

ARTICLES

THE JURISPRUDENCE OF PROCLAMATION: FETAL PERSONHOOD AND THE STRUGGLE OF LEGAL AUTHORITY

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ABSTRACT

The Alabama Supreme Court’s 2024 ruling in LePage v. Center for Reproductive Medicine, which granted the legal status of children to cryopreserved embryos, is not just a landmark in the nation’s ongoing abortion disputes. It is a shift in how the law thinks about personhood and reproductive rights, with implications for IVF practices, as well as abortion, contraception, and family planning. This article argues the decision is a struggle over the source and method of legal authority itself. It seeks to force American law to abandon its commitment to what I call the internal authority—a jurisprudence of reasoned accommodation and public deliberation, and instead submit to a jurisprudence of proclamation tethered to external authority, which draws on absolute claims about when life begins. This article shows how this proclamatory jurisprudence exploits the ambiguities of reproductive technology to construct a constitutionally defective status I call “asymmetrical personhood,” a legal fiction that grants embryos a single, symbolic right, such as a wrongful death claim, for the functional purpose to subordinate the established liberty and equality rights of born persons. The selective personhood status, and the proclamation behind it, violates the Fourteenth Amendment principles against state-imposed dogma and gender-based discrimination. To restore constitutional coherence, this article proposes concrete judicial and legislative remedies, a judicial doctrine of Metaphysical Abstention and a framework of Relational Stewardship, to govern assisted reproductive technologies.

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INTRODUCTION

A legal judgment is an act of power.¹ Backed by the state, a court’s words can redefine personhood, rearrange family bonds, and even exert control over the human body. When a legal system declares a cryopreserved embryo to be a child

1. See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1612 (1986) (discussing that law is not a mere system of rules, but a powerful force that shapes and destroys lives, thereby requiring that legal interpreters such as judges and legal scholars critically examine the narratives they create, especially in cases of competing legal orders).

one week, then declares that it can be routinely discarded with full immunity the next, it does more than contradict itself. It reveals a deep lesion at the heart of its authority—a system of power deployed in a way that is incoherent and dangerously capricious. This is the paradox now facing the American legal order, and nowhere has this conflict been made starker than in Alabama.

In February 2024, the Alabama Supreme Court's decision in *LePage v. Center for Reproductive Medicine* declared that cryopreserved embryos are “extrauterine children” for the purposes of the state's Wrongful Death of a Minor Act.² Although the majority based its argument on a textual interpretation, its theoretical core clearly appeals to a pre-political source of theological authority. Chief Justice Parker's concurring opinion clearly reflects this. He wrote that Alabama's citizens voted to reflect and express the glory of God,³ and “human life cannot be wrongfully destroyed without incurring the wrath of a holy God.”⁴ The *LePage* ruling appeared to impose the highest duty of care upon IVF clinics to protect these *new children*.

However, the immediate consequence of the verdict is not legal clarity, but social chaos. Major IVF clinics across the state halted services due to fears of catastrophic liability.⁵ In response to this panic, the Alabama legislature retreated quickly. Within weeks, it enacted an immunity statute, SB 159, that exempts IVF providers from liability for the “damage to or death of an embryo” during the standard IVF process.⁶ To prevent the collapse of IVF services, the legislature approved the routine destruction or discarding of some embryos in order to successfully conceive others.

This puts the IVF clinics in a legally and logically impossible position. Alabama law now commands these clinics to (A) treat each cryopreserved embryo as a person owed a supreme duty of care AND (Not-A) engage in a process that necessarily involves the selection and destruction of these same *persons*. The result is the creation of a quicky legal chimera, an entity that is simultaneously a rights-bearing subject and a disposable object. How can a legal system accommodate this? This kind of doctrinal impasse stems from a deep conflict over the nature of legal

2. *LePage v. Ctr. for Reprod. Med.*, P.C., 408 So. 3d 678, 680 (Ala. 2024) (“The central question . . . is whether the Act contains an unwritten exception to that rule for extrauterine children – that is, unborn children who are located outside of a biological uterus at the time they are killed. Under existing black-letter law, the answer to that question is no: the Wrongful Death of a Minor Act applies to all unborn children, regardless of their location.”). The statute at issue was Alabama's Wrongful Death of a Minor Act, Ala. Code § 6-5-391, originally enacted in 1872. *Id.* at 683.

3. *Id.* at 694 (Parker, C.J., concurring) (“[E]ven before birth, all human beings bear the image of God, and their lives cannot be wrongfully destroyed without incurring the wrath of a holy God. . . .”). For an analysis of the influence of theological language in state rulings on personhood, see generally MARTHA NUSSBAUM, *THE CLASH WITHIN: DEMOCRACY, RELIGIOUS VIOLENCE, AND INDIA'S FUTURE* 123 (2007) (discussing the entanglement of state law and religious doctrine in shaping legal outcomes).

4. *LePage*, 408 So. 3d at 693.

5. See, e.g., *The Alabama Supreme Court's Ruling on Frozen Embryos*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Feb. 27, 2024), <https://perma.cc/KUG5-Y6J3> (noting that within a week of the ruling, major fertility clinics, including at the University of Alabama at Birmingham, paused IVF treatments due to concerns about civil and criminal liability).

6. S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024) (providing civil and criminal immunity to any individual or entity in connection with “death or damage to an embryo” when providing or receiving IVF services).

authority, which threatens the rule of law itself because it undermines the intrinsic coherence of law.

The conditions created by *Dobbs v. Jackson Women's Health Organization* created the perfect breeding ground for such conflicts to thrive.⁷ By overturning nearly fifty years of precedent that had protected a constitutional right to abortion, *Dobbs* returned the issue to the states, effectively creating fifty laboratories for new and often radical legal theories of fetal personhood to be tested and implemented.⁸

At the heart of this fetal personhood struggle lies the Fourteenth Amendment. The textual and historical meaning of *person* in the Due Process and Equal Protection Clauses has been a subject of intense scholarly debate, and has been reignited fiercely. Based on the originalist interpretations proposed by scholars such as Joshua Craddock, proponents of fetal personhood argue that prenatal life from conception should be protected by the amendment.⁹ This claim, if accepted, would directly conflict with the existing jurisprudence and historical background of the Supreme Court.¹⁰ Although *Dobbs* overruled *Roe v. Wade*¹¹ and *Planned Parenthood v. Casey*¹², it did not extinguish the liberty interests concerning bodily integrity, procreation, and family autonomy recognized in cases from *Griswold v. Connecticut*¹³ to *Obergefell v. Hodges*.¹⁴ The current constitutional struggle thus pits expansive state claims of prenatal personhood against these persisting, constitutionally protected liberties of born persons. The arguments for Equal

7. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 232 (2022) (The *Dobbs* majority opinion explicitly returned the authority to regulate abortion to the states, stating that the Constitution does not confer a right to abortion.); See MARY ZIEGLER, PERSONHOOD: THE NEW CIVIL WAR OVER REPRODUCTION 219 (2026) (arguing that the fetal personhood movement, emboldened by *Dobbs*, seeks to establish constitutional rights for the unborn from the moment of fertilization).

8. Justice Blackmun noted in *Roe* that the personhood question was the central unresolved issue: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." *Roe v. Wade*, 410 U.S. 113, 156–57 (1973). *Dobbs* did not resolve this question, leaving it for states to address. See also Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (January 2024) (arguing that the Court's appeal to democracy is misleading, as it "misapprehends the processes and institutions that are constitutive of democracy" and is more about advancing a specific ideological agenda, potentially setting the stage for the recognition of fetal personhood); PREGNANCY JUSTICE, UNPACKING FETAL PERSONHOOD 4 (Sept. 2024) (defining fetal personhood as a "radical legal doctrine" that creates a direct conflict between the rights of pregnant people and those of the unborn).

9. See Joshua J. Craddock, *Personhood After Dobbs*, 74 CATH. U. L. REV. 536, 538 (2025) (arguing that the historical evidence shows that when the Fourteenth Amendment was ratified in 1868, the word "person" had a "settled public meaning that included every human being—children in the womb among them").

10. The Supreme Court in *Roe v. Wade* explicitly considered and rejected the argument that a fetus is a "person" under the Fourteenth Amendment, concluding that the word's usage in the Constitution applies only postnatally. 410 U.S. 113, 158 (1973).

11. *Dobbs*, 597 U.S. at 231.

12. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Dobbs*, 597 U.S. at 231.

13. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). *Griswold* established a constitutional right to privacy for married couples regarding the use of contraceptives, finding this right in the "penumbras" of the Bill of Rights. *Id.* at 484.

14. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015). *Obergefell* held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.*

Protection put forward by scholars like Cary Franklin and Reva Siegel emphasize that this legal framework for elevating the status of the fetus at the expense of the pregnant individual has profound sexist implications.¹⁵

The conventional framing of this fetal personhood debate as a *culture war* misses the underlying legal mechanism that generates deep contradictions behind it. That frame fails to explain the *how*—the specific procedural tactics and claims to authority through which one contested worldview seeks to impose itself as constitutional fact. In this article, I contend that it also rests on a flawed assumption that drives the current fetal personhood movement: that legal status, especially for entities at the threshold of life, must reflect or even be determined entirely by a specific external assertion about the true starting point of life. Although the proponents of fetal personhood are not monolithic—they argue from the perspectives of originalist interpretations of the Constitution,¹⁶ New Natural Law theories,¹⁷ and substance ontology,¹⁸ in addition to direct theological claims¹⁹—they have in common their jurisprudential function. They all seek to align legal personhood with a singular and externally derived ontological origin.

I challenge this shared jurisprudential function as fundamentally incompatible with the structure and normative commitments of a pluralistic and liberal constitutional order. When the law is used to enforce a controversial metaphysical truth as the basis for defining legal status and distributing fundamental rights, it inevitably abandons what I have called *internal authority*—a jurisprudence that derives legitimacy from public reason and procedural justice—in favor of *external authority*, a jurisprudence where law claims its authority by claiming itself as a conduit for a single external truth.

The central inquiry of the current fetal personhood debate is not just what should be the moral or legal status of the embryo or fetus, but *how*, and on what authority, the law tries to decide. The crisis is one of legitimacy over the very source of law itself. It is triggered by an attempt to replace the established constitutional processes with a proclaimed pre-legal truth.

The fault lines of this conflict paint the contours of ancient jurisprudential divides—positivism vs. natural law, public reason vs. private faith.²⁰ However, to consider it merely as another chapter in this long-running debate would miss out

15. See Cary Franklin & Reva Siegel, *Equality Emerges as a Ground for Abortion Rights in and after Dobbs*, in ROE V. DOBBS 25 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024). Franklin and Siegel argue that restricting abortion access enforces traditional gender roles and imposes unique burdens on women, which implicates the main concerns of the Equal Protection Clause. See *id.* at 34–35.

16. See e.g., Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 542 (2017).

17. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 13 (1980).

18. The substance view holds that a person is an entity with a natural, inherent capacity for human functions, and this personhood begins when the substance itself begins. See Francis J. Beckwith, *Abortion, Bioethics, and Personhood: A Philosophical Reflection*, CTR. FOR BIOETHICS AND HUM. DIGNITY (Nov. 18, 2001), <https://perma.cc/R3PQ-WX4F>.

19. *LePage*, *supra* note 2 at 693, 697 (Parker, C.J., concurring).

20. See JOHN RAWLS, POLITICAL LIBERALISM 213 (expanded ed. 2005); see also Samuel Freeman, *Public Reason and Political Justifications*, 72 FORDHAM L. REV. 2021, 2021 (2004).

on its uniquely modern character. The analysis advanced in this article is not a simple relabeling of these concepts. It aims to dissect a deliberate attempt to alter the very grammar of American law, focusing less on abstract philosophy and more on the concrete procedural moves—the *how*—by which a claim to external absolute truth tries to control a legal system built on internal deliberation.

Advanced reproductive technologies (ARTs) further exacerbate this conflict. These techniques create ontologically liminal entities such as extrauterine embryos, whose states of existence are legally and conceptually ambiguous,²¹ and are difficult to be dealt with by traditional categories and reasoning methods that rely on internal authority, i.e., jurisprudence rooted in public reason and procedural justice. At the same time, visualization technologies such as ultrasound promote the social construction of the *public fetus* and provide a strong visual image for the claims of external authorities.²² Feminist jurisprudence, on the other hand, reveals the ultimate goal of this proclamatory turn: to rewrite the gender hierarchy through fertility control.²³ The inevitable result is the creation of what this article theorizes as “asymmetrical personhood,” a constitutionally flawed legal status that gives the embryo a single, symbolic right (such as the right to sue for wrongful death) but deprives it of all other rights, thus creating a legal fiction. Its effect is not for equality, but to suppress the rights and autonomy of the born.

This article is divided into four parts. The first part analyzes the application of a jurisprudence of proclamation in the process of creating asymmetrical personhood. Part II constructs an analysis tool, explains in detail the two opposing modes of internal and external authority, and uses the bundle theory of legal personality. Part III applies this toolkit to argue that this creation of asymmetrical personhood violates the Due Process and Equal Protection Clauses. Finally, Part IV concludes by proposing concrete pathways to restore jurisdictional integrity and constitutional coherence.

I. PROCLAMATION IN ACTION: THE CREATION OF ASYMMETRICAL PERSONHOOD

The Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* did more than overturn nearly fifty years of precedent. It altered the underlying logic of the constitutional controversy surrounding reproductive rights.²⁴ By returning the question of abortion to the states, the Court triggered intense legislative and judicial

21. See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (holding that preembryos “are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life”).

22. See JANELLE S. TAYLOR, *THE PUBLIC LIFE OF THE FETAL SONOGRAM: TECHNOLOGY, CONSUMPTION, AND THE POLITICS OF REPRODUCTION* 24–25 (2008). Taylor analyzes how ultrasound imagery has created a “public fetus,” an entity visually separated from the pregnant woman that becomes a site for projecting social and political meanings. *Id.*

23. See, e.g., GRACE E. HOWARD, *THE PREGNANCY POLICE: CONCEIVING CRIME, ARRESTING PERSONHOOD* 191–92 (2024). Feminist legal scholars analyze how fetal personhood measures are used to police the bodies and choices of pregnant people. See *id.*

24. *Dobbs*, 597 U.S. at 218–19 (holding that *Roe* was “egregiously wrong . . . from the day it was decided” and must be overruled).

activity aimed at redefining the legal status of prenatal life.²⁵ A more strategic approach is emerging beyond a straightforward abortion ban. It seeks to establish fetal personhood not through a frontal constitutional assault, but rather achieves this goal step by step through concrete operations in different areas of law. This chapter will provide an in-depth look at this phenomenon. Using the Alabama Supreme Court's decision in *LePage v. Center for Reproductive Medicine* as its central case study,²⁶ I will examine how this proclamatory approach works and what kind of contradictory legal reality it ultimately creates.

A. THE JUDICIAL CREATION OF THE EXTRAUTERINE PERSON AND THE CRISIS OF INCOHERENCE

On February 16, 2024, the Supreme Court of Alabama issued a ruling that startled the legal and medical communities.²⁷ In *LePage v. Center for Reproductive Medicine*, the court held that under Alabama's 1872 Wrongful Death of a Minor Act, embryos cryopreserved outside the uterus should be treated as children.²⁸ This allowed the parents of embryos destroyed in a fertility clinic accident to sue for punitive damages.²⁹ The decision sets a precedent for extending liability for manslaughter to embryos that have never survived in the womb. But the real significance of this judgment is far more than that. The decision is also an illustration of the *jurisprudence of proclamation*, which vividly shows how a state court can use a narrow statutory question to leverage a radical expansion of prenatal personhood.

1. The Façade of Textualism

The majority opinion of Judge Jay Mitchell formally follows the textual interpretation path. He reduced the dispute to the question of whether the Wrongful Death of a Minor Act of 1872 contained an unwritten exception to the exclusion of children outside the womb.³⁰ The conclusion is: no. Since no such exceptions were found in the text of the bill, the majority concluded that the scope of application of the bill should be sweeping and unqualified.³¹ The defendants, of course, argued that the legislators of 1872 could not have foreseen the technology of freezing embryos, so the Act should not apply here.³² The majority responded by

25. *Id.* at 302 (“We now overrule those decisions and return that authority to the people and their elected representatives.”).

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

27. *Id.*

28. *Id.* at 680. The case arose after a hospital patient wandered into a cryogenic nursery and destroyed several cryopreserved embryos, leading the parents to sue under Alabama's Wrongful Death of a Minor Act. *Id.* at 681.

29. *Id.*

30. *Id.* at 680 (holding that “the central question . . . is whether the Act contains an unwritten exception to that rule for extrauterine children – that is, unborn children who are located outside of a biological uterus at the time they are killed.”)

31. *Id.* at 688.

32. *Id.* at 700 (Stewart, J., concurring).

inverting this argument. For IVF embryos not to be covered, Justice Mitchell reasoned, 19th-century lawmakers had to take the initiative to tailor an exception to a technology that only appeared more than a century later. This is an unreasonable method of legal interpretation, which uses an unconventional originalism in the name of judicial restraint, claiming to only interpret legal texts, but in fact completes the radical expansion of personhood. “It is not the role of this Court,” the majority insists, “to craft a new limitation based on our own view of what is or is not wise public policy.”³³

This textual claim, however, is vulnerable under historical and jurisprudential pressure. The majority’s originalism is not a faithful application of historical legal principles but more like a conclusion-first derivation. The starting point for its argument is the established view that life begins at fertilization and deserves legal protection, which is a premise explicitly codified in Alabama’s 2018 Sanctity of Unborn Life Amendment.³⁴ The court’s approach to this modern amendment as a guide for interpreting the ancient Act is methodologically controversial. It essentially uses a concept full of modern political and philosophical colors to retroactively transform the core vocabulary in a historical legal text. As Justice Greg Cook pointed out in his dissenting opinion, this reading is anachronistic.³⁵ At the time the Act was passed in 1872, the common law generally followed the born-alive rule, which states that only the death of a live birth baby could trigger legal action.³⁶ The legislators of the time, in their legal worldview, could never have extended the imagination of the word child to an entity existing outside the womb in a cryopreservation facility. The majority opinion’s reliance on modern precedents like *Mack v. Carmack* essentially projects 21st-century values onto 19th-century statutes.³⁷ By taking advantage of the legislature’s silence on IVF technology in 1872, the court reversed the duty of legislative interpretation and instead required historical legislators to foresee and exclude all future technological developments. This is, as Justice Cook noted, a process of “short-circuit[ing] the legislative process”³⁸ that

33. *Id.* at 688.

