

THE PAST IS PROLOGUE: IVF, ABORTION, AND STATE
REGULATION OF PROCREATIONA Response to *The New Abortion* by Dov Fox and Mary Ziegler

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This Piece responds to The New Abortion by Dov Fox and Mary Ziegler by critically examining their legal history of in vitro fertilization (IVF) regulation and their proposals for federal regulation to stave off regressive regulation. First, while admiring the value of their historical analysis, this Piece challenges the authors to delve more deeply into the internal dynamics of reproductive rights advocacy during the twentieth century to better understand the implications of race and class divisions in the mainstream reproductive rights movement's leadership. Second, it rejects the authors' legislative recommendations as politically naïve and insufficiently attentive to the race, class, and gender dynamics that have long shaped reproductive regulation in the United States. Drawing on the history of stratified reproduction and the emergence of the reproductive justice movement, this Piece argues that IVF is unlikely to face the same legal fate as abortion due to its association with privileged, predominantly white, presumed heterosexual, and married users. It critiques the authors' call for federal regulation as both impractical and potentially harmful, especially under a political regime hostile to reproductive autonomy. Instead, this Piece advocates for a more nuanced, justice-centered approach that resists exceptionalism in regulating assisted reproduction and centers the needs of marginalized communities. It warns against repeating the mistakes of mainstream abortion advocacy, which often prioritized legal access over equitable outcomes. Ultimately, this Piece calls for bold, inclusive leadership and state-based strategies that reflect the lived realities of those most affected by reproductive injustice.

INTRODUCTION

The intersection of abortion and assisted reproduction is a fruitful space for study that deserves substantially more attention in legal scholarship. For this reason, *The New Abortion* is a significant and timely piece with much to teach readers about the divergent legal treatment of

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abortion, which is overregulated in comparison to other forms of healthcare¹ and was deeply politicized well before *Dobbs v. Jackson Women's Health Organization*,² and IVF, which has received comparatively little attention from federal and state lawmakers. In their article, Professors Dov Fox and Mary Ziegler demonstrate how and why lawmakers have left IVF relatively untouched by law as compared to abortion. That disparate treatment perhaps derives from the perception that IVF and abortion sit at distinct and wholly opposite ends of the procreative spectrum. IVF benefits from the belief that it is fundamentally a tool for creating life, and abortion suffers from the belief that it exists only as a tool to end prenatal life. This stark contrast presents itself through widespread public valorization and celebration of babies born through IVF, even while acknowledging that the path to success is frequently difficult and expensive.³ Abortion seekers and providers experience shaming, stigma, and even violence, especially when women seek out so-called “elective” abortions.⁴

Few things in the world are as basic as these contrasting views of IVF and abortion. Abortions end fetal life, including fetuses that have anomalies that will inexorably cause death in utero or soon after birth.⁵ Abortions also save the lives or preserve the health of people whose pregnancies have gone awry.⁶ IVF creates thousands of potential or

1. See Comm. on Reprod. Health Servs., Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States* 6 (2018) (“Abortion is among the most regulated medical procedures in the nation.”).

2. See 141 S. Ct. 2228, 2284 (2022) (holding there is no federal constitutional right to abortion).

3. See generally Theresa Miller, *Making Babies: Personal IVF Stories* (2007) (relaying stories of IVF patients and their paths to parenthood); Lindsey Jacobson, Jessica Hopper, Anthony Castellano & Kelly Harold, *How IVF Has Redefined the Modern Family*, ABC News (Apr. 25, 2019), <https://abcnews.go.com/Health/ivf-redefined-modernfamily/story?id=61969890> [<https://perma.cc/H6D6-LAVP>] (containing stories of IVF journeys).

4. “Elective” abortion implies a meaningful distinction between people who terminate pregnancies for risks to their own life or health or because of significant fetal anomalies and people who have abortions for socioeconomic reasons or because they simply do not wish to be pregnant. This unnecessary distinction increases abortion stigma and has a deleterious impact on all pregnant people—not just those who have abortions—as well as on abortion providers and the partners and families of abortion patients. See Alison Norris, Danielle Bessett, Julia R. Steinberg, Megan L. Kavanaugh, Silvia De Zordo & Davida Becker, *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 *Women's Health Issues* S49, S50 (2011) (“Stigma [about abortion] may be mitigated or exacerbated by whether the[] abortions fall into one category or the other. ‘Good abortions’ are those judged to be more socially acceptable ‘Bad abortions,’ in contrast, occur at later gestational ages and are had by ‘selfish’ women”).

5. See Tracy B. Grossman & Stephen T. Chasen, *Abortion for Fetal Genetic Abnormalities: Type of Abnormality and Gestational Age at Diagnosis*, 10 *Am. J. Perinatology Reps.* e87, e88 (2020) (describing many such fetal abnormalities).

6. See *Facts Are Important: Abortion Is Healthcare*, Am. Coll. Obstetricians & Gynecologists, <https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare> [<https://perma.cc/8NAK-GSQC>] (last visited Aug. 6, 2025) (“Pregnancy complications,

nascent lives that will either remain in frozen stasis indefinitely, fail to implant, be donated to research, or be destroyed.⁷ For a person who believes that frozen embryos warrant the respect due to newborns, IVF destroys millions of lives.⁸ The comparison to abortion is even more stark in the context of selective reduction, a practice that terminates some fetuses in a multiple fetal pregnancy—which is more common among people who become pregnant through IVF—to reduce health risks to the other fetuses or to the pregnant person.⁹ While much of the public may view IVF and abortion as serving cross purposes, reality is more complex.

The overly simplistic contrasts between IVF and abortion lead Fox and Ziegler to warn that IVF risks becoming the focus of organized anti-abortion efforts post-*Dobbs* that could lead to its prohibition.¹⁰ After providing a fascinating description of the legal history of IVF regulation, Fox and Ziegler proffer ideas for federal legislative changes that they argue may find common ground between opposing sides in the abortion wars.¹¹ This second part of their article, while ambitious, is less persuasive than the first because the authors do not adequately account for the present radical political moment and the historical precedent of discriminatory regulation of reproduction in the United States. Therefore, this Piece focuses on how the authors could deepen and complicate their legal history and then problematizes their legislative proposals.

Part I quickly rejects the idea of IVF as “the new abortion” given that abortion remains a focal point of the regulation of reproduction in the United States. More crucially, several factors, including differences between the public face of IVF users and the public face of women seeking

including placental abruption, bleeding from placenta previa, preeclampsia or eclampsia, and cardiac or renal conditions, may be so severe that abortion is the only measure to preserve a woman’s health or save her life.”).

7. Lisa A. Rinehart, Storage, Transport, and Disposition of Gametes and Embryos: Legal Issues and Practical Considerations, 115 *Fertility & Sterility* 274, 278 (2021) (discussing the myriad ways gametes and embryos may be disposed of during IVF).

8. See, e.g., Emma Waters, *Babies Aren’t Disposable, at Any Stage*, Heritage Found. (Feb. 15, 2023), <https://www.heritage.org/life/commentary/babies-arent-disposable-any-stage> [<https://perma.cc/4SZJ-WM7L>] (“IVF, as it’s practiced today, is not pro-life. The practices and methods commonly used violate the integrity of pre-born children.”).

9. Interestingly, even though selective reductions terminate fetal life, abortion laws have not been applied to these procedures because the pregnancy continues, just with fewer fetuses. See Kimberly Mutcherson, *When Is an Abortion Not an Abortion?*, 43 *J.L. Med. & Ethics* 206, 208 (2015) (“[T]he real reason[s] for the dividing line between [selective reduction] and abortion are mostly political and pragmatic—namely to ‘insulate one procedure from the divisive politics surrounding the other.’” (quoting Radhika Rao, *Selective Reduction: “A Soft Cover for Hard Choices” or Another Name for Abortion?*, 43 *J.L. Med. & Ethics* 196, 203 (2015))).

10. Dov Fox & Mary Ziegler, *The New Abortion*, 125 *Colum. L. Rev.* 1555, 1562 (2025). (“[T]he contemporary social-movement efforts that doomed the Right to IVF Act have fueled concerted campaigns to restrict or ban IVF—either across the board or for certain families, such as same-sex couples.” (footnote omitted)).

11. *Id.* at 1609–14.

abortions,¹² mean that closer regulation of IVF is likely to be very different than abortion regulation and unlikely to include outright bans on the procedure.

Part II details myriad concerns with *The New Abortion's* legislative proposals. Crucially, the authors fail to fully engage with long-standing patterns of mainstream abortion advocates ignoring or delaying seeking positive changes in law and policy that would benefit people whose reproductive futures are too often relegated to the margins. If laws and policies created to protect IVF also treat the needs of marginalized people as secondary, they will replicate disturbing patterns that reproductive justice advocates have appropriately challenged for decades.

I. RACE, CLASS, GENDER, AND THE HISTORY OF REGULATING REPRODUCTION IN THE UNITED STATES

Though state legislators, Congress, and courts—including the U.S. Supreme Court—are not done restricting abortion,¹³ Fox and Ziegler are correct that IVF has become part of the reproductive rights zeitgeist post-*Dobbs*.¹⁴ Even so, regulation of IVF is unlikely to become the new abortion when considered within the larger context of the regulation of procreation in the United States. As discussed below, law and lawmakers have treated reproduction with differing levels of concern depending on whose reproduction is at issue.¹⁵ Public discourse about reproductive practices can also vary depending on the people being discussed.¹⁶ In the current

12. See *infra* notes 34–36 and accompanying text.

13. See Kimya Forouzan, Isabel Guarnieri, Mollie Fairbanks & Talia Curhan, State Policy Trends 2024: Anti-Abortion Policymakers Redouble Attacks on Bodily Autonomy, Guttmacher Inst. (Dec. 16, 2024), <https://www.guttmacher.org/2024/12/state-policy-trends-2024-anti-abortion-policymakers-redouble-attacks-bodily-autonomy> [<https://perma.cc/XZ7R-GGH8>] (explaining that in 2024, state legislators introduced 508 provisions that would restrict abortion access, with twenty-one of these being enacted and three facing veto). Abortion regulation, either protective or restrictive, is on track to remain popular in 2025 and beyond. State Legislation Tracker, Guttmacher Inst., <https://www.guttmacher.org/state-legislation-tracker> [<https://perma.cc/VVP7-Y4Q9>] (last updated Oct. 1, 2025).

14. Fox & Ziegler, *supra* note 10, at 1596–600 (explaining the impact of *Dobbs* on the political debates surrounding reproductive rights).

15. See, e.g., Loretta J. Ross & Rickie Solinger, Reproductive Justice: An Introduction 11 (2017) (“[W]omen of color have been targeted in distinctive, brutal ways across U.S. history.”).

16. The derision heaped on so-called “welfare queens” has helped fuel constraints on providing public assistance to those in need. See Michele Estrin Gilman, The Return of the Welfare Queen, 22 J. Gender Soc. Pol’y & L. 247, 247 (2014) (“The ‘welfare queen’ was shorthand for a lazy woman of color, with numerous children she cannot support, who is cheating taxpayers by abusing the system . . . [T]his long-standing racist and gendered stereotype was used to attack the poor and the cash assistance programs that support them.”). In other contexts, families with many children, sometimes created through assisted reproduction, can lead to lucrative television and sponsorship deals. See, e.g., Ken Tucker, Why We Used to Love ‘Jon & Kate Plus 8’, *Today* (Nov. 24, 2009), <https://www.today.com>

context, this is exemplified by the vitriol that can accompany public discussions of abortion and abortion seekers¹⁷ versus the sympathy often offered to people who are infertile.¹⁸ Fox and Ziegler flag some of those forces in *The New Abortion*,¹⁹ but their analysis could more thoroughly excavate the history of regulating reproduction in the United States to better contextualize what might be on the horizon for IVF. That history is long, bleak, and steeped in stratified reproduction.²⁰

Throughout U.S. history, procreative regulation has arisen from lawmakers' desire to maintain white supremacy, uphold patriarchy,²¹ and reinforce the proper roles for women, especially white women, as wives and mothers.²² That history includes requiring the children of enslaved Black women to carry the status of their mothers as legal property.²³ That history includes restricting access to birth control²⁴ and creating the Hyde

/popculture/why-we-used-love-jon-kate-plus-8-wbna34128395 [https://perma.cc/D8ZY-VB-LP] (noting that the Gosselins' reality television show brought them wealth and notoriety).

