traits like sex, height, and skin pigmentation provokes serious concerns about “designer children” and slippery slopes, including the erosion of the unconditional character of parental love, the very real risk of depressing social equality, and the strain on the structural resources available to diverse individuals who struggle to conceive.⁴⁵³

Surrogacy and the trading of eggs for money raises issues about exploiting vulnerable women and commodifying their reproductive labor.⁴⁵⁴

insurance coverage for infertility treatment, see Meghan E. Vreeland, Note, ARTful Dodging: States’ Reliance on the Medical Expense Income Tax Deduction as a Failure to Provide Inclusive Coverage for Infertility Treatment, 40 Women’s Rts. L. Rep. 211, 215–16 (2019).

447. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–92 (2014) (holding that the contraceptive mandate violated RFRA without offering a religious exemption).

448. Michelle Bayefsky, Who Should Regulate Preimplantation Genetic Diagnosis in the United States?, 20 AMA J. Ethics 1160, 1160 (2018).

449. See, e.g., Dov Fox, Selective Procreation in Public and Private Law, 64 UCLA L. Rev. Discourse 294, 296–97 (2016), <https://www.uclalawreview.org/wp-content/uploads/2019/09/Fox-D64.pdf> [<https://perma.cc/4ARV-2R7R>] (providing a “critical[] apprais[al] [of] the law and ethics of selective procreation”).

450. See Alicia Ouellette, Selection Against Disability: Abortion, ART, and Access, 43 J.L. Med. & Ethics 211, 219 (2015) (discussing the disability critique of pre-implantation genetic selection and selective abortion).

451. See Bailey K. Sanders, Setting the Price of Fertility: Egg Donor Compensation Following *Kamakahi v. American Society for Reproductive Medicine*, 22 Hou. J. Health L. & Pol’y 183, 185 (2022) (explaining the effect of pricing caps on the egg donation market).

452. See, e.g., Fox, Reply to Critics, *supra* note 3, at 166–67 (discussing the history of malpractice suits for events occurring during pregnancy).

453. See Dov Fox, Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos, 33 Am. J.L. & Med. 567, 604–09 (2007) (warning that “as genetic possibilities enlarge the perception of control over heredity, people may well come to think of those born with certain abnormalities as ‘genetic failures’”); Sonia Mateu Suter, The Routinization of Prenatal Testing, 28 Am. J.L. & Med. 233, 251 (2002) (explaining how wrongful birth lawsuits have caused medical professionals to push for more genetic testing).

454. See Dov Fox, Paying for Particulars in People-to-Be: Commercialisation, Commodification and Commensurability in Human Reproduction, 34 J. Med. Ethics 162,

Meanwhile, states may variously resolve embryo disputes based on party contracts or by favoring reproductive interests to pursue parenthood or avoid it.⁴⁵⁵ And different states might determine parental status as a function of intention, genetics, gestation, marriage, or social parenthood.⁴⁵⁶ Nonnegotiable anywhere in the United States under this model would be keeping IVF legal for everyone, subject to informed consent requirements, and licensing and monitoring for the safety of patients and resulting children. On these issues alone, contrary state laws would be preempted unless lawmakers repealed them.

National guidance and model legislation should still recommend ways in which states can broaden access, provide security, and enhance equality in areas of law and life that have long excluded certain minority groups.⁴⁵⁷ Those who would favor a free-market approach to assisted reproduction—to promote autonomy, patient choice, efficiency, and innovation—must reckon with the barriers to access that include the high cost of IVF, the high incidence of negligent mishaps, and expensive and risky multiple births that result from embryo-maximizing multiple implantations.⁴⁵⁸

A Republican Congress wouldn't permit requiring equal access to IVF for sexual minorities at the national level. But still the federal government ought to recommend that states reclassify the inability to conceive as qualifying for mandatory insurance under health plans.⁴⁵⁹ Those unable

165 (2008) (discussing the moral degradation that occurs when surrogacy and eggs are traded for money).