34. Ala. Const. art. I, § 36.06 (West, Westlaw current with amend. ratified through Nov. 18, 2025) (added by Amend. 930 (2018)). The amendment declares it the public policy of the state to “recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.” *Id.* The *LePage* majority held this amendment compelled the court to resolve any statutory ambiguity in favor of protecting unborn life. *LePage*, 408 So. 3d at 688.

35. See *LePage*, 408 So. 3d at 723.

36. The born-alive rule, a common law doctrine articulated by jurists like Sir Edward Coke, precludes homicide charges for a fetal death unless the infant is born alive and subsequently dies from injuries sustained *in utero*. The rationale, stemming from the inability of pre-modern medicine to either determine if a fetus was alive at the time of injury or prove that such an act was the proximate cause of a stillbirth. See, e.g., Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 VAL. U. L. REV. 563, 564 (1987).

37. *Mack v. Carmack*, 79 So. 3d 597, 611 (Ala. 2011). In *Mack*, the Alabama Supreme Court held for the first time that a wrongful death action could be brought for a non-viable fetus, explicitly overruling prior precedent that required viability. *Id.*

38. *LePage v. Ctr. for Reprod. Med.*, P.C., 408 So. 3d 678, 708 (Ala. 2024) (Cook, J., dissenting).

violates the fundamental principle “that is, that the legislative branch and not the judicial branch updates laws.”³⁹

2. The Theological Engine

If the majority opinion provides a formal argument for the law, then Chief Justice Parker’s concurring opinion reveals the substantive ideological basis of the judgment. Justice Mitchell relies on dictionaries and statutory interpretation, while Chief Justice Parker turns to the Bible, Thomas Aquinas, and John Calvin.⁴⁰ This concurrence is notable not for its eccentricity but for its candor in articulating the theological foundations of the court’s holding. He argues that the “sanctity of unborn life” in Alabama Constitution’s is not mere policy but an affirmation of a theological truth that “each human being, from the moment of conception, is made in the image of God” and that human life “cannot be wrongfully destroyed. . . without effacing his glory.”⁴¹

For Justice Parker, the legal issues are closely linked to divine missions. The drive and the authority to define the embryo as a child comes not from the legislature, nor from common law precedent, but from a value system external to the legal system. He clearly writes:

Even before birth, all human beings bear the image of God, and their lives cannot be destroyed without effacing his glory. . . . Carving out an exception for the people in this case, small as they were, would be unacceptable to the People of this State, who have required us to treat every human being in accordance with the fear of a holy God who made them in His image.⁴²

Justice Parker’s opinion is anything but an inconsequential personal monologue. It makes clear the cultural ideas that underpin the legal reasoning of the majority. The court’s ability to declare an extrauterine embryo a child lies on a pre-existing cultural acceptance of the embryo as a person-like entity. This acceptance has been built over decades through what medical anthropologist Janelle Taylor calls the “public fetus” project.⁴³ According to Taylor, visual technologies such as ultrasound conceptually and visually separate the fetus from the pregnant woman’s body, transforming it into a separate and decontextualized public object.⁴⁴ This public fetus becomes a screen for social, political, and, as Parker shows, theological meanings.⁴⁵ The *LePage* court has been actively involved in

39. *Id.* at 709 (Cook, J., dissenting).

40. *Id.* at 693, 697 (Parker, C.J., concurring).

41. *Id.* at 693–94, 697 (Parker, C.J., concurring).

42. *Id.* at 693–97 (Parker, C.J., concurring).

43. See TAYLOR, *supra* note 22, at 29.

44. *Id.* at 80. Taylor’s ethnographic research shows how ultrasound technology has entered public consumer culture, fostering a market for “keepsake” images and being used by anti-abortion clinics to encourage “bonding.”

45. *Id.* at 13.

this personification project through its rhetoric, most notably in its repeated use of the term “cryogenic nursery” instead of the neutral technical term cryopreservation facility or tissue bank.⁴⁶ The metaphor of a nursery evokes images of vulnerability and innocence, and gives the laboratory a connotation of caring for children in language. Chief Justice Parker’s concurrence thus makes the cultural subtext of the decision the main text. He connects the technologically created “extrauterine child” directly to a divine mandate, completing the closed loop between technology, culture, and law.

B. THE LEGISLATIVE RESPONSE: INSTITUTIONALIZING INCOHERENCE

The immediate aftermath of the *LePage* decision was chaos. Fearing a wave of wrongful death lawsuits that could bring uncapped punitive damages, major IVF providers across Alabama, including the University of Alabama at Birmingham’s programs, had announced a suspension of services.⁴⁷ Patients in the middle of expensive and emotionally draining treatment cycles found their sessions abruptly canceled. The ruling had created an untenable conflict between two constituencies: the pro-life movement that hails the decision as a victory for the unborn, and the thousands of families who rely on assisted reproductive technology to have children. The political pressure for a legislative solution was immense and immediate. What came next was not a thoughtful clarification of personhood but a maneuver that entrenched the logic of proclamation and codified asymmetrical personhood into state law.

Faced with this situation, the Alabama legislature moved quickly, passing Senate Bill 159 (“S.B. 159”) less than three weeks after the *LePage* ruling, signed by Governor Kay.⁴⁸ The law grants broad civil and criminal immunity to any “individual or entity when providing or receiving services related to in vitro fertilization” for the “damage to or death of an embryo.”⁴⁹ The act is retroactive, thus removing legal obstacles for IVF clinics to resume operations.⁵⁰

But S.B. 159 is a liability shield, not a re-definition of legal status. The act conspicuously avoids the holding of *LePage*.⁵¹ It neither redefines the legal nature of embryos nor explicitly states that embryos are no longer children under the

46. See, e.g., *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 680 (Ala. 2024). The majority opinion repeatedly uses the term “cryogenic nursery” to describe the storage facility, a term that anthropomorphizes the clinical setting.

47. See Alander Rocha, *Alabama Supreme Court rules that frozen embryos outside the womb are children*, THE 19TH (Feb. 20, 2024); Matthew Cullen, *Alabama Hospital Paused I.V.F. Treatments After Court Ruling*, N.Y. TIMES (Feb. 21, 2024). Patient advocates and medical providers immediately warned that the decision would make IVF untenable in the state due to the risk of wrongful-death lawsuits;

48. S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024). The bill was passed and enacted on March 6, 2024.

49. *Id.* § 1(a).

50. *Id.* § 1(b) (stating that “this section “intended to apply retroactively to any act, omission, or course of services which are not the subject of litigation on the effective date of this act.”).

51. The bill was carefully drafted to provide a liability shield without engaging with or overturning the court’s underlying determination that embryos are children.

Wrongful Death of a Minor Act. It simply creates an exemption zone for the specific field of IVF.

This legislative strategy does not solve the fundamental contradiction, but institutionalizes it. It allows the original proclamation in *LePage* to be politically maintained through legal exceptions. In other words, the legislature solved the immediate crisis by protecting the state's IVF industry while preserving the symbolic and legal triumph of embryonic personhood entirely intact.

What's left in the end is a legally incoherent but stable state, with the very *A and Not-A* contradiction described in this article's introduction. An extrauterine embryo in Alabama is now a child whose negligent destruction gives rise to a wrongful death claim, yet at the same time, it is an entity whose routine destruction as part of standard medical practice is exempt from all liability. The personhood declaration from *LePage* is thus preserved as a legal precedent, a loaded weapon available for future legal battles over abortion and contraception. Meanwhile, its inconvenient practical consequences are cleverly nullified by a special bill. This clearly demonstrates the operation logic of the proclamatory approach, that is making a declaration of personhood in one legal field (such as tort law) and setting up immunity in another area (such as special regulations), resulting in a fragmented and inherently contradictory legal status.

Alabama's situation is perhaps dramatic, but it is by no means an isolated case. Across the country, many states have already explored the legal status of embryos in different ways, which together form a complex and disparate picture. In Louisiana, for example, we can see a path to direct legal personhood through legislation. Since 1986, Louisiana law has designated an *in vitro* fertilized human ovum as a juridical person with a right to sue and be sued.⁵² But this personhood is also incomplete. Although the law prohibits the destruction of embryos or their use for research, it also stipulates that embryos cannot be implanted in the uterus if one parent objects.⁵³ This has directly led to thousands of embryos being frozen indefinitely, falling into a legal dilemma that can neither lead to life nor legally end.⁵⁴

Other states have shown differences in this strategic legal fragmentation spectrum. For example, in Colorado's *In re Marriage of Rooks* case, the court pioneered the argument that an embryo is neither ordinary property nor a complete person, but a property of a *special status*.⁵⁵ On this basis, the court uses the balancing of interests test, which carefully weighs one party's desire to have children and the other party's unwillingness to become a parent.⁵⁶ Given the far-reaching

52. La. Rev. Stat. Ann. § 9:121 *et seq.* (1986) (West, Westlaw current through the 2025 Reg. and 1st Extra. Sess.) The statute designates a viable *in vitro* fertilized human ovum as a "juridical person" that "shall not be intentionally destroyed." *Id.* § 9:129.

53. *Id.* § 9:129.

54. *Id.*

55. *In re Marriage of Rooks*, 429 P.3d 579, 591 (Colo. 2018). The court declined to classify embryos as persons or property, instead adopting a balancing test to weigh the parties' competing interests. *Id.*

56. *Id.* at 581.

implications of forcing a person to become a parent, the outcome of such judgments tends to favor the protection of the right of the reluctant party. In stark contrast to this middle path that gives judges discretion, Arizona has chosen to use legislation to provide a clear but mandatory answer. The state passed legislation that the judge must award the embryo to the party “with the intention to develop and give birth” when the couple cannot agree.⁵⁷ This law almost completely deprives judges of discretion, expressing in a clear but mandatory way the position of the state government’s preference to protect the right to life of embryos.

Juxtaposing these different practices, it is clear that whether through legislation or judiciary, whether granting personhood or special status, the result is the creation of a fragmented and inherently contradictory legal status. While the starting points and ways of proceeding vary, they have led to the result that the legal status of embryos has become increasingly complex and inconsistent, setting the stage for more legal disputes in the future.

C. A THEORETICAL FRAMEWORK FOR ASYMMETRY: THE BUNDLE THEORY OF LEGAL PERSONHOOD

To better understand the incoherence created by the state of Alabama, we need an analytical framework that goes beyond the persons versus property binary, which has become too rigid when it comes to modern legal issues such as the embryos’ personhood in debate. The Bundle Theory of legal personhood, as articulated by the legal philosopher Visa Kurki, provides the right conceptual tool.⁵⁸

Kurki’s central argument is that the traditional, orthodox view of legal personhood—which treats it as a binary, all-or-nothing status conferred upon any entity that holds legal rights and duties—is inadequate and fails to address the complexity of modern law.⁵⁹ In its place, he proposes that legal personhood should be understood as a “cluster property” or, more intuitively, a “bundle” of distinct legal incidents.⁶⁰ Just as property ownership is best understood not as a single thing but as a bundle of rights (the right to use, to exclude, to alienate, etc.), legal personhood is a collection of legally recognized capacities, protections, and responsibilities that can be held in various combinations.⁶¹

The key distinction within Kurki’s framework is between passive incidents and active incidents of personhood. Active incidents refer to the ability of legal subjects to actively change legal relationships, which requires the entity to have subjective will and behavioral capacity.⁶² Typical examples include entering into

57. Ariz. Rev. Stat. Ann. § 25-318.03 (2018) (West, Westlaw current through leg. of the 2nd Reg. Sess. of the 57th Leg. (2026), effective as of Feb. 12, 2026.) This statute mandates that in a dispute, the court must award the embryos to the spouse who intends to allow them to “develop to birth.” *Id.*

58. See generally VISA A. J. KURKI, A THEORY OF LEGAL PERSONHOOD 93 (2019).

59. See *id.* at 118; see also Brunello Stancioli, *A Bundle of Rights and Pachamama: Visa Kurki’s Theory of Legal Personhood*, 44 REVUS: J. CONST THEORY AND PHIL. 103, 104 (2021).

60. See KURKI, *supra* note 58 at 93.

61. See *id.* at 94–95.

62. See *id.* at 113.

a binding contract independently, filing a lawsuit in court in one's own name, and incurring civil or criminal liability for one's own actions.⁶³ For an entity to take the initiative, it must be able to act and take responsibility. Passive incidents, on the other hand, refer to the qualification of an entity as an object in a legal relationship to passively accept protection or action, which does not require any subjective will on the part of the entity.⁶⁴ For example, a newborn baby, although not active, has a wide range of passive powers: he has the right to be protected from harm by tort law, he has the right to inherit property, and he cannot be legally owned by someone else. These are all protective qualifications conferred on him by law.⁶⁵

Using the Bundle Theory, we can more precisely analyze the judgment in the *LePage* case. The court did not, in fact, grant cryopreserved embryos personhood in full. Instead, it reached into the conceptual bundle of legal personhood and selectively extracted a single passive incident, that is the capacity to be considered a child for the purpose of a parental wrongful death claim, and attached it to the extrauterine embryo.⁶⁶ All other incidents in the bundle remained unattached. For example, the *LePage* decision did not grant the embryo the right to inherit property, the right to be free from harm under other tort theories, or the protection of the criminal code.

Most telling is what is conspicuously absent from the bundle: the right to have a guardian ad litem appointed to represent its interests.⁶⁷ In virtually any other legal context involving a minor, from custody disputes to tort settlements, the law's first move is to appoint an independent guardian for the minor.⁶⁸ The guardian's legal duty is to independently assess and advocate for the best interests of the minor before the court, especially in situations where those interests may not be consistent with those of the parents or other interested parties.⁶⁹ However, this basic and standard legal process was completely absent from the *LePage* proceedings, and the court never discussed or appointed a guardian ad litem for the embryo in question.⁷⁰ The fact that this most basic protection was not even contemplated in *LePage* is a telling omission that reveals the entire project's legal fiction. It signals that even the court did not truly conceive of the "extrauterine child" as a child with a full set of legal

63. *See id.*

64. *See id.* at 94.

65. *See id.* at 95.

66. *See LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 683 (Ala. 2024).

67. *See, e.g., Ala. R. Civ. P. 17(c)* (requiring that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action"). *But see LePage* (containing no mention or appointment of a guardian ad litem for the extrauterine embryos throughout the proceedings).

68. *See Ala. Code* § 26-2A-52 (2024) (West, Westlaw through Act 2026-15) ("At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor . . .").

69. *See Guidelines with Comments for Guardians Ad Litem in Dependency and Termination-of-Parental Rights Cases in Juvenile Court*, ALA. DEPT. OF FIN. (Sept. 28, 2016), <https://perma.cc/R753-B26Y>. The guidelines state a GAL shall "diligently advocate a position in the best interests of the child" and shall "conduct all necessary interviews with persons having contact with or knowledge of the child in order to ascertain the child's wishes, feelings, attachments, and attitudes." *Id.*

70. *See, e.g., Ala. R. Civ. P. 17(c)*. *But see LePage*, 383 So. 3d at 402 (confirming the complete absence of this standard legal process for the embryos in question).

interests, but rather as a legal construct that primarily serves the interests of its parents.

One can analyze the significance of this absence in terms of legal effect. Once a guardian ad litem is appointed for the embryo, the guardian assumes the duty to advocate the best interests of the embryo.⁷¹ This would immediately raise a series of unsolvable legal dilemmas: Is the best interest of the embryo to be implanted for a chance of life, or to continue to be cryopreserved? This would create a direct legal conflict of interest with the reproductive choices of its parents and the standard operating procedures of the clinic. The court thus granted a right while sidestepping the procedural protections that should accompany it. This practice of granting a legal incident without its corresponding protection is the core expression of asymmetrical personhood. It creates an inherently contradictory legal status. An entity is proclaimed a child yet is denied the basic legal protections its new status should entail.

Faced with the inherent contradictions exposed by this judicial decision, the legislature did not attempt to amend it. Instead, through the immunity statute (S.B. 159), it structurally entrenched this contradiction.⁷² It retains the passive power granted by the court, namely, the status of child under tort law, while legislatively preventing any other power, mostly the status of victims under criminal law, from being attached to the embryo.⁷³ In this way, the legislative act ensures that the personhood of the embryo is strictly confined to a specific civil claim context, thereby removing its unbearable legal and practical consequences while preserving the effects of the judicial judgment. This demonstrates how a combination of judicial and legislative action can be used to maintain a legal status that is, in principle, internally contradictory.

Applying the Bundle Theory reveals the legal construction of asymmetrical personhood. Yet one might reasonably ask: Is this kind of asymmetry so unusual? The law, after all, is full of such partial persons, from corporations and trusts to ships at sea. This objection, however, goes away when we examine not just the fact of asymmetry, but its purpose and its relationship with full legal persons.

Taking corporate personality as an example, its legal structure is fundamentally instrumental and volitional. It is a legal tool created by one or more full legal persons such as founders or shareholders based on voluntary agreements to solve practical problems of collective action, such as limiting liability and aggregating capital.⁷⁴ The rights owned by a company are derived from the delegation and aggregation of the rights of its members, with the aim of facilitating and enhancing the achievement of common economic goals by its members. Critically, the creation of corporate personhood does not, by structural necessity, diminish the constitutional rights of any non-consenting third party.

71. Ala. Code § 26-2A-52.

72. See S.B. 159, 2024 Reg. Sess. (Ala. 2024).

73. *Id.*

74. See Phillip I. Blumberg, *The Corporate Personality in American Law: A Summary Review*, 38 THE AM. J. OF COMPAR. L. 49, 49–51 (1990) (noting the legal fiction of a corporation is a pragmatic tool that allows a collective enterprise to act as a single entity for legal purposes, such as owning property and entering contracts).