17. See Blake Ellis & Melanie Hicken, These Male Politicians Are Pushing for Women Who Receive Abortions to Be Punished With Prison Time, CNN, <https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs> [https://perma.cc/MEY5-W3QR] (last updated Sep. 21, 2022) ("A businessman turned state representative from rural Oil City, Louisiana, and a Baptist pastor banded together earlier this year on a radical mission. They were adamant that a woman who receives an abortion should receive the same criminal consequences as one who drowns her baby.").

18. See Exec. Order No. 14,216, 90 Fed. Reg. 10,451, 10,451 (Feb. 18, 2025) ("[M]any hopeful couples . . . are unable to conceive a child. Despite their hopes and efforts, infertility struggles can make conception difficult, turning what should be a joyful experience into an emotional and financial struggle. . . . [We] must make it easier for loving and longing mothers and fathers to have children.").

19. Fox & Ziegler, *supra* note 10, at 1566.

20. See Lisa H. Harris & Taida Wolfe, Stratified Reproduction, Family Planning Care and the Double Edge of History, 26 *Current Op. Obstetrics & Gynecology* 539, 541 (2014) ("Anthropologists coined the term 'stratified reproduction' to describe the ways in which the fertility, reproduction and maternity of some people are valued, and the fertility of others is not.").

21. See Taylor Riley, Yasaman Zia, Goleen Samari & Mienah Z. Sharif, Abortion Criminalization: A Public Health Crisis Rooted in White Supremacy, 112 *Am. J. Pub. Health* 1662, 1663 (2022) ("The policing of bodies of pregnant-capable people racialized as Black is central to the historical perpetuation of White supremacy, starting with the forced reproduction of women who were enslaved.").

22. See, e.g., Dorothy E. Roberts, Racism and Patriarchy in the Meaning of Motherhood, 1 *Am. U. J. Gender & L.* 1, 6 (1993) ("[P]atriarchy's meaning of motherhood[] [is] one designed to serve the interests of men. The meaning of motherhood in America, however, is molded, on the basis of race as well as gender. . . . [T]he image of the Black mother has always diverged from, and often contradicted, the image of the white mother.").

23. See Jennifer L. Morgan & Alys Eve Weinbaum, Introduction: Reproductive Racial Capitalism, 14 *Hist. Present* 1, 2 (2024) ("What it underscores above all is that all forms of racial capitalism are predicated on ongoing reproductive extraction, dispossession, and accumulation. Reproductive racial capitalism is, in our view, most visible in hereditary racial slavery, but it is also, we argue, alive and well today.").

24. There was no federal constitutional right to contraception in the United States until the latter half of the twentieth century. See *Eisenstadt v. Baird*, 405 U.S. 438, 453

Amendment,²⁵ which has effectively banned the use of Medicaid funds for abortion except in rare instances.²⁶ It is also a history of state-sanctioned eugenic sterilizations of people the state deemed “feeble-minded,” a drain on the public coffers, or criminals.²⁷ The history of regulating reproduction further includes the Supreme Court validating a state interest in potential life that justified broad restrictions on abortion access, including bans on post-viability abortions unless needed to save the life or health of a pregnant woman.²⁸

The history of reproductive regulation is indispensable to the discussion of why IVF has not been deeply regulated and to predicting likely characteristics of future regulation. In an early footnote, Fox and Ziegler nod to this need for context, explaining: “IVF’s eclipse by the shadow of abortion politics has crowded out other possible explanations for its underregulation, such as . . . [its use] by upper-middle-class people who are frequently married and want to have a child.”²⁹ Later they note that those upper-middle-class users are largely white,³⁰ despite the fact that statistics show women of color disproportionately struggle with getting diagnosed with infertility, accessing IVF treatment, and succeeding once treatment begins.³¹ IVF users reflect racial and class divides in the need for

(1972) (extending the right to contraception to single people); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a state law banning contraception contravenes the constitutionally protected right to privacy, which encompasses a married couple’s right to access contraception).

25. Departments of Labor and Health, Education, and Welfare Appropriation Act, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

26. See Alina Salganicoff, Laurie Sobel, Ivette Gomez & Amrutha Ramaswamy, *The Hyde Amendment and Coverage for Abortion Services Under Medicaid in the Post-Roe Era*, KFF (Mar. 14, 2024), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services-under-medicaid-in-the-post-ro-e-era/> [https://perma.cc/GXC7-8E9V] (“The Affordable Care Act (ACA) includes a provision that applies the Hyde restrictions to Marketplace plans, ensuring that federal funds are only used to subsidize coverage for pregnancy terminations that endanger the life of the woman or that are a result of rape or incest.”).

27. See generally Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (2008) (explaining state legitimization of eugenics and sterilization). In the infamous words of Justice Oliver Wendell Holmes in *Buck v. Bell*, in which the Supreme Court upheld a eugenic sterilization law that targeted “mental defectives”: “It is better for all the world . . . [if] society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.” 274 U.S. 200, 205, 207 (1927).

28. After the Supreme Court’s decision in *Dobbs*, states can even ban pre-viability abortions pursuant to their interest in potential life. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973), and finding no right to abortion in the federal constitution).

29. Fox & Ziegler, *supra* note 10, at 1558 n.11.

30. *Id.* at 1578.

31. Tia Jackson-Bey, Jerrine Morris, Elizabeth Jasper, Digna R. Velez Edwards, Kim Thornton, Gloria Richard-Davis & Torie Comeaux Plowden, *Systematic Review of Racial and Ethnic Disparities in Reproductive Endocrinology and Infertility: Where Do We Stand Today?*, 2 *Fertility & Sterility* Revs. 169, 187 (2021) (“[W]hether linked to structural barriers

and access to this technology.³² By contrast, women of color and low-income women are overrepresented in abortion statistics.³³ If the public face of IVF is opposite-sex, white, married couples, the privileges of presumed heterosexuality, whiteness, and marriage attach when lawmakers consider IVF regulation, further entrenching stratified reproduction.³⁴

Government control over reproduction skews toward protecting the reproductive futures of favored classes and dismantling the reproductive futures of others. In this moment of surging pronatalism, spurred by claims of falling birth rates³⁵ and calls for more babies,³⁶ warning of a coming prohibition of IVF is too simplistic. This is especially so because while abortion abolition is not a complete third rail in the political and public spheres,³⁷ eliminating access to IVF is not a politically powerful platform for those who wish to have influence beyond the fringes.³⁸ More

in obtaining basic reproductive health and preconception care, associated with decreased access to fertility treatment, or rooted in an incomplete understanding of ethnic variation during [assisted reproductive technology] cycles, disparities continue to impact under-represented minorities at multiple junctures.”).

32. See Jamie M. Merkison, Anisha R. Chada, Audrey M. Marsidi & Jessica B. Spencer, Racial and Ethnic Disparities in Assisted Reproductive Technology: A Systematic Review, 119 *Fertility & Sterility* 341, 342 (2023) (describing existing disparities in access to fertility coverage in the United States); see also Isabel Galic, Olivia Negriz, Christopher Warren, Dannielle Brown, Alexandria Bozen & Tarun Jain, Disparities in Access to Fertility Care: Who’s In and Who’s Out, 2 *F&S Reps.* 109, 109 (2021) (“A 2003 survey . . . demonstrated that, even in a state with mandated insurance coverage for fertility treatment, disparities in access to infertility services persist. The majority of individuals accessing services were White, highly educated, and had income levels >\$100,000.” (footnote omitted)).

33. See Stephanie Ramer, Antoinette T. Nguyen, Lisa M. Hollier, Jessica Rodenhizer, Lee Warner & Maura K. Whiteman, Abortion Surveillance—United States, 2022, 73 *Morbidity & Mortality Wkly. Rep.*, Nov. 28, 2024, at 1, 6 (finding that Black women constituted a disproportionately high number of all abortion patients).

34. See Galic et al., *supra* note 32, at 109 (“[A]ccess to needed fertility treatment may be limited to more affluent patients.”).

35. See Veronica Agudelo, Selective Gestation: The Racial Politics of American Pronatalism, *Colum. Pol. Rev.* (June 10, 2025), <https://www.cpreview.org/articles/2025/6/selective-gestation-the-racial-politics-of-american-pronatalism> [<https://perma.cc/B5UH-U5QY>] (“The fear of declining birth rates is often framed in a way that suggests a threat to national or cultural identity, often in reference to a particular racial or ethnic group.”).

36. See, e.g., Fact Sheet: President Donald J. Trump Expands Access to In Vitro Fertilization (IVF), The White House (Feb. 18, 2025), <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-expands-access-to-in-vitro-fertilization-ivf/> [<https://perma.cc/TV5Q-MFTM>] (“President Trump has long advocated for more babies and expanding American families: ‘Because we want more babies, to put it very nicely.’” (quoting President Donald Trump)).

37. See, e.g., Rose Conlon, Abortion Rights Opponents Across the Country Want to Charge Women With Murder, *NPR* (July 13, 2025), <https://www.npr.org/2023/07/13/1187435403/abortion-abolitionists-across-the-country-want-to-charge-women-with-murder> [<https://perma.cc/T6TL-WSZ5>] (“A small but growing faction of the anti-abortion movement is calling for patients to be criminally punished.”).

38. See 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/>

likely, IVF regulation will shape who can access the technology by focusing on affordability and insurance³⁹ and on how patients can use it (that is, what testing can be performed on embryos, how many embryos can be created in a cycle, or bans on embryo destruction). What these new laws will look like is especially concerning given efforts to boost birth rates that explicitly or implicitly invoke eugenics and discredited “science” about white genetic superiority.⁴⁰ Taking account of very positive popular opinion on IVF, politicians would do well to focus not on politically unpalatable bans but on ways to make IVF more affordable for the “right” people: white, upper-class, opposite-sex couples who may not be able to afford the upfront cost of IVF but will be able to financially support future children without public assistance.⁴¹ The aftermath of the Alabama Supreme Court’s decision in *LePage v. Center for Reproductive Medicine, P.C.* is revealing in this regard.⁴²

americans-overwhelmingly-say-access-to-ivf-is-a-good-thing [https://perma.cc/Q96Z-3ND3] (finding that seven out of ten Americans support IVF access).

39. In February 2025, President Donald Trump issued an Executive Order directing the Assistant to the President for Domestic Policy to submit “a list of policy recommendations on protecting IVF access and aggressively reducing out-of-pocket and health plan costs for IVF treatment” within ninety days of the date of the order. Exec. Order No. 14,216, 90 Fed. Reg. 10,451, 10,451 (Feb. 18, 2025). This list of policy recommendations was initially meant to be released in May 2025; however, the plan was backtracked in August 2025, and the Administration did not release its first round of IVF policy proposals until October 16, 2025. Praveena Somasundaram, Dan Diamond & Isaac Arnsdorf, White House Releases Plan to Broaden Access to IVF, Fertility Drugs, Wash. Post (Oct. 16, 2025), <https://www.washingtonpost.com/nation/2025/10/16/trump-ivf-fertility-drugs/> (on file with the *Columbia Law Review*).

40. See, e.g., David Robert Grimes, Opinion, Silicon Valley Is Reviving the Discredited and Discriminatory Idea of ‘Race Science’, *Sci. Am.* (Dec. 17, 2024), <https://www.scientificamerican.com/article/silicon-valley-is-reviving-the-discredited-and-discriminatory-idea-of-race/> [https://perma.cc/Z2WA-VVBC] (“Across Europe and the U.S., racist and anti-immigrant groups have embraced long-discredited ideas that races constitute biologically separate groups differing in everything from intelligence to birthrate. With immigration a defining topic in fractious debates on both sides of the Atlantic, scientific racism is now explicit in right-wing discourse.”); Luke Munn, Pronatalism Is the Latest Silicon Valley Trend. What Is It—And Why Is It Disturbing?, *The Conversation* (May 28, 2024), <https://theconversation.com/pronatalism-is-the-latest-silicon-valley-trend-what-is-it-and-why-is-it-disturbing-231059> [https://perma.cc/63CG-RF6Q] (reporting on the rise of pronatalism to encourage childbearing among certain demographics).