455. See *Loeb v. Vergara*, 313 So. 3d 346, 368 (La. Ct. App. 2021) (discussing the contractual element of an embryo dispute); I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, *Hastings Ctr. Rep.*, July–Aug. 2016, at 13, 13–15 (overviewing divergent approaches to embryo disputes in different jurisdictions); Gerard Letterie & Dov Fox, *Legal Disputes Over Frozen Embryos After Dobbs: A Retrospective Study of Claims, Contracts, and Liability in Cases of Divorce or Separation*, 45 *Pace L. Rev.* 73, 78 (2024) (“Personhood was used as a basis for claims in 10% of cases. Embryos in these cases were characterized as a person with all rights and privileges . . .”).

456. See Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 *Colum. L. Rev.* 319, 337 (2023) (discussing states that recognize “functional parent doctrines” recognizing nonbiological and nonmarital parenthood).

457. See, e.g., Daar, *supra* note 290, at 33 (describing how a lack of research and regulation “can produce devastating outcomes visited upon the most vulnerable in our society”); NeJaime, *The Nature of Parenthood*, *supra* note 232, at 2277 (describing an example of a nationwide congressional initiative in which drafters hoped to impose parental obligations upon resistant biological fathers).

458. See Maartje Schermer, *Reprogentic Technologies Between Private Choice and Public Good*, in *Human Flourishing in an Age of Gene Editing* 212, 222 (Erik Parens & Josephine Johnston eds., 2019) (discussing the need to expand access to reproductive technology such as gene editing); Martha M. Ertman, *What's Wrong With a Parenthood Market?: A New and Improved Theory of Commodification*, 82 *N.C. L. Rev.* 1, 16 (2003) (observing that the lack of subsidies for reproductive technology functions as a barrier to parenthood).

459. Financial burden leads patients to transfer more embryos at once to increase the chances of getting pregnant in a single cycle. If patients have no insurance coverage to help with the costs, they may be able to afford only one or two treatment cycles. If, however, IVF

to make a baby should be eligible for coverage regardless of marital status, sexual orientation, or gender identity—even as some identities have come under attack by the Trump Administration.⁴⁶⁰ Some states model reasonable coverage limits. For example, New York mandates insurance coverage for a maximum of three IVF cycles,⁴⁶¹ while Maryland and Rhode Island cap coverage at \$100,000.⁴⁶² The federal government should strongly discourage discrimination in regard to these benefits, subject to limited protections for religious refusal on conscience grounds.⁴⁶³ The Uniform Parentage Act of 2017—adopted in California, Connecticut, Massachusetts, Pennsylvania, Rhode Island, Vermont, and Washington—is a strong model for recognizing equal rights for parents who have a child through assisted means of reproduction.⁴⁶⁴

Recommended ranges for paying surrogates and donors of eggs and sperm could prorate compensation based on factors like associated time, inconvenience, and risk.⁴⁶⁵ To address fears about designer babies and

is covered by an insurance mandate like those existing in a handful of states, physicians and patients can make decisions that are most medically appropriate. See, e.g., Leanne Aban, Jenna Pickering, Kira Eidson, Reema Holz, Chunhui Li & Olivia Luongo, Assisted Reproductive Technologies, 24 *Geo. J. Gender & L.* 337, 364–65 (2023) (summarizing insurance companies' arguments for excluding ART procedures from coverage); Dov Fox, It's Time for the U.S. to Cover IVF (for Gays and Lesbians Too), *HuffPost* (Mar. 18, 2013), https://www.huffpost.com/entry/it-is-time-for-the-us-to_b_2900323 [<https://perma.cc/S8UY-25EY>] (last updated Nov. 14, 2013) (outlining how various arguments against IVF subsidies fall short).

460. See *PFLAG, Inc. v. Trump*, 769 F. Supp. 3d 405, 416 (D. Md. 2025) (deciding a case against President Trump's executive orders allegedly stripping funding from institutions providing gender-affirming care to patients).

461. IVF and Fertility Preservation Law Q&A Guidance, N.Y. Dep't of Fin. Servs., https://www.dfs.ny.gov/apps_and_licensing/health_insurers/ivf_fertility_preservation_law_qa_guidance [<https://perma.cc/T838-JAHB>] (last visited Aug. 9, 2025).

