Putting *Dobbs* on Ice: Defending the Right to Destroy Frozen Embryos Using the Takings Clause

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When the U.S. Supreme Court decided Dobbs v. Jackson Women's Health Organization*, calls flooded into fertility centers. People of reproductive age panicked, concerned that new abortion trigger bans could subject them to criminal liability for destroying their frozen embryos post-IVF. This concern came to a new head in February 2024, when the Alabama Supreme Court ruled that embryos were persons under a wrongful-death statute and found that individuals could be liable for destruction of or damage to embryos. National outcry was immediate, with conservatives, progressives, and reproductive healthcare providers alike condemning the decision. While Alabama's state legislature ultimately abrogated the decision, Republican legislators across the country continue to introduce "fetal personhood" bills that threaten IVF.*

This Note responds to fetal personhood statutes by exploring whether the Fifth Amendment Takings Clause prevents states from interfering with frozen embryos without just compensation. This Note grounds its defense of IVF in property law and the Takings Clause, a doctrine favored by legal conservatives. While other scholars have explored property-based defenses to abortion, this Note is one of the first to engage in a doctrinal analysis of Takings Clause jurisprudence to defend IVF. This Note also explores bioethics scholarship to discuss the moral and ethical dangers of recognizing a compensable property interest in embryos. It concludes with the observation that although property law defenses to reproductive healthcare have their risks, advocates must consider every tool in the toolbox to protect reproductive rights in the United States.

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INTRODUCTION

When the U.S. Supreme Court decided *Dobbs v. Jackson Women's Health Organization*[1] in 2022, patients flooded fertility centers with calls, asking how the decision would affect their embryos, currently frozen in storage facilities at 320 degrees below zero.[2] In thirteen states, the fall of the fundamental right to abortion "triggered" statutes that banned abortion in almost all situations.[3] Some states historically have had "fetal personhood" laws that give embryos the same

1. 597 U.S. 215 (2022).

2. *See* Julianna Goldman, *Why Many IVF Patients Worry About the Antiabortion Movement*, WASH. POST (July 29, 2023), https://www.washingtonpost.com/wellness/2023/07/29/dobbs-abortion-ivf-embryos-impact; UNIV. OF WASH. MED. CTR., EMBRYO CRYOPRESERVATION: WHAT IT IS AND HOW IT IS DONE 2 (2011), https://www.uwmedicine.org/sites/stevie/files/2018-11/Embryo-Cryopreservation.pdf [https://perma.cc/79D2-SL7Y].

3. *See* Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned [https://perma.cc/4BDJ-KTBB].

legal status as humans beginning at conception or fertilization, and some states began to pass new fetal personhood statutes after *Dobbs* paved the way for pre-viability restrictions on embryos.[4] The combination of trigger bans and fetal personhood statutes changed the legal landscape by creating the question of whether destroying embryos would subject their genetic parents to criminal liability for feticide.[5] A 2024 case brought this question into public discourse when the Alabama Supreme Court ruled that in vitro embryos were people for the purposes of the state's Wrongful Death of a Minor Act, and anyone who destroyed them could be civilly liable.[6] While no case has found criminal liability yet, and many state trigger bans specify that they do not apply to in vitro fertilization (IVF), anti-abortion advocates may seek to amend state abortion bans or pass a federal abortion ban that would make it possible to criminalize IVF or the destruction of embryos. But, as ever, legal advocates should not rest until there is unequivocal reproductive justice for all people in the United States. Lawyers can make creative legal arguments to challenge state legislatures that would prefer embryos be used—at any cost—or would freeze them in perpetuity. This Note argues that property law can protect the right against forced pregnancy and analyzes current doctrine to posit that the Fifth Amendment Takings Clause prevents the government from interfering with frozen embryos without just compensation.[7]

Part I gives a background to the IVF process and its byproduct of cryopreserved embryos. It will also discuss personhood laws passed before and after *Dobbs* and how these laws could be interpreted as banning IVF and embryo cryopreservation. Part II examines the applicability of the Fifth Amendment Takings Clause to embryo cryopreservation, specifically the right to destroy embryos by thawing them or disposing of them as medical waste. This analysis proceeds in

4. *See* Anna North, *Fetal Personhood Laws, Explained*, VOX (Mar. 4, 2024, 1:45 PM), https://www.vox.com/policy/24090347/alabama-ivf-ruling-fetal-personhood-abortion-embryos [https://perma.cc/NDQ5-PYT9].

5. *See* Gerard Letterie & Dov Fox, *Legal Personhood and Frozen Embryos: Implications for Fertility Patients and Providers in Post-*Roe *America*, 10 J.L. & BIOSCIENCES, JAN.–JUNE 2022, at 1, 4–6 (2023).

6. LePage v. Ctr. for Reprod. Med., P.C., Nos. SC-2022-0515, SC-2022-0579, 2024 WL 5703334, at *6 (Ala. Feb. 16, 2024).

7. This Note contributes to scholarship that explores the relationship between the Takings Clause and the right to an abortion. *See, e.g.*, Susan E. Looper-Friedman, *"Keep Your Laws Off My Body": Abortion Regulation and the Takings Clause*, 29 NEW ENG. L. REV. 253, 256 (1995) (arguing that the Takings Clause and, more specifically, property defenses of the right to exclude should be used to challenge restrictions on abortion); Nicole Knight, *American Motherhood – A Taking*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 162, 179–80 (2022) (same); Bella Miller, *My Uterus, My Choice: Abortion Bans and Property Interests in the Female Body*, 64 B.C. L. REV. 2131, 2169 nn.272–73, 2170 (2023) (calling for creative lawyering and scholarship advocating for safe, legal abortions and suggesting the Takings Clause may be a defense to restrictions on bodily autonomy, especially in light of Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021)); Rebecca L. Rausch, *Reframing Roe: Property over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 28 (2012) (arguing that an unwanted fetus is a trespasser in a woman's womb whom the woman has the right to eject); Jeffrey D. Goldberg, *Involuntary Servitudes: A Property-Based Notion of Abortion-Choice*, 38 UCLA L. REV. 1597, 1599 (1991) (arguing a woman has a licensor–licensee relationship with the fetus and has the right to exclude it from her body); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 439–43 (2000) (discussing the limitations of constitutional protections for the body under the Takings Clause).

four parts: Section II.A summarizes case law that defines embryos as property, quasi-property, or persons and interrogates whether the label of property is proper for embryos. Section II.B examines whether restricting genetic parents' right to destroy their embryos in the name of preserving potential life is a valid "public use." Section II.C appraises and analogizes Fifth Amendment Takings Clause case law to argue that any restriction on genetic parents' right to control their embryos could be a categorical physical taking of the metaphorical "bundle of sticks." This is especially true after the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*.[8] Section II.D questions what would be "just compensation" for taking one's embryos. It acknowledges the dangers of making a Fifth Amendment argument to protect bodily autonomy when the Court could constitutionally spirit away a taking's harm by providing market-value compensation.

I. BACKGROUND

A. IN VITRO FERTILIZATION

In vitro fertilization is a form of assisted reproductive technology (ART) used to help people become pregnant.[9] Unlike traditional fertilization, which occurs in the fallopian tube when an egg (ovum) and sperm fuse, IVF occurs outside of the body.[10] In the first step of IVF, a person with a uterus[11] takes hormones that stimulate ovulation, causing them to produce more eggs than usual. A medical

8. 594 U.S. 139 (2021).

9. *IVF (In Vitro Fertilization)*, CLEVELAND CLINIC (Mar. 2, 2022), https://my.clevelandclinic.org/health/treatments/22457-ivf [https://perma.cc/G88D-ZL3S].