41. See 90 Fed. Reg. at 10,451 (ordering a policy to provide “access to affordable fertility treatments”). Insurance mandates exist in many states that provide some amount of coverage for infertility treatment, including IVF; research indicates, however, that insurance mandates do not close the race gap in successfully accessing IVF. See, e.g., Katharine F. B. Correia, Katherine Kraschel & David B. Seifer, State Insurance Mandates for In Vitro Fertilization Are Not Associated With Improving Racial and Ethnic Disparities in Utilization and Treatment Outcomes, 228 *Am. J. Obstetrics & Gynecology* 313.e1, 313.e5 (2023) (“Racial disparities in utilization not only persisted regardless of mandate but were greater in mandated states.”).

42. 408 So. 3d 678, 680 (Ala. 2024) (“This Court has long held that unborn children are ‘children’ for purposes of Alabama’s Wrongful Death of a Minor Act . . .”).

Fox and Ziegler cite *LePage* as a quintessential case in which the lack of adequate redress through negligence claims led to a problematic decision from the Alabama Supreme Court declaring extracorporeal frozen embryos to be children under the state's wrongful death statute.⁴³ Rather than a lesson on the drawbacks of state courts, the case's aftermath illuminates whose reproductive rights lawmakers protect and how they protect them. Post-*LePage*, the Alabama legislature passed legislation broadly protecting IVF providers from civil and criminal liability for IVF-related errors, thus allowing stalled IVF cycles to restart in the state.⁴⁴ Compare the rapidity of this response to legislators' refusals and long deferrals in restructuring exceptions to restrictive abortion laws that delay or deny abortion care, causing documented harms, including death, to pregnant people.⁴⁵ In other states, legislators have sought to reassure constituents and media that their restrictive abortion laws are not meant to interfere with IVF.⁴⁶ The lesson: Attacking IVF brings about drastic and hasty legislative action to protect it, even in deeply red states,⁴⁷ while the deaths of those who sought or needed abortion care leads to legislative silence, sluggish response times, and even renewed support for the laws

43. See Fox & Ziegler, *supra* note 10, at 1602 ("*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."); see also *LePage*, 408 So. 3d at 683 ("[N]either the text of the Wrongful Death of a Minor Act nor this Court's precedents exclude extra-uterine children from the Act's coverage.").

44. The Alabama Supreme Court released the *LePage* opinion in February 2024. The next month, the Alabama legislature passed a law providing expansive immunity for IVF providers. Liz Baker, Debbie Elliott & Susanna Capelouto, Alabama Governor Signs IVF Bill Giving Immunity to Patients and Providers, NPR, <https://www.npr.org/2024/03/06/1235907160/alabama-lawmakers-pass-ivf-immunity-legislation> [<https://perma.cc/KM9D-293T>] (last updated Mar. 6, 2024).

45. See Kavitha Surana, Mariam Elba, Cassandra Jaramillo, Robin Fields & Ziva Branstetter, Are Abortion Bans Across America Causing Deaths? The States that Passed Them Are Doing Little to Find Out., ProPublica (Dec. 18, 2024), <https://www.propublica.org/article/abortion-bans-deaths-state-maternal-mortality-committees> [<https://perma.cc/WGD8-8GT9>] ("In states with abortion bans, ProPublica has found, pregnant women have bled to death, succumbed to fatal infections and wound up in morgues with what medical examiners recorded were 'products of conception' still in their bodies.").

46. Michelle Jokisch Polo, Infertility Patients Fear Abortion Bans Could Affect Access to IVF Treatment, NPR: Shots (July 21, 2022), <https://www.npr.org/sections/health-shots/2022/07/21/1112127457/infertility-patients-fear-abortion-bans-could-affect-access-to-ivf-treatment> [<https://perma.cc/QX4C-YRWZ>] ("In other states with strict abortion bans like Alabama and Oklahoma, officials have clarified that their current abortions bans will not impact IVF treatments.").

47. See Nadine El-Bawab, Cheyenne Haslett & Elizabeth Schulze, Alabama Bill to Protect IVF Signed Into Law by Governor, ABC News (Mar. 6, 2024), <https://abcnews.go.com/US/alabama-bill-protect-ivf-passes-house-senate-heads/story?id=107860667> [<https://perma.cc/C8K2-J7UY>] ("Much of the debate over the bill among lawmakers stemmed from whether the bill provides too broad of protection to clinics in cases of malpractice . . . [and] whether the bill goes far enough to protect IVF treatment should more lawsuits come forward . . .").

restricting abortion access.⁴⁸ This differential treatment is unsurprising given the historically disparate regulation of reproduction and opposing beliefs about abortion and IVF as life taking versus life giving.⁴⁹ Stratified reproduction and polarizing beliefs about IVF and abortion are core elements of the legal history of IVF regulation warranting deeper analysis in *The New Abortion*.

A. *Mainstream Advocacy and the Reproductive Justice Movement*

In addition to more reflection on the history of reproductive regulation in the United States, a legal history of IVF could grapple more robustly with the identities of the agenda setters during this extended period of regulatory inaction on IVF—potentially finding commonalities between the past and the present. Understanding the motivations, commitments, internal and external restrictions, and blind spots of leaders can unearth the identity of those whose rights motivate advocacy.⁵⁰ Fox and Ziegler argue that leaders on both sides were fine with a “regulatory vacuum” that allowed them to avoid the “complicated questions that IVF raised.”⁵¹ But knowing that the leaders of the mainstream abortion rights movement in the 1990s were often white women reveals how leaders’ personal identities, coupled with a lack of engagement with women of color, shaped movement priorities.⁵²

48. Legislators have had varying responses to calls for new laws to clarify exceptions to restrictive abortions laws, which have been blamed for the deaths of women who were either denied care or only received it after lengthy delays. See, e.g., Shefali Luthra & Barbara Rodriguez, *New State Laws Aim to Clarify Abortion Bans. Doctors Say It’s Not So Simple*, *The 19th* (June 11, 2025), <https://19thnews.org/2025/06/state-abortion-ban-laws-clarifications-doctors> [<https://perma.cc/QS5W-Q4FK>] (“The end result [is] clarification laws that remain unclear to physicians and their employing hospitals and health systems, who can still face high penalties for violating an abortion ban.”). Some anti-choice advocates argue that the laws do not need reform because the issue is physicians who are misinterpreting the laws, not unclear laws. Alice Miranda Ollstein & Megan Messerly, *Patients Are Being Denied Emergency Abortions. Courts Can Only Do So Much.*, *Politico* (Apr. 23, 2024), <https://www.politico.com/news/2024/04/23/doctors-abortion-medical-exemptions-00153317> (on file with the *Columbia Law Review*).

49. See *supra* notes 3–4 and accompanying text.

50. Sociologist Zakiya Luna helpfully explains: “Attending to movement actors’ multiple identities and experiences helps us understand varying ways movements can successfully operate at what Crenshaw termed the ‘political intersections,’ where many people reside.” Zakiya Luna, *Reproductive Rights as Human Rights: Women of Color and the Fight for Reproductive Justice* 42 (2020).

51. Fox & Ziegler, *supra* note 10, at 1574.

52. For instance, Reproductive Freedom for All, formerly the National Abortion Rights Action League (NARAL), published a “Road Map to Equity” in 2021, noting in part that: “Reproductive Freedom for All is striving to be an inclusive organization. Crucial to that journey is acknowledging that we are a legacy organization started mostly by white women and still largely led by white women.” Road Map to Equity, Reprod. Freedom for All, <https://reproductivfreedomforall.org/road-map-to-equity/> [<https://perma.cc/BZ6K-7QV3>] (last visited Aug. 6, 2025). Since its founding in 1966, The National Organization for Women (NOW) has had only two Black women as presidents: Aileen Hernandez, who served

The reproductive justice (RJ) movement, founded in 1994, was a powerful response to women of color's limited role in setting a national agenda for reproductive rights advocacy.⁵³ Black women birthed the RJ movement to respond to their erasure from mainstream discourse and most leadership roles in national organizations.⁵⁴ These women did not organize themselves around abstract ideas of choice, nor did they center abortion in their advocacy.⁵⁵ Recognizing myriad ways in which the law denied Black women and other women of color access to pregnancy and the tools of pregnancy creation, RJ leaders set the right to have children as the first tenet of their movement, followed by the rights not to have children and to parent children in safe and healthy environments.⁵⁶

a one-year term (1970–1971), and Christian F. Nunes, who resigned from the organization after a five-year term in 2025 amid allegations that NOW created a toxic work environment for women of color. See Past & Current Presidents, Nat'l Org. Women, <https://now.org/about/history/presidents/> [<https://perma.cc/QT9Y-N2A8>] (last visited Sep. 19, 2025); see also Candice Norwood, 'Toxic' Work Environment at the Largest U.S. Feminist Group Prompts President to Leave, *The 19th* (May 14, 2025), <https://19thnews.org/2025/05/national-organization-for-women-president-departing/> [<https://perma.cc/H4XG-E7FS>]. Nunes has spoken out about the difficulties she faced as a Black woman leading NOW. Id. Janet Benshoof, a white woman, founded the Center for Reproductive Rights (CRR) in 1992 after an extensive career as the head of the Reproductive Freedom Project at the ACLU. Press Release, Ctr. for Reprod. Rts., Center for Reproductive Rights Mourns the Loss of Founder and President Emerita Janet Benshoof (Dec. 19, 2017), <https://reproductiverights.org/center-for-reproductive-rights-mourns-the-loss-of-founder-and-president-emerita-janet-benshoof/> [<https://perma.cc/JY3G-JAQC>]. Benshoof's successor at CRR, Nancy Northup, is also a white woman. Board of Directors: Nancy Northup, Ctr. Reprod. Rts., <https://reproductiverights.org/profile/nancy-northup/> [<https://perma.cc/W9A5-HCRQ>] (last visited Aug. 6, 2025). Deborah Archer became the first Black president of the ACLU in 2021. Press Release, ACLU, Civil Rights Attorney, Inclusion Expert Deborah Archer Elected as New ACLU National Board President (Feb. 1, 2021), <https://www.aclu.org/press-releases/civil-rights-attorney-inclusion-expert-deborah-archer-elected-new-aclu-national-board> [<https://perma.cc/C972-B8R2>]. A significant exception to the leadership rule is Alyce Faye Wattleton, who became the first Black woman and youngest ever leader of Planned Parenthood in 1978 and remained in the role through 1992. Alyce Faye Wattleton, *Hist. Makers*, <https://www.thehistorymakers.org/biography/alyce-faye-wattleton-40> (on file with the *Columbia Law Review*) (last visited Aug. 6, 2025). This era saw some of the most turbulent years of anti-abortion activism and violence in the United States.

53. See Reproductive Justice, SisterSong, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/6KWX-3G5P>] (last visited Aug. 6, 2025) ("Indigenous women, women of color, and trans* people have always fought for Reproductive Justice, but the term was invented in 1994.").

54. See Dorothy Roberts, Foreword to *Radical Reproductive Justice: Foundations, Theory, Practice, Critique* 9, 9 (Loretta Ross, Lynn Roberts, Erika Derkas, Whitney Peoples & Pamela Bridgewater eds., 2017) ("The reproductive justice movement offered a radically different place for women of color to be in the leadership and to develop political strategies that could effectively contest the interlocking oppressions they faced . . .").

55. See id. (arguing that an approach to women's rights focused on the right to choose and abortion was "completely inadequate to grasp the violations of black women's bodies").

56. Reproductive Justice, In *Our Own Voice: Nat'l Black Women's Reprod. Just. Agenda*, <https://blackrj.org/our-causes/reproductive-justice/> [<https://perma.cc/8STC-E4N>] (last visited Aug. 6, 2025).