462. Md. Code Ann., Ins. § 15-810.1 (West 2025); 27 R.I. Gen. Laws § 27-18-30 (2025).

463. See Comm. on Ethics, Am. Coll. of Obstetricians & Gynecologists, *The Limits of Conscientious Refusal in Reproductive Medicine* 5 (2007), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2007/11/the-limits-of-conscientious-refusal-in-reproductive-medicine.pdf> [<https://perma.cc/F9BB-H53M>] (recommending measures designed to accommodate religious beliefs but without imposing them upon others); Jo Yurcaba, *Gay Couple Files First-of-its-Kind Class Action Against NYC for IVF Benefits*, NBC News (May 9, 2024), <https://www.nbcnews.com/nbc-out/out-news/gay-couple-files-first-kind-class-action-nyc-ivf-benefits-rcna151250> [<https://perma.cc/2JXB-U3K7>] (discussing a suit brought by a gay couple against New York City for excluding male couples from the City's IVF insurance coverage); ASRM Today: Equity, Access, and Innovation, Episode Two: Access, Am. Soc'y for Reprod. Med. (Sep. 5, 2024), <https://asrmtoday.libsyn.com/asrm-today-s2-ep2-access> [<https://perma.cc/9W5W-R4BR>] (discussing barriers to accessing fertility treatment).

464. See Unif. Parentage Act (Unif. L. Comm'n 2017); Douglas NeJaime, *The Constitution of Parenthood*, 72 *Stan. L. Rev.* 261, 338–40 (2020) (describing the development and structure of the 2017 UPA).

465. See Prac. Comm., Am. Soc'y for Reprod. Med. & Prac. Comm., Soc'y for Assisted Reprod. Tech., *Gamete and Embryo Donation Guidance*, 122 *Fertility & Sterility* 799, 803 (2024) (describing methods of evaluating complicating factors).

eugenics,⁴⁶⁶ the government should advise minimum testing requirements that prioritize serious, single-gene disorders over mild or genetically complex ones—and should distinguish testing for potentially fatal health conditions like prostate cancer and Alzheimer’s from selecting for behavioral and physical traits like intelligence or height.⁴⁶⁷ In setting forth any recommendations about genetic screening, public actors should be sensitive to the potential for disrespect or discrimination against people with disabilities.⁴⁶⁸

These policies promise concrete benefits for fertility patients. Greater transparency will facilitate informed choices about reliable treatments that safely and effectively diagnose devastating disorders. Insurance coverage will enable access for the many Americans who are currently unable to afford the high price of IVF.⁴⁶⁹ For some people, funding assistance makes the difference between becoming a parent and not, or between living in their home state and having to move to a state that offers insurance coverage in order to make a family.⁴⁷⁰ Antidiscrimination policies can likewise be what allows sexual minorities to find willing providers in parts of the country where they are scarce. Capping the number of embryos that can be implanted at once—subject to special, patient-specific circumstances—will tend to improve health outcomes for both women and children,⁴⁷¹ while addressing concerns about the commodification of sex

466. See, e.g., Ari Schulman, Opinion, *The World Isn’t Ready for What Comes After I.V.F.*, N.Y. Times (Sep. 9, 2024), <https://www.nytimes.com/2024/09/09/opinion/ivf-debate.html> (on file with the *Columbia Law Review*) (outlining fears that new advancements in I.V.F. will allow parents to select “the most genetically desirable of dozens and even hundreds of embryos”).

467. See Prac. Comm., Am. Soc’y for Reprod. Med. & Prac. Comm., Soc’y for Reprod. Biologists & Technologists, *Comprehensive Guidance for Human Embryology, Andrology, and Endocrinology Laboratories: Management and Operations: A Committee Opinion*, 117 *Fertility & Sterility* 1183, 1194 (2022) (highlighting different possible focus points that regulation could specifically target).

468. See, e.g., Dov Fox, *Prenatal Screening Policy in International Perspective: Lessons From Israel, Cyprus, Taiwan, China, and Singapore*, 9 *Yale J. Health Pol’y L. & Ethics* 471, 478–79 (2009) (reviewing Ruth Schwartz Cowan, *Heredity and Hope: The Case for Genetic Screening* (2008)) (“[N]ew genetics threatens ‘expressive’ harm toward those whose genetic traits are targeted for elimination through reproductive measures.”).