The asymmetrical fetal personhood analyzed here, however, is structurally different. Its nature is imposing and confrontational. It was not created voluntarily by all directly involved parties, but was unilaterally imposed by state power upon a non-consenting fully recognized legal person, namely the pregnant woman. Its legal effect is not to aggregate or promote rights, but to create a new, non-consensual, status-based legal duty and assign it on a specific group of citizens. When the law grants a right to a fetus, its unavoidable and direct legal consequence is the imposition of a physical and legal burden on the woman, resulting in a necessary and structural curtailment of her bodily autonomy and equal status.⁷⁵

Therefore, the fundamental difference between two forms of partial personhood is not based on a subjective value judgment, but on an objective and structural analysis. Corporate personality is a legal tool that enhances individual human agency by aggregating rights to solve coordination problems.⁷⁶ Asymmetrical fetal personhood, in contrast, is a legal construct used to impose non-consensual duties, and its very existence must come at the cost of another's fundamental rights. This is the root cause of its profound constitutional controversy. The issue is not whether the law can technically create partial persons. The issue is that when a form of partial personhood is constructed in a way that structurally inevitably leads to the erosion of the constitutional rights of a complete personality and imposes unprecedented legal obligations, it has gone beyond the scope of legal technique and now implicates the basic principles of liberty and equality that define the constitutional order.

II. THE TWO JURISPRUDENCES: INTERNAL ACCOMMODATION VS. EXTERNAL PROCLAMATION

A. INTERNAL AUTHORITY: THE JURISPRUDENCE OF REASONED ACCOMMODATION

1. Conceptual Grounding

The concept of internal authority finds its most influential jurisprudential basis in Hart's legal positivism theory, particularly his notion of the rule of recognition.⁷⁷ For Hart, the rule of recognition is a secondary rule that specifies the criteria for identifying valid laws, thereby providing the procedural framework for a system of internal authority.⁷⁸ This meta-rule grounds a legal system's internal coherence and continuity, establishing authoritative procedures for how laws are made, interpreted, adjudicated, and amended. As Shapiro notes in his analysis of Hart, the rule of recognition addresses the problem of uncertainty in pre-legal

75. This creates a direct conflict of rights between the pregnant person and the fetus, a conflict that does not arise in the context of corporate personhood. See Laura Hermer, *Intentional Parenthood, Contingent Fetal Personhood, and the Right to Reproductive Self-Determination*, 57 U. MICH. J. L. REFORM 259, 294 (2024).

76. Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 790, 797–98 (2013).

77. See H. L. A. HART, *THE CONCEPT OF LAW* xx-xxi (Paul Craig eds., 3d ed. 2012). Hart's rule of recognition is a secondary rule that provides the ultimate criteria for legal validity within a legal system. It is a social rule accepted by legal officials. See *id.*

78. *Id.*

societies by offering a clear test for validity.⁷⁹ It thereby allows normative disputes to be resolved under a common standard and avoiding perpetual conflict. This rule defines the hierarchy among different sources of law, such as the supremacy of the U.S. Constitution over federal statutes.⁸⁰ The rule of recognition is a social rule. Its existence and content are determined by the practices and acceptance of legal officials, particularly judges, who adopt an internal point of view towards it.⁸¹

Shapiro refines Hart's concept through his "planning theory of law." He proposed that the rule of recognition, along with other secondary rules, such as rules of change and adjudication, can be understood as a "shared plan" that constitutes the legal system.⁸² This shared plan sets out the constitutional order and aims to guide and organize the collective activity of legal regulation by setting roles and procedures for officials.⁸³

According to Shapiro, this planning framework more effectively addresses certain flaws in Hart's original formulation, such as problems of under- and over-inclusiveness, and better explains how complex social practices gain their normative power.⁸⁴ The planning theory posits that the rule of recognition, as part of this plan, helps resolve not only first-order uncertainty, i.e., what the substantive rules are, but also critical second-order uncertainty, i.e., who possesses the legitimate authority to create, interpret, and apply said rules. This conceptualization helps explain how a legal system maintains its operational integrity and identity through agreed-upon procedures even in the face of substantive disagreements.⁸⁵

These theories are directly relevant to the current debate over fetal personhood. When advocates of fetal personality seek legal recognition, for example, by arguing for a particular interpretation of the word "person" in the Fourteenth Amendment or by pushing for legislation to define the fetus as a legal person from the time of conception, they are, in effect, trying to bypass internal lawmaking process. Rather than seeking change within the framework of recognition

79. See Scott J. Shapiro, *What is the Rule of Recognition (and Does it Exist)?*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 238 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

80. HART, *supra* note 77 at xxii-xxiii.

81. *Id.* at xxiii. Hart's concept of the "internal point of view" refers to the practical attitude of rule acceptance by officials, who use the rules as standards to guide and evaluate their own and others' conduct. This is contrasted with the "external point of view" of an observer who merely notes behavioral regularities. See *id.*; Grégoire C. N. Webber, *Some Internal Points of View of Law and the Study of the Law*, 28 CONST. COMMENT. 325, 334-45 (2012).

82. See SCOTT J. SHAPIRO, *LEGALITY* 189-90, 155 (2011) (arguing that legal systems are best understood as complex tools for creating and applying social plans).

83. See *id.* at 165-66. Shapiro's theory posits that law's moral aim is to solve moral problems that cannot be solved as effectively without it, thereby framing law as a tool for social planning. *Id.* See Michael McBride, *A Guide to Scott Shapiro's Planning Theory of Law* (2014), <https://perma.cc/8ANB-X73F>.

84. See *id.* at 190, 156. Shapiro argues that the normative force of law derives from the rational pressures inherent in planning itself; for example, plans must be consistent, and means must be adopted to achieve the ends specified in the plan.

85. See *id.* at 165-66 (positing that the exercise of legal authority is an activity of social planning, where the rule of recognition is part of a "master plan" for the community).

rules or constitutional shared plans, they seek to implant a substantive legal conclusion directly from the outside.

While Hart and Shapiro establish the procedural foundations of internal authority, Dworkin's theory of "law as integrity" adds an indispensable interpretive dimension.⁸⁶ Dworkin bridges the gap between purely procedural validity and substantive moral coherence.⁸⁷ He argues that law is an interpretive practice where judges must strive to find the interpretation of legal materials that best fits with past legal decisions and legislative enactments, and also justifies that practice by showing it in its best moral light.⁸⁸ For Dworkin, "law as integrity" requires that the principles needed to underpin authoritative judicial decisions must be accepted consistently across contexts, thus precluding political compromises that would undermine legal conviction.⁸⁹

Dworkin's analogy of law to a chain novel illustrates this process: each judge is like a novelist in a chain, constrained by the chapters already written but also responsible for continuing the story in a way that makes the work as a whole "the best it can be" from a moral and principled perspective.⁹⁰ This vision refutes any claim that internal authority is morally empty.⁹¹ Rather, it accommodates moral principles in the interpretation of the law itself, requiring judgments to be based on a coherent reading of existing legal materials. Dworkin's own stance on the issue of abortion exemplifies this approach.⁹² He argues that the principle of integrity draws from precedents on reproductive autonomy such as in contraceptive cases and supports a woman's right to make an abortion decision.⁹³ He also acknowledged a societal interest in respecting the sanctity of human life through regulations that encourage responsible decision-making rather than outright coercion.⁹⁴ He rejects the idea that a fetus is a constitutional person with its own rights, viewing this as inconsistent with the law's overall narrative.⁹⁵

86. See RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986). Dworkin argues that law is an "interpretive concept," meaning that determining what the law requires involves interpreting past legal practice to present it in its best possible moral light.

87. *Id.* at 225–26.

88. *Id.*

89. *See id.* at 225. Law as integrity requires judges to assume that the law is structured by a coherent set of principles concerning justice and fairness. *See also* T. R. S. Allan, *Dworkin and Dicey: The Rule of Law as Integrity*, 8 OXFORD J. LEGAL STUD. 266, 266–67 (1988).

90. DWORKIN *supra* note 86 at 229. The chain novel metaphor illustrates the dual constraints on judges: the need for their decisions to "fit" with the existing legal record (the previous chapters) and to "justify" that record by making the law the best it can be from a moral standpoint. *See* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1167–68 (2005).

91. DWORKIN *supra* note 86 at 229–30.

92. *See* RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 24–25 (1993) (reframing the abortion debate not as a question of fetal rights but as a conflict over how to respect the "sanctity" or "intrinsic" value of human life, which he views as a fundamentally spiritual concept).

93. *See id.* at 158.

94. *See id.* at 151–52, 154–55.

95. *See id.* at 111.

In a pluralistic democracy, the legitimacy of internal authority is clarified by John Rawls's concept of public reason.⁹⁶ Rawls argues that when debating "constitutional essentials" and matters of "basic justice," citizens and officials have a moral duty to justify their political positions based on reasons and principles that all citizens, as free and equal, can reasonably be expected to endorse.⁹⁷ In a sense, public reason is "freestanding," by which I mean it's not dependent on any particular metaphysical doctrine. Its goal is to reach fair terms of cooperation in a society characterized by pluralism. Although Rawls's analysis of abortion has been criticized for failing to maintain this neutrality,⁹⁸ the idea of public reason itself reveals a strong commitment of internal authority. That is, legal justification must be public and accessible, rather than imposing the metaphysical beliefs of a particular group on society as a whole.

These different jurisprudential traditions, from Hart's positivism to Dworkin's interpretivism to Rawls's political liberalism, have different theoretical paths, but together they depict a legal system with a high degree of autonomy. The authority of this system derives from its own sources of recognition, methods of reasoning, and within its own standards of public justification. Moral considerations are not excluded but are integrated into the system's own operating procedures.

Internal authority is not without its own flaws. Concerns regarding the potential for judicial activism, where judges are perceived to overstep their interpretive bounds and engage in quasi-legislative law-making, a frequent criticism leveled against living constitutionalist approaches, are a staple of legal discourse.⁹⁹ Similarly, insights of critical legal studies caution that legal interpretation can be influenced by underlying power dynamics, and legitimate concerns exist that an overreliance on precedent could cause the law to become rigid.¹⁰⁰ These critiques, while significant, do not necessarily invalidate the framework of internal authority, which itself provides mechanisms to manage these challenges.

First, debates over the proper judicial role are conducted within the system of internal authority. Arguments about judicial activism and restraint are not abstract philosophical discussions external to law. They are actually developed through the tools of the internal authority, such as different understandings of

96. See JOHN RAWLS, *POLITICAL LIBERALISM* 213 (2d ed. 2005).

97. *Id.* at 214–15; see also Samuel Freeman, *Public Reason and Political Justifications*, 72 *FORDHAM L. REV.* 2021, 2028 (2004).

98. See RAWLS, *supra* note 96 at 243–44 n.32. Rawls's own application of public reason to abortion has been criticized for importing a comprehensive liberal doctrine by assuming the fetus is not a person deserving of equal respect, thereby failing the test of neutrality he sets for public reason. See John Rawls, *The Idea of Public Reason Revisited*, 64 *U. CHI. L. REV.* 765, 798 n.80 (1997); see also David M. Shaw, *Justice and the Fetus: Rawls, Children, and Abortion*, 20 *CAMBRIDGE Q. HEALTHCARE ETHICS* 93, 93 (2011).

99. The critique of judicial activism often centers on the accusation that judges are substituting their personal policy preferences for the law, particularly when constitutional texts are open to interpretation. See Kermit Roosevelt, *Judicial Activism and Its Critics*, 115 *UNIV. OF PENN. L. R.* 112, 112 (2006).

100. Critical Legal Studies (CLS) posits that law is not neutral or objective but is instead a tool that supports existing power structures and is infused with social biases. See Legal Information Institute, *Critical Legal Theory*, CORNELL L. SCH (2022), <https://perma.cc/3KYS-DZEC>.

stare decisis or competing methods of textual interpretation. When a judge is criticized for activism, the critic is essentially claiming that the judge fails to properly use the accepted method of legal reasoning, that is, she or he has deviated from the track laid by internal authority. The critique itself thus affirms and relies upon the existence of a shared internal standard of judgment.¹⁰¹ The dispute is therefore not about whether to follow internal rules, but how best to apply them.

Second, internal authority contains the potential for self-correction. Criticism of legal rigidity and injustice may have effect precisely because internal interpretations allow for gradual evolution. The doctrine of *stare decisis* is not absolute. Precedents, as we know, can be distinguished, narrowed, or, in some cases, overturned, as in *Brown v. Board of Education*'s relationship to *Plessy v. Ferguson*.¹⁰² This evolution proceeds by re-evaluating existing legal principles, thereby balancing stability with responsiveness to social change and avoiding the legal discontinuity that would result from imposing external standards.

The justification for adhering to this internal authority framework, despite its imperfections, rests on two foundational principles of the U.S. constitutional system. First, the institutional role of the judiciary is constitutionally defined.¹⁰³ Courts are designed to resolve specific disputes by applying existing rules through established procedures.¹⁰⁴ They lack the democratic mandate and institutional capacity to resolve fundamental moral or metaphysical disputes from scratch. That task is assigned by the constitutional design to the political branches—the legislature, which can represent public will and broker compromises—and ultimately to the people through the process of constitutional amendment.¹⁰⁵ To ask courts to rule based on an external source, be it religious doctrine or a philosophical truth, is to ask them to act as legislators, a role for which they have neither the institutional capacity nor the legitimacy. Second, internal authority is essential to the rule of law, which requires that the legal system should be predictable and non-arbitrary.¹⁰⁶ Internal authority ensures that the law is public by requiring judgments to be linked to publicly published legal texts and precedents, that is, citizens can know and plan their lives accordingly. In contrast, to permit judges to decide cases based on their personally held external convictions would undermine legal certainty and open the door to arbitrary decision-making.

101. Roosevelt, *supra* note 99 at 113. The charge of activism presupposes that there is a clear legal answer that a judge is ignoring. However, in many difficult constitutional cases, the text is indeterminate, requiring judges to create doctrine to apply general principles to specific facts.

102. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that “[s]eparate educational facilities are inherently unequal”), *overruling* *Plessy v. Ferguson*, 163 U.S. 537 (1896).

103. See U.S. CONST. art. III, § 2.

104. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (identifying “a lack of judicially discoverable and manageable standards for resolving” a dispute as a hallmark of a nonjusticiable political question).

105. *Baker*, 369 U.S. at 217.

106. See LON L. FULLER, *THE MORALITY OF LAW* 44–45 (rev. ed. 1969); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 213–18 (1979); See also JOHN RAWLS, *A THEORY OF JUSTICE* 208–09 (rev. ed. 1999).

2. Doctrinal Manifestations

The operational logic of internal authority is clear in the evolution of American family law. Over the past century and a half, this field has undergone a major jurisprudential shift away from a rigid, status-based model, often defined by bloodlines and fixed social roles, toward a more pluralistic and functional framework. This is rooted in the law's own capacity for reasoned accommodation to societal change and evolving understandings of fairness and human dignity.

a. Adoption Law: From Instrumentalism to Intent-Based Kinship. Nowhere, perhaps, is the law's power to create kinship independent of biology more powerfully demonstrated than in the evolution of adoption. Early adoption practices, influenced by Roman law but molded by American social and economic conditions, were instrumental.¹⁰⁷ Adoption was often a pragmatic tool concerned with providing heirs, securing lineage, ensuring a supply of labor, or managing the inheritance of property.¹⁰⁸ This reflects how the law then viewed the child's place in the family primarily in terms of status and utility, where the well-being of individual children was often overshadowed by their value to the adoption family. As legal historian Michael Grossberg has argued, the 19th-century legal family was an institution of governance, and adoption often served these practical ends, sitting uneasily within the common law's traditional deference to blood ties.¹⁰⁹

The turning point came in the mid-19th century with the Massachusetts Adoption of Children Act of 1851, widely regarded as the nation's first modern adoption statute.¹¹⁰ This statute introduced procedural safeguards. It mandated judicial oversight of adoptions, and required the consent of living biological parents (or their equivalent).¹¹¹ And, most significantly, it conditioned approval on the judge being "satisfied. . . that the petitioner [is] of sufficient ability to bring up the child, and furnish suitable nurture and education."¹¹² This legislative innovation was revolutionary. It compelled courts to look beyond formal blood ties and to engage in a reasoned inquiry into the relational capacities of the prospective family.

Out of these reforms emerged the "best interests of the child" standard, which became the core mechanism of the legal shift. While not without its own critiques regarding its vagueness and the breadth of judicial discretion it affords, its

107. See Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 447–51 (1971); see also Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U. L. REV. 1038, 1046–47 (1979).

108. See David R. Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 459–60 (1999); see also *The Origins of Adoption in America*, PBS (2026), <https://perma.cc/PD7D-XPY5>. Early adoptions were often informal arrangements to secure labor or heirs.

109. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 26 (1985).

110. Adoption of Children, Massachusetts Acts of 1851, ch. 324 [hereinafter Adoption of Children Act]; see also Papke, *supra* note 108 at 461 n.11.

111. Adoption of Children Act §§ 1, 2.

112. Adoption of Children Act § 5.

procedural and functional focus represents a decisive rejection of the kind of old absolutist logic of status-based parenthood.¹¹³ It set a far-reaching precedent, namely, that the law could, and should, determine parental status and family relations on its own terms rather than on fixed biological status alone.

Modern adoption law has only deepened this commitment by a continued downplaying of biological essentialism. The law instead recognizes and validates the importance of intent and function in building a parent-child relationship and institutionalizes relational bonds in the creation of legal parentage.¹¹⁴

For instance, federal legislation like the Adoption and Safe Families Act of 1997 (ASFA), along with parallel state statutes, reinforced the idea that new families should be formed based on judicial scrutiny of parental fitness and the clear intent of the adopters.¹¹⁵ The act, aiming to “accelerate permanent placement” for children in foster care, reinforces the state’s role in ensuring child safety and permanency, which in some cases could include the termination of biological parental rights and free children for adoption after specified timeframes.¹¹⁶ Such frameworks institutionalize a remarkable legal power, that is to create, *ex nihilo*, a new legal family that is, in the eyes of the law, equal in all respects to a biological one.

The use of legal constructs, sometimes termed legal fictions, such as deeming an adopted child “as if born to” the adoptive parents, demonstrates the law’s internal capacity to construct non-biological kinship as a social and legal good. As some commentators note, child adoption is a legal fiction in that the adoptive parents become the legal parents, notwithstanding the lack of a biological relationship—a new birth certificate reflecting this is issued, which is a legal fiction.¹¹⁷ This legal rebirth, as we can call it, shows how internal legal authority can bridge biological reality with the needs of social policy.¹¹⁸

113. The “best interests” standard has been widely criticized for its indeterminacy, which can allow judicial decisions to be based on the subjective values and prejudices of the presiding judge rather than on objective criteria. See Janet L. Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2 (1996).

114. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2266–72 (2017); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 660–68 (2008).

115. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

116. *Id.* ASFA requires states to initiate proceedings to terminate parental rights when a child has been in foster care for 15 of the most recent 22 months, with certain exceptions, thereby prioritizing permanency over the preservation of biological ties. *Id.* See also CHILD WELFARE INFO. GATEWAY, *Adoption and Safe Families Act of 1997*, <https://perma.cc/33B6-73UH>.

117. See, e.g., Denise Blake, Leigh Coombes & Mandy Morgan, *Wade in the Water: Rethinking Adoptees’ Stories of Reunion*, in DOING PSYCHOLOGY: MANAWATŪ DOCTORAL RESEARCH SYMPOSIUM (Te Herenga Waka—Victoria Univ. of Wellington) (discussing the consequences of being raised in the fictional subject position of being “as if born to” another family).

118. See, e.g., D.C. CODE § 16-312(a) (2023) (“A final decree of adoption establishes the relationship of natural parent and natural child between adopter and adoptee for all purposes, including mutual rights of inheritance and succession as if adoptee were born to adopter.”).

b. Assisted Reproductive Technologies: The Uniform Parentage Act and the Primacy of Intent. When confronted with the novel legal and ethical questions posed by assisted reproductive technology (ART), the legal system's internal authority did not collapse or look outward for a simple external command. Instead, it used its established, evolving tools of intent, contract, and interest-balancing to manage unprecedented parentage questions that ART introduced. The development of the Uniform Parentage Act (UPA) provides a vivid case study in this process of reasoned adaptation.¹¹⁹

Originally promulgated by the Uniform Law Commission (ULC) in 1973, its primary aim was to eliminate the legal distinctions between marital and non-marital children and to establish clear rules for determining paternity, thereby removing the legal status of illegitimacy and providing presumptions for parentage.¹²⁰ The UPA has since undergone multiple revisions, a process that itself exemplifies internal authority at work. It shows how the legal system can cope with deep social and technological shifts by methodically refining its own rules through established deliberative procedures.¹²¹

The Act was revised in 2002, as an initial response to the impact of ART, adding nonjudicial acknowledgment procedures and provisions for genetic testing and the determination of parentage in some ART contexts.¹²² It was the 2017 version, however, that most comprehensively addressed the complex legal questions arising from modern procedures like gestational surrogacy and gamete donation,¹²³ responding directly to the post-*Obergefell* recognition of diverse family structures. The UPA, in all its versions, has continually adapted to the evolving complexities of family structures and reproductive technologies.¹²⁴

A look inside the UPA reveals a conscious commitment to handling ART complexities. Article 7, for instance, makes a pair of powerful and complementary moves. First, in Section 702, it erects a legal firewall, stating plainly that, "A donor is not a parent of a child conceived by assisted reproduction."¹²⁵ This decisively de-links genetic contribution from legal parentage in context of gamete donation, protecting the intended family from the claims of donors. At the same time, Section 703 provides that "[a]n individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child

119. Unif. Parentage Act (1973).

120. *Id.* The original UPA was promulgated in response to the U.S. Supreme Court decisions mandating equal legal treatment for children regardless of their parents' marital status. See Christopher Reinhart, *Uniform Parentage Act*, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH. (July 19, 1999).

121. The UPA has been revised multiple times, notably in 2002 and 2017, to keep pace with changes in family structures and reproductive technologies. See Unif. Parentage Act (2002) (Unif. L. Comm'n); Unif. Parentage Act (2017) (Unif. L. Comm'n).

122. Unif. Parentage Act (2002) (Unif. L. Comm'n).

123. See Camille Workman, *Comment, The 2017 Uniform Parentage Act: A Response to the Changing Definition of Family?*, 32 J. AM. ACAD. MATRIM. LAW. 233 (2019).

124. Unif. Parentage Act (2017) prefatory note (Unif. L. Comm'n).

125. *Id.* at § 702.

conceived by the assisted reproduction is a parent of the child.”¹²⁶ This firmly grounds legal parentage in the parties’ intent. The official commentary to the UPA confirms that this was a conscious decision to provide legal certainty for families formed via ART.

Judicial rulings have complemented these statutory developments. For instance, the Supreme Court of Pennsylvania in *Glover v. Junior* (2025) has explicitly adopted an intent-based standard for establishing parentage.¹²⁷ For another example, courts have recognized “de facto parents” and applied “parentage by estoppel” in appropriate situations.¹²⁸ These doctrines, working hand in hand with the best interests of the child standard, extend legal protection to parent-child bonds forged by actual caregiving and reliance, even in the absence of biological or formal adoptive ties.

The result is a sophisticated legal framework, built piece by piece through both legislative action and judicial reasoning. It demonstrates the system’s ability to use existing legal concepts and create new ones where necessary. The UPA’s framework for severing genetics from parentage provides a direct doctrinal counterpoint to the central claim of fetal personhood advocates, that a specific biological status must automatically trigger a specific legal status.¹²⁹ It shows internal authority has rejected biological determinism in favor of more flexible and pragmatic foundations of intent and functional family relationships.¹³⁰

c. Judicial Reasoning in Embryo Disposition Disputes. In disputes over the disposition of cryopreserved embryos, courts have largely, and wisely, avoided making definitive pronouncements on their ultimate metaphysical or ontological status.¹³¹ Instead, we see internal authority at its most pragmatic, as judges lean on established legal tools by enforcing prior agreements, balancing the parties’ personal procreative interests at stake, and applying, with necessary modifications, principles derived from family law or, more cautiously, property law, to fit these new circumstances.¹³²

A landmark case in this area is the Tennessee Supreme Court’s 1992 decision in *Davis v. Davis*.¹³³ The court faced a genuine dilemma, with a divorcing couple

126. *Id.* at § 703.

127. *Glover v. Junior*, 316 A.3d 1106 (Pa. 2025). In this decision, the Pennsylvania Supreme Court adopted intent-based parentage into its common law, finding it a “more dignified means to establish parentage for couples who use ART to conceive.”

128. A “de facto parent” is a non-legal parent who has lived with and cared for a child for a significant period with the agreement of a legal parent, forming a parent-child bond. See American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.03(1)(c) (2002).

129. Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J.F. 589 (2018).

130. *Id.*

131. See I. Glenn Cohen & Eli Y. Adashi, *Embryo Disposition Disputes: Controversies and Case Law*, 46 HASTINGS CTR. REP. 13, 13–14 (2016).

132. *Id.*

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

at odds over their frozen preembryos and no statute or clear precedent to guide resolution.¹³⁴ Mary Sue Davis wanted to implant the embryos, whereas Junior Davis wanted them to remain frozen or be discarded.¹³⁵ The court explicitly rejected the trial court's conclusion that the preembryos were "children *in vitro*," while also declining to classify them as mere "property."¹³⁶ The Davis court opened a third way by characterizing the preembryos as occupying an "interim category that entitles them to *special respect* because of their potential for human life."¹³⁷ From this premise, the Davis court laid out a sequence for resolving such disputes.¹³⁸ First, to look at the preferences of the progenitors; second, to consider any prior agreement concerning disposition; and third, if no agreement existed or was dispositive, to weigh their respective interests in using or avoiding the use of the preembryos.¹³⁹ The court then added that, "[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question."¹⁴⁰ The court's refusal to definitively label the embryo as either person or property is a jurisdictional choice to confine the conflict within manageable legal bounds and avoid falling into intractable philosophical and moral debates.¹⁴¹

In contrast, yet complementary in its reliance on internal legal tools, *Kass v. Kass* from the New York Court of Appeals gave weight to the parties' prior written agreement.¹⁴² The Kasses had signed informed consent documents with their IVF program specifying that any unused embryos would be donated for research if they could not agree on their disposition.¹⁴³ When the marriage fell apart, Maureen Kass sought to implant the embryos against her ex-husband Steven Kass's wishes; the court enforced that prior agreement.¹⁴⁴ The *Kass* court reasoned "[a]greements between progenitors . . . regarding the disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."¹⁴⁵ It stressed that "the gamete providers, not the state or courts, should mutually decide whether or not to procreate using the pre-embryos."¹⁴⁶ Like the *Davis* court, the judges in *Kass* affirmed that pre-zygotes are not recognized as constitutional persons and that their disposition prior to implantation does not directly implicate a woman's rights to privacy or bodily

134. *Id.*

135. *Id.*

136. *Id.* at 597. The court found that preembryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category."

137. *Id.*

138. *Id.*

139. *Id.* at 604.

140. *Id.*

141. *Id.*

142. *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

143. *Id.* at 181.

144. *Id.* at 175.

145. *Id.*

146. *Id.*

integrity. This decision reflects internal authority's deference to contract law and prior expressed intent of the parties, which uphold their liberty to determine their own procreative arrangements by agreement.

These foundational cases show that the judiciary has consistently refused to grant embryos any absolute, external status that would override pragmatic legal analysis. The very creation of a "special respect" or "interim" status is a deliberate jurisprudential strategy. One might criticize the degree of uncertainty that remains in such approach, but it is not a weakness. It allows the law to acknowledge an embryo's unique nature and profound human potential, to view them as what some scholars have called "liminal entities," without prematurely foreclosing diverse societal views or locking into a rigid definition.¹⁴⁷

d. Constitutionalizing Relational Autonomy. Internal authority finds its another clear expression in the U.S. Constitution's interpretation of individual liberty. In a series of decisions, the Supreme Court has gradually established and consolidated the concept of relational autonomy. The essence of this concept is that individuals have the freedom to form, define and have legally recognized the intimate and familial bonds that are central to personal dignity, rather than being confined to the rigid model preset by the state.

The doctrinal path begins with *Griswold v. Connecticut* (1965).¹⁴⁸ In striking down a state law banning the use of contraceptives by married couples, the Court, through Justice Douglas, famously located a right to marital privacy in the "penumbras" formed by "emanations" from the specific guarantees in the Bill of Rights.¹⁴⁹ Though the Justices differed on the precise constitutional anchor for this right, with some pointing to the Ninth Amendment, others to the Fourteenth Amendment's Due Process Clause, *Griswold* established a protected zone of decision-making for married couples regarding procreation.¹⁵⁰ Several years later, *Eisenstadt v. Baird* (1972) extended this protection beyond marriage.¹⁵¹ In *Eisenstadt*, the Court invalidated a Massachusetts law that barred unmarried individuals from obtaining contraceptives, finding that the law's distinction between married and unmarried people violated equal protection by creating an unwarranted classification.¹⁵² The Court made clear that the right of privacy belongs to

147. The concept of the embryo as a "liminal entity" captures its threshold status in law, being neither fully a person nor simply property, which explains the law's struggle to create a stable regulatory framework. See CATRIONA A. W. McMILLAN, *THE HUMAN EMBRYO IN VITRO: BREAKING THE LEGAL STALEMATE* 206 (2021).

148. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

149. *Id.* Justice Douglas argued that specific guarantees in the Bill of Rights have "penumbras," formed by emanations," which create zones of privacy.

150. See *id.* (Goldberg, J., concurring) (arguing the Ninth Amendment protects fundamental personal rights not specifically mentioned in the first eight amendments); *id.* at 500 (Harlan, J., concurring) (arguing the law violated the Due Process Clause of the Fourteenth Amendment).

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

152. *Id.*

the individual, not the marital unit.¹⁵³ As the opinion stated, “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”¹⁵⁴ These decisions led to a broader understanding of personal autonomy in intimate matters.

Loving v. Virginia (1967) provided another pillar for relational autonomy.¹⁵⁵ The Court, in striking down anti-miscegenation laws, declared marriage to be “one of the basic civil rights of man, fundamental to our very existence and survival” and a “vital personal right essential to the orderly pursuit of happiness by free men.”¹⁵⁶ Chief Justice Warren, writing for a unanimous Court, asserted, “Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.”¹⁵⁷ *Loving* was a key decision that established the right to marry as being protected by both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁵⁸

Decades later, the sphere of protected intimate conduct expanded in *Lawrence v. Texas* (2003),¹⁵⁹ which struck down the sodomy law in Texas. Overruling its prior decision in *Bowers v. Hardwick*, the Court in *Lawrence*, through Justice Kennedy, emphasized the concept of relational autonomy, holding that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁶⁰

This constitutional affirmation of internal authority in defining family and relationships reached its apex in *Obergefell v. Hodges*.¹⁶¹ There, Justice Kennedy, writing for the majority, argued that the right to marry is “inherent in the liberty of the person,” protected by the Due Process Clause of the Fourteenth Amendment, and that the reasons marriage is fundamental “apply with equal force to same-sex couples.”¹⁶² This majority opinion affirmed the idea that families are constituted through bonds of love and shared intent, not on a state-imposed definition rooted in biology.¹⁶³ The opinion emphasized the connection between liberty and equality, citing *Griswold* to affirm that fundamental rights “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”¹⁶⁴ The opinion combined concepts of individual autonomy, the unique importance of intimate association, the safeguarding of children and families, and marriage as a keystone of the social order, to conclude that denying same-sex couples this right violated

153. *Id.*

154. *Id.*

155. *Loving v. Virginia*, 388 U.S. 1 (1967).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Lawrence v. Texas*, 539 U.S. 558 (2003).

160. *Id.* at 562.

161. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

162. *Id.* at 663.

163. *Id.*

164. *Id.* at 666.

core principles of equality and liberty.¹⁶⁵ As Justice Kennedy wrote, “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”¹⁶⁶

And yet, for all its historic importance, *Obergefell*’s rhetoric has drawn its own scholarly critique for glorifying marriage in a way that may deny the equal dignity of citizens in nonmarital families.¹⁶⁷ Critics argue that the Court’s emphasis on marriage as an ideal family form, while extending a right, could implicitly denigrate other family structures and violate the ideal of public reason by relying on a specific theory of the good life not universally shared.¹⁶⁸ But, the decision did offer public reasons for extending the right to marry, such as protecting autonomy in relationships, promoting child welfare, and ensuring equal access to a fundamental social institution.¹⁶⁹ The decision also explicitly acknowledged that “new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”¹⁷⁰

This line of cases tells, then, collectively narrates a coherent story of the U.S. Constitution’s internal capacity, through dynamic interpretive approaches, adapting to protect the liberty of individuals to form their most fundamental relationships based on their will, not their biology, in the face of evolving social realities. It is this entire adaptive and humane tradition of legal reasoning that what I refer to as the proclamation approach now seeks to overthrow.

B. THE INSURGENT JURISPRUDENCE: THE CLAIMS OF EXTERNAL AUTHORITY

1. Conceptual Grounding

What sets the jurisprudence of proclamation apart is its insistence on drawing its binding norms from outside the legal system itself. Internal authority finds its justification in its own endogenous processes such as the Constitution, legislation, and judicial precedents. External authority works quite differently. It claims legitimacy from outside the legal process, like divine law, a particular school of natural law theory, or a specific philosophy of human nature, and it asserts that these sources of value are objectively knowable and demand the law’s obedience.¹⁷¹

Internal authority’s claim to legitimacy is procedural and public-facing; external authority is substantive and truth-based. The proclaimed “truth”—moral, metaphysical, or theological—is held to be universally binding, and when legal procedures or democratic outcomes conflict with the supposed absolute truths

165. *Id.*

166. *Id.* at 675–81.

167. *See, e.g.,* Gregg Strauss, *What’s Wrong with Obergefell?*, CARDOZO L. REV. (2017). Some scholars argue that the Court’s celebratory rhetoric about marriage implicitly denigrates nonmarital families and relationships.

168. *Id.* (suggesting that by framing marriage as an uniquely fulfilling institution, the Court steps away from the neutrality required by public reason and endorses a particular conception of the good life).

169. *Obergefell*, 576 U.S. at 667–71. The Court’s reasoning includes secular justifications such as the protection of children and the provision of stability and legal benefits.

170. *Id.*

171. HART, *supra* note 77; FINNIS, *supra* note 17.

identified by external authority, the latter claims overriding dominance. This aligns with Natural Law theories, which hold that “there are rational objective limits to the power of rulers, the foundations of law are accessible through reason, and it is from these laws of nature that human laws gain force.”¹⁷² The ancient maxim “*lex iniusta non est lex*” (an unjust law is no law at all) captures this hierarchical claim that the validity of positive law is always contingent on its conformity to an external moral standard.¹⁷³ This stands in direct opposition to legal positivism’s core tenet that the validity of a law depends on its source and procedural legitimacy, not necessarily on its moral content.

Now, a proponent of these views would rightly protest the external label. They would argue, with considerable force, that their claims are in fact internal, grounded either in the constitution’s *original public meaning* or in timeless principles inherent in any legitimate legal system. This objection has merit but misses the nature of my critique. My use of the term external is not simply a judgment about where the values come from but rather highlights how such values function practically within a modern constitutional state. When a highly contested historical or philosophical interpretation is presented as an incontrovertible truth and is used to nullify all competing legal interests and procedural safeguards, it functions as an external mandate. Its purpose is to bypass, rather than engage with, the deliberative processes internal to the legal system.

Positing a certain truth as the ultimate source of legal validity challenges the basic premise of legal pluralism and the ability of a secular democracy to accommodate diverse moral and philosophical viewpoints. If one particular metaphysical or theological account of reality or morality becomes legally dominant, alternative belief systems risk marginalization or exclusion. This runs headlong into the Rawlsian ideal of public reason, which calls for political and legal justifications based on principles acceptable to reasonable persons who hold diverse comprehensive doctrines.¹⁷⁴

At a practical level, the absolutism inherent in external authority is also difficult to reconcile with the reality of legal practice. Internal authority thrives on careful balancing of competing interests, and flexible adaptation to changing societal conditions. Those are processes that naturally leave room for compromise. External authority’s commands tend to be rigid, however. Absolute statements such as “abortion is always impermissible” leave little to no room for balancing tests. Such rigidity would cause real difficulties for courts in complex cases such as *Davis v. Davis*, where judges must weigh competing fundamental rights.¹⁷⁵

Moreover, the jurisprudence of external authority rests on an epistemological claim, which is perhaps its most vulnerable point. The underlying logic is that

172. FINNIS, *supra* note 17; Brian Bix, *Natural Law Theory*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 211, 213–17 (Dennis Patterson ed., 2d ed. 2010).

173. Augustine of Hippo, *De Libero Arbitrio* (On Free Choice of the Will), bk. 1, § 5. The phrase is often translated as “for I think a law that is not just, is not actually a law.”