The disconnect between RJ activists and mainstream women's and reproductive rights organizations is worth exploring in the context of how reproductive rights organizations thought about abortion and IVF because it reveals alternatives for responding to the current anti-abortion interest in regulating IVF. The divide between how mainstream organizations advocated around issues of sterilization versus how RJ activists framed that same discussion is instructive. When it came to sterilization, mainstream advocates raised concerns that physicians were refusing to perform sterilizations at the request of middle-class, white women and depriving them of the choice to permanently avoid pregnancy.⁵⁷ For women of color, the issue of sterilization focused on the persistent practices of forced and coerced sterilizations.⁵⁸ In the realm of abortion, mainstream leaders focused on "choice" and abortion's legality, while RJ activists forced attention to abortion's inaccessibility even where legal.⁵⁹ Mainstream advocates even forged coalitions that supported their work on choice but created conflicts with women of color activists.⁶⁰ Too often, and arguably to the movement's detriment, the public-facing reproductive rights movement did not, by design or by ignorance, reflect the lived realities of many women of color, especially Black women.⁶¹

As Fox and Ziegler note, RJ founders, leaders, activists, and scholars know and knew that infertility is and was disproportionately an issue for Black women and other women of color in the United States.⁶² RJ leaders also understood that issues surrounding IVF were not just about personhood but about equal access, antidiscrimination, and the potential exploitation of Black and brown women in the United States and abroad

57. See Luna, *supra* note 50, at 44–47 (describing how women of color advocated against sterilization abuse while mainstream reproductive rights organizations focused on lifting barriers to consensual sterilizations).

58. See *id.* at 48–49 (“Conversely, organizations like [the Committee for Abortion Rights and Against Sterilization Abuse] suggested that women of color were having the choice to become mothers taken away from them due to forced sterilization.”).

59. See Dorothy Roberts, *Reproductive Justice, Not Just Rights*, *Dissent Mag.* (2015) <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights/> [<https://perma.cc/TE85-XTGC>] (describing how the rhetoric of choice and the narrow focus on abortion have alienated many women of color, especially Black women, from mainstream reproductive rights advocacy organizations).

60. See Luna, *supra* note 50, at 44 (“Mainstream reproductive rights organizations’ partnerships to improve their strategic position and legislative success undermined long-term possibilities for building coalitions that could engender broader cultural change.”). Luna also notes that women of color who asked to bring their work and perspective to mainstream organizations did not receive adequate institutional support for their efforts. *Id.* at 49.

61. *Id.* at 43 (“[T]he assumption that the experience and desires of White, heterosexual, middle-class wives could express the experience and desires of all women was short-sighted at best.”).

62. Fox & Ziegler, *supra* note 10, at 1603.

as reproductive laborers.⁶³ To the extent that the mainstream organizations' decision to step away from IVF reflected a consensus among those who set the national reproductive rights movement agenda, perhaps leadership that included more RJ leaders and activists would have spawned different decisions about tackling issues around IVF. A more robust legal history of IVF and the reproductive rights movement, a project that Fox and Ziegler will hopefully pursue, would provide a more complete picture.⁶⁴

The post-*Dobbs* era of advocacy offers an opportunity to center marginalized voices in debates about how to protect IVF. Audacious leaders can expand their IVF advocacy beyond shoring up support for abortion rights, as *The New Abortion* describes of past leaders' efforts.⁶⁵ A broader RJ-driven agenda would craft laws and policies that privilege the experiences of women and pregnant people at the margins, even when those solutions are presently politically untenable.⁶⁶ Arguably, a lesson to draw from the demise of *Roe v. Wade* is that advocating for the most politically tractable solutions that do not provide relief for the most vulnerable among us brings hollow and temporary victories.⁶⁷ Said another way, advocacy rooted in the needs of the most privileged brings little or no justice for the most vulnerable.

63. See Jamila Perritt & Natalia Eugene, *Inequity and Injustice: Recognizing Infertility as a Reproductive Justice Issue*, 3 *Fertility & Sterility Reps. (Special Issue)* 2, 3 (2022) ("A vision for reproductive health and wellbeing that truly supports reproductive justice must include access to infertility care regardless of race, income, geography, or insurance status.").

64. Cf. Gena Corea, *The Mother Machine: Reproductive Technologies From Artificial Insemination to Artificial Wombs* (1985) (providing a wide-ranging critique of the commodification of reproduction and the specific ways in which that commodification harms all women, but especially women of color).

65. Fox & Ziegler, *supra* note 10, at 1576 ("[B]ecause of the apparent popularity of IVF, abortion-rights groups made IVF an argument against the HLA and other anti-abortion proposals." (emphasis omitted)).

66. See generally *In Our Own Voice: Nat'l Black Women's Reprod. Just. Agenda, 2025 Black Reproductive Justice Policy Agenda* (2025), https://blackrj.org/wp-content/uploads/2025/06/2025-Black-Reproductive-Justice-Policy-Agenda_In-Our-Own-Voice-2025.pdf [<https://perma.cc/T5Y2-ZLCB>] [hereinafter 2025 Black Reproductive Justice Policy Agenda] ("Reproductive Justice cannot be achieved unless all members of our society—particularly Black women, girls, and gender-expansive people—have equitable access to the social, economic and political supports that enrich our lives.").

67. See Christine Fernando & Summer Ballentine, *Disputes Over Viability Are Dividing Abortion-Rights Groups and Complicating Ballot Measure Efforts*, PBS News (Jan. 16, 2024), <https://www.pbs.org/newshour/politics/disputes-over-viability-are-dividing-abortion-rights-groups-and-complicating-ballot-measure-efforts> [<https://perma.cc/ZCQ8-6DZM>] (discussing the post-*Roe* conflict among abortion rights supporters regarding viability limits, with some seeing such limits as a necessary concession and others seeing them as an unnecessary restriction on abortion access for some of the neediest abortion seekers).

B. *Building a New Law of IVF*

Fox and Ziegler acknowledge that the fertility industry in the United States is not a Wild West,⁶⁸ and many in the fertility industry strongly dispute any account of IVF as sitting in a regulatory vacuum.⁶⁹ On the federal level, the FDA, CDC, and Centers for Medicare and Medicaid Services—pursuant to the Clinical Laboratory Improvement Act—regulate IVF practices related to the handling of gametes and embryos, and the FTC regulates advertising.⁷⁰ Other regulation comes from state medical licensing boards, courts, and professional oversight by prestigious organizations like the American College of Obstetricians and Gynecologists (ACOG), the Society for Assisted Reproductive Technology (SART), and the American Society for Reproductive Medicine (ASRM).⁷¹ Before seeking congressional action, advocates would do well to consider whether they can more effectively use existing formal and informal regulations in lieu of spending political capital to create new, potentially ineffective mechanisms.

Fox and Ziegler lean in favor of seeking protection for IVF from the federal government and creating new legislative and regulatory pathways for future federal protections because leaving IVF regulation to hostile states allows anti-choice advocates to chip away at IVF with the same long-range strategy used to attack abortion.⁷² They imply that state efforts to curtail IVF access will prevail in state legislatures, as has been the case with abortion restrictions.⁷³ But, note again, the immediate backlash post-*LePage* that caused the undeniably abortion-hostile Alabama legislature to swiftly protect access to IVF.⁷⁴ Well before *LePage*, Louisiana passed a

68. See Fox & Ziegler, *supra* note 10, at 1557 (“IVF goes mostly unregulated, but it’s not the Wild West that headlines routinely portray it as.” (footnote omitted)).

69. See, e.g., Am. Soc’y for Reprod. Med., Oversight of Assisted Reproductive Technology 11 (2021), https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/oversiteofart.pdf [<https://perma.cc/G64P-TA85>] (“[Assisted reproductive technology] is already one of [the] most highly regulated of all medical practices in the United States.” (emphasis omitted)).

70. *Id.*

71. Am. Soc’y for Reprod. Med., Oversight of IVF in the US, https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/advocacy-resources/oversight-of-ivf-in-the-us.pdf [<https://perma.cc/VHR4-4CJY>] (last visited Aug. 6, 2025) [hereinafter ASRM, Oversight of IVF].

72. See Fox & Ziegler, *supra* note 10, at 1580 (“The failure to reach consensus on IVF regulation in some ways suited the anti-abortion movement . . .”).

73. RESOLVE tracks legislation that creates threats to IVF, including personhood bills. In 2025, they have been tracking bills in Alabama, Arkansas, Idaho, Iowa, Louisiana, North Carolina, Ohio, and Vermont, among other states. Current Legislation, RESOLVE, https://resolve.org/legislation_topic/ivf-threats/ [<https://perma.cc/ZQN9-5EV8>] (last visited Aug. 6, 2025).

74. See Aditi Gupta & Emily Lu, The Alabama Law Created More Problems Than Solutions. Here’s How We Can Safeguard Access to IVF, Fertility & Sterility (May 27, 2024), <https://www.fertstert.org/news-do/alabama-law-created-more-problems-than-solutions-he>

statute that declares embryos to be juridical persons,⁷⁵ as described in *The New Abortion*.⁷⁶ Despite this statute, IVF remains accessible to Louisianans.⁷⁷ Knowing that deeply abortion-hostile states that have protected embryos have not implicitly or explicitly banned access to IVF, neither pre- nor post-*Dobbs*, offers some hope that the fate of IVF and abortion are not irrevocably intertwined.

Fox and Ziegler justify their call for federal solutions to the problems they identify in the world of IVF based on the many ways that the current system fails IVF patients and the risks of a potential ban on the practice.⁷⁸ This Part has considered the ban issue, so the next Part considers the bevy of concerns they raise about current practices in IVF and the legislative solutions they propose to fix them. Those concerns include:

- A “high incidence” of negligence and underreporting of wrongdoing and reproductive never events⁷⁹ that presumably flow from insufficient regulation of clinics and laboratories;⁸⁰
- Inability of state courts to handle complex IVF-related malpractice cases;⁸¹
- Inadequate data available to IVF patients about safety of procedures and provider success rates,⁸² including lack of access to substantive reviews;⁸³ and

re-s-we-can-safeguard-access-ivf (on file with the *Columbia Law Review*) (“Following national outrage, the Alabama legislature passed a law to shield IVF providers on Ma[r]ch 6.”).

75. La. Stat. Ann. § 9:129 (2025).

76. Fox & Ziegler, *supra* note 10, at 1577.

77. There are many IVF providers in Louisiana. E.g., Arklatex Fertility, <https://www.arklatexfertility.com/> [<https://perma.cc/F6A4-GG6T>] (last visited Aug. 6, 2025); Audubon Fertility, <https://www.audubonfertility.com/> [<https://perma.cc/SH9B-Q2X2>] (last visited Aug. 6, 2025); Fertility Answers, <https://www.fertilityanswers.com/> [<https://perma.cc/JZ6L-BG5C>] (last visited Aug. 6, 2025); Fertility Inst., <https://fertilityinstitute.com/> [<https://perma.cc/HS6M-7Z5H>] (last visited Aug. 6, 2025); Positive Steps Fertility, <https://positivestepsfertility.com/> [<https://perma.cc/9FGY-YLXR>] (last visited Aug. 6, 2025).

78. See Fox & Ziegler, *supra* note 10, at 1588–605 (describing IVF’s inaccessibility, its regulatory vacuum, and the potential threats to access post-*Dobbs*).

79. *Id.* at 1614–15, 1625.

80. *Id.* at 1614–16. The comparatively low number of incidents may indicate that the vast majority of providers do not commit negligence and may also reflect, as Fox and Ziegler suggest, that some non-negligible number of errors or “reproductive never events” are kept from public attention through confidential settlements. *Id.* at 1597, 1614–15. Confidential settlements are not an unusual way to compensate injured plaintiffs, though important questions have been raised about whether such settlements conflict with ethical and professional commitments to compassion, compensation, and transparency. See William M. Sage, Joseph S. Jablonski & Eric J. Thomas, Use of Nondisclosure Agreements in Medical Malpractice Settlements by a Large Academic Health Care System, 175 *JAMA Internal Med.*, 1130, 1131, 1134 (2015) (concluding that nondisclosure agreements are frequently used to settle disputes and often overprotect doctors’ interests).

81. Fox & Ziegler, *supra* note 10, at 1615.

82. *Id.* at 1581–82, 1618.

83. *Id.* at 1618–19.