10. *See id.*

11. In this Note, I attempt to use gender-neutral and gender-inclusive language when describing human anatomy and reproductive relationships. Reproductive healthcare and "women's healthcare" are often used synonymously, but trans individuals, non-binary people, and intersex individuals also choose to become pregnant. They experience the same issues with embryo cryopreservation as cis women who are often the main audience of IVF-focused resources and scholarship. In line with this reality, I use the term "genetic parent" to describe the relationship of individuals who provide their gametes (i.e., sperm and egg) to produce an embryo. While "genetic parent" does not capture the emotional connection that many people feel toward their embryos or how they may perceive their kin relationship (e.g., motherhood, fatherhood, or parenthood), I use "genetic parent" as a baseline descriptor for the biological relationship between the two that neither assumes nor denies any socioemotional relationship. Some terms such as "progenitor" or "gamete provider" may be more neutral than the word parent, but I have opted to choose "genetic parent" for ease of understanding and clarity. For more resources on gender-neutral and gender-inclusive language in the ART context that I utilized in making my language choices, see Kinnon R. MacKinnon, Ariel Lefkowitz, Gianni R. Lorello, Brett Schrewe, Sophie Soklaridis & Ayelet Kuper, *Recognizing and Renaming in Obstetrics: How Do We Take Better Care with Language?*, 14 OBSTETRIC MED. 201, 201 (2021); *Inclusive and Gender-Neutral Language*, NAT'L INSTS. OF HEALTH (Jan. 17, 2024), https://www.nih.gov/nih-style-guide/inclusive-gender-neutral-language [https://perma.cc/4XH9-DWPS]; Comm. on Gynecologic Pract. & Comm. on Health Care for Underserved Women, Am. Coll. of Obstetricians & Gynecologists, *Health Care for Transgender and Gender Diverse Individuals*, OBSTETRICS & GYNECOLOGY, MAR. 2021, at e75; and I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1138 (2008) (discussing genetic, legal, and gestational parenthood as distinct rights); *see also* MILIANN KANG, DONOVAN LESSARD, LAURA HESTON & SONNY NORDMARKEN, INTRODUCTION TO WOMEN, GENDER, SEXUALITY STUDIES 56–59 (2017) (providing an overview of gender studies literature that addresses the question of who constitutes "family").

professional collects the eggs from the ovary via a brief procedure and manually fertilizes them with sperm in a petri dish.[12] After a few days, a multicellular embryo called a blastocyst forms,[13] and a medical professional transfers the mature blastocyst to the uterine cavity.[14] The blastocyst will then implant into the uterine wall's inner lining, and if successful, the patient will become pregnant.[15]

B. EMBRYO CRYOPRESERVATION

Embryo cryopreservation, also known as embryo freezing, commonly follows from IVF.[16] Pregnant people undergoing IVF commonly produce more embryos than they end up using. During normal monthly ovulation, the ovary usually releases only one egg.[17] Ovulation-stimulating hormones, however, can produce about five to fifteen eggs, with the idea that fertilizing and implanting more viable embryos increases the chances of a successful pregnancy.[18] A genetic parent must then decide what to do with these extra embryos, assuming that they do not wish to carry multiple embryos at once. One of the most common avenues is cryopreservation, where embryos are frozen in medical facilities, potentially for decades.[19] Embryo cryopreservation gives parents the option to control when they have children, to choose the number of children they might have, or to defer reproductive decision making until a later time.

According to the most recent estimate, approximately 1.2 million embryos were cryopreserved in the United States from 2004 to 2013.[20] In 2018, close to 2% of children were born using ARTs, and in states like Massachusetts that mandate health insurance coverage of some ARTs, the birth rate is 4.5%.[21] As

12. *See* CLEVELAND CLINIC, *supra* note 9.

13. *See Blastocyst*, CLEVLAND CLINIC (Apr. 29, 2022), https://my.clevelandclinic.org/health/body/22889-blastocyst [https://perma.cc/79D2-SL7Y].

14. *See In Vitro Fertilization (IVF)*, MAYO CLINIC (Sept. 1, 2023), https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/XV8H-HM6F].

15. *See id.*

16. *See* CLEVLAND CLINIC, supra note 9.

17. *See Ovulation*, CLEVELAND CLINIC (July 8, 2022), https://my.clevelandclinic.org/health/articles/23439-ovulation [https://perma.cc/H9Z4-4TF7].

18. *See* Sesh Kamal Sunkara, Vivian Rittenberg, Nick Raine-Fenning, Siladitya Bhattacharya, Javier Zamora & Arri Coomarasamy, *Association Between the Number of Eggs and Live Birth in IVF Treatment: An Analysis of 400 135 Treatment Cycles*, 26 HUM. REPROD. 1768, 1770 (2011); *see also* Yoo Jin Shim, Yeon Hee Hong, Seul Ki Kim & Byung Chul Jee, *Optimal Numbers of Mature Oocytes to Produce at Least One or Multiple Top-Quality Day-3 Embryos in Normal Responders*, 47 CLINICAL & EXPERIMENTAL REPROD. MED. 221, 222 (2020).

19. *See, e.g.*, Jen Christensen & Nadia Kounang, *Parents Welcome Twins from Embryos Frozen 30 Years Ago*, CNN HEALTH (Nov. 21, 2022, 9:18 AM), https://www.cnn.com/2022/11/21/health/30-year-old-embryos-twins/index.html [https://perma.cc/N5J8-7W27] (reporting the birth of two children born from embryos first frozen thirty years before).

20. *See* Mindy S. Christianson, Judy E. Stern, Fangbai Sun, Heping Zhang, Aaron K. Styer, Wendy Vitek & Alex J. Polotsky, *Embryo Cryopreservation and Utilization in the United States from 2004–2013*, 1 F&S REPS. 71, 73 (2020).

21. *See* Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR. (July 17, 2018), https://www.pewresearch.org/short-reads/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has [https://perma.cc/VL5S-KJM7].

Americans have children at later ages,[22] LGBTQIA couples choose to have biological children,[23] and private health insurers offer coverage,[24] IVF and embryo cryopreservation appear to be increasingly attractive tools for prospective genetic parents.

After storing these embryos, genetic parents usually have the option to use, donate, or destroy their embryos. Most states ban the sale of embryos, and some do not allow their donation to medical research.[25] Destruction is very common and is accomplished by thawing or disposing of cryopreserved embryos as medical waste.[26]

C. APPLICATION OF *DOBBS* TO IVF

Prior to the Supreme Court's watershed decision in *Dobbs v. Jackson Women's Health Organization*, genetic parents' right to control their embryos was largely protected by the constitutional right to privacy and bodily autonomy enshrined in

22. *See* Gretchen Livingston, *They're Waiting Longer, but U.S. Women Today More Likely to Have Children Than a Decade Ago*, PEW RSCH. CTR. (Jan. 18, 2018), https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago [https://perma.cc/8L49-AXP5] (finding that the median age at which women become parents in the U.S. was 26 in 2018, compared with 23 in 1994); GLADYS M. MARTINEZ & KIMBERLY DANIELS, NAT'L CTR. FOR HEALTH STATS., U.S. DEP'T HEALTH & HUM. SERVS., FERTILITY OF MEN AND WOMEN AGED 15–49 IN THE UNITED STATES: NATIONAL SURVEY OF FAMILY GROWTH, 2015–2019, at 15–16 (2023), https://www.cdc.gov/nchs/data/nhsr/nhsr179.pdf [https://perma.cc/P8XD-T5JM] (finding that the average age at which women become parents has increased from 23.1 in 2011–2015 to 24.1 in 2015–2019 and that the average age at which men become parents has increased from 25.5 in 2011–2015 to 27.0 in 2015–2019).