174. RAWLS, *supra* note 96.

175. *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992).

external truths are either self-evident, or else are accessible through some kind of revelation. This leads to an unavoidable dilemma: how can such truths be verified in a pluralistic society? More importantly, why should these supposed truths have binding authority over individuals who, operating under different rational faculties or fundamental beliefs, do not share those same conclusions? If, for example, certain moral principles are claimed to be universally rational, but are, in practice, recognized or accepted mainly within a particular philosophical or theological community, legally enforcing it upon others outside that community becomes deeply problematic from the standpoint of public reason and democratic legitimacy. This again contrasts sharply with internal authority's reliance on publicly accessible legal texts, established precedents, transparent legislative processes, and judicial reasoning that is, at least ideally, open to public scrutiny and critique.

2. The Claims of External Authority

Central to the legal and moral discourse surrounding the unborn is the concept of personhood. Whether a fetus is recognized as a person determines its standing under the law and the rights it may be accorded. Justice Blackmun's observation in *Roe v. Wade* remains as potent today as it was in 1973, "if this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."¹⁷⁶ This shows how the designation of person is no mere semantic quibble but carries immense legal and moral weight.¹⁷⁷ The jurisprudence of proclamation's most important move is to insist that fetal personhood is not a complex question at all, but a simple matter of fact. This section examines that claim. It explores the intellectual foundations of external authority by examining its three primary methodological claims: a claim to objective ontological fact, a claim to superior moral reason, and a claim to dispositive historical and theological mandate.

a. The Claim to Ontological Fact. Drawing from Aristotelian metaphysics, proponents argue that a human being is a substance, an enduring entity with an intrinsic nature, and that this nature, which includes personhood, begins when the substance itself begins.¹⁷⁸ Proponents of this view identify this beginning as conception, the moment the paternal and maternal genomes combine to form a genetically distinct zygote, at which point a complete human organism with a capacity to keep developing into a full human being comes into existence.¹⁷⁹ Robert George and Christopher Tollefsen, for example, support this view, asserting that the human embryo is, from fertilization, a "whole and distinct organism," a member of the species *Homo sapiens* deserving of full moral respect, and not merely a potential human

176. *Roe v. Wade*, 410 U.S. 113, 156–57 (1973).

177. *Id.*

178. Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 *RATIO JURIS* 173, 176 (2008).

179. *Id.*

being or a collection of cells.¹⁸⁰ From this perspective, the embryo in the uterus is “not a possible person, but rather a possibly functioning actual person by its very nature.”¹⁸¹

But is the ground beneath this claim as solid as it seems? The philosophical concept of substance, however, faces challenges from both within and outside its own theoretical framework. Philosophically, empiricists like David Hume long ago criticized that a supposed substance is a metaphysical construct unverifiable by empirical observation.¹⁸² Modern science, including field theory in physics and evolutionary biology, likewise casts doubt on the traditional idea of a fixed essence. Internally, the theory struggles with the problem of *individuation*.¹⁸³ If “form,” or the universal quality of being human, is the key to defining the entity, the theory cannot explain what makes each individual unique. If instead “matter” is the basis of individuality, then a living organism’s constant material turnover, as in cellular metabolism, means the substance is ever-changing, a notion at odds with the idea of a persistent identity.¹⁸⁴

A specific challenge to the claim of personhood from conception arises from the biological reality of monozygotic twinning.¹⁸⁵ The logic is straightforward: if an early embryo (within about 14 days of fertilization) can split into two or more independent individuals, how can that original embryo be defined as a single, determinate legal person? This suggests that personhood, if tied to biological individuality, cannot logically commence before the possibility of twinning has passed.¹⁸⁶

Some respond that the possibility of twinning does not negate the embryo’s individuality prior to the split.¹⁸⁷ Louis Guenin, for example, contended that this event can be understood as a form of asexual reproduction, where one existing individual ceases to be, though not in the traditional sense of death, and gives rise

180. Robert P. George & Christopher Tollefsen, *EMBRYO: A DEFENSE OF HUMAN LIFE* 5, 23 (2008). The authors argue from scientific and philosophical perspectives that the embryo is a “distinct” and “whole” human organism from fertilization.

181. Kirkland Young, *The Zygote, the Embryo, and Personhood: An Attempt at Conceptual Clarification*, 10 *ETHICS & MED.* 2, 4 (1994).

182. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 16 (L.A. Selby-Bigge ed., Oxford Clarendon Press 2000). Hume famously argued that we have no impression of “substance” itself, distinct from a collection of particular qualities. The idea of substance is a fiction of the imagination used to unify a collection of co-existing qualities.

183. David L. Hull, *The Effect of Essentialism on Taxonomy—Two Thousand Years of Stasis*, 16 *BRIT. J. PHIL. SCI.* 1, 13–15 (1965); Stephen Boulter, *Can Evolutionary Biology Do Without Aristotelian Essentialism?*, 70 *ROYAL INST. PHIL. SUPP.* 83, 90–94 (2012); Michael T. Ghiselin, *A Radical Solution to the Species Problem*, 23 *SYST. ZOOL.* 536, 537–40 (1974).

184. *Id.*

185. NORMAN M. FORD, *WHEN DID I BEGIN? CONCEPTION OF THE HUMAN INDIVIDUAL IN HISTORY, PHILOSOPHY AND SCIENCE* 119–20 (1988).

186. *Id.*; see also COMM. OF INQUIRY INTO HUMAN FERTILISATION & EMBRYOLOGY, *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY* (1984) (recommending the 14-day rule based on the formation of the primitive streak and the end of possible twinning).

187. See Louis M. Guenin, *The Nonindividuation Argument Against Zygotic Personhood*, 81 *PHIL.* 463 (2006).

to two new individuals.¹⁸⁸ Thus, the capacity for twinning would not mean the pre-twinning embryo was any less of an individual organism.

Guenin's argument may be philosophically coherent on its own terms, but in my view it lays bare the fundamental flaw in transposing such metaphysical concepts directly into legal rules. Consider Guenin's idea in legal terms, that, a legal "person" (Embryo A) could, without dying or committing any wrong, simply cease to exist as a legal subject, replaced by two brand new persons (Embryos B and C). How is the law to handle this? If Embryo A were named as a beneficiary in a will, would that inheritance vanish upon A's ontological expiration, or would it pass to B and C? If a tortious act, exposure to a drug, for example, happened to induce the split, did the tortfeasor kill A or did they create B and C? These questions are unanswerable with our existing legal tools because they describe no observable biological or juridical event. A theory that allows legal subjects to disappear and appear out of thin air cannot provide a stable foundation for a workable legal system.

Standing opposite the substance view is a functionalist theory of personhood, exemplified by Mary Anne Warren. Warren argues that personhood is not determined by species membership, but rather by the possession of certain exercisable capacities or functions.¹⁸⁹ She proposes a set of criteria typically including consciousness such as the ability to feel pain, reasoning, self-motivated behavior, communicative ability, and self-awareness.¹⁹⁰ Because fetuses, particularly in the earlier stages of development, lack these developed capacities, Warren concludes they are not persons in a morally relevant sense.¹⁹¹ This view, of course, generally supports the permissibility of abortion, as the fetus does not possess the characteristics that would grant it a right to life sufficient to override a pregnant person's autonomy.

Functionalism and substance ontology represent two irreconcilable philosophical systems. One sees personhood as a developed attribute, the other as an innate essence. For the law, the key is not to decide whether Aristotle or Warren is correct. The key point is that the law requires a "judicially discoverable and manageable standard."¹⁹² When the state chooses to legally enshrine one view—that personhood is an innate substance from conception, it is not discovering or confirming an objective fact so much as making a partisan normative choice a fact and imposing that as law.

The argument for potential personhood contends that even if a fetus does not currently possess the functions of a person, its potential to develop into one is morally significant and grounds a right to life, or at least a strong moral claim against its destruction. Don Marquis, with his "future like ours" (FLO) argument,

188. See *id.* at 479. Guenin refutes the argument that twinning negates individuality by comparing it to other forms of asexual reproduction, like mitosis, where an individual cell ceases to exist upon dividing, succeeded by two new individuals, without calling the individuality of the original cell into question.

189. Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 *MONIST* 43, 55 (1973).

190. *Id.*

191. *Id.* at 56.

192. See *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (plurality opinion) (reaffirming that the absence of judicially manageable standards renders a question nonjusticiable).

posits that what makes killing fundamentally wrong is that it deprives the victim of a valuable future; abortion, by that logic, has the same effect and is therefore also immoral.¹⁹³ This argument attempts to sidestep debates about current capacities by focusing on what is lost. But this argument runs into the sperm/ova problem: human gametes (sperm and ova) also possess the potential, under the right conditions, to develop into a person, at least when combined together.¹⁹⁴ If potentiality grounds a right to life, this would seem to imply that contraception, or even abstinence, is *prima facie* morally suspect, a conclusion most would find untenable.¹⁹⁵ As a legal standard, potentiality is either too broad to be workable or requires the drawing of an arbitrary line, which saps the principle of its coherence.¹⁹⁶

Finally, I must turn to Judith Jarvis Thomson's pivotal analysis in her essay *A Defense of Abortion*, where she reframed the debate, shifting the legal focus from the question of the fetus's status to the question of relational rights.¹⁹⁷ To appreciate her contribution, it is worth revisiting her famous violinist thought experiment. Thomson asks us to imagine waking up one day to find yourself in a hospital bed, connected back-to-back with an unconscious but renowned violinist.¹⁹⁸ He has a fatal kidney ailment, and you alone have the right blood type to save him. The Society of Music Lovers has kidnapped you and plugged your circulatory system into his. The doctors inform you that the connection must be maintained for nine months, after which he will have recovered. To unplug him before then would be to kill him.¹⁹⁹

Thomson argues that while it would be kind of you to remain connected and keep the violinist alive, you are under no absolute legal or moral obligation to do so.²⁰⁰ The violinist's right to life does not translate into a right to use your body for nine months against your will.²⁰¹ The brilliance of this analogy is that it concedes, for the sake of argument, that the other party (the violinist/fetus) has a full right to life and then asks: even so, does that right entitle one to conscript another's body to sustain it? Back to her point on abortion, she concludes that abortion can be morally permissible, not because the fetus lacks a right to life, but because the pregnant person has a right to bodily autonomy and is not morally obligated

193. Don Marquis, *Why Abortion Is Immoral*, 86 J. PHIL. 183, 194–95 (1989).

194. See Warren, *supra* note 189 at 53–56; see also Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFF. 37, 60–63 (1972).

195. See Marquis, *supra* note 193 at 201. Marquis addresses this by arguing that, in the case of contraception, there is no determinate individual who is deprived of a future. There are millions of sperm and an egg, but no single entity that can be identified as the subject of the loss. *Id.* at 174.

196. The FLO argument faces the critique of overgeneralization. See Joe Slater, *The Overgeneralization of the Future Like Ours Argument*, 31 NEW BIOETHICS 1 (2025).

197. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

198. *Id.* at 48.

199. *Id.* at 49.

200. *Id.*

201. *Id.* at 56–57. Thomson concludes, “The right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly.” Depriving the violinist of the use of one’s kidneys is not, in her view, an unjust killing. She argues that the right to life does not entail the right to use another person’s body against their will, thus separating the question of the fetus’ personhood from the pregnant person’s right to bodily autonomy.

to sustain the fetus's life through the use of her body, particularly in cases of rape (analogous to the violinist) or where the pregnancy poses a threat to her life.²⁰² Thomson's analysis exposes the limits of treating personhood as the sole decisive factor.²⁰³ It shows that even if we resolve that thorny ontological question in the fetus's favor, we have only completed the first step in a complex moral and legal balancing process. It is far from the end of the inquiry.

b. The Claim to Moral Reason. The diverse tradition of natural law theory posits a necessary connection between law and morality. New Natural Law (NNL) theory provides a crucial theoretical foundation for those who argue that life begins at conception and seek legal recognition of that principle in the current fetal personhood debate.²⁰⁴ It starts from the premise that there exist certain basic goods, such as life itself.²⁰⁵ From the perspective of NNL, these basic goods are not external dogmas but are understood as self-evident starting points for any rational agent. Morality, in the NNL framework, enters at the level of choice. The "first principle of morality," as articulated in Germain Grisez's later work, directs that human agents should always contribute to integral communal well-being.²⁰⁶ From this emerges an unbending directive that one must never choose to act directly to harm a basic human good. Following this line, a law's legitimacy rests on its ability to uphold these goods.²⁰⁷

The aforementioned maxim, "*an unjust law is no law at all*," though often called an oversimplification, nevertheless captures the essence of this tradition that law, to be true law, must possess a certain moral content or serve morally acceptable ends.²⁰⁸ The law's primary purpose is to serve and promote the common good, which Finnis describes as "a set of conditions which enables the members of a community to attain for themselves reasonable objectives."²⁰⁹ Just laws, by directing citizens towards this common good, create a genuine moral obligation of obedience.

But what of unjust laws that seem to stand in the way? Regarding the contentious maxim *lex injusta non est lex*, John Finnis offers an interpretation that this principle does not mean that an unjust enactment utterly lacks legal validity in a technical sense.²¹⁰ An unjust law, such as a law allowing abortion, can still be

202. *Id.* at 61–62.

203. *Id.* at 58.

204. Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, 21 *RATIO JURIS* 173, 175 (2008).

205. While specific lists may vary slightly, they generally include life (encompassing health and vitality), knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness (the capacity to use one's intelligence to deliberate, choose, and act well), and religion (harmony with some ultimate source of meaning). See FINNIS, *supra* note 17 at 86. Some theorists also identify marriage as a distinct basic good.

206. Germain Grisez, Joseph Boyle & John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 *AM. J. JURIS.* 99, 128 (1987).

207. JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 38–45 (1991).

208. Augustine of Hippo, *supra* note 173.

209. FINNIS, *supra* note 17, at 155.

210. *Id.* at 363–66 (2d ed. 2011). Finnis argues that the maxim is not a denial of legal validity in the positivist sense, but a statement about a law's lack of moral force. An unjust law may be technically

enforced by officials and recognized within the system, but it represents a corruption of law because its lacking moral obligatoriness fails to meet the criteria of law in its “focal” or “fullest” sense.²¹¹ Such interpretation allows NNL to acknowledge the reality of existing legal systems while denying their moral authority.

Despite its sophistication, NNL theory has its weaknesses. Russell Hittinger, for instance, has argued that NNL, by eschewing a fuller metaphysics, cannot show how nature is normative for human activity, thereby resembling Kantian deontology more than traditional Thomism.²¹² Apart from that, the foundational claim that the basic goods are “self-evident” is challenged by those who do not, in fact, find them to be so, raising serious questions about the theory’s epistemic base.²¹³

The incommensurability of basic goods has also drawn heavy fire. NNL insists that the basic goods are “incommensurable,” meaning no basic good can be weighed against another.²¹⁴ Critics contend this principle would lead to practical inconsistencies within a legal system because it lacks a clear basis for prioritizing between competing interests.²¹⁵ American jurisprudence, particularly constitutional law, is replete with balancing tests that require exactly the kind of weighing that NNL seems to forbid. If these goods cannot be rationally weighed against one another, how is practical decision-making even possible? How is a judge to resolve a case where the basic good of “life” (attributed to a fetus) appears to conflict with the basic good of “health” or “practical reasonableness” (instantiated in a pregnant person’s autonomy)?

A bigger challenge lies in how this theory sees intention. At first glance, one might think that probing an actor’s intention is no different from how courts determine mens rea in criminal or tort cases. However, the two differ significantly in both analytical framework and evidentiary requirements.

In legal practice, mens rea must be established through external objective evidence.²¹⁶ Courts infer a defendant’s state of mind by examining the act itself, the surrounding circumstances, and verifiable consequences.²¹⁷ In a sense, legal intention has to be tied to the external world. It is a state of mind ascribed to the actor based on observable evidence and rational inference.²¹⁸ NNL’s concept of “intention,” by contrast, is internal to the actor. According to their theories, especially as explained by Finnis and Grisez, the moral attributes of an action depend

“law,” but it is a corruption of law and does not create a moral obligation to obey. Jeremy Waldron, *Lex Satis Iusta*, 75 NOTRE DAME L. REV. 1829, 1830 (2000).

211. *Id.*

212. RUSSELL HITTINGER, A CRITIQUE OF THE NEW NATURAL LAW THEORY 192 (1987). Hittinger argues that by severing practical reason from a metaphysical account of human nature, NNL cannot adequately explain *why* nature is normative.

213. *Id.* at 43.

214. FINNIS, *supra* note 17 at 115.

215. See Alex E. Wallin, *John Finnis’s Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods*, 35 CAMPBELL L. REV. 59, 80 (2012).

216. David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1071–74 (2010).

217. See WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.2(b) (3d ed. 2025).

218. *Id.*

on the “*proposal for action*” the agent adopts after careful consideration.²¹⁹ This understanding of intention underlies NNL’s reliance on the principle of double effect, which distinguishes acts that directly intend a particular result from those in which a result is merely a foreseeable but unintended side effect.²²⁰ Whether a consequence is *intended* or simply *foreseen* hinges on this internal proposal.

This creates an evidentiary problem when one tries to apply NNL in real legal disputes. Consider one of the most challenging scenarios: the disposition of remaining frozen embryos after in vitro fertilization.²²¹ Suppose a couple decides to stop paying the storage fees and authorizes the clinic to destroy the remaining embryos. Under NNL, the morality of this act depends on the couple’s “proposal for action.”²²² Those in favor of the embryo legal personhood could argue that the couple’s proposal is to destroy human life, an intention directly attacking a basic good. The couple could just as easily retort that their proposal was to end an expensive and no longer needed medical procedure, and that the destruction of the embryo was a foreseen but unintended side effect. The interesting point here is that both two versions of “proposal for action” are perfectly compatible with the only external act involved here, that is, signing a consent form. The court lacks any judicially cognizable standard to choose between these two accounts. In a typical criminal case, shooting someone strongly indicates an intent to cause harm.²²³ But here, signing a consent form is morally neutral. This shifts the judicial inquiry away from the analysis of public evidence to the speculation of private conscience, which goes beyond the institutional competence of the judiciary.²²⁴

A prudent conclusion here is that while NNL theory brings valuable moral insight to the debate about when life begins, it attempts to offer the law a moral answer whose internal structure makes it unusable by legal methods. When it comes to deciding whether an embryo has legal personhood, NNL theory alone remains insufficient to serve as the basis for a workable legal rule.

c. The Claim to Historical Mandate and Theology. A third pillar of external authority comes from an application of originalism. Proponents, such as scholar Joshua Craddock, argue that the original public meaning of the word person in the

219. John Finnis, *Intention and Side-Effects*, in 2 INTENTION AND IDENTITY: COLLECTED ESSAYS 195 (2011).

220. The principle of double effect holds that an action with both a good and a bad effect is permissible if the action is not intrinsically wrong, the bad effect is merely foreseen and not intended, the good effect is not a result of the bad effect, and there is a proportionate reason for allowing the bad effect. See Alison McIntyre, *Doctrine of Double Effect*, in *Stanford Encyclopedia of Philosophy* (2004).

221. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1137–42 (2008).

222. John Finnis, Germain Grisez & Joseph Boyle, “Direct” and “Indirect”: A Reply to Critics of *Our Action Theory*, 65 THOMIST 1, 12 (2001).

223. LAFAVE, *supra* note 217.

224. The civilian law concept of *dolus* (intent) often incorporates an attitudinal or volitional component, such as indifference or acceptance of a foreseen harm, which is closer to the NNL concept of intention than the more cognitive-based approach of *mens rea* in American criminal law. See Luis E. Chiesa, *Mens Rea in Comparative Perspective*, 102 MARQ. L. REV. 575, 583 (2018).

Fourteenth Amendment at the time of its ratification in 1868 included children *in utero*.²²⁵ They support this claim with a host of historical sources, from 19th-century dictionaries and treatises to statutes criminalizing abortion, attempting to show that the framers of the Fourteenth Amendment and the public who approved it widely understood unborn fetuses to be persons protected by the Constitution.²²⁶

This originalist claim functions as a form of what I refer to as external authority because it seeks to bind present-day law to a particular and hotly contested historical interpretation.²²⁷ It circumvents the internally developed system of judicial precedents. Rather than engaging with the nuanced legal framework established by cases from *Griswold* through *Casey*, a framework encompassing principles of personal privacy, bodily autonomy, and the right to life, it simply puts forward a purported “historical fact” and asserts that this fact alone is enough to overturn an entire line of precedent.²²⁸

In my view, this line of reasoning attempts to substitute a supposedly settled historical conclusion for the careful reasoning and dynamic evolution on which the common-law constitutional tradition relies. It turns what should be an open-ended question, one that requires ongoing legal argumentation, into a closed question whose answer has supposedly been fixed by history.²²⁹ The danger of such an approach is that it eliminates the space for legal reasoning itself, reducing constitutional interpretation to nothing more than a historical fact-finding exercise.²³⁰

If the originalist argument at least cloaks itself in the methodology of historical and legal interpretation, then in the Alabama Supreme Court’s *LePage* case we see the external authority argument in its most bold form.²³¹ I revisit Chief Justice Parker’s concurring opinion here not to rehash its basic holding, but to analyze how his reasoning strategy challenges the very practice of legal reasoning.

In *LePage*, Chief Justice Parker argued that frozen embryos should be treated as “children” under state law.²³² His reasoning did not confine itself to legal texts or precedents. Instead, he grounded it directly in theology.²³³ “Even before birth,” he wrote, “all human beings have the image of God, and their lives cannot be destroyed without effacing his glory.”²³⁴ He declared that Alabama law is rooted in a “theologically based view of the sanctity of life” adopted by the People of

225. See Craddock, *supra* note 16 at 556.

226. *Id.* But see Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1105–11 (2023) (critiquing the originalist personhood thesis).

227. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–36 (2007); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352 (2015).

228. See Craddock, *supra* note 16 at 568.

229. *Id.* at 561–62.

230. Legal historian Mary Ziegler argues that the constitutional argument for fetal personhood is a modern invention, originating in the 1960s as a legal strategy to counter the abortion reform movement, rather than a recovery of the Fourteenth Amendment’s original meaning. See MARY ZIEGLER, *PERSONHOOD: THE NEW CIVIL WAR OVER REPRODUCTION* 2–3 (2025).

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

232. *Id.* at 694 (Parker, T., concurring).

233. *Id.*

234. *Id.*

Alabama, encompassing the beliefs that “(1) God made every person in His image; (2) each person therefore has a value that far exceeds the ability of human beings to calculate; and (3) human life cannot be wrongfully destroyed without incurring the wrath of a holy God.”²³⁵

In making this argument, Justice Parker extensively cited Christian theologians such as Petrus Van Mastricht, Thomas Aquinas, and John Calvin, as well as passages from the Bible.²³⁶ This actually went much further than a simple expression of personal faith or a casual nod to moral philosophy. It was installing an authority entirely extrinsic to the American legal system, a specific theological doctrine, and using it as the rule of decision in a judicial case.

The far-reaching effect of this move is a shift in the very basis of legal argument. When the justification for a legal claim is the “image of God” or the “wrath of God,” that claim places itself beyond the reach of secular scrutiny. One cannot refute a commandment from the Book of Exodus by citing *Roe* or *Casey*.²³⁷ Nor can one apply the secular legal principle of balancing rights to challenge a theological proposition about divine glory. The two belong to entirely different discourses.

Chief Justice Parker’s concurrence thus brings the logic of external authority to its natural endpoint. The disintegration of legal reasoning that occurs when this logic is taken to its conclusion. The fundamental problem, as I see it, is that the judge’s role shifts from an interpreter of the law to a conduit of sacred truth from without. When the law itself risks becoming an instrument of theology, it comes into fundamental conflict with the secular constitutional order from which it draws its legitimacy. This is the root of the constitutional conflict that the remainder of this article will examine.

III. THE CONSTITUTIONAL JUDGMENT: DECONSTRUCTING ASYMMETRICAL PERSONHOOD

A. THE DUE PROCESS VIOLATION: STATE-IMPOSED ONTOLOGY AND THE REJECTION OF PUBLIC REASON

The first constitutional casualty of the jurisprudence of proclamation is the Due Process Clause.²³⁸ When a state uses its authority to give a single answer to a long-contested philosophical question—namely when *personhood* begins—and makes that answer the sole premise for stripping citizens of fundamental rights, it exceeds its constitutional role. Such an act imposes a particular ontological view on all citizens and denies due process.²³⁹

235. *Id.* at 693.

236. *Id.*

237. See generally *Roe v. Wade*, 410 U.S. 113, 156–57 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

238. See U.S. Const. amend. XIV, § 1 (“Nor shall any State deprive any person of life, liberty, or property, without due process of law.”).

239. The imposition of a single ontological viewpoint via state power implicates the core of substantive due process, which limits the state’s ability to intrude upon fundamental personal liberties, regardless of the procedures followed. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)

An analysis of liberty under the Fourteenth Amendment must begin with the nature of the state power being exercised. The constitutional tradition draws a clear, if sometimes difficult, line between laws founded on accessible reason and those based on official orthodoxy.²⁴⁰ In my view, a fetal personhood inherently crosses that line.

This foundational principle finds its clearest articulation in Justice Robert Jackson's opinion in *West Virginia State Board of Education v. Barnette*.²⁴¹ In striking down a law compelling public school students to salute the American flag, the Court held, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."²⁴²

Applying *Barnette* here, it becomes clear that determining the ontological status of a fertilized egg or embryo, specifically, whether it constitutes a person in moral and legal terms, is exactly the kind of "matter of opinion" upon which the state can prescribe no orthodoxy.²⁴³ This is not a straightforward empirical or scientific matter that can be neatly resolved by legislative fiat. Modern science can describe the biological stages of development with great precision, but it cannot tell us when a cluster of cells becomes a person. That question has been vigorously debated for millennia by philosophers, theologians, and ethicists, and it remains unresolved.

When a state attempts to settle this debate by legislative or judicial fiat, its actions are fundamentally similar to, and indeed more intrusive than, the compelled flag salute condemned in *Barnette*.²⁴⁴ *Barnette* involved compelled symbolic speech, whereas forced pregnancy, a very possible phenomenon resulting from fetal personhood, embodies a far more profound and sustained intrusion, converting state-declared truth into direct physical domination over an individual's body.²⁴⁵

If the state cannot compel the *Barnette* children to affirm the symbolic meaning of a flag, it certainly cannot compel a woman to carry a pregnancy based on a

(establishing early substantive due process limits on the state's power to "standardize" individuals or dictate a singular path of formation).

240. This line is often policed by the Establishment Clause and the Free Speech Clause of the First Amendment, which are understood to prevent the government from establishing a religious orthodoxy or compelling citizens to affirm beliefs they do not hold. See Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B. U. L. REV. 939 (2009).

241. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

242. *Id.* at 642. In *Barnette*, the Court invalidated a West Virginia Board of Education resolution that required students to salute the flag and recite the Pledge of Allegiance. Students who refused (in this case, Jehovah's Witnesses who believed the act constituted worship of a graven image) were subject to expulsion and delinquency proceedings. Justice Jackson's opinion for the Court grounded the decision in freedom of speech, establishing a foundational principle against state-compelled affirmation of belief.

243. The question of when personhood begins is a subject of profound disagreement among philosophers and theologians and is not a matter of settled scientific fact.

244. See Alan Compelled Speech and the Regulatory State, 97 IND. L.J. 881, 889–90 (2022).

245. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (arguing that the right to privacy protects against laws that are "totalitarian" in that they "take over or occupy" the entirety of a person's life, with compelled childbirth being a prime example).

controversial metaphysical claim.²⁴⁶ The coercion here goes beyond compelled expression and reaches into fundamental bodily autonomy. This principle against compelled orthodoxy, while originating in the First Amendment context, informs the very idea of liberty that the Due Process Clause protects.²⁴⁷

Dobbs curtailed the specific right to abortion but neither erased nor could erase the broader spectrum of liberty interests recognized in cases from *Griswold* to *Lawrence* and *Obergefell*.²⁴⁸ These cases protect a sphere of “personal choices . . . central to individual dignity and autonomy.”²⁴⁹ Forcing a person to conform their body and life to a state-mandated metaphysical doctrine about personhood, a belief neither universally shared nor empirically verifiable, is no doubt a violation of that very dignity.

This freedom from state-imposed metaphysics is also rooted in Justice Harlan’s concurrence in *Griswold v. Connecticut*.²⁵⁰ There, Justice Harlan argued that the Due Process Clause protects basic values “implicit in the concept of ordered liberty.”²⁵¹ The inquiry into liberty, he wrote, must be grounded in a “continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.”²⁵²

For contemporary society, is any value more basic than a sense of epistemic humility on the part of the state? A nation of laws, not of men, must remain cautious and humble about the ultimate truths it purports to know.²⁵³ Compelling adherence to a hotly contested metaphysical creed is the hallmark of a theocracy or

246. See *Barnette*, 319 U.S. at 634 (“To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”)

247. See Genevieve Lakier, *West Virginia State Board of Education v. Barnette, and the Changing Meaning of the First Amendment*, 2019 U. CHI. LEGAL F. 739, 742–44 (2019) (discussing how *Barnette*’s principle has been reconceptualized over time from a democracy-focused to an autonomy-focused protection).

248. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right of married couples to use contraception); *Lawrence v. Texas*, 539 U.S. 558 (2003) (recognizing right to engage in private, consensual same-sex intimacy); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (recognizing the right to same-sex marriage). These cases are central to the doctrine of substantive due process, which protects fundamental liberties from state interference.

249. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). This language from the joint opinion in *Casey* has been cited repeatedly, including in *Lawrence* and *Obergefell*, to affirm a constitutional protection for personal autonomy in fundamental life decisions.

250. *Griswold v. Connecticut*, 381 U.S. 479 (1965)

251. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Justice Harlan’s concurrence is widely seen as providing a more durable foundation for the right to privacy than the majority’s “penumbras” reasoning, grounding the right directly in the Fourteenth Amendment’s Due Process Clause.

252. *Id.* (Harlan, J., concurring) (quoting his dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961)).

253. See generally Parker Wilkson, *The Danger of Dobbs: Substantive Due Process, Fundamental Rights, and a Critique of the Theory of Historical Tradition*, 35 U. FLA. J.L. & PUB. POL’Y 195 (2024) (arguing that a strict historical test for fundamental rights freezes the concept of liberty in a time when many groups were excluded from the political community).

a totalitarian state, not a liberal republic that respects the “rich cultural diversities that we owe to exceptional minds.”²⁵⁴

This idea finds its most rigorous philosophical defense in the work of John Rawls. As noted earlier, Rawls argued that laws concerning “constitutional essentials” are legitimate only when justified by public reason—that is, by reasons that all citizens, regardless of their comprehensive religious or moral doctrines, can reasonably be expected to endorse.²⁵⁵ The proclamation that personhood begins at conception is not from public reason.²⁵⁶ It is an assertion rooted in specific theological and metaphysical beliefs—as Chief Justice Tom Parker’s concurring opinion in *LePage v. Center for Reproductive Medicine*, with its extensive theological citations, makes so plain—that cannot be justified through publicly accessible evidence or reasoning.²⁵⁷

The constitutional violation becomes even more pronounced when state intrusion escalates from imposing abstract beliefs to exercising direct physical control over a person’s body through pregnancy. Regulating belief is one thing, and compelling someone to use her body in service of that belief is quite another. Any attempt to ground a compelling interest in a doctrinally imposed personhood status collapses when examined against established legal principles governing bodily integrity.

First, as the Supreme Court recognized in *Cruzan by Cruzan v. Director, Missouri Department of Health*, a competent adult has the right to refuse life-sustaining medical treatment.²⁵⁸ This right, rooted in bodily integrity, means the state cannot even compel an individual to save her own life through invasive medical interventions.²⁵⁹ Second, the law is even clearer that the state cannot compel one person to undergo a bodily intrusion to save another person’s life. This principle was illustrated in *McFall v. Shimp*, where a Pennsylvania court refused to order a man to donate bone marrow to his cousin, who would die without it.²⁶⁰ While finding the defendant’s refusal “morally indefensible,” Judge Flaherty held that to compel the donation “would change every concept and principle upon which our society is founded.”²⁶¹ To force the extraction of tissue from one to sustain

254. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640–41 (1943).

255. RAWLS, *supra* note 96 at 214–217.

256. *See id.* at iv. *See generally* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2495 (1997) (arguing that the moral status of the fetus is a matter of comprehensive belief that cannot be resolved by public reason alone).

257. *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 69 (Ala. 2024).

258. *Cruzan by Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277 (1990).

259. *Id.* at 269–70. The Court recognized for the first time that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment, including life-sustaining nutrition and hydration. This right is grounded in the common-law right of informed consent and the principle of bodily integrity.

260. *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (Pa. Com. Pl. Allegheny Cty. 1978).

261. *Id.* at 91. Judge Flaherty’s opinion is a strong defense of individual bodily autonomy against claims of social necessity, even in a life-or-death situation.

another, he wrote, “is revolting to our hard-wrought concepts of jurisprudence” for it would “defeat the sanctity of the individual.”²⁶²

The logic, then, is inescapable. If the government’s substantial interest in preserving the life of an undisputed, already-born person is not enough to override an individual’s right to avoid even a relatively minor bodily intrusion (*McFall*), and if its interest in preserving a person’s own life cannot overcome that person’s refusal of treatment (*Cruzan*), how can the state possibly justify compelling a woman to endure the nine-month all-encompassing burden of pregnancy to protect an embryo whose status as a person is predicated on a disputed moral judgment?²⁶³ It cannot. The state’s rationale is circular. It attempts first to impose an unconstitutional orthodoxy (*Barnette*) to create a rights-bearing entity, then cites that artificially created right to justify violating pre-existing constitutional liberties of citizens.²⁶⁴ Such circular reasoning cannot stand as constitutional justification.²⁶⁵

B. THE EQUAL PROTECTION VIOLATION: ASYMMETRICAL PERSONHOOD AS GENDER-BASED SUBORDINATION

Declaring fetal personhood through external legal authority may directly violate the Equal Protection Clause of the Fourteenth Amendment by creating a form of procedural discrimination based on gender. Specifically, such measures impose procedural inequality by selectively applying inferior and less protective decision-making processes exclusively to issues involving women’s reproductive rights. Instead of utilizing standard deliberative procedures typically afforded to other significant public concerns, states increasingly rely on rigid pronouncements or external authoritative sources when regulating pregnancy-related matters. Such selective procedural practices reinforce gender hierarchy by signaling that women, particularly regarding reproductive decisions, deserve fewer procedural protections than other citizens.

In considering whether this practice violates equal protection principles, I find the standard articulated by the Supreme Court in *United States v. Virginia* (*VMI*) is particularly instructive.²⁶⁶ In that case, Justice Ginsburg emphasized that when a state engages in sex-based classifications, it bears the burden of demonstrating an “exceedingly persuasive justification.”²⁶⁷ Under this heightened standard, the state must show not only that its objectives are genuinely important, but also that its chosen regulatory means bear a substantial relationship to those objectives.²⁶⁸ Moreover, the proffered justification must be authentic and cannot merely be a

262. *Id.* at 91–92.

263. See *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91–92 (Pa. Com. Pl. Allegheny Cty. 1978); *Cruzan by Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277 (1990).

264. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

265. See *id.*

266. *United States v. Virginia*, 518 U.S. 515 (1996).

267. *Id.* at 531.

268. *Id.* at 533 (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

post hoc rationalization designed for litigation, nor can it rely on stereotypes about gender differences.²⁶⁹

This type of scrutiny, often termed “skeptical” or heightened intermediate scrutiny in sex classification cases, means that the state must do more than simply assert a legitimate goal.²⁷⁰ It must also explain, in particular, why in regulating women’s reproductive autonomy it departed from the normal procedures used for other serious matters and instead resorted to a process with comparatively scant safeguards. In other words, the question is not only “*Why regulate pregnancy?*” but “*Why regulate pregnancy through a one-sided pronouncement inferior to the deliberative process used for other public issues?*” The state’s defense of such an anomalous method is unlikely to ever meet the “exceedingly persuasive” bar, as choosing an inferior regulatory procedure inherently reflects discriminatory assumptions that issues affecting women’s reproductive autonomy are somehow less deserving of normal procedural safeguards.²⁷¹

However, before pressing this argument further, we must address the Supreme Court’s 1974 decision in *Geduldig v. Aiello*.²⁷² In *Geduldig*, the Court held that excluding pregnancy from a disability insurance program was not sex discrimination because, in a formalistic view, the classification at issue simply distinguished “pregnant women” from “non-pregnant persons,” the latter category including both men and women.²⁷³ While the logic of *Geduldig* remains controversial and has received significant criticism, I also believe it does not control our present analysis.²⁷⁴ First, modern equal protection doctrine, particularly through the anti-subordination lens offered by scholars like Reva Siegel and Catharine MacKinnon, looks beyond formal classifications to see how laws perpetuate the second-class status of women.²⁷⁵ A legal regime that uniquely burdens women’s reproductive capacity does just that. Second, and more to the point, the discrimination at issue here is procedural, and it is structured quite differently from the classification in *Geduldig*. The classification here is not simply between the pregnant vs. non-pregnant. It is between matters governed through usual deliberative procedures and matters governed by arbitrary external authority. This divergence in governance mode happens to align exactly with issues unique to women’s

269. *Id.*

270. See Heather L. Stobaugh, *The Aftermath of United States v. Virginia: Why Five Justices are Pulling in the Reins on the ‘Exceedingly Persuasive Justification,’* 55 SMU L. REV. 1755, 1755–56 (2002) (analyzing the demanding nature of the VMI standard).