▪ Deceptive practices in advertising.⁸⁴

They make several recommendations related to these concerns, including a more robust clinic certification system that would involve “monitoring fertility clinics and related entities, conducting longitudinal studies of existing practices, maintaining safety standards, and enforcing them;”⁸⁵ greater transparency from fertility care providers and an information system that would provide data that is currently unavailable, including “systematic [and] reliable disclosures about IVF errors or failures, adjusted for risk[;] . . . reporting of success rates associated with specific diagnoses and treatments;”⁸⁶ and reviews and ratings that would “include . . . subjective experiences of patients, individually and aggregated, including nonintrusive background information about their reproductive health.”⁸⁷

Without question, maintaining IVF’s legality, reducing error in IVF practices, ensuring truth in advertising, and requiring robust, informed consent practices are all laudable goals. Achieving those goals, however, should happen in ways that truly benefit patients without creating more barriers to access that will fall most acutely on those already less able to avail themselves of IVF treatment. In particular, as advocates build a proactive agenda for IVF regulation, they should be wary of using available and probably short-lived political goodwill to create potentially onerous, invasive, and expensive regulatory requirements that increase costs for patients, demonize healthcare providers, and treat IVF with the same exceptionalism⁸⁸ that unintentionally mirrors the successful anti-abortion playbook.⁸⁹ With these thoughts in mind, Fox and Ziegler’s proposals leave much to be desired.

II. CONGRESS WILL NOT SAVE US

Unlike its illuminating legal history, the federal legislative proposals in *The New Abortion* are unsatisfying in their scope and focus. Any legislative proposals related to IVF will inevitably be met with attempts to do far more than Fox and Ziegler propose, and these risks warrant more than passing mention. In the present climate, pushing for federal IVF-related legislation that can be cabined in a productive way to avoid harm to marginalized

84. Id. at 1619–20.

85. Id. at 1615–16.

86. Id. at 1618.

87. Id. at 1619.

88. See Elizabeth Sepper, Anti-Abortion Exceptionalism After *Dobbs*, 51 J.L. Med. & Ethics 612, 612 (2023) (“Over the last thirty years, courts frequently twisted or ignored relevant constitutional doctrine where abortion was involved. Perhaps nowhere was this ‘abortion exceptionalism’ more extreme than under the First Amendment’s speech and religion clauses.” (footnote omitted)).

89. See Abortion Reporting Requirements, Guttmacher Inst., <https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements> (on file with the *Columbia Law Review*) (last updated Oct. 1, 2025) (describing how abortion data gets reported).

people is naïve given open hostility to many of the families who will use IVF or other forms of assisted reproduction to have children.⁹⁰ As they must, Fox and Ziegler recognize this environment and cite Project 2025's limited notion of family, which reduces families to opposite-sex, married couples raising their genetically related children.⁹¹ Under this view, government should not support single parenthood—only the creation of “stable, married, nuclear families.”⁹² Further, laws and policies related to reproductive technologies “should never place the desires of adults over the right of children to be raised by the biological fathers and mothers who conceive them.”⁹³ These foundational ideas confirm that same-sex couples, single people, and people who use donated or purchased gametes to create children are not part of a “well-ordered nation”⁹⁴ in the eyes of those that share Project 2025's views. Given this backdrop, the notion of a moment ripe for political compromise on IVF is anathema to a worldview that condemns a wide swath of U.S. families. It is difficult to imagine language that could make clearer the risks of federal action under the current Administration and Congress.⁹⁵

Fox and Ziegler also claim that allowing IVF to remain untouched is no longer tenable post-*Dobbs* and that leaving regulation to the states is risky.⁹⁶ They express a valid concern that if advocates for IVF access fail to act, opposition forces will fill the void, as they did during the campaign to make abortion illegal in the United States.⁹⁷ But regulatory vacuums can perhaps serve as safety nets, and that has arguably been true in the context of IVF for decades, as it has meant that measures that discriminate against marginalized people have not been enshrined into law. Further, while a federal response would be more all-encompassing and potentially more

90. Fox and Ziegler are calculating that the risks of inaction outweigh the risks of seeking consensus on some aspects of IVF regulation. See Fox & Ziegler, *supra* note 10, at 1563 (“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 . . .”).

91. *Id.* at 1608; see also Roger Severino, Department of Health and Human Services, *in* *Mandate for Leadership: The Conservative Promise* 449, 451 (Paul Dans & Steven Groves eds., 2023), <https://www.documentcloud.org/documents/24088042-project-2025s-mandate-for-leadership-the-conservative-promise/> (on file with the *Columbia Law Review*).

92. Severino, *supra* note 91, at 451.

93. *Id.*

94. *Id.*

95. See, e.g., Kiara Alfonseca, Some Republican Lawmakers Increase Calls Against Gay Marriage SCOTUS Ruling, ABC News (Mar. 3, 2025), <https://abcnews.go.com/Politics/republican-lawmakers-increase-calls-gay-marriage-scotus-ruling/story?id=119395181> [<https://perma.cc/3X7V-QWEW>] (describing how legislators in a small number of states have passed resolutions asking the U.S. Supreme Court to revisit *Obergefell v. Hodges*, 576 U.S. 644 (2015), which guaranteed marriage equality).

96. Fox & Ziegler, *supra* note 10, at 1563.

97. See *id.* at 1609 (“America’s IVF moment is thus one of great opportunity and great risk. . . . [T]he threat of state prohibitions—or even national limits—can no longer be dismissed.”).

powerful and protective for some IVF users, the focus on maintaining *Roe* over the almost fifty years between *Roe* and *Dobbs* ultimately did not save abortion rights.⁹⁸ A state-based strategy—especially when, as here, there is strong support for IVF, even from people who do not support abortion—is less risky than Fox and Ziegler suggest. According to the Pew Research Center:

[E]ven those who say abortion should be illegal in most cases generally view IVF access positively (60% say it's good). And while views of IVF are least positive among those who say abortion should always be illegal, this group is still twice as likely to say having access to IVF is good (40%) as to say it's bad (20%). An additional 40% say they are not sure.⁹⁹

This data is another reminder that, in many people's minds, the distinctions between IVF and abortion are meaningful. IVF's protectors must use caution and exercise precision when predicting how the anti-abortion playbook could translate to a broad-based IVF agenda.

As IVF protectors, Fox and Ziegler seek “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.”¹⁰⁰ To achieve their goals, they prioritize legality, licensing, and transparency in the IVF industry, each of which is discussed in turn.

A. *Legality*

To protect the legality of IVF, Fox and Ziegler propose changes to the regulatory scope of the FDA,¹⁰¹ an agency with a vast portfolio encompassing public health related to the safety and efficacy of drugs, medical devices, biologics, food, and cosmetics; regulating tobacco products; supporting innovation in making medical products safer and cheaper; and aiding in counterterrorism efforts.¹⁰² To this list of responsibilities, Fox and Ziegler suggest adding the regulation of “fertility

98. The federal protection for abortion rights, if not access, that *Roe* represented meant that mainstream reproductive rights organizations dedicated significant resources, especially litigation resources, to protect it. Between *Roe* and *Dobbs*, the U.S. Supreme Court heard approximately thirty cases related to various aspects of the abortion right created in *Roe*. See Cases—Abortion and Contraceptives, Oyez, <https://www.oyez.org/issues/423> [<https://perma.cc/B62Z-GWGU>] (last visited Aug. 11, 2025). There were also many state court cases that relied on state laws and constitutions that provided more protections than *Roe*. See, e.g., State Constitutions and Abortion Rights, Ctr. Reprod. Rts., <https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/> [<https://perma.cc/S6EM-ZGS2>] (last visited Oct. 13, 2025) (summarizing state court decisions related to abortion rights that have relied on state constitutional rights to privacy, liberty, and equality, among others).

99. Borelli, *supra* note 38 (emphasis omitted).

100. Fox & Ziegler, *supra* note 10, at 1563.

101. *Id.* at 1611–12.

102. See What We Do, FDA, <https://www.fda.gov/about-fda/what-we-do> (on file with the *Columbia Law Review*) (last updated Nov. 21, 2023).

‘products[]’ from donors to embryos” to allow for consolidation of this responsibility and better enforcement.¹⁰³ They believe their proposals would increase pressure for compliance with existing regulations related to “reporting, screening, testing, and reliability,” which presently fall to several agencies to enforce.¹⁰⁴

Existing regulations require screening for gamete donors and sellers as well as testing and storage of reproductive tissue to ensure there are no sexually transmitted infections in assisted reproduction.¹⁰⁵ Providers found out of compliance are subject to appropriate sanction.¹⁰⁶ Further, due to market pressures, commercial gamete sellers conduct a range of genetic tests not required by law, thus exceeding current regulatory standards.¹⁰⁷ Where rules already exist, the question is one of enforcement capacity, not rule changes, and consolidating enforcement in an already heavily burdened agency may not be fruitful. Further, the desire to obtain or maintain membership in crucial professional organizations like ASRM and SART may incentivize clinics to engage in best practices.¹⁰⁸ Members of the public can search for clinics in a SART database to confirm membership in one of the leading professional organizations for IVF providers in the United States.¹⁰⁹

103. Fox & Ziegler, *supra* note 10, at 1611–12.

104. *Id.* at 1612. Those agencies include the CDC and Centers for Medicare and Medicaid Services. *Id.*

105. See What You Should Know—Reproductive Tissue Donation, FDA, <https://www.fda.gov/vaccines-blood-biologics/safety-availability-biologics/what-you-should-know-reproductive-tissue-donation> (on file with the *Columbia Law Review*) (last updated Apr. 25, 2019).

106. The FDA can take enforcement action—including issuing orders to cease manufacturing and suspending or revoking licenses—when labs do not comply with regulations. See Enforcement Actions (CBER), FDA, <https://www.fda.gov/vaccines-blood-biologics/compliance-actions-biologics/enforcement-actions-cber> [<https://perma.cc/PTM8-S8J4>] (last updated Mar. 18, 2024).

107. See, e.g., An Overview of the Screening Process for Donor Sperm, Rocky Mountain Fertility Ctr.: Blog, <https://www.rockymountainfertility.com/blog/an-overview-of-the-screening-process-for-donor-sperm> [<https://perma.cc/N3VS-QUTS>] (last visited Aug. 6, 2025) (“Approximately 5% of men that seek to donate sperm meet the criteria. . . . The typical screening process takes anywhere from two to six months.”); Screening Standards for Sperm Donors, Cryos Int’l, <https://www.cryosinternational.com/en-us/us-shop/client/donor-sperm/sperm-donor-screening/> [<https://perma.cc/8UJM-QBSM>] (last visited Aug. 6, 2025) (discussing one large sperm bank’s extensive screening process for sperm donors).

108. See SART IVF Clinic Membership, Soc’y for Assisted Reprod. Tech., <https://www.sart.org/about-us/sart-ivf-clinic-membership/> [<https://perma.cc/5SSU-9KPK>] (last visited Aug. 6, 2025) (detailing SART membership benefits, including access to data for research, inclusion in SART’s searchable database for prospective patients, access to standard operating procedures to meet FDA requirements, and permission to use the SART logo in advertising).

109. See Find an IVF Clinic, Soc’y for Assisted Reprod. Tech., <https://www.sartcors.org/members/Search> [<https://perma.cc/2B64-LUM4>] (last visited Aug. 6, 2025) (providing a platform for prospective patients to ensure that a chosen clinic is a SART member and to read the standards required for membership, including those relating to advertising).

Second, IVF is already a prohibitively expensive endeavor for many prospective patients, and Fox and Ziegler's proposals risk raising the price even further for all individuals who purchase gametes, especially sperm, not just those who use it for IVF.¹¹⁰ The practical result is the recommendations may not benefit, and could actually injure, the populations Fox and Ziegler want to protect by pricing them out of an already exorbitantly expensive market.¹¹¹ This is especially strange to the extent that the concerns about negligence and liability, framed by the authors as largely focused on the mishandling of embryos, not gametes,¹¹² make gamete purchasers and providers collateral damage in a quest for reform.