23. *See* Pedro Brandão, Rafal Zadykowicz, Rebecca Miscioscia, António de Pinho, Maria Liz-Coelho, Lavinia Iftene, Anita Ungure & Nathan Ceschin, *Reproductive Plans and Knowledge of Assisted Reproductive Techniques Among Lesbian Women: An International Survey Study*, 27 JBRA ASSISTED REPROD. 602, 604 (2023) (reporting that most lesbians in a study of 549 same-sex couples would consider using ART techniques for future pregnancy and a smaller number considered using adoption or spontaneous pregnancy); Steven R. Lindheim, Jody Lyneé Madeira, Artur Ludwin, Emily Kemner, J. Preston Parry, Georges Sylvestre & Guido Pennings, *Societal Pressures and Procreative Preferences for Gay Fathers Successfully Pursuing Parenthood Through IVF and Gestational Carriers*, 9 REPROD. BIOMEDICINE & SOC'Y ONLINE 1, 2 (2019) (summarizing studies that have found cisgender gay couples have a growing preference for IVF and surrogacy, in addition to adoption and the foster system).

24. *See* Michael Ha, Abigail Drees, Madalyn Myers, Emily R. Finkelstein, Mary Dandulakis, Maxine Reindorf, Dana M. Roque, Stephanie A. Beall, Sheri Slezak & Yvonne M. Rasko, *In Vitro Fertilization: A Cross-Sectional Analysis of 58 US Insurance Companies*, 40 J. ASSISTED REPROD. & GENETICS 581, 582 (2023) (finding that 69% of major private insurance providers offer some coverage for IVF, although there is substantial variation plan-by-plan).

25. Eleven states ban human embryo research: Arkansas, Kentucky, Louisiana, Minnesota, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, and South Dakota—and many of the same have banned the sale of embryos. Kirstin R.W. Matthews & Daniel Morali, *Can We Do That Here? An Analysis of US Federal and State Policies Guiding Human Embryo and Embryoid Research*, J.L. & BIOSCIENCES, JAN.–JUNE 2022, at 1, 17–18.

26. *See* Mara Simopoulou, Konstantinos Sfakianoudis, Polina Giannelou, Anna Rapani, Evangelos Maziotis, Petroula Tsioulou, Sokratis Grigoriadis, Efthimios Simopoulos, Dimitris Mantas, Maria Lambropoulou, Michael Koutsilieris, Konstantinos Pantos & J. C. Harper, *Discarding IVF Embryos: Reporting on Global Practices*, 36 J. ASSISTED REPROD. & GENETICS 2447, 2450 (2019) ("Regarding cryopreserved embryos, the majority of embryologists opt to 'place the carrier in a trash can strictly dedicated for embryo disposal while still frozen' . . . .").

Planned Parenthood of Southeastern Pennsylvania v. Casey[27] and *Roe v. Wade*[28] (abortion), and *Griswold v. Connecticut*[29] and *Eisenstadt v. Baird*[30] (contraception). *Skinner v. Oklahoma* also recognized the fundamental right to procreate,[31] although no Supreme Court decision has ever addressed whether the right to procreate extends to IVF or other ARTs.[32] In *Skinner*, a statute prescribed involuntary sterilization for "habitual criminals" who committed two or more felonies of moral turpitud such as larceny, but it exempted similar white collar offenses like embezzlement.[33] Mr. Skinner, the petitioner, would have been sterilized for stealing chickens and committing two robberies with firearms.[34] The Court invalidated the statute, explaining that procreation is "one of the basic civil rights of man," and "[m]arriage and procreation are fundamental to the very existence and survival of the race."[35] Applying strict scrutiny analysis for the first time, the Court found the statute violated the Fourteenth Amendment's Equal Protection Clause.[36]

In *Dobbs*, the Supreme Court reviewed the constitutionality of Mississippi's Gestational Age Act, which banned most abortions after fifteen weeks of pregnancy with exceptions for medical emergencies or severe fetal abnormalities.[37] *Dobbs* reassessed *Roe*, which established the constitutional right to an abortion, and *Casey*, which affirmed *Roe*'s main holding but clarified that the right arose under the Fourteenth Amendment's Due Process Clause.[38] *Casey* also established the "undue burden" test, which invalidated any state law if its purpose or effect was to place a substantial obstacle in the path of a person seeking an abortion before the fetus attained viability.[39]

In rejecting the right to abortion's basis in the Fourteenth Amendment, *Dobbs* applied a "history and tradition" analysis and determined that there was no broader fundamental right to bodily autonomy "deeply rooted in [our] history and tradition."[40] It rejected *Casey*'s finding that people had developed a reliance

27. 505 U.S. 833, 896 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

28. 410 U.S. 113, 163 (1973), *overruled by Dobbs*, 597 U.S. 215.

29. 381 U.S. 479, 485 (1965).

30. 405 U.S. 438, 443, 453 (1972).

31. 316 U.S. 535, 536 (1942).

32. *See, e.g.*, I. Glenn Cohen, *The Right(s) to Procreate and Assisted Reproductive Technologies in the United States*, *in* THE OXFORD HANDBOOK OF COMPARATIVE HEALTH LAW 1009, 1011–14 (David Orentlicher & Tamara K. Hervey eds., 2022) (providing a pre-*Dobbs* analysis of case law that would support or weigh against recognizing the right to procreate using assisted reproductive technologies).

33. *Skinner*, 316 U.S. at 536.

34. *Id.* at 537.

35. *Id.* at 541.

36. *Id.* at 541–42.

37. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022) (citing MISS. CODE ANN. § 41-41-191 (2018)).

38. *See id.* at 231.

39. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

40. *Dobbs*, 597 U.S. at 237, 250 (alteration in original) (quoting Timbs v. Indiana, 586 U.S. 146, 150 (2019)).

interest in obtaining an abortion because women had significantly altered their life plans and made decisions about their careers, relationships, and education based on the right to abortion, instead indicating that the reliance interest in abortion was unlike the concrete reliance interests that develop in "cases involving property and contract rights."[41] Nor did stare decisis support upholding *Roe* and *Casey* because those cases were "egregiously wrong" and an abuse of judicial power.[42] The Court framed its reasoning as a five-factor analysis and determined that the severe nature of *Casey* and *Roe*'s error, their poor reasoning, the unworkability of the undue burden test, their disruption to other areas of law, and women's alleged lack of reliance on abortion services justified overruling the two cases.[43] Instead of *Casey*'s undue burden test, restrictions on abortion would be subject only to rational basis review, like other health and welfare laws.[44] The *Dobbs* majority freely offered that state interests such as respect for prenatal life, protection of women's health, mitigation of fetal pain, and elimination of gruesome or barbaric medical procedures were all legitimate state interests that would satisfy rational basis review and allow for previability restrictions on abortion.[45] *Dobbs* effectively allows the states to reign free in enacting anti-abortion and anti-reproductive healthcare statutes, framing the decision as one that "returns the issue of abortion to those [state] legislative bodies, and . . . allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion."[46]

It is an open question whether *Dobbs*'s anti-abortion holding applies to IVF and embryo-disposition regulation. Kerry Lynn Macintosh argues that a right to IVF could be situated in either the fundamental right to procreate or the fundamental right of privacy.[47] Macintosh argues that *Dobbs* likely leaves the fundamental right to procreate untouched both because the right is so entrenched in cases like *Skinner* and *Loving v. Virginia*[48] and because procreation is deeply rooted in American history and tradition.[49] And while *Dobbs* weakened the right to privacy, it did not overrule privacy cases like *Eisenstadt*, *Griswold*, and *Carey v. Population Services International*, which could still serve as a basis to protect an IVF right.[50] Any constitutional challenge to an IVF regulation would consider whether case law has established IVF as a fundamental right and if it is deeply

41. *Id.* at 287–88; *see Casey*, 505 U.S. at 957.