271. See *United States v. Virginia*, 518 U.S. 515, 531 (1996); see also Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 110 (2010).

272. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

273. *Id.* at 496–97, n. 20.

274. See Lucinda M. Finley, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (Judgment), in FEMINIST JUDGMENTS 185, 190–207 (Kathryn M. Stanchi et al. eds., 2016) (offering a rewritten opinion that critiques the original’s formalistic logic and failure to recognize pregnancy discrimination as sex discrimination).

275. See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

reproductive capacity, thereby functioning as a sex-based classification. The state, accordingly, must supply an exceedingly persuasive justification for its choice of governing method.

To clarify the discriminatory nature of these procedures, consider the recent experience in Alabama, once again. In *LePage*, the Alabama Supreme Court declared that cryopreserved embryos are unborn children, a ruling that suddenly exposed the state's IVF clinics to potentially catastrophic legal liability.²⁷⁶ In reaching that decision, the court invoked external authorities like dictionary definitions and sectarian notions, which are exactly characteristic of a jurisprudence of proclamation rather than reasoned adjudication.²⁷⁷

In contrast, when faced with the immediate and chaotic real-world consequence of this proclamation, for example, the shutdown of IVF services across the state, the Alabama legislature swiftly reversed course by enacting Senate Bill 159 (2024).²⁷⁸ S.B. 159 grants civil and criminal immunity for any death or damage to an embryo in the course of IVF services, effectively allowing embryos to be routinely discarded without liability.²⁷⁹ This legislation represents the state's normal mode of governance grounded in practical considerations responding to concrete social and economic anxieties. Suddenly, public reason returned. Pragmatism replaced proclamation. This rapid pivot shows that the state possesses and follows a deliberative problem-solving legal process for every major issue except for the one concerning the regulation of pregnancy. This selective application of governing methods constitutes a *prima facie* case of procedural discrimination.²⁸⁰

Feminist legal scholarship further clarifies why this procedural inequality is constitutionally problematic. The anti-subordination principle holds that the Equal Protection Clause's core purpose is to dismantle laws that perpetuate the subordination of historically disadvantaged groups.²⁸¹ For Catharine MacKinnon, gender inequality is fundamentally a hierarchy, and forcing women to submit to a legal rule lacking a sound rational basis is a classic means of entrenching their subordination.²⁸² In this view, a legal regime imposed on women without well-founded justification is not simply poor policy, but an instrument of

276. *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 680 (Ala. 2024); *see also* Alander Rocha, *Alabama Passes Law to Protect Access to IVF Treatments*, THE 19TH (Mar. 7, 2024), <https://perma.cc/74DN-M5TE>.

277. *LePage* 408 So. 3d at 686 (relying on dictionary definitions); *id.* at 692 (Parker, C.J., concurring) (relying on theological concepts).

278. *See* S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024); Alander Rocha, *Alabama Passes Law to Protect Access to IVF Treatments*, THE 19TH (Mar. 7, 2024), <https://perma.cc/74DN-M5TE>.

279. S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024).

280. *See* *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

281. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1011 (1986) (explaining the anti-subordination principle as seeking to eliminate power disparities between groups).

282. *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1294–1300 (1991). MacKinnon's dominance approach views gender as a system of social hierarchy in which men have power over women, a system that law often reinforces.

domination.²⁸³ Building on this, Reva Siegel's work on "reasoning from status" shows how facially neutral rules can enforce traditional social hierarchies.²⁸⁴ The state's choice to abandon its normal deliberative process in favor of dogmatic proclamation when dealing with pregnancy is itself a form of reasoning from a traditional, status-based view of women as primarily reproductive vessels.²⁸⁵

This procedural discrimination is parallel to what the Supreme Court identified in *Batson v. Kentucky*.²⁸⁶ In *Batson*, the Supreme Court held that even facially neutral procedural practices, such as peremptory juror challenges, violate equal protection if employed with discriminatory intent.²⁸⁷ Likewise, the state's choice of governance method, deliberation versus proclamation, is a procedural tool that can be used in a discriminatory manner. Selectively deploying the inferior and arbitrary method against a legal domain that uniquely burdens one sex is a form of procedural discrimination that, like the practice condemned in *Batson*, undermines the legitimacy of the entire process.²⁸⁸

Once the *prima facie* case of a sex-based classification of governing methods is established, the burden shifts to the state to give a legitimate, non-discriminatory reason for its choice of method.²⁸⁹ The state's usual justification—protecting potential life—cannot survive the "exceedingly persuasive" standard of *VMI*, as the state's own later actions reveal it to be pretextual.²⁹⁰ The swift passage of S.B. 159 granting immunity for embryo destruction in the IVF context is the ultimate evidence of pretext.²⁹¹ If the state genuinely believed, as a matter of consistent legal and moral principle, that an embryo is a child, it could not grant blanket immunity for its destruction. One does not grant immunity for the accidental killing of born children. The fact that the state immediately created a special exemption in the IVF context shows that its primary concern was not uniformly protecting embryonic life as such, which, if truly regarded as human life, would possess a

283. See Christine A. Littleton, *Reconstruction Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

284. Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

285. Siegel's theory demonstrates how, as overtly hierarchical laws are dismantled, new, facially neutral justifications emerge to preserve traditional status relationships. For example, justifications based on "family privacy" or "associational liberty" have been used to perpetuate gender and racial hierarchies, respectively. *Id.*

286. *Batson v. Kentucky*, 476 U.S. 79 (1986).

287. *Id.* at 80. (holding that the Equal Protection Clause forbids a prosecutor from using peremptory challenges to strike potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant").

288. The harm of such discrimination, the Court noted, extends beyond the defendant to the excluded juror and the entire community, as it "undermine[s] public confidence in the fairness of our system of justice." *Id.* at 86.

289. See *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

290. *United States v. Virginia*, 518 U.S. at 516 (requiring the state's justification to be "genuine, not hypothesized or invented post hoc in response to litigation"). A pretextual justification is one that conceals the real, discriminatory reason for a state action.

291. S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024).

full suite of passive incidents.²⁹² Rather, the aim was to impose a particular legal consequence on a specific group, namely pregnant women, especially those seeking to terminate a pregnancy. This is why I conclude that conferring an asymmetric form of legal personhood on the fetus by invoking external authority violates the constitutional guarantee of equal protection. The choice of how to govern reveals the true, and impermissible, motive.

C. THE STRUCTURAL VIOLATION: A CRISIS OF INSTITUTIONAL ROLES AND THE RULE OF LAW

The damage from the jurisprudence of proclamation goes well beyond individual rights violations. The substantive harms to due process, equality, and liberty are enabled by a deep structural decay of the legal system. The situation in Alabama is not just messy politics or the normal friction of federalism. It exemplifies what Joseph Fishkin and David Pozen call “asymmetric constitutional hardball,” which refers to a deliberate sabotage of the legal system to rig the rules and achieve results that normal democratic processes would not permit.²⁹³

This crisis exposes dual institutional failures. First is the judiciary. In *LePage*, the Alabama Supreme Court overstepped its authority, engaging in plain judicial overreach.²⁹⁴ Faced with a deeply contested moral and philosophical question, the court resolved it through theological reasoning and declared that reasoning binding law. This move carried the court far beyond its judicial duty of interpreting the law and into the area of legislating. Then came the legislature. In its turn, the Alabama legislature combined abdication with contradiction.²⁹⁵ Having rushed through S.B. 159 in response to *LePage*, the legislature then refused to fix the underlying inconsistency, and it papered over it, creating a legally absurd scenario where embryos are children who can be vindicated in court, but no one is liable for destroying them in a clinic.²⁹⁶ In so doing, the legislature forsook its fundamental responsibility to enact clear and consistent laws.

A state committed to the rule of law requires, at a minimum, an internally coherent legal system. The ruling in Alabama, where an embryo is both a person and not a person for purposes of liability, fails this basic test. How should we understand a legal system that functions this way? Legal philosopher Lon Fuller had a name for this kind of thing: a failure of law itself.²⁹⁷ For law to have legitimacy—what Fuller called its internal morality—it must at least be non-

292. KURKI, *supra* note 58 at 95.

293. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 579 (2018) (defining constitutional hardball as using the technical rules of law to violate or strain unwritten constitutional norms for partisan gain).

294. See *Judicial Overreach and Constitutional Limits on Federal Courts: Joint Hearing Before the Subcomm. on Cts., Intell. Prop., A.I., & the Internet & the Subcomm. on the Const. & Ltd. Gov't of the H. Comm. on the Judiciary*, 119th Cong. (2025).

295. S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024).

296. *Id.*

297. FULLER, *supra* note 106.

contradictory and possible for people to follow.²⁹⁸ A system that commands the impossible, that says embryos are both protected persons and disposable things, has lost its claim to be law. It becomes merely a set of conflicting ideas, too irrational to guide behaviors.²⁹⁹

The dilemma does not only merely exist in theory. In practice, doctors, patients, and researchers find themselves in uncertainty, chilled by the risk of arbitrary enforcement.³⁰⁰ The situation mirrors *Colautti v. Franklin*, where Pennsylvania required doctors to exercise heightened care when dealing with a fetus that “may be viable.”³⁰¹ The Court struck down the statute as unconstitutionally vague on two grounds: first, it created an indefinable middle ground between “viable” and “non-viable,” leaving doctors unable to know when their duties kicked in; second, it failed to specify whether a doctor’s determination that a fetus “may be viable” should be made by a subjective or an objective standard.³⁰² This ambiguity, compounded by the threat of criminal penalties, created a chilling effect that made it difficult for doctors to exercise their professional judgment without risk.³⁰³ Apply *Colautti*’s logic to Alabama, and we see the very same pattern of structural vagueness and resulting chilling effect, exactly the kind of situation the Constitution forbids.

For these reasons, federalist defenses of this kind of the jurisprudence of proclamation, such as insisting that it is merely a political question for each state to sort out, are unconvincing. What we are seeing is not a political disagreement that federalism is designed to accommodate. It is not a loophole or a one-off failure. It is strategic in a sense. As Fishkin and Pozen argue, constitutional hardball involves using legal tools to shatter established institutional norms, not to resolve conflict within them.³⁰⁴ In cases like Alabama’s on embryo personhood, the court oversteps its bounds. When that leads to politically messy fallout, the legislature rushes in with a patch that bails out powerful interest groups like IVF users, while preserving the underlying contradictions for future use against another group, say, those seeking abortions.³⁰⁵ In this way, the political aims of the jurisprudence of proclamation get achieved through structural disruption, not through the give-and-take of ordinary democratic debate.

298. *Id.* Fuller identified eight principles that constitute the “inner morality of law,” one of which is the avoidance of contradictions. A legal system that issues contradictory commands fails a basic test of coherence and thus fails as law.

299. *Id.*

300. See Nicole Huberfeld, *Alabama Court Ruling That Frozen Embryos Are Children and Its Impact on the Future of IVF Treatment*, BU TODAY (Feb. 22, 2024), <https://perma.cc/T5E9-NB5F> (noting that the immunity law does not resolve the underlying legal uncertainty for IVF providers).

301. *Colautti v. Franklin*, 439 U.S. 379 (1979).

302. *Id.* at 391–93.

303. *Id.* at 396.

304. Fishkin & Pozen, *supra* note 293 (arguing that such tactics are often employed asymmetrically, with one political party being more willing to strain or break norms to achieve its goals).

305. S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024).

IV. PATHWAYS TO CONSTITUTIONAL COHERENCE

A. THE JUDICIAL ROLE: POLICING JURISDICTIONAL BOUNDARIES

The most immediate challenge for restoring constitutional order falls upon the judiciary. The jurisprudence of proclamation, in its various forms, pushes the courts into a role for which they are ill-suited and for which the Constitution provides no warrant, namely, acting as arbiters of contested metaphysical truths. This predicament requires the judiciary to assert a first principle of judicial review, a duty to defend the boundary between public reason and comprehensive dogma, in order to protect its institutional integrity.³⁰⁶ The Supreme Court's decision in *Dobbs* confirmed that state legislatures may ground their policy choices in a particular belief about when life begins.³⁰⁷ But the power to make policy based on their views about personhood differs fundamentally from the power to define reality for the judicial branch. Nothing in *Dobbs* authorizes states to compel judges to adopt those same views as judicially cognizable facts when conducting constitutional analysis. In other words, the potential constitutional problem is not a state merely holding a view on embryonic personhood, but the attempts to make courts transform that position into a legal fact. Doing so undermines the judiciary's role in applying reasoned analysis.

As a direct remedy for the due process violation of ontological coercion analyzed above, I propose a formal doctrine of *Metaphysical Question Abstention*. This would be a justiciability principle designed *not* to defy *Dobbs*, but to preserve the judiciary's structural role in its aftermath. The doctrine would require a court to abstain from endorsing or relying upon a state's ontological proclamation when adjudicating a constitutional challenge. Abstention is triggered when a state law, understood here to include both a legislative enactment and a binding state court decision, meets two objective conditions: (1) it creates or recognizes a novel legal status for a non-born entity, whether by legislative act or judicial fiat, that lacks deep roots in the common law or broad settled precedent;³⁰⁸ and (2) it wields that status to nullify or subordinate an established right of a born person.

The court would still decide the case, but it would disregard the metaphysical basis for deciding it. By setting aside unanswerable metaphysical questions, the court returns to traditional constitutional analysis. The case must then be decided on the law's tangible effects on born persons and on the state's secular policy interests. In other words, once the metaphysical premise is stripped away, the

306. RAWLS, *supra* note 96 at 387 (defining “public reason” as the mode of justification in a pluralistic constitutional democracy, which avoids reliance on contested comprehensive doctrines).

307. See *Dobbs v. Jackson Whole Women's Health Organization*, 597 U.S. 215, 231, 301 (2022) (noting that the Constitution “allows the citizens of each State to regulate or prohibit abortion” based on legitimate interests, including “respect for and preservation of prenatal life at all stages of development”).

308. Historically, the law did not treat unborn embryos or fetuses as persons with independent legal rights. See, e.g., *Roe v. Wade*, 410 U.S. 113, 132–35, 162 (1973) (surveying common law and early statutes and noting that the unborn “have never been recognized in the law as persons in the whole sense”).

court must evaluate the statute under conventional constitutional doctrines, for example, by examining whether the law's infringement on a woman's liberty or equality is justified by valid state interests such as public health or the protection of potential life that the court is competent to weigh in the evidentiary record.³⁰⁹

In proposing this doctrine, I draw from principles of institutional competence, particularly the political question framework. It aligns closely with the first *Baker v. Carr* factor, which highlights a "lack of judicially discoverable and manageable standards" for resolving the issue presented.³¹⁰ A court facing a political question might struggle with complex facts, but there are, at least, facts to be found. Questions about personhood's beginning lack even that empirical foundation. They are alien to the tools of the judiciary. What discovery could a court order to determine the moment of ensoulment? What expert testimony on the nature of a soul could satisfy the *Daubert* standard for scientific evidence?³¹¹ Would it hear expert testimony from theologians, and under what standard would it weigh their credibility? By what burden of proof would such an ontological proposition be proven, a preponderance of the evidence? The absurdity of these questions reveals the point. Indeed, the very act of asking them highlights the hollowness of pretending that any manageable legal standard exists for resolving such matters. As Chief Justice Roberts pointed out in a different context, attempting to judicially referee questions that lack objective standards only exposes the futility of the endeavor and the *hypocrisy* of feigning neutrality in doing so.³¹² In embracing Metaphysical Abstention, a court would be formalizing the caution courts have long shown, from *Roe*'s refusal to speculate on when life begins as ("the disciplines of medicine, philosophy, and theology are not agreed"),³¹³ to *Casey*'s acknowledgment of "the mystery of life" that each individual must confront according to "the dictates of their conscience."³¹⁴

This doctrine differs from the substantive balancing test of *Planned Parenthood v. Casey*. It is not a reboot of the *Casey* undue burden standard. *Dobbs* made clear that states are permitted to have a view on when life begins and to legislate based on that view.³¹⁵ The proposed abstention leaves states free

309. Even before *Dobbs*, courts recognized only certain legitimate state interests in regulating abortion, such as safeguarding maternal health or protecting potential life. See *Roe*, 410 U.S. at 162–63 (identifying those interests); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–77 (1992) (plurality opinion) (reaffirming that the State has a "legitimate interest from the outset of pregnancy in protecting the health of the woman and the life of the fetus that may become a child"). This doctrine ensures courts consider such secular interests rather than unverifiable metaphysical claims.

310. *Baker v. Carr*, 369 U.S. 186, 214 (1962).

311. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–95 (1993) (requiring that scientific expert testimony be based on empirical testing and methodology subject to peer review).

312. See *Rucho v. Common Cause*, 588 U.S. 684, 708 (2019) (finding no "judicially discernible and manageable standards" for deciding when partisan gerrymandering goes too far, and cautioning that any supposed standard would be arbitrary).

313. *Roe*, 410 U.S. at 159.

314. *Casey*, 505 U.S. at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

315. See *Dobbs v. Jackson Whole Women's Health Organization*, 597 U.S. 215, 289 (2022) ("Our decision allows women on both sides of the abortion issue to seek to affect the legislative process by

to legislate based on their views of life, as *Dobbs* allows. Instead, it draws a line against states requiring federal courts to endorse those views as facts in constitutional review.