In lieu of expanding the FDA's reach, Fox and Ziegler endorse creating a new federal agency dedicated to the oversight of assisted reproduction.¹¹³ This second possibility mimics agencies like the Human Fertilisation and Embryology Authority (HFEA) in the United Kingdom, which maintains close governmental supervision over reproductive technologies and the patients who use them.¹¹⁴ As they must, Fox and Ziegler recognize that replicating agencies from other countries is unrealistic in the United States because "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."¹¹⁵

An especially salient difference between the United States and the United Kingdom is the latter's commitment to healthcare as a human

110. Though Fox and Ziegler focus on IVF, their proposals would impact users of artificial insemination—one of the most low-tech and low-cost forms of assisted reproduction. Fox and Ziegler, *supra* note 10, at 1609–18 (outlining their proposals); IUI vs. IVF: The Procedures, Success Rates, and Costs, *Extend Fertility* (Sep. 3, 2020), <https://extendfertility.com/iui-vs-ivf/> [<https://perma.cc/K3HA-9D5Q>] (detailing how artificial insemination can cost one thousand dollars while the cost of an IVF cycle is, on average, over twelve thousand dollars).

111. Raising the price of sperm by requiring more testing will disproportionately impact single women and same-sex female couples, who comprise the majority of sperm purchasers in the United States. See Nellie Bowles, *The Sperm Kings Have a Problem: Too Much Demand*, *N.Y. Times* (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/business/sperm-donors-facebook-groups.html> (on file with the *Columbia Law Review*) (last updated June 25, 2023) ("About 20 percent of sperm bank clients are heterosexual couples, 60 percent are gay women, and 20 percent are single moms by choice, the banks said.").

112. See Fox & Ziegler, *supra* note 10, at 1602 ("LePage[']s . . . holding opened the possibility that the accidental destruction of an embryo could lead to ruinous liability . . .").

113. *Id.* at 1612–13.

114. See What We Do, Hum. Fertilisation & Embryology Auth., <https://www.hfea.gov.uk/about-us/> [<https://perma.cc/2DJC-RPY7>] (last updated Apr. 25, 2025) (describing how the HFEA regulates the fertility industry, provides information, and ensures ethical research).

115. Fox & Ziegler, *supra* note 10, at 1613.

right¹¹⁶—a veritable foreign concept in U.S. healthcare policy.¹¹⁷ Part of this commitment includes some public financing for assisted reproduction, though some policies uniquely burden single women and women in same-sex couples.¹¹⁸ Given these significant differences from the U.S. political and healthcare ecosystems, creating an agency that regulates without any mandate to provide financial resources for care is a shadow of what exists in other countries.

Even if the model of expanding agency purview or creating a new agency was appealing, what Fox and Ziegler suggest is so far out of step with the current moment as to be completely implausible. The second Trump Administration quickly began decimating federal agencies and halting wide-ranging research projects that it did not support, including research on IVF.¹¹⁹ HHS, which houses both the CDC and FDA, has experienced these drastic cuts.¹²⁰ Further, the Administration's cuts specifically target populations of people for whom access to IVF and assisted reproduction and expanded research about these procedures are crucial.¹²¹ The Administration's mass firings at the CDC, as Fox and Ziegler

116. See International Covenant on Economic, Social and Cultural Rights (ICESCR), Equal. & Hum. Rts. Comm'n, <https://humanrightstracker.com/en/un-treaty/icescr> [<https://perma.cc/6SRJ-MJJM>] (last updated Oct. 7, 2025) (identifying the United Kingdom as a signatory to the International Covenant on Economic, Social, and Cultural Rights, which includes a right to health, since 1976).

117. See Andrea S. Christopher & Dominic Caruso, Promoting Health as a Human Right in the Post-ACA United States, 17 *AMA J. Ethics* 958, 959–60 (2015) (“The focus in the US on health care financing and insurance is reflected in the ACA’s silence on a human right to health and health care.”).

118. See IVF, NHS, <https://www.nhs.uk/tests-and-treatments/ivf/> [<https://perma.cc/4P6Z-NB8F>] (last updated Apr. 15, 2025) (excluding sexual orientation and marital status as required considerations in granting public financing for IVF). But there are age restrictions on NHS coverage for IVF. The NHS will only fund a handful of cycles, and it requires patients to have tried multiple cycles of artificial insemination through intrauterine insemination before seeking IVF, which particularly impacts single women and same-sex female couples. NHS-Funded In Vitro Fertilisation (IVF) in England, Dep’t Health & Soc. Care, <https://www.gov.uk/government/publications/nhs-funded-ivf-in-england/nhs-funded-in-vitro-fertilisation-ivf-in-england> [<https://perma.cc/L8EG-7H2Z>] (last updated Sep. 11, 2025); see also Anna Tippet, Reproductive Rights Where Conditions Apply: An Analysis of Discriminatory Practice in Funding Criteria Against Would-Be Parents Seeking Funded Fertility Treatment in England, 26 *Hum. Fertility* 483, 487–89 (2023) (explaining that, in most circumstances, “it is an expectation that lesbians and single women go through at least 6 [intrauterine insemination] procedures”—which are usually self-funded—before becoming “eligible for IVF funding”).

119. Sarah McCammon, Trump Administration Cuts Team in Charge of Researching IVF, *NPR* (Apr. 7, 2025), <https://www.npr.org/2025/04/07/nx-s1-5352870/trump-administration-cuts-team-in-charge-of-researching-ivf> [<https://perma.cc/XK7S-MGDF>].

120. See Elena Shao & Ashley Wu, The Federal Work Force Cuts So Far, Agency by Agency, *N.Y. Times*, <https://www.nytimes.com/interactive/2025/03/28/us/politics/trump-doge-federal-job-cuts.html> (on file with the *Columbia Law Review*) (last updated May 12, 2025) (documenting a twenty-four percent workforce reduction at HHS).

121. See Alyssa Llamas & Harper Eisen, Status of Women’s Health: 100 Days Into the Trump Administration, *Commonwealth Fund: Blog* (May 27, 2025), <https://www.commonwealthfund.org/blog/2025/05/status-of-womens-health-100-days-into-the-trump-administration>.

point out,¹²² included the staff who worked on the National ART Surveillance System, the CDC initiative that enforced portions of the Fertility Clinic Success Rate and Certification Act of 1992.¹²³ While imperfect, IVF patients can use data from this surveillance system to better understand their chances for success and to identify providers from whom they want to receive treatment.¹²⁴ The fate of that data collection and reporting is now questionable.¹²⁵ If the Trump Administration is already scaling back current regulations on IVF, spending money on new staff to do more work within existing agencies or a new agency is a pipe dream.

This Administration is stacked with supporters of Project 2025,¹²⁶ a document which, as described earlier in this Piece and in *The New Abortion*, argues that children are best served when raised by their biological parents who are married and of the opposite sex.¹²⁷ Turning the Trump Administration's eye to the commercial sale of gametes would almost certainly not end with enhanced enforcement of testing requirements, but would instead lead to the kind of regulation that Fox and Ziegler want to avoid, including "onerous and pretextual 'quality' restrictions on clinics designed to drive them out of business."¹²⁸ It is unfathomable that any such effort conducted under the present Administration would not cause substantial harm to those whose reproductive plans are already most at risk for disruption.

wealthfund.org/blog/2025/how-trump-administrations-actions-first-100-days-womens-health (on file with the *Columbia Law Review*) (describing how the Trump Administration's changes have "effectively shutter[ed]" critical programs addressing maternal and women's health needs).

122. Fox & Ziegler, *supra* note 10, at 1622–23 & n.441.

123. See Llamas & Eisen, *supra* note 121; National ART Surveillance System, CDC (Dec. 10, 2024), <https://www.cdc.gov/art/php/nass/index.html> [<https://perma.cc/WZ8D-QZQA>] ("The Fertility Clinic Success Rate and Certification Act of 1992 mandates that clinics performing ART annually provide data to CDC . . . [and the] CDC publishes these clinic-specific success rates.").

124. See Ashley M. Eskew & Emily S. Jungheim, A History of Developments to Improve In Vitro Fertilization, 114 *Mo. Med.* 156, 159 (2017) ("[A] large amount of information is available allowing for detailed analysis of data for transparency and continued opportunities for improvement of patient outcomes.").

125. Roni Caryn Rabin, Trump Has Called for More Babies but Dismissed Fertility Experts, *N.Y. Times* (May 7, 2025), <https://www.nytimes.com/2025/05/07/health/trump-fertility-ivf-cdc.html> (on file with the *Columbia Law Review*) (last updated May 8, 2025).

126. See Faith Wardwell, The Key Project 2025 Authors Now Staffing the Trump Administration, *NBC News* (Mar. 12, 2025), <https://www.nbcnews.com/politics/trump-administration/key-project-2025-authors-now-staffing-trump-administration-rcna195107> [<https://perma.cc/R5KS-CYKN>].

127. See Severino, *supra* note 91, at 451 ("Families comprised of a married mother, father, and their children are the foundation of a well-ordered nation and healthy society. . . . 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.").

128. Fox & Ziegler, *supra* note 10, at 1613.

B. *Licensing, Monitoring, and Compliance*

The New Abortion's most plausible proposals fall under the category of licensing, monitoring, and compliance.¹²⁹ To avoid and track what Fox and Ziegler describe as “reproductive never events,” like the negligent destruction of embryos, transferring embryos into the wrong patient, and other catastrophic errors, they propose enhanced monitoring, more longitudinal studies, and better enforcement of safety standards.¹³⁰ Recognizing that the costs of their proposals will be passed on to the consumer (a tariff, if you will), they also suggest government subsidies to discourage price increases.¹³¹ But seeking federal subsidies to absorb increased costs is infeasible in our present political climate.¹³² Further, as Fox and Ziegler point out, professional organizations like SART and ASRM already create clinical accreditation requirements and issue reports on best practices.¹³³ The authors tacitly claim that these existing mechanisms are insufficient to address negligence,¹³⁴ but more regulation cannot guarantee total compliance or remove the risk of human error. Increased financial and human investment in enforcing existing IVF regulations could improve clinical safety and efficacy without burdening patients with rising healthcare costs.¹³⁵

Fox and Ziegler also suggest a way to respond to the issue of multifetal pregnancies, which are an increased risk during IVF.¹³⁶ Multifetal

129. See *id.* at 1614–18.

130. See *id.* at 1615–17 (“Key functions [of a basic clinic certification system] would involve monitoring fertility clinics and related entities, conducting longitudinal studies of existing practices, maintaining safety standards, and enforcing them.”).

131. New costs could arise from the need to hire additional staff and make other changes to comply with new rules. See *id.* at 1616.

132. See McCammon, *supra* note 119 (reporting on how the Trump Administration has gutted America’s public health infrastructure, including a team of CDC researchers responsible for collecting data about the safety and effectiveness of IVF clinics around the country).

133. See Fox & Ziegler, *supra* note 10, at 1597 (observing that several programs developed by professional societies and practitioners provide IVF laboratory data to the CDC and publish reports on best practices); see also ASRM, *Oversight of IVF*, *supra* note 71 (describing the “complex and comprehensive network of federal and state regulations and professional oversight” in IVF).

134. See Fox & Ziegler, *supra* note 10, at 1597 (“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.”).

135. See Am. Soc’y for Reprod. Med., *Assisted Reproductive Technology (ART) Oversight: Lessons for the United States From Abroad* 1, 12–14 (2025) https://www.asrm.org/globalassets/_asrm/advocacy-and-policy/advocacy-resources/asrm-cpl-white-paper-international-reg-of-art-2025.pdf [<https://perma.cc/34YP-GVKU>] (stating that “countries like Australia and the UK offer more comprehensive public funding and transparent regulatory frameworks, improving ART patients’ access and outcomes” and that “sufficient funding is vital to access assisted reproductive technology and successful oversight”).

136. See Fox & Ziegler, *supra* note 10, at 1618 (“[W]e would offer government incentives to reinforce evidence-based recommendations . . .”).

pregnancies heighten risks for pregnant people and the fetuses they carry.¹³⁷ Again, Fox and Ziegler seek to tackle this problem with recommendations and government incentives¹³⁸ that are unlikely to become a reality. Their chosen example refutes their larger argument about the ineffectiveness of professional self-regulation.¹³⁹ ASRM guidelines, which are issued and periodically revised to recommend the best practices in embryo transfers,¹⁴⁰ have substantially decreased the rate of multiple births for IVF patients, even absent the passage of new laws.¹⁴¹ Compliance with IVF safety standards and guidelines through professional self-regulation has worked, and other issues Fox and Ziegler discuss could be addressed by the same, especially when combined with increased enforcement of existing laws and regulations.