42. *Dobbs*, 597 U.S. at 231–32, 268–69.

43. *Id.* at 268.

44. *See id.* at 300–01.

45. *Id.* at 301.

46. *Id.* at 289.

47. Kerry Lynn Macintosh, *Dobbs, Abortion Laws, and In Vitro Fertilization*, 26 J. HEALTH CARE L. & POL'Y 1, 28–32 (2023).

48. 388 U.S. 1 (1967).

49. *See* Macintosh, *supra* note 47, at 30; *see also* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (holding that the Due Process Clause only protects those fundamental rights and liberties that are "deeply rooted in this Nation's history and tradition") (quoting Moore v. East Cleveland, Ohio, 431 U.S. 494, 503 (1977) (plurality opinion)).

50. Macintosh, *supra* note 47, at 31 (first citing Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965); then citing Carey v. Population Servs. Int'l, 431 U.S. 678, 684–90 (1977); and then citing Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972)).

rooted in the nation's history and tradition.[51] If the right is found to be fundamental and deeply rooted, strict scrutiny would apply, and a state would have to show that the regulation is narrowly tailored to a compelling government interest.[52] Otherwise, *Dobbs*'s result is that IVF laws are only subject to rational basis review, like other health and welfare laws.[53] If the government invokes one of the legitimate state interests delineated in *Dobbs*, the legislation would likely pass rational basis review. A total IVF ban is unlikely because it is a political third rail,[54] but it is not unimaginable that a less restrictive regulation, like one banning embryo destruction, could pass and be subject only to rational basis review.

D. EXISTING LIMITS ON DESTRUCTION AND THE NEW THREAT OF FETAL "PERSONHOOD" LAWS

Many states had laws regulating embryo disposition before *Dobbs*, but the possibility that anti-abortion fetal personhood laws could apply to embryo destruction became a revived threat after the decision. This Section highlights a few state policies and how they impact genetic parents' control of their embryos. It also discusses federal efforts to legitimate the fetal personhood movement and their potential impacts on IVF.

1. Louisiana

Only one state categorically restricts an individual's right to destroy cryopreserved embryos.[55] Since 1986, Louisiana's Human Embryo Statutes have afforded human embryos personhood status by considering them juridical persons.[56] Because of their personhood status, Louisiana prohibits their sale,[57] use in research,[58] or destruction.[59] This effectively means genetic parents undergoing IVF in Louisiana must implant all of their viable embryos, store them indefinitely, or donate them to a married couple. If a genetic parent stops paying the storage fees for their cryopreserved embryos, their attending physician receives temporary guardianship until "adoptive implantation" can occur.[60] It is unclear

51. *See id.* at 32; *see also Glucksberg*, 521 U.S. at 720–21.

52. *See* Macintosh, *supra* note 47, at 40.

53. *See id.* at 43 (citing Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022)).

54. *See* Kavitha Surana, *"We Need to Defend This Law": Inside an Anti-Abortion Meeting with Tennessee's GOP Lawmakers*, PROPUBLICA (Nov. 15, 2022, 12:00 PM), https://www.propublica.org/article/inside-anti-abortion-meeting-with-tennessee-republican-lawmakers [https://perma.cc/W55P-PH5S].

55. While it is beyond the scope of this Note, some statutes restrict funding to medical facilities that destroy embryos in the process of medical (usually stem cell) research. *See, e.g.*, KY. REV. STAT. ANN. § 311.715(2).

56. LA. STAT. ANN. § 9:121 (1986); *see also* A. Brooke Reedy, Comment, *Uneggspected: Louisiana's Scrambled Approach to Ownership of Frozen Embryos After Dissolution of Marriage*, 83 LA. L. REV. 373, 382 (2022).

57. *See* LA. STAT. ANN. § 9:122.

58. *See id.*

59. *See id.* § 9:129.

60. *Id.* § 9:126; *see also id.* § 9:130 (establishing procedures if genetic parents renounce their parental rights to an embryo). Note that the Human Embryo Statutes do not define the term "adoptive implantation."

whether any involuntary adoptions have ever taken place, but several agencies regularly facilitate voluntary embryo adoptions in Louisiana.[61] Most Louisiana fertility clinics have avoided the need for embryo adoption by requiring genetic parents to store their embryos out of state,[62] but at least one reported decision left the door open for whether Louisiana courts may still have diversity jurisdiction over embryos transferred to other states, theoretically allowing suits to prevent their destruction.[63] In 2024, the Louisiana Senate passed an amendment to a bill that would have prevented healthcare providers from sending embryos out of state "for the purpose of the destruction of the emb[ryo],"[64] which is exactly what most genetic parents do now after an IVF cycle in Louisiana. While Louisiana shelved the bill due to fear of legal challenges,[65] these recent legislative and court actions show how Louisiana's already-extreme restrictions could become more stringent.

2. Missouri

After *Dobbs*, many state abortion "trigger bans" went into effect, banning almost all abortions except in circumstances of absolute medical necessity. Many of these laws function by giving fetuses, ova, or embryos "personhood" status starting at the moment of conception or fertilization,[66] which creates the question

61. *See, e.g.*, *Louisiana Adoption Agency*, NIGHTLIGHT CHRISTIAN ADOPTIONS, https://nightlight.org/louisiana-adoption-agency [https://perma.cc/59N3-5FQT] (last visited May 20, 2025); *About*, AUDUBON FERTILITY, https://audubonfertility.com/about [https://perma.cc/5LBF-Y6UK] (last visited May 20, 2025); *see also* Polina M. Dostalik, *Embryo "Adoption"? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y. L. SCH. L. REV. 867, 888, 890–91 (2011) (explaining the Louisiana embryo "adoption" statute, as well as its shortcomings).

62. *See* Anumita Kaur, *Louisiana's Ban on Destruction of IVF Embryos Strips Patients' Options*, WASH. POST (Mar. 3, 2024, 6:00 AM), https://www.washingtonpost.com/nation/2024/03/03/louisiana-ivf-embryos-law-alabama.

63. *See* Hum. Embryo #4 HB-A *ex rel.* Emma & Isabella Louisiana Tr. No. 1 v. Vergara, No. 17-1498, 2017 WL 3686569, at *4 (E.D. La. Aug. 25, 2017). Plaintiff Nicholas Loeb sued his ex-wife, actress Sofia Vergara, to regain custody of frozen embryos they had conceived together. *See id.* Loeb asserted that Louisiana had subject matter jurisdiction based on diversity of citizenship, and while the district court declined to decide jurisdiction on these grounds, it discussed questions of embryo citizenship that the Human Embryo Statutes raise: For purposes of diversity, would an embryo be considered a citizen under Louisiana law? Does the value of embryo life satisfy diversity jurisdiction's amount in controversy requirement? Does federal citizenship law preempt state citizenship law? Can the Human Embryo Statutes apply to embryos neither stored nor created in Louisiana? *See id.* Such questions show the Human Embryo Statutes' dangerous implications and how nonstate actors have tried to take advantage of the law.

64. *See* S. Floor Amend. 3902, H.B. 833, 2024 Leg., Reg. Sess. (La. 2024).

65. *See* Julie O'Donoghue, *Louisiana Lawmaker Shelves IVF Protection Bill, Leaving Questions About Legal Challenges*, LA. ILLUMINATOR (May 29, 2024, 1:18 PM), https://lailluminator.com/2024/05/29/louisiana-lawmaker-shelves-ivf-protection-bill-leaving-questions-about-legal-challenges [https://perma.cc/9WQ6-95GM].