469. See, e.g., Seema Mohapatra, *Assisted Reproduction Inequality and Marriage Equality*, 92 *Chi.-Kent L. Rev.* 87, 92 (2017) (describing the expense associated with assisted reproductive technologies like IVF). An alternative to insurance coverage is financial “risk-sharing” or refund programs that offer patients a payment structure under which they pay a higher initial fee for a package of multiple cycles that is discounted over the per-cycle fee, and patients may receive a partial or complete refund if they do not become pregnant or deliver an infant. Ethics Comm., Am. Soc’y for Reprod. Med., *Financial “Risk-Sharing” or Refund Programs in Assisted Reproduction: An Ethics Committee Opinion*, 121 *Fertility & Sterility* 783, 783 (2024).

470. Jody Lyneé Madeira, *Taking Baby Steps: How Patients and Fertility Clinics Collaborate in Conception* 91–108 (2018).

471. See, e.g., Am. Soc’y for Reprod. Med., *supra* note 410, at 9 (describing the clinical outcomes from current IVF regulation).

cells, gestational services, the act of procreation itself, and the children who result.⁴⁷²

Reforms centered on health, truthfulness, competency, and access recall the earliest common ground forged in the earliest days of IVF around the EAB hearings, Wyden bill, and beyond.⁴⁷³ For half a century, divisions within and between the movements for and against legal abortion have stood in the way of realizing responsive measures to make IVF more safe, effective, honest, and available.⁴⁷⁴ Radical realignments in the wake of *Dobbs* have sparked an anti-abortion campaign to restrict IVF even as the backlash to *Dobbs* reveals considerable bipartisan agreement about the benefits of IVF itself.⁴⁷⁵ A new threat to IVF has emerged, with a powerful social movement openly seeking to transform or eliminate its practice. This American moment represents an important legislative opportunity to capitalize on a wide-ranging consensus about IVF's value. We have sought to identify the most promising places to start that legislative work.

CONCLUSION

For decades, the debates about abortion and IVF have veered down opposite paths. Abortion stood as a byword for polarization. It figured centrally in presidential elections and judicial nominations, and in states across the country, it was subject to uniquely invasive regulation. IVF, by contrast, rarely played a central role in the nation's law and politics, and perhaps for this reason, was subject to little regulation at all.

The aftermath of *Dobbs* has blurred these differences. Future conflicts over reproductive rights are as likely to feature IVF *and* abortion—and to tie the two ever closer together. At our present crossroads, it is critical to understand what brought us to this defining moment in conflicts over reproduction and infertility and to see what lies beyond it.

The legal history of IVF, and the rise and fall of its so-called Wild West, offers plenty of reason for pessimism about what comes next. Our past has at times been a story about federal officials who sometimes prioritized conflict avoidance or even industry preferences over the welfare of those struggling with infertility. And the parallel stories of abortion and IVF underscore the risks and unintended regulation of any reproductive

472. See, e.g., Rene Almeling, *Sex Cells: The Medical Market for Eggs and Sperm* 60–65 (2011) (expressing concern over the amount of information available to IVF participants); Dov Fox, *Retracing Liberalism and Remaking Nature: Designer Children, Research Embryos, and Featherless Chickens*, 24 *Bioethics* 170, 175 (2010) (comparing genetic engineering to other accepted “environmental enhancements like college test preparation and private musical training”); Kimberly D. Krawiec, *Markets, Morals, and Limits in the Exchange of Human Eggs*, 13 *Geo. J.L. & Pub. Pol’y* 349, 364 (2015) (discussing how the taboo around reproduction complicates the market structure around IVF).

473. See *supra* text accompanying notes 63–64, 83–92, and 170–173.

474. See *supra* sections I.B–.E.

475. See *supra* Part II.

decision. But this history also illuminates the promise of common ground for those who have always wanted IVF to be not only legal but also safer, more reliable, more transparent, and more equitable.