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

Fox and Ziegler offer a set of proposals to combat the IVF industry's purported lack of transparency about wrongdoing.¹⁴² They believe their suggestions would incentivize insurance companies to put only the best fertility care providers in their networks and help patients better identify error-prone providers.¹⁴³ The lack of existing data about the IVF errors that Fox and Ziegler believe occur could mean people are hiding their mistakes, or it could mean that there are not copious failures of this sort happening in American IVF clinics. This author is wary of advocating for legislative change by casting aspersions on an entire industry without data. This tactic mirrors those employed by anti-choice advocates to demonize abortion providers and justify targeted regulation of abortion providers

137. See *id.* at 1617 (“Multiple-birth deliveries are associated with worse maternal and infant outcomes . . . compared to singletons.”).

138. *Id.* at 1617–18.

139. See *id.* (suggesting that medical boards, staffed by doctors, could discipline or revoke the medical licenses of doctors who violate regulations).

140. See Prac. Comm., Am. Soc’y for Reprod. Med. & Prac. Comm., Soc’y for Assisted Reprod. Tech., Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion, 116 Fertility & Sterility 651, 651 (2021) (“The American Society for Reproductive Medicine’s . . . guidance for the limits to the number of embryos to be transferred during in vitro fertilization (IVF) cycles aims to promote singleton gestation and reduce the number of multiple pregnancies while maximizing the cumulative live birth rates.”).

141. See Prac. Comm., Soc’y for Reprod. Endocrinology & Infertility, Quality Assurance Comm., Soc’y for Assisted Reprod. Tech. & Prac. Comm., Am. Soc’y for Reprod. Med., Multiple Gestation Associated With Infertility Therapy: A Committee Opinion, 117 Fertility & Sterility 498, 498–99 (2022) (“IVF twin births reported by the Society of Assisted Reproductive Technology (SART) have dropped from over 30% in 1998 to only 9.7% in 2018, and IVF high-order multiple gestations have dropped from 7%–0.2% over the same time frame.”).

142. See Fox & Ziegler, *supra* note 10, at 1618–21 (proposing mechanisms for IVF provider disclosure regarding patient experience, profit incentives and marketing claims, and safety).

143. *Id.* at 1618.

(TRAP) laws.¹⁴⁴ Ultimately, those advocacy efforts have not benefited patients.¹⁴⁵ Any instance of preventable error and harm caused by medical malpractice for which there is no available remedy is a failure of the tort system, potentially rectifiable by state law, which is where the law of torts resides almost exclusively,¹⁴⁶ thus speaking to the need for a state-based reform strategy.¹⁴⁷ Further, there might be opportunities for more aggressive self-regulation, including requirements of transparency for admission of errors as a prerequisite to SART or ASRM membership.¹⁴⁸ No doubt, incentives for hiding wrongdoing are significant for bad actors, but there are also incentives for ignoring practice guidelines about embryo transfers in the hope of increasing a clinic's success rate. Even so, the reduction in multiples created through IVF speaks to the industry's ability to focus on ethical practice.

Fox and Ziegler acknowledge that the FTC is already charged with monitoring and enforcing regulations about truth in advertising but essentially argue that a new agency could do a better job.¹⁴⁹ In the absence

144. See *infra* note 154 and accompanying text.

145. See Graham Gardner, *The Maternal and Infant Health Consequences of Restricted Access to Abortion in the United States*, J. Health Econ., Dec. 2024, at 1, 14 (noting that “TRAP laws increase rates of adverse cardiovascular health outcomes [and chronic hypertension] among birthing people” and “increase racial disparities in infant health outcomes at birth”).

146. See Kevin M. Lewis & Andreas Kuersten, Cong. Rsch. Serv., IF11291, *Introduction to Tort Law* (2023), https://www.congress.gov/crs_external_products/IF/PDF/IF11291/IF11291.4.pdf [<https://perma.cc/T4HF-X5GQ>] (“With a few significant exceptions, tort law is largely a matter of state rather than federal law. Tort law has also historically been a matter of common law rather than statutory law; that is, judges (not legislatures) developed many of tort law’s fundamental principles through case-by-case adjudication.”).

147. The legal history in *The New Abortion* discusses how abortion advocates understand the broader risks of the anti-choice personhood agenda, including enhanced criminalization of the conduct of pregnant women. Fox & Ziegler, *supra* note 10, at 1574–88. Unfortunately, it does not explore how any of its proposals might also feed the personhood agenda, which is a dangerous omission. If the destruction of an extracorporeal embryo warrants civil redress, the same could be argued of an embryo destroyed by the negligent or intentional acts of a pregnant person, potentially leading to more criminalization of pregnancy. See Pregnancy Just., *The Role of the Viability Line in Pregnancy Criminalization* 1, 18 (2025), <https://www.pregnancyjusticeus.org/wp-content/uploads/2025/05/Viability-Line-Report.pdf> [<https://perma.cc/Y96C-NXRM>] (“When the viability line is enshrined in state legislation, court decisions, or constitutional amendments in any form, the criminalization of pregnancy outcomes often follows.”).

148. See Ethics Comm., Am. Soc’y for Reprod. Med., *Disclosure of Medical Errors and Untoward Events Involving Gametes and Embryos: An Ethics Committee Opinion*, 122 *Fertility & Sterility* 814, 817 (2024) (“Respect for patients means providing them with the information necessary to understand their situations and to make choices about future courses of treatment. Such information includes telling patients when . . . members of the medical team have made an error or mistake that affects the [patient’s] well-being or goals . . .”).

149. See Fox & Ziegler, *supra* note 10, at 1620–22 (“The Federal Trade Commission is authorized in theory to prohibit unfair and deceptive practices and the dissemination of

of any viable path forward for the creation of a new agency, pushing for better enforcement from the agency already tasked with this job makes significantly more sense from the perspective of what is possible. The same is true for the goal of greater information sharing. As previously discussed, Congress passed the Fertility Clinic Success Rate and Certification Act to provide consumers with better data on individual clinic success rates.¹⁵⁰ Here, again, is an example of how change to the status quo can happen without creating new agencies or new responsibilities for existing agencies. When it became clear that some providers were gaming the system, such as by refusing to work with patients whose chances of successfully achieving a pregnancy were minute, Congress updated the Act to change the reporting system to create greater transparency for IVF patients.¹⁵¹

Perhaps the most worrying suggestion from Fox and Ziegler, if only for its deceptive simplicity, is that the federal government impose national standards for informed consent for IVF patients. They argue that this would ensure a standard level of information sharing, including information about side effects and chances of success, which is already a basic part of informed consent to medical care, including IVF.¹⁵² Fox and Ziegler, however, suggest that informed consent includes “communicating the fact of [the clinic’s] 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 . . . health and well-being.”¹⁵³ This is a radical suggestion that far exceeds the normal regulation of informed consent in medical practice offered with scant justification for treating IVF differently from other forms of healthcare.

Finally, while this Piece emphatically imputes no ill will to Fox and Ziegler, the call for national standards for informed consent mimics biased informed consent requirements governing abortion provision in many restrictive states under TRAP laws.¹⁵⁴ In some cases, those laws force

misleading claims regarding medical services—but in practice, it has rarely exercised this power in meaningful ways.”).

150. 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)).

151. See Reporting of Pregnancy Success Rates From Assisted Reproductive Technology (ART) Programs, 89 Fed. Reg. 70,189 (Aug. 29, 2024) (describing changes to the reporting process under the Fertility Clinic Success Rate and Certification Act of 1992 to maintain accurate reporting of ART success rates).

152. Fox & Ziegler, *supra* note 10, at 1618–21. Unsurprisingly, ASRM also has an Ethics Committee opinion on the importance of informed consent in reproductive healthcare. See Ethics Comm., Am. Soc’y for Reprod. Med., Informed Consent in Assisted Reproduction: An Ethics Committee Opinion, 119 Fertility & Sterility 948 (2023) [hereinafter ASRM, Informed Consent].

153. Fox & Ziegler, *supra* note 10, at 1620.

154. See Targeted Regulation of Abortion Providers, Guttmacher Inst., <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers> [https://perma.cc/37LL-JS5Q] (last updated Oct. 2, 2025) (summarizing TRAP laws in twenty-four states that impose facility structural requirements and require clinics to get admitting privileges with local hospitals).

healthcare providers to share false information, shame patients, and delay care.¹⁵⁵ Anything that moves in this dangerous direction is especially perplexing given the myriad resources to help IVF providers ensure patient informed consent.¹⁵⁶ Additionally, since 1992 when the Fertility Clinic Success Rate and Certification Act became law, the plethora of publicly accessible information has only grown, and potential patients no longer need to rely on advertising from clinics for assistance in learning more about the rigors of IVF treatment.¹⁵⁷ SART and the CDC provide online tools through which IVF patients can predict their chances for success based on characteristics like age.¹⁵⁸ There are publicly available rankings of IVF clinics.¹⁵⁹ IVF patients have extensive access not only to general information about IVF but to substantive reviews of fertility clinics made by patients on public forums or on search engines like Google.¹⁶⁰ None of this is to say that fertility care providers should be free to lie or deceive patients, including by failing to secure appropriate informed consent at all stages of treatment. The tools for consumer education are significant and accessible to anyone with a smartphone or access to the computers at a public library. Broad shifts in law that will inevitably

155. See Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, *Guttmacher Pol’y Rev.*, Fall 2006, at 6, 6–11 (criticizing counseling materials for providing misleading or incorrect information about abortion, including medically inaccurate claims on increased risks of breast cancer and severe negative mental health outcomes after abortion, assertions on fetal pain, and referrals to crisis pregnancy centers that provide false information about the health effects of abortion).

156. ASRM, *Informed Consent*, *supra* note 152, at 949–50 (outlining practices for ethical informed consent, e.g., shared decisionmaking, disclosure of alternatives, attention to patients’ cultural background, and ongoing discussion of treatment and options).

157. Patients have access to books, videos, online communities, and more. See, e.g., Rebecca Fett, *It Starts With the Egg: How the Science of Egg Quality Can Help You Get Pregnant Naturally, Prevent Miscarriage, and Improve Your Odds in IVF* 12 (2d ed. 2019) (“This book will be your guide to specific strategies that are supported by strong scientific research [into improving egg quality].”); Cleveland Clinic, *How Does In Vitro Fertilization (IVF) Work? A Step-by-Step Explanation*, at 00:29–04:30 (YouTube, Nov. 16, 2022), <https://www.youtube.com/watch?v=fnYBLYfFx2Y> (on file with the *Columbia Law Review*) (detailing the process of IVF); r/IVF, Reddit, <https://www.reddit.com/r/IVF/> (last visited Sep. 30, 2025) (discussing IVF in an online forum with current, former, and potential patients).

158. SART’s IVF Success Estimator allows would-be IVF patients to enter information about themselves (age, weight, height, past use of IVF, previous pregnancies, and information about any diagnoses and what eggs will be used) to allow people to calculate their own chance of success with using IVF. See *Predict Your IVF Success*, Soc’y for Assisted Reprod. Tech., <https://sartcorsonline.com/Predictor/PatientV2Landing> [<https://perma.cc/9RZT-NYLB>] (last visited Aug. 12, 2025).

159. E.g., Alexis Kayser, *America’s Best Fertility Clinics 2025*, *Newsweek*, <https://rankings.newsweek.com/americas-best-fertility-clinics-2025> [<https://perma.cc/S8UV-ETUD>] (last visited Aug. 13, 2025).

160. See, e.g., *id.* (noting that rankings are compiled, in part, using patient satisfaction based on Google reviews).

incorporate changes that target the most marginalized IVF patients warrant caution.