66. *See* Letterie & Fox, *supra* note 5, at 4 (citing H.B. 813, 2022 Leg., Reg. Sess. (La. 2022); H.R. 4327, 58th Leg., 2d Reg. Sess. (Okla. 2022); UTAH CODE ANN. § 76-7-301; KY. REV. STAT. ANN. § 311.715); *see also* PREGNANCY JUSTICE, WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 3–4 (2022), https://www.pregnancyjusticeus.org/wp-content/uploads/2023/05/fetal-personhood-with-appendix-UPDATED-1.pdf [https://perma.cc/F4PK-J7WU].

of whether destruction of an embryo could be considered abortion.[67] "By explicitly overruling *Roe*'s holding that abortion is a right, the *Dobbs* majority implicitly opened space to reconsider *Roe*'s separate holding that prenatal life lacks the legal status of personhood."[68]

Some scholars have concluded that some state trigger bans likely would not create criminal liability for IVF or embryo destruction.[69] This is because some bans include language excepting contraceptives administered before a clinically diagnosable pregnancy, and it would stretch the imagination for states to argue that a person could be considered "pregnant" as soon as an embryo was successfully fertilized via IVF in a petri dish.[70] Some bans also likely would not create criminal liability for IVF because they include definitions of "pregnancy" or "unborn child" that require a fetus or embryo to be in utero, which would exclude ex vivo embryos.[71]

The problem is that personhood statutes do not accurately describe reproductive biology, creating contradictions and potential arguments for personhood that make liability for embryo destruction unclear. For example, until it was abrogated by state constitutional referendum in 2024,[72] Missouri's 2022 trigger ban defined abortion as "[t]he act of using or prescribing any instrument, device, medicine, drug, or any other means or substance with the intent to destroy the life of an embryo or fetus in his or her mother's womb; *or* . . . [t]he intentional termination of the pregnancy . . . with an intention other than to increase the probability of a live birth or to remove a dead unborn child."[73] The first clause of § 188.015(1) implied that an embryo would have to be implanted in "his or her mother's womb" to be considered abortion, meaning that destruction of an ex vivo frozen embryo likely would not be abortion.

But the second clause of § 188.015(1), separated by a disjunctive "or," considered termination of pregnancy of an unborn child to be abortion. The clause's language is ambiguous due to Missouri's broad definition of the term "unborn child" and its lack of a definition for the term "pregnancy." Section 188.015(11) defines unborn child as "the offspring of human beings from the moment of conception

67. *See* Fiorella Valdesolo, *The Connection Between Fertility Treatments and the Overturning of* Roe v. Wade, VOGUE (Jan. 27, 2023), https://www.vogue.com/article/fertility-treatment-overturning-roe-v-wade; *see also* Letterie & Fox, *supra* note 5, at 2, 5–6.

68. Letterie & Fox, *supra* note 5, at 4.

69. *See* Macintosh, *supra* note 47, at 8–18.

70. *See id*. at 11 n.107 (citing IDAHO CODE §§ 18-604(1), (11), 18-622 (prohibiting termination of a "clinically diagnosable pregnancy")); *see also, e.g.*, KY. REV. STAT. ANN. § 311.772(6) ("Nothing in this section may be construed to prohibit the sale, use, prescription, or administration of a contraceptive measure, drug, or chemical, if it is administered prior to the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure is sold, used, prescribed, or administered in accordance with manufacturer instructions.").

71. *See* Macintosh, *supra* note 47, at 11 n.107 (citing the abortion bans of Idaho, Kentucky, Louisiana, Missouri, Tennessee, Texas, and Wyoming).

72. *See* Jason Hancock, *Missouri Voted for Abortion-Rights Amendment and Republicans Who Vow to Overturn It*, MO. INDEP. (Nov. 7, 2024, 5:55 AM), https://missouriindependent.com/2024/11/07/missouri-voted-for-abortion-rights-amendment-and-republicans-who-vow-to-overturn-it/.

73. MO. REV. STAT. § 188.015(1) (2024) (emphasis added).

until birth and at every stage of its biological development, including the human conceptus, zygote, morula, blastocyst, embryo, and fetus."[74] Because the statute contemplated an embryo and a blastocyst (a mature embryo) as unborn children, they would fall under the anti-abortion statute's purview. That may also have been true because of another Missouri law, Missouri Revised Statute § 1.205, which since 1986 has stipulated that human life begins at conception and that "'unborn child' shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development."[75] Conception is not a medical term, but it often refers to fertilization.[76] Under § 1.205 as well, embryos would be unborn children and have a protectable interest in life under Missouri law.[77] Kerry Macintosh explains that advocates challenged § 1.205's constitutionality when *Roe* was still good law, and Missouri averred that § 1.205 was precatory and did not restrict abortions.[78] Macintosh uses this as evidence to support her argument that § 1.205 would not have precluded IVF practices if Missouri had attempted to enforce the law before its abrogation.[79] But it is not clear whether § 188.015's definitions of "abortion" and "unborn child" would stand independently, even if Missouri agreed that § 1.205 were precatory, thereby creating liability for embryo destruction.

Missouri's anti-abortion statute's effect on embryos was also ambiguous because it did not provide a general definition of pregnancy, only viable pregnancy.[80] Mainstream medical definitions and federal law state that pregnancy begins when an embryo implants into the uterine wall,[81] but Missouri's definition of pregnancy could have a broader interpretation if pinpointed to conception or fertilization. In reference to another state's abortion ban that does not define pregnancy, Macintosh explains that a broad reading of the term "pregnancy" is unlikely, partially because the *Oxford Dictionary* definition of pregnancy "refers to the condition of being pregnant, and 'pregnant' entails a child developing in a uterus," which would seem to exclude ex vivo embryos.[82] Macintosh is correct that a view of pregnancy that extends to frozen embryos in storage stretches the plain and ordinary meaning of the word, but even a 2012 study found that

74. *Id.* § 188.015(11).

75. *Id.* §§ 1.205(1)(1), (3).

76. *See* Richard J. Paulson, *It Is Worth Repeating: "Life Begins at Conception" Is a Religious, not Scientific, Concept*, 19 F&S REPS. 177, 177 (2022).

77. *See* MO. REV. STAT. § 1.205(1)(3).

78. Macintosh, *supra* note 47, at 9–10.

79. *Id.* at 10.

80. *See* MO. REV. STAT. § 188.015(13) ("[I]n the first trimester of pregnancy, an intrauterine pregnancy that can potentially result in a liveborn baby.").

81. *See* Grace S. Chung, Ryan E. Lawrence, Kenneth A. Rasinski, John D. Yoon & Farr A. Curlin, *Obstetrician-Gynecologists' Beliefs About When Pregnancy Begins*, 206 AM. J. OBSTETRICS & GYNECOLOGY 132.e1, 132.el (2012) ("Since 1965, the American College of Obstetricians and Gynecologists (ACOG) has defined *pregnancy* as beginning with implantation of the embryo in the uterine wall."); 45 C.F.R. § 46.202(f) ("Pregnancy encompasses the period of time from implantation until delivery.").