In practical terms, the violation targeted by this doctrine is the state's attempt to force an Article III court to adopt the state's contested metaphysical premise as the court's own factual finding in the course of constitutional adjudication. For example, if a state defending an abortion restriction argues that "this embryo is a legal person" and therefore the restriction must be upheld, the court would invoke Metaphysical Abstention. The court's response, in effect, would be: "*That is a metaphysical proposition, not a judicially cognizable fact. We will abstain from crediting or adjudicating that claim. Please reformulate your defense based on recognized secular state interests, such as promoting public health or protecting potential life, which this court is competent to evaluate with evidence.*" This allows a court to respect *Dobbs*'s grant of legislative power while fiercely protecting its own Article III integrity from being used as a rubber stamp for a state's theological or philosophical conclusions.

Of course, any proposal of a new justiciability doctrine must contend with the usual critiques of such doctrines. One might ask whether the Metaphysical Abstention doctrine is itself an act of judicial activism or, to use Tara Grove's terms, an assertion of "judicial supremacy" where courts arrogate to themselves the power to police the boundaries of lawmaking?³¹⁶ In a sense, yes, but it is a defensive, not an aggrandizing, use of³¹⁷ that power. The doctrine proposed here is carefully self-limiting. It applies only under the narrow conditions of the two-part test above, and solely for the purpose of preventing the corruption of the judicial fact-finding process. It maintains courtrooms as of reason and evidence rather than faith or dogma. The court is not deciding the metaphysical question; it is declining to decide that question and insisting the case be argued on legal grounds.

A sharper critique, from scholars like Louis Michael Seidman, is that all justiciability doctrines conceal a secret value choice or political judgment by the courts.³¹⁸ This insight is powerful and, as I see, should be acknowledged.

influencing public opinion, lobbying legislators, voting, and running for office."). The Court in *Dobbs* expressly disclaimed any judicial role in arbitrating the moral question of when life begins.

316. See Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1911–13 (2015) (discussing views of the political question doctrine as a tool of judicial supremacy in maintaining the Court's interpretative authority).

317. This reasoning aligns well with longstanding constitutional norms. The U.S. legal system expects that laws be justified in terms accessible to all citizens, not enforced as articles of faith. Cf. *Epperson v. Arkansas*, 393 U.S. 97, 106–07 (1968) (invalidating a state ban on teaching evolution as an unconstitutional imposition of religious orthodoxy in public education). By refusing to elevate one metaphysical viewpoint to legal fact, the judiciary could safeguard the secular as well as inclusive nature of our legal order.

318. See Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 441–43 (2004) (arguing that justiciability rulings often mask substantive decisions about how far courts should go in resolving contentious issues).

Seidman is right: a choice is inevitable. A state following the jurisprudence of proclamation, after all, asks the court to effectively bless a particular comprehensive doctrine that an embryo is a legal person with rights as the law of the land, thus abandoning the court's neutral stance. The doctrine of Metaphysical Abstention, by contrast, makes a more legitimate choice where it chooses to uphold the procedural framework of constitutionalism itself, a framework of public reason that allows a pluralistic society to function despite its deepest disagreements. So, if a secret choice must be made, this is perhaps the only option consistent with the judiciary's structural role. This choice upholds law itself against the jurisprudence of proclamation.

B. THE LEGISLATIVE AND COMMON LAW PATHWAY: A FRAMEWORK OF RELATIONAL STEWARDSHIP

While the judiciary must police the outer bounds of its competence, the duty to craft affirmative solutions for novel technological problems lies with legislatures and the common law. Addressing the status of the *ex utero* embryo requires not a radical invention *ex nihilo*, but a refinement of principles already visible in cases like *Davis* and *Kass*.³¹⁹ The *Relational Stewardship* framework proposed here builds on those cases and provide a middle path between the unworkable extremes of treating embryos as absolute persons on one hand or as disposable property on the other.

As I have discussed in prior sections, the seeds of a more coherent approach can be found in the bottom-up reasoning of courts that have confronted embryo disputes. The foundational case is *Davis v. Davis*, where the Tennessee Supreme Court expressly rejected both the person and property labels.³²⁰ Instead, *Davis* held that embryos occupy an "interim category" and are entitled to "special respect" because of their potential for human life.³²¹ By carving out this *sui generis* status, the *Davis* court acknowledged that embryos are not mere things, yet it refrained from granting them the full legal rights of persons.³²² Importantly, the Tennessee court recognized that disputes over embryos implicate the profound liberty and dignity interests of the would-be parents, such as their interests in deciding whether or not to procreate, rather than any independent legal interests of the embryo itself.³²³ In other words, the value of the embryo was understood to derive from its connection to the progenitors' reproductive plan and their potential for creating life, not from the assignment of personhood to the embryo.

Kass v. Kass built on this. Faced with divorcing parties' competing claims, the New York Court of Appeals looked to the express intent of the progenitors themselves and held that a prior written agreement between the IVF patients, specifying how to dispose of any unused embryos in the event of divorce, was

319. See *Davis v. Davis*, 842 S.W.2d 588, 590–91 (Tenn. 1992); *Kass v. Kass*, 91 N.Y.2d at 562–64 (N.Y. 1998).

320. *Davis*, 842 S.W.2d at 597.

321. *Id.*

322. *Id.*

323. *Id.* at 598–600 (emphasizing the constitutional privacy right to procreate or avoid procreation when resolving an embryo custody dispute).

enforceable and would govern the outcome.³²⁴ Agreements between progenitors regarding disposition of their embryos “should generally be presumed valid and binding.”³²⁵ This holding reinforces the key insight of *Davis* that the legal status of the *ex utero* embryo has no inherent legal status independent of the relationships and agreements that created them. Its destiny is, and should be, defined by the *procreative liberty* of those who created it, exercised either through an agreement or, absent an agreement, through a case-by-case balancing of their respective interests in procreation.³²⁶

The Relational Stewardship framework draws on established private law concepts to structure these relationships. Law routinely adapts principles across domains when addressing novel problems.³²⁷ I borrow two private-law concepts of trusts and bailments as a functional analogy to explain the duties and relationships surrounding IVF embryos forcing inappropriate classifications.

First, consider a trust analogy. The progenitors act as the settlers of a kind of trust when they create embryos via IVF. The embryos themselves are the *res*, meaning the subject matter of the trust, and they are created for a specific and limited purpose, namely, the couple’s shared procreative project to have a child or to preserve the possibility of having one in the future. The dispositional consent forms that IVF patients sign with the clinic are like trust instruments, documenting the intended purpose and stipulating what should happen with the embryos under various contingencies (e.g., death, divorce, completion of family, etc.). The progenitors and the fertility clinic together then assume the role analogous to trustees or stewards of the embryos. They bear duties to manage and use the embryos consistent with the stated purpose of the *trust*. As I should note, this duty is not owed to the embryo as a legal beneficiary, as calling the embryo a beneficiary would improperly imply it has legal personhood or enforceable rights. Instead, the duty is owed *to the integrity of the procreative project itself*, and by extension to the progenitors’ own constitutionally protected interests in deciding whether and when to procreate. In effect, the law can recognize that those who create and hold embryos in IVF have a fiduciary obligation to each other to safeguard the embryos’ potential in line with the creators’ intent and mutual expectations.³²⁸

324. *Kass*, 696 N.E.2d at 181.

325. *Id.* at 179.

326. *Kass*, 91 N.Y.2d at 563–64; *Davis*, 842 S.W.2d at 597; see also I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1145–55 (2008).

327. For instance, courts have used tort principles to inform constitutional remedies and causation analyses. See *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978) (explaining that common-law tort rules should inform the determination of damages under §1983 for violation of constitutional rights).

328. This framing aligns with the idea that procreative liberty is a fundamental right of the individuals involved. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (procreation is “one of the basic civil rights of man”). By treating the handling of embryos as a matter of fulfilling the progenitors’ purposes and rights, rather than a duty owed to the embryo itself, the proposed framework avoids attributing independent personhood to the embryo while still ensuring it is not mistreated or misused contrary to the creators’ wishes.

Second, the relationship between the progenitors and the fertility clinic also resembles specialized bailment. In a bailment, one party (the bailee) temporarily holds property belonging to another (the bailor) for a specific purpose. Here, the fertility clinic is a bailee, entrusted with the couple's unique and irreplaceable genetic material for the purpose of preserving them until they can be used in accordance with the couple's decisions. Unlike ordinary bailment such as when one leaves a car with a parking valet, this material in the IVF context directly implicates fundamental rights of procreation and family formation. Because of the constitutional dimension, the bailee's duties should be elevated beyond the normal commercial relationships. The clinic's obligation approaches that of a fiduciary, that it must exercise heightened care and loyalty in safeguarding the embryos and following the progenitors' directives. This notion isn't purely theoretical as courts have implicitly recognized something akin to a bailment in the IVF context. For example, in *York v. Jones*, one of the first IVF cases, a federal court held that an IVF clinic's refusal to transfer a couple's frozen embryo to another clinic violated the couple's rights under a bailment theory, essentially treating the embryo as property belonging to the couple and entrusted to the clinic's care.³²⁹ The Relational Stewardship model proposed here would formalize this, that the clinic and any other custodians of the embryo must act as a faithful bailee, recognizing the inestimable subjective value of the embryos to the people who created them. In practice, this could justify allowing parents to recover not just economic losses but also emotional and dignitary damages if a clinic negligently destroys or loses their embryos because the harm, as we can imagine, is akin to losing one's chance at bearing a child, not merely the loss of fungible property.³³⁰

In addition to these analogies, the Relational Stewardship framework can draw on the doctrine of condition precedent. In contract and property law, a condition precedent is an event that must occur before a certain legal status or obligation comes into effect. We can conceive of the progenitors' relationship to the embryo as containing a latent condition precedent, an *awakening* condition. The embryos are initially in a protected interim status, not full persons, but not mere chattels held in stewardship. Upon the occurrence of a defined event, specifically, the joint and informed decision of the progenitors to initiate a pregnancy with a given

329. *York v. Jones*, 717 F. Supp. 421, 425–27 (E.D. Va. 1989) (finding that the relationship between an IVF clinic and a couple storing a pre-zygote was a bailment and that the couple retained ultimate decision-making authority over the disposition of their embryo).

330. See Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 179–83 (2017) (arguing that lost or destroyed embryos implicate a unique category of harm – the thwarting of reproductive plans – which is not adequately redressed by traditional property or contract damages); *id.* (advocating recognition of emotional distress damages in such cases). Many courts have been reluctant to award emotional-distress or quasi-personal injury damages for the loss of embryos when treating the matter as a property or contract claim. A stewardship framework would provide a doctrinal basis for such recovery by characterizing the duty in handling embryos as a heightened one intertwined with fundamental rights.

embryo, the legal status of that embryo would change. At that moment, the embryo would no longer be simply an object of property arrangements. It would become, for legal purposes, an embryo *in utero* once implanted or otherwise elevated in status in contemplation of actual gestation. In more familiar terms, once the parents together decide “yes, we will try to have a baby with this embryo now,” the law can treat the embryo as entering a new phase where the ordinary rules of pregnancy and the state’s interests in potential life attach. Until that condition is fulfilled, however, the embryo remains in the stewardship phase.

The condition precedent doctrine offers a procedural mechanism for the status shift that *Davis* intuited but did not fully articulate. I propose it as a counter-narrative to fetal personhood proclamations, especially in the IVF context, as it shows that we do not need to declare an embryo a constitutional person, with all the binary and absolutist consequences that entails, in order to protect what is meaningful about it. Instead, we can use the law’s internal instruments such as contracts and trusts to recognize that the embryo’s significance is contingent on the parents’ reproductive intent, and we enforce that intent through established legal structures. In doing so, we uphold the values of private ordering and liberty embedded in what I have called the legal system’s internal authority against the external authority of blanket personhood edicts.

Why adopt this Relational Stewardship model? I would argue its primary advantage is that it provides a clear and principled way to resolve disputes between progenitors about embryo disposition, which is an area where courts currently struggle for lack of consistent doctrine. Rather than ad hoc balancing of equities or ill-defined appeals to morality, the stewardship approach instructs courts to enforce the ex ante intent of the parties. If the couple made an agreement, that agreement governs. If they did not, the default rule is that no use or disposition can occur absent mutual consent. This approach re-centers the decision on the parties’ relational autonomy, which is an area where courts have the capability to accommodate with their internal legal reasoning process.

As a secondary benefit, this framework provides a more coherent basis for remedies when things go wrong, such as cases of clinic misconduct or accidents. Under a simplistic property model, the loss or damage of embryos is often treated as a property loss, which severely limits recovery and often precludes damages for emotional harm. On the other hand, under a pure tort model, plaintiffs would struggle to fit into traditional categories like “wrongful death” (since embryos are not legally persons under most laws) or negligent infliction of emotional distress (since plaintiffs’ emotional harm is not accompanied by a physical injury in many jurisdictions). The Stewardship model, however, by framing the harm as a breach of a fiduciary duty concerning property tied to fundamental rights, naturally allows recovery for the real injuries suffered including for damages emotional and dignitary harms.

This proposal must, however, confront the hostile legal environment in states that have adopted personhood amendments or have binding precedent like the

Alabama Supreme Court's decision in *LePage*.³³¹ In such as jurisdiction, a statute embodying Relational Stewardship by treating embryos as special-property held in trust might well be struck down in state court as contrary to the *public policy* that embryos are persons. But that does not mean the stewardship concept is useless there. Its role there shifts from an implementable policy to a litigative tool for exposing inconsistency. The tension between private practice and public proclamation can be highlighted to show the impracticality and even the absurdity of the absolute personhood stance. If a state insists that embryos are legal children, one might ask how can these children be the subject of contracts and storage agreements? How can the law treat an embryo as a child and allow it to be frozen and divided between divorcing spouses, or discarded as medical waste? In fact, the entire IVF practice, to date, operated on the assumption that embryos can be owned, stored, and disposed of under private agreements, which is fundamentally incompatible with treating them as full human beings under law. By rigorously detailing how IVF is built upon the private law principles as I mentioned above, one, especially litigators and scholars, can point out the functional incoherence of a legal regime that calls embryos persons.³³²

The strategies proposed in this Part provide a multi-front defense of what I have called the internal authority of the law. The judicial doctrine of Metaphysical Abstention prevents courts from being forced into theological debates while preserving their ability to protect constitutional rights. When courts abstain from metaphysical questions, they can examine whether states apply different standards of reasoning to women's reproductive decisions than to other areas of law. If a state abandons evidence-based policymaking specifically for female reproduction while maintaining it elsewhere, that selective irrationality may itself violate equal protection. The Relational Stewardship framework provides practical solutions grounded in private law traditions. Together, these two approaches refuse to answer the improper question, "Is this a person?" Instead, they refocus on the only question that a constitutional court should ask, "Is this law an exercise of reasoned governance?" By doing so, they counter the jurisprudence of proclamation with a principled insistence on a jurisprudence of reason. The hope is that,

331. See Ala. Const. art. I, § 36.06 (announcing Alabama's policy "to recognize and support the sanctity of unborn life and the rights of unborn children"); *LePage v. Ctr. for Reprod. Med., P.C.*, 408 So. 3d 678, 680 (Ala. 2024) (reversing dismissal of wrongful-death claims for the destruction of cryopreserved embryos, in light of Alabama's personhood amendment and prior cases).

332. For example, personhood measures threaten to criminalize routine IVF procedures, which often involve creating more embryos than will be used and discarding or donating the rest. See MARY ZIEGLER, PERSONHOOD: THE NEW CIVIL WAR OVER REPRODUCTION 143–44 (2025) (noting that broad fetal personhood frameworks inherently threaten to cast a cloud over IVF by making the disposal of unused embryos tantamount to homicide); see also Dov Fox, *The Personhood Double Standard*, 59 U.C. DAVIS L. REV. ONLINE 177, 178–80 (2025) (contributing to a symposium on Ziegler's work and analyzing the functional incoherence of states treating embryos as constitutional persons while maintaining their property status in IVF practice). Even where such laws have been enacted, enforcement typically blinks at IVF because of this tension. Pointing out this inconsistency can undermine the credibility of the personhood model.

in this space reclaimed for reason, the legal system can resolve our conflicts in debate without abandoning its fundamental commitments.³³³

CONCLUSION

A constitutional republic dedicated to the rule of law must, from time to time, confront insurgent legal claims that challenge its most basic operating principles. This article has contended that the effort to grant legal personhood to the unborn represents such a moment. The strategy, which I have termed the jurisprudence of proclamation, is a challenge to the source of legal authority in a pluralistic society. It seeks to displace the law's internal, deliberative processes with an external and absolute proclamation.

The primary output of the jurisprudence of proclamation is a legal chimera, an asymmetrical personhood, a status bestowed not for the sake of equality, but for the purpose of subordination. This does more than damage individual rights; it attacks the very coherence of the legal system, creating a framework where an entity can be both a person and not a person, and where a legal command to protect life is at the same time nullified by a grant of immunity for its routine destruction. Such a system cannot long endure, for it ceases to be a system of laws and descends into a series of contradictory decrees.

The solutions must be as fundamental as the problem. They require a principled defense of the law's own internal jurisdiction. For the judiciary, this means a humble refusal to be conscripted into metaphysical contests. For legislatures and the common law, it means the patient construction of humane, practical frameworks to govern the complexities of modern life, such as the stewardship of reproductive technology. And for litigators, it means framing the fight not merely as a defense of privacy, but as a demand for the equal protection of process itself.

In the end, the choice is between two visions of law. One seeks certainty in an external command, a truth asserted to be absolute and final. It offers simplicity at the cost of liberty and coherence. The other finds legitimacy in its own difficult, internal processes—in deliberation, reason, and a humble acknowledgment of enduring, good-faith disagreement. This latter vision is the demanding but necessary path for a republic that promises both freedom and a government of laws. In the most intimate spheres of human life, where individuals strive to build families and futures, a just legal order must have the wisdom to honor that endeavor, not to command its outcome.

333. In practical litigation, this means that once a court has bracketed off the metaphysical assertion (through abstention), plaintiffs can then argue that the law in question fails basic constitutional norms of rationality and equality. For example, if a state only departs from ordinary fact-based policymaking in the realm of women's reproductive health – and nowhere else – that disparate treatment can be cast as evidence of unconstitutional bias or arbitrariness. Cf. Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 317–20 (1992) (suggesting that abortion restrictions have historically been rooted in, and serve to reinforce, stereotypical assumptions about women's roles). This “equal protection of process” argument posits that women, as a class, are entitled to the same rational and evidence-based lawmaking that the state applies in other domains—and that singling out women's liberty for regulation based on unverifiable dogma is a form of unconstitutional subordination.