Even more, accuracy of information is yet another area for which federal legislation exists. The Fertility Clinic Success Rate and Certification Act of 1992 addresses the issue of advertising exaggerated success rates,¹⁶¹ though Fox and Ziegler raise concerns that fertility industry lobbyists watered down that law.¹⁶² They suggest that this new era of compromise post-*Dobbs* creates a way for “more robust information-forcing legislation that responds to the deficiencies of past legislation.”¹⁶³ Any such attempt to buttress existing laws will likely face the same well-funded industry lobbyists and the same questions about whether the real issue is lack of enforcement.¹⁶⁴

Mandated informed consent language would not solve the issues of causation, tangible injury, and limited compensation that Fox and Ziegler raise in their critique of existing tort law,¹⁶⁵ and the inclusion of language about the for-profit nature of IVF clinics is especially baffling. Presumably, the vast majority of adult patients who receive care outside of settings where healthcare providers are clearly volunteering their services understand that payment is how the physician makes their living. Singling out IVF providers suggests that their profit motive is particularly nefarious, which is eerily reminiscent of anti-choice claims about abortion providers making money at the cost of the lives of the “unborn” and the health of pregnant people.¹⁶⁶ Implicitly singling out IVF providers for engaging in nefarious practices for profit is patently not the goal of *The New Abortion*, but rhetoric about IVF providers should be measured and accurate in a

161. Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, § 2(a)(1), 106 Stat. 3146, 3146 (codified at 42 U.S.C. § 263a-1 (2018)) (mandating disclosure of “pregnancy success rates achieved by such program through each assisted reproductive technology”).

162. Fox & Ziegler, *supra* note 10, at 1621 (“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.”).

163. *Id.*

164. The FTC has an active enforcement arm that targets false claims in healthcare, potentially curtailing enforcement concerns. Health Claims, FTC, <https://www.ftc.gov/news-events/topics/truth-advertising/health-claims> [<https://perma.cc/RB8G-9KLP>] (last visited Aug. 7, 2025). It also targets false claims related to fertility. See, e.g., Lisa Lake, Considering Fertility Products? Spot the Fake Claims, FTC: Consumer Advice (May 26, 2021), <https://consumer.ftc.gov/consumer-alerts/2021/05/considering-fertility-products-spot-fake-claims> [<https://perma.cc/3UQ3-5XBE>] (“The FTC and the Food and Drug Administration (FDA) are teaming up to stop companies marketing fertility dietary supplements from deceiving people about the effectiveness of their products and implying that they meet FDA guidelines when they don’t.”).

165. Fox & Ziegler, *supra* note 10, at 1614–21.

166. See, e.g., Chris Pandolfo, World’s Largest Pro-Life Group Asks Congress to Investigate Planned Parenthood Profits From Abortion Pills, Fox News (Mar. 1, 2023), <https://www.foxnews.com/politics/worlds-largest-pro-life-group-asks-congress-investigate-planned-parenthood-profits-abortion-pills> [<https://perma.cc/D889-QQV8>].

world in which violence against abortion providers, encouraged by dangerous rhetoric, remains a substantial concern.¹⁶⁷ A future in which violence haunts IVF providers is neither welcome nor desirable.¹⁶⁸

CONCLUSION

Fox and Ziegler should be applauded for wading into the regulatory morass surrounding the fertility industry, which goes beyond IVF. A business that makes babies creates complex regulatory dilemmas often ill-suited to the bright line rules or the blunt remedies law offers.¹⁶⁹ The overarching concern of this Piece has been how best to regulate IVF given the persistence of stratified reproduction, a deep history of discriminatory regulation of procreation, unjustified incursions into the right to procreate using assisted reproduction, the potential for mirroring regressive anti-abortion legislation, and a political climate ripe for targeting disfavored family forms. In searching for compromise, Fox and Ziegler risk an outcome that declares victory from maintaining IVF's legality even if that compromise maintains or even deepens disparities in access and success with treatment.

There are many questions that *The New Abortion* does not resolve satisfactorily. Is the purported regulatory vacuum the central problem to be remedied, or is it the failure to vigorously enforce existing regulation? If there are true gaps in regulation, can they only be remedied through new laws, regulations, or agencies? Even if new regulation is proper and necessary, are federal remedies viable and preferred, especially given the role some state courts and state constitutions are playing in fighting

167. See NAF 2024 Violence & Disruption Report, Nat'l Abortion Fed'n, <https://prochoice.org/our-work/provider-security/2024-naf-violence-disruption/> [<https://perma.cc/R5EP-WH6F>] (last visited Aug. 7, 2025) ("Anti-abortion extremists continue to perpetrate high levels of violence and harassment against abortion providers, including arsons, obstructions, assaults, constant picketing, death threats, and other activities meant to intimidate and terrorize abortion providers.").

168. In May 2025, a car bomb exploded outside of American Reproductive Centers, a fertility clinic in Palm Springs, California. The suspect killed in the blast was later identified as a believer in anti-natalist ideology. Tom Winter, Jonathan Dienst, Andrew Blankstein & Viola Flowers, FBI Links California Fertility Clinic Bombing to Anti-Natalist Ideology, NBC News (May 18, 2025), <https://www.nbcnews.com/news/us-news/palm-springs-fertility-clinic-bomb-anti-natalism-rcna207543> [<https://perma.cc/HW3N-5TTC>] (last updated May 19, 2025). The bombing raised fears of potential future violence against other IVF clinics. Elizabeth Chuck, Bombing at IVF Clinic Should Be a Security Wake-Up Call for Fertility Centers, Experts Say, NBC News (May 16, 2025), <https://www.nbcnews.com/news/us-news/bombing-ivf-clinic-security-wake-call-fertility-centers-experts-say-rcna207675> [<https://perma.cc/9LYU-U233>].

169. See Teneille R. Brown, Abortion and the Extremism of Bright Line Rules, 119 Nw. U. L. Rev. Online 1, 6–7 (2024), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1338&context=nulr_online [<https://perma.cc/P243-5R5H>] ("In the case of abortion, and many other phenomena that rely on biological criteria, we benefit from acknowledging nuance in our legal rules, legislation, and rulemaking.").

reproductive oppression?¹⁷⁰ Though well-intentioned, Fox and Ziegler's regulatory proposals have serious implications for buyers and sellers in fertility markets and create higher burdens on noncoital reproduction than exist for those who procreate coitally. These different standards must be justified by something more than the fact that regulation is more practicable for those struggling with infertility.

In a political moment rife with bombast; disinformation; and impossible-to-keep, pie-in-the-sky promises, a federal compromise on IVF that protects legality but does not take rights from vulnerable communities is a veritable impossibility. Unfortunately, history tells us that political compromises seldom lean in favor of the most marginalized. Given the typical consumer of IVF—white, upper class, and married¹⁷¹—new IVF laws are unlikely to create total or virtual illegality; rather, they will protect the interests of the technology's primary consumers, which means more private insurance coverage and perhaps access to testing to optimize the yield of nondisabled children. Therefore, any push from IVF's proponents to stave off abortion-like restrictive regulation by creating their own abortion-like regulation is inapt. Just as abortion opponents created broad TRAP laws,¹⁷² IVF's proponents and protectors should be wary of allowing lawmakers to create a new category of targeted procreative regulation for patients who use assisted reproduction, a category that Professor Katherine Kraschel has described as TRIP laws, or targeted regulation on IVF provision.¹⁷³ Ultimately, in the effort to be big enough to matter but small enough to avoid fracture, the legislative proposals offered by Fox and Ziegler do too little and too much.

An alternative to placing IVF in the crosshairs of a Republican-controlled Congress is to engage in conversation about what pre-*Dobbs* abortion rights strategies need to be reevaluated, reformed, or jettisoned. The legal history in *The New Abortion* illuminates some deficiencies and builds anticipation for subsequent work that mines those lessons more

170. See After *Roe* Fell: Abortion Laws by State, Ctr. Reprod. Rts., <https://reproductive-rights.org/maps/abortion-laws-by-state/> [<https://perma.cc/CL9S-VK9Y>] (last visited Aug. 6, 2025) (illustrating states that protect abortion post-*Dobbs*).

171. See *supra* Part I.

172. See Targeted Regulation of Abortion Providers, *supra* note 154 (“Most of these laws—referred to as targeted regulation of abortion providers, or TRAP laws—go beyond what is necessary to ensure patient safety. They vary widely in severity, though some are intended to be so burdensome that they shutter clinics that provide abortion care.”).

173. These laws, Kraschel explains, “rob patients of their ability to build their families by compelling physicians to provide less effective, more expensive care.” Katherine L. Kraschel, The Beginning of a Bad TRIP—Alabama's Embryonic Personhood Decision and Targeted Restrictions on IVF Provision, Petrie-Flom Ctr. (Feb. 21, 2024), <https://petrieflom.law.harvard.edu/2024/02/21/the-beginning-of-a-bad-trip-alabamas-embryonic-personhood-decision-and-targeted-restrictions-on-ivf-provision/> [<https://perma.cc/8RDK-RAKC>]. Additionally, they “erect barriers and exacerbate long standing racial disparities in accessing fertility care, and they will disproportionately impact members of the LGBTQ+ community who wish to build families through fertility treatments.” *Id.*

expansively. Those lessons, from the perspective of this author, include the risks of relying on tenuous federal protections not explicitly enumerated in the Constitution; the need to sustain and support state-level advocacy rooted in grassroots activism and led by local RJ leaders; the necessity of treating reproductive healthcare as an integrated model and avoiding exceptionalism, whether negative or positive, for particular patients or particular types of care; the need for fertility care providers to embrace the unambiguous connections between their work and abortion provision; a commitment to justice instead of just rights when it comes to reproduction, which requires centering the experiences of marginalized people; and the need for radical and brave leadership to create and sustain progress.

The question of leadership is especially crucial. The 2025 Black Reproductive Justice Policy Agenda, created through the collaboration of over fifty Black-led organizations and individuals, provides one roadmap for what that leadership could look like and what it might seek in terms of legislation.¹⁷⁴ In that agenda, the members of the coalition reaffirm their commitment to their principles in the face of a frightening assault on many communities of color, but especially Black communities. They write:

[R]est assured, in 2025, even as we see political and policy conditions continue to deteriorate in our country, particularly for Black women, girls and gender-expansive people, this agenda takes not one step back from its goals. Our commitment to Reproductive Justice is unwavering. Our demands are bold; our direction is clear.¹⁷⁵

There is room for multiple strategies in any movement, but the history of biased reproductive regulation in the United States illuminates the need to not just include marginalized people, but to allow those people to lead.¹⁷⁶ If there is to be RJ:

174. 2025 Black Reproductive Justice Policy Agenda, *supra* note 66, at 1.

175. *Id.* at 2.

176. The inadequacy of incrementalism and moderation can be seen in the political rallying cry of “Restore *Roe*” after the *Dobbs* decision. Melissa Gira Grant, “Restore *Roe*!” Is a Bad Rallying Cry, *New Republic* (Mar. 20, 2024), <https://newrepublic.com/article/179961/abortion-ballot-restore-roe-biden> [<https://perma.cc/43KP-BESP>]. Rather than seeing the end of *Roe* as an opportunity to aggressively seek a radical shift in abortion politics and legislation, mainstream politicians sought a return to a system of abortion regulation under *Roe* that fundamentally failed to provide true access to abortion care to thousands of women, including women on Medicaid, incarcerated women, and young women forced to notify parents or seek a judicial bypass before they could end unwanted pregnancies. See State of the Union: Restoring *Roe v. Wade* Is Not Enough, In Our Own Voice: Nat’l Black Women’s Reprod. Just. Agenda (Mar. 8, 2024), <https://blackrj.org/state-of-the-union-restoring-roe-v-wade-is-not-enough/> [<https://perma.cc/M7N7-YY3H>] (“A nationwide right to abortion care is only the minimum to ensuring bodily autonomy. We are calling . . . for eliminating all barriers to reproductive health care, including abortion care, providing public funding to close gaps in access to care and preventing the criminalization of pregnancy.”).

[A]ll members of our society—particularly Black women, girls, and gender-expansive people—[must] have equitable access to the social, economic and political supports that enrich our lives. This equity is not optional—it is the essential correction to historic and persistent injustices and ensures that Black women, girls, and gender-expansive people can reach our full potential.¹⁷⁷

This is the work before us. It demands new strategies, new coalitions, and cannot be achieved through moderation.

177. 2025 Black Reproductive Justice Policy Agenda, *supra* note 66, at 2.