82. Macintosh, *supra* note 47, at 12 (citing NEW OXFORD AMERICAN DICTIONARY 1378 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010)).

obstetrician-gynecologists were split on when, exactly, pregnancy begins.[83] And some older medical dictionaries pin the start of pregnancy to fertilization or conception, with conservative pro-life organizations advocating for use of these definitions.[84] Without state definitions of pregnancy that are based in scientifically accurate biology, it leaves the statute open to interpretation by judges who may be sympathetic to the fetal personhood movement. If courts interpreted pregnancy as starting with fertilization or conception, then destroying a fertilized embryo theoretically could expose medical professionals to criminal liability for abortion. The lack of scientific precision in personhood statutes shows how they can impose sweeping liability post-*Dobbs*, especially because state laws are no longer subject to heightened judicial scrutiny under *Casey*'s "undue burden" test.[85] And while Missouri's abortion ban was invalidated by a state-ballot measure to enshrine the right to abortion in Missouri's state constitution, conservative lawmakers have vowed to roll back the amendment.[86] Republican legislators recently approved a new referendum that would seek the amendment's repeal and would go to Missouri voters by November 2026.[87] The new ballot measure would likely restore the definitions of "abortion" and "unborn child" in Missouri's 2022 trigger ban. And Missouri's House Speaker indicated that he would be willing to define fetal viability for purposes of the state's new abortion regulations, which theoretically (although almost certainly illegally) could reach back to conception.[88] Reproductive healthcare advocates should expect that Republicans will continue to propose fetal personhood statutes and language similar to that of Missouri's 2022 trigger ban.

3. Alabama

In other states, conservative law groups have responded to *Dobbs*'s invitation by attempting to limit all forms of reproductive and gender-affirming healthcare, which includes specifically targeting IVF. In 2022, Tennessee Republican

83. *See* Chung et al., *supra* note 81, at 132.e1.

84. *See, e.g.*, *Pregnant?*, LIFE INSTITUTE: LEARNING CENTRE, https://thelifeinstitute.net/learning-centre/pregnant# [https://perma.cc/JUE3-BCF7] (last visited May 20, 2025); Christopher M. Gacek, *Conceiving Pregnancy: U.S. Medical Dictionaries and Their Definitions of "Conception" and "Pregnancy,"* 9 NAT'L CATH. BIOETHICS Q. 543, 546–49 (2009).

85. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

86. *See* Jeremy Kohler, *Missouri Voters Enshrined Abortion Rights. GOP Lawmakers Are Already Working to Roll Them Back*, PROPUBLICA (Dec. 5, 2024, 5:00 AM), https://www.propublica.org/article/missouri-abortion-amendment-republican-bill-proposals [https://perma.cc/N6E9-ULP7].

87. *See* H.R.J. Res. 54, 103rd Gen. Assemb., 1st Reg. Sess. (Mo. 2025); David A. Lieb, *Missouri Lawmakers Pass Referendum Seeking to Repeal Abortion-Rights Amendment Approved by Voters Last Year*, PBS NEWS (May 15, 2025, 2:22 PM), https://www.pbs.org/newshour/politics/missouri-lawmakers-pass-referendum-seeking-to-repeal-abortion-rights-amendment-approved-by-voters-last-year.

88. *See* Anna Spoerre, *Defining Fetal Viability Among GOP Priorities After Missourians Overturn Abortion Ban*, NEWS FROM THE STATES (Jan. 17, 2025, 6:55 AM), https://www.newsfromthestates.com/article/defining-fetal-viability-among-gop-priorities-after-missourians-overturn-abortion-ban.

lawmakers were recorded seeking advice from anti-abortion groups on how to limit access to IVF, among other forms of reproductive healthcare.[89] One anti-abortion group responded that while restricting IVF was not a politically viable issue, it could be revisited in a few years.[90]

Those post-*Dobbs* restrictions on IVF and embryo destruction finally materialized in February 2024, when the Alabama Supreme Court ruled in *LePage v. Center for Reproductive Medicine* that in vitro embryos were people for the purposes of the state's Wrongful Death of a Minor Act of 1872.[91] In this case, genetic parents had sued an Alabama IVF provider for wrongful death of their "unborn children" after a former patient accessed an embryo storage room and destroyed their embryos by dropping them on the floor.[92] The result of the case was that anyone who discarded or damaged an embryo could be found civilly liable for damages.[93]

National backlash to *LePage* was immediate. Major news outlets reported on the Alabama Supreme Court's decision,[94] which contained a concurrence directly referencing God as a primary source of its authority and quoting the Book of Genesis as support for the view that the Wrongful Death of a Minor Act contemplated embryos as humans.[95] Multiple IVF providers in the state ceased providing services out of fear that legal action could be pursued against medical professionals who damaged or destroyed embryos during the IVF process.[96] While the Wrongful Death of a Minor Act does not address criminal penalties, advocates were concerned that state prosecutors would rely on *LePage* until the Alabama attorney general issued a statement indicating that he would not use the decision.[97] And less than a month after the decision, after public outcry and statements by

89. *See* Surana, *supra* note 54 ("Maybe your caucus gets to a point next year, two years from now, three years from now, where you do want to talk about IVF, and how to regulate it in a more ethical way . . . . But I don't think that that's the conversation that you need to have now.").

90. *Id.*

91. Nos. SC-2022-0515, SC-2022-0579, 2024 WL 5703334, at *1 (Ala. Feb. 16, 2024).

92. *See id.*

93. *See id.* at *7.

94. *See, e.g.*, Michelle Boorstein, *Alabama Judge Says God Opposes IVF. Religions Hold Varied Views*, WASH. POST (Feb. 28, 2024, 6:00 AM), https://www.washingtonpost.com/nation/2024/02/28/alabama-ivf-embryos-religion-beliefs/; Roni Caryn Rabin, *How a Sudden Halt to In Vitro Fertilization Shook Alabama Couples*, N.Y. TIMES (Mar. 8, 2024), https://nytimes.com/2024/03/07/health/ivf-alabama-families.html; Hannah Yasharoff, *What Is IVF? Explaining the Procedure in Alabama's Controversial Supreme Court Ruling*, USA TODAY (Aug. 27, 2024, 7:02 AM), https://www.usatoday.com/story/life/health-wellness/2024/02/27/what-is-ivf/72757633007 [https://perma.cc/B86M-JDK3].

95. *See LePage*, 2024 WL 5703334, at *11, *16 (Parker, C.J., concurring) ("We believe that each human being, from the moment of conception, is made in the image of God, created by Him to reflect His likeness.").

96. *See* Kim Chandler, *More Alabama IVF Providers Pause Treatment After Court Ruling on Frozen Embryos*, AP NEWS (Feb. 22, 2024, 10:45 PM), https://apnews.com/article/alabama-frozen-embryos-ruling-ivf-pause-3ea72dd4494cad3f65c57e751e4c5c3b [https://perma.cc/48Y3-8C7R].

97. *See* Josh Rayburn & the Associated Press, *Alabama Attorney General Steve Marshall Says He Won't Prosecute Cases Tied to Supreme Court IVF Ruling*, WAAY31 (Feb. 23, 2024), https://www.waaytv.com/news/alabama-attorney-general-steve-marshall-says-he-won-t-prosecute-cases-tied-to-supreme-court/article_e10ca116-d283-11ee-82a9-67a02132c678.html [https://perma.cc/B6TA-EHG4].

several Republican lawmakers who walked back their support for the decision,[98] the Alabama legislature passed a bill giving civil and criminal immunity to "any individual or entity when providing or receiving services related to in vitro fertilization" for damage to or destruction of embryos.[99] The bill provides immediate protection for IVF providers and enabled fertility centers to resume services,[100] but it does not restore the fundamental right to an abortion. The bill creates statutory protections for IVF providers, but it does not wholesale protect genetic parents' right to obtain IVF. There is still an open question of whether an embryo has full rights under the Alabama Constitution.

Threats to IVF also still exist in other states that do not have legislation like Alabama's. Louisiana still has statutory prohibitions on embryo destruction, and more than one-third of states have statutes that "consider fetuses to be people at some point during pregnancy."[101] In case some legislatures do not respond to political pressure in the same way that Alabama's did, legal advocates should consider all possible legal defenses to IVF, including the Takings Clause.

4. Federal

In 2025, Donald J. Trump began his second presidential term, with Republicans taking a majority in both houses of Congress. Unified Republican control increases the likelihood that Congress will advance fetal personhood bills. For example, in January 2025, the U.S. House Representative for Missouri, Eric Burlison, introduced a bill called the Life at Conception Act, which would declare that fetuses have a right to life under the Fourteenth Amendment's Equal Protection Clause.[102] The Fourteenth Amendment protects all "persons" from any deprivation of "life, liberty, or property," [103] and by defining "preborn human person[s]" as "persons" under the Amendment, the Act effectively would outlaw abortion. Although the bill states that "nothing in this Act shall be construed to authorize the prosecution of any woman for the death of her unborn child,"[104] it does not address regulations limiting IVF or frozen embryo destruction. Although the Life at Conception Act likely would never result in criminal penalties for IVF or embryo destruction, it could have a chilling effect or lead to restrictive regulations on ARTs. The Act is also unlikely to pass because it has been proposed every year since 1973 without

98. *See, e.g.*, Maggie Astor, *Republicans Struggle to Respond as Democrats Emphasize the Alabama I.V.F. Ruling*, N.Y. TIMES (Feb. 25, 2024), https://www.nytimes.com/2024/02/25/us/politics/alabama-ivf-ruling-republicans-democrats.html.

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

100. *See id.*; Liz Baker, Debbie Elliott & Susanna Capelouto, *Alabama Governor Signs IVF Bill Giving Immunity to Patients and Providers*, NPR (Mar. 6, 2024, 10:56 PM), https://www.npr.org/2024/03/06/1235907160/alabama-lawmakers-pass-ivf-immunity-legislation [https://perma.cc/Y5P4-86FC].

101. *See* Megan Messerly, *'Scratching Their Heads': State Lawmakers Take a Closer Look at Personhood Laws in Wake of Alabama Ruling*, POLITICO (Feb. 29, 2024, 5:00 AM), https://www.politico.com/news/2024/02/29/states-fetus-personhood-alabama-ivf-00143973.

102. *See* Life at Conception Act, H.R. 722, 119th Cong. (2025).

103. U.S. CONST. amend. XIV, § 1.

104. H.R. 722.

success,[105] and a national abortion ban remains extremely unpopular.[106] However, the Act shows that the growing trend of fetal personhood laws is not limited to states. While this Note primarily imagines state restrictions on embryo destruction, a Takings Clause argument against embryo restrictions would apply equally to federal law.

II. DOES LIMITING THE RIGHT TO DESTROY EMBRYOS IMPLICATE THE TAKINGS CLAUSE?

The Fifth Amendment prohibits the taking of "private property . . . for public use, without just compensation."[107] In turn, the following Sections explain how the Takings Clause is implicated because (A) embryos are, or should be, considered a form of private property by courts; (B) post-*Dobbs*, the Supreme Court would likely find restrictions on reproductive autonomy to be a valid "public use"; (C) restricting the right to destroy is a taking under U.S. Supreme Court jurisprudence and recent decisions like *Cedar Point Nursery v. Hassid*; and (D) compensation for restrictions on the right to destroy is likely quantifiable by courts.

A. PRIVATE PROPERTY: MANY COURTS TREAT EMBRYOS AS SUCH

The question of whether embryos are property has been addressed primarily in the family law context, particularly in divorce cases where spouses contest ownership of embryos created during the marriage.

Courts first addressed the question of whether embryos are property in the seminal case *Davis v. Davis*.[108] In this divorce action, husband and wife disputed custody over their seven cryopreserved embryos, with the husband seeking to destroy them.[109] The wife originally had wished to implant the embryos in her own uterus, but by the time the case came to the Tennessee Supreme Court, the wife had decided that she wished to donate the embryos to a childless couple.[110] At the outset, the court determined that the parties had "an interest in the nature of ownership" of the embryos, but because the embryos were neither purely persons nor property, they occupied an "interim category" due "special respect because of their potential for human life."[111] In deciding whom to award the embryos, the court determined that the ultimate answer depended on the constitutional right to privacy found in both the federal and Tennessee state constitutions, and that the privacy rights include the right to procreate (and the right not to

105. *See, e.g.*, H.J. Res. 261, 93rd Cong. (1973).

106. Shannon Augustus, *Two-Thirds of Americans Oppose National Abortion and IVF Bans, According to New UMass Amherst/League of Women Voters Poll*, LEAGUE OF WOMEN VOTERS (Oct. 28, 2024), https://www.lwv.org/newsroom/press-releases/two-thirds-americans-oppose-national-abortion-and-ivf-bans-according-new [https://perma.cc/4XRS-VW5G].

107. U.S. CONST. amend. V.

108. 842 S.W.2d 588 (Tenn. 1992).

109. *See id.* at 589–90.

110. *See id.*

111. *Id.* at 597.

procreate).[112] Forced genetic parentage would have such a significant emotional impact on the husband that his "interest in avoiding genetic parenthood [was] significant enough to trigger the protections afforded to all other aspects of parenthood."[113] Because the husband did not want any more children, especially if another couple were to raise them, the husband's right not to procreate outweighed the wife's emotional desire to donate the embryos.[114] The wife had spent years and thousands of dollars trying to conceive through IVF, and while this was a substantial emotional burden, the father's constitutional right to avoid procreation warranted the most protection.[115] The court then allowed destruction of the embryos.[116]

Since first addressing the issue in *Davis v. Davis*, family law courts have solidified around three different outcomes for the legal status of embryos: (1) treating the embryo as traditional personal property; (2) treating the embryo as "quasi-property" entitled to special respect, similar to *Davis v. Davis*; and (3) treating the embryo as a person.[117] The first view, treating embryos as traditional personal property, is the dominant approach.[118]

While cases determining the legal status of embryos are predominantly in the family law context, it is possible that their reasoning could spread to civil and criminal litigation over abortion. These cases provide more than thirty years of jurisprudence considering how state and federal privacy and property regimes apply to frozen embryos, and reproductive justice and anti-abortion advocates alike will not hesitate to borrow from case law. These cases are already in discussion with the fetal personhood movement. The dissenting opinion in *LePage* borrowed heavily from the family law context, citing *Davis v. Davis* as evidence that most states do not consider embryos to be persons and Alabama's Wrongful Death of a Minor Act should not protect embryos.[119] Applying family law

112. *See id.* at 598–601. The court considered the affirmative right to procreate discussed in *Buck v. Bell*, 274 U.S. 200, 205–06 (1927), and *Skinner v. Oklahoma* ex rel. *Williamson*, 316 U.S. 535, 536 (1942); reproductive freedom cases, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973); and cases concerning parental rights and responsibilities with respect to children, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Prince v. Massachusetts*, 321 U.S. 158 (1944). *See Davis*, 842 S.W.2d at 600–01.

113. *Davis*, 842 S.W.2d at 603.

114. *See id.* at 603–04.

115. *See id.* at 604.

116. *See id.* at 604–05.

117. Numerous articles have summarized courts' approaches to embryo disposition disputes. For a more in-depth discussion, with example cases, of the three ways that courts have approached embryos in marital property disputes, see, for example, Gabrielle Lipsitz, *Say Yes to Her Redress: A Two-Step Approach to Post-Divorce Embryo Disputes*, 95 S. CAL. L. REV. 993, 1011–15 (2022).

118. *See id.* at 1015 tbl.2 (compiling state approaches); *see also* Madison Hynes, *"Who Gets the Children?": Innovations in Reproductive Technology Create More Problems Than Solutions for the Legal System*, 53 UIC J. MARSHALL L. REV. 163, 171 (2020) ("For the small number of states that have classified frozen embyos, the majority considers them property."); A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (finding embryos have a special interim status).

119. LePage v. Ctr. for Reprod. Med., P.C., Nos. SC-2022-0515, SC-2022-0579, 2024 WL 5703334, at *41 (Ala. Feb. 16, 2024) (Cook, J., dissenting).

jurisprudence to the abortion context is not unimaginable after *Dobbs* and the Supreme Court's abdication of reproductive healthcare regulation to the states.

1. Because *Dobbs* Weakened Privacy Rights, Property Defenses to Abortion Are More Valuable

As discussed in Section I.C, before *Dobbs*, genetic parents' right to control their embryos was largely protected by the constitutional right to privacy enshrined in reproductive freedom cases.[120] Even cases like *Davis v. Davis* that recognized a quasi-property right in embryos were based on a privacy framework.[121] Privacy grants a libertarian "freedom from" government intrusion, whereas property grants an affirmative right to control and exclude others from one's property.[122] But as Radhika Rao argues, a privacy conception of the body treats the body as inviolable and integral to personhood, whereas property treats the body as a distinct entity from the person who owns it.[123] Privacy of the body, in effect, has greater valence because it is not an entitlement that can be granted or taken away like property, and it protects the entire, living body from intrusion. Meanwhile, property can be fragmented into interests: under the traditional bundle of sticks metaphor, property can be used, sold, transferred, or destroyed, with vested or contingent remainders that affect the conditionality and timing of ownership.[124] Questions of whether a fragmented body part is attached or separated, living or dead, or person or not create issues under a property conception of the body because it lacks the encompassing shield of personhood that makes intrusions on the body unconscionable.[125] Finally, characterizing embryos as traditional property does not appropriately capture the emotional, genetic, and symbolic connection that many individuals have to their embryos.

However, *Dobbs*'s holding limits privacy rights as a justification for reproductive freedom, especially when it comes to control over reproductive decisions that state legislatures believe implicate "potential life."[126] And in front of the current conservative Supreme Court that privileges enumerated rights and interpretive tools like originalism, property defenses to abortion and related bodily interests have jurisprudential strength. One study found that before Justice Scalia's death in 2016, the Roberts Court had been consistently expanding protection for property rights: property owners prevailed in 86% of civil property-

120. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by Dobbs*, 597 U.S. 215.

121. *See Davis*, 842 S.W.2d at 598–601.

122. Rao, *supra* note 7, at 432–34.

123. *See id.* at 428.

124. *See id.* at 429, 434–36.

125. Rao proposes a three-part test to determine whether a body part should be protected as an interest in privacy versus an interest in property: "(1) whether it is living or dead; (2) whether it is integrated with the whole person or a separate part; and (3) whether it is involved in a personal relationship or an object relationship." *Id.* at 445.

126. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 228 (2022) (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

related disputes.[127] The Court has become more lenient in finding that a Fifth Amendment taking occurred, saying that in cases of physical takings, the government need only take one stick in the metaphorical bundle to warrant just compensation.[128] Compare this to 2000, when Rao made the point that privacy theory gave significantly more protection to bodily autonomy than a property approach.[129] Before *Dobbs*, that was true because invasions of privacy usually triggered heightened scrutiny, such as the "undue burden" analysis for abortion restrictions, whereas only rational basis review applies to Fifth Amendment takings.[130] After *Dobbs*, both takings and abortion restrictions are subject only to rational basis review, and this likely extends to IVF and embryo cryopreservation as health and welfare legislation.[131]

Dobbs has made it possible for states to prohibit the destruction of embryos, including by passing personhood statutes that define life as starting at conception or fertilization. Property-based arguments are one way in which advocates should prepare for restrictions on IVF and other reproductive rights.[132] Many scholars have already posited property-based defenses to abortion.[133] For example, Rebecca Rausch argued that an unwanted fetus is a trespasser in a woman's womb whom the woman has the right to eject.[134] She suggests that property-based conceptions of the uterus could be used to protect the right to an abortion, imagined as a government duty to provide abortion funding.[135] Similarly, Susan E. Looper-Friedman argued that forced pregnancy "is undeniably a physical occupation of a woman's body," and where an owner is denied the right to eject an "unwelcome intruder" from their own body, this constitutes a per se taking under the Fifth Amendment.[136] Looper-Friedman argued that advocates should avoid relying exclusively on privacy rights when challenging abortion

127. *See* John G. Sprankling, *Property and the Roberts Court*, 65 U. KAN. L. REV. 1, 4 (2016). *But see id.* at 2 (stating that "property owners usually lose in property-related disputes involving criminal law").

128. *See id.* at 17 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); Hodel v. Irving, 481 U.S. 704, 716 (1987); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 711 (2010)); *see also* Cedar Point Nursery v. Hassid, 594 U.S. 139, 150 (2021).

129. *See* Rao, *supra* note 7, at 441 (citing *Roe*, 410 U.S. at 163; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992), *overruled by Dobbs*, 597 U.S. 215).

130. *Id.*

131. *See Dobbs*, 597 U.S. at 300. *But see id.* at 290 ("[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

132. *See, e.g.*, Lilah Kleban, *Towards an Equitable Review of Pre-Embryo and Divorce Disputes for Women*, 18 NW. J.L. & SOC. POL'Y 131, 154 (2022) (highlighting this urgency by suggesting the fundamental right not to procreate in divorce cases where one spouse opposes use of a pre-embryo may be constitutionally irrelevant after *Dobbs*).

133. *See, e.g.*, Goldberg, *supra* note 7, at 1598, 1618 (arguing a woman has a licensor–licensee relationship with a fetus and has a right to exclude it from her body under the Fifth and Fourteenth Amendments); Knight, *supra* note 7, at 164 (proposing that women denied access to abortions by state laws bring inverse condemnation claims).

134. *See* Rausch, *supra* note 7, at 51.

135. *See id.* at 51–52.

136. Looper-Friedman, *supra* note 7, at 281.

restrictions, and that basing defenses of abortion on traditional constitutional interests, like property law's right to exclude, would provide more security for reproductive freedoms.[137] Writing shortly before *Roe* was overturned, Nicole Knight revived Looper-Friedman's argument that people who are denied abortion procedures should make inverse condemnation claims under the Takings Clause.[138] And Bella Miller argued that these Fifth Amendment arguments deserve a second look and deeper analysis, especially after *Dobbs* and the expansion of the Supreme Court's Fifth Amendment jurisprudence.[139] This Note dives into the Fifth Amendment analysis, interrogating which cases would be relevant to theoretical state restrictions on embryo cryopreservation.

2. For Fifth Amendment Purposes, Embryos Are Properly Treated as Private Property or Quasi-Property

The traditional analogy of property as a "bundle of sticks" that gives an owner the right to use, possess, destroy, or transfer describes the legal relationship between a property owner, their property, and the outside world.[140] Such an analogy also can retrofit to genetic parents' use of embryos: parents can use, possess, donate, or, in almost all jurisdictions, destroy their embryos.

Embryos may be characterized accurately as property or quasi-property because the choice to keep embryos in storage indefinitely could be construed as exercising either the right to possess or the right to destroy. The right to possession is straightforward because the genetic parent still has full ownership or control over the embryo in storage. Indefinite storage could be considered destruction because it is wasteful and has an equivalent net effect: no child will ever be born from the embryo. Generally, courts disfavor the destruction of valuable resources, in line with John Locke's utilitarian view that "[n]othing was made by God for Man to spoil or destroy," reasoning that permitting an individual party to destroy or waste their property is a net loss for society.[141] Under an absolutist conception of this view, leaving an embryo in storage with no plan to use it would disadvantage society because it both requires resources to store and produces nothing of utilitarian value. Lior Strahilevitz, however, explains that when it comes to body parts or embryos, most courts generally consider negative externalities caused by "wasting" to be irrelevant.[142] The parties' individual interests, particularly the constitutional right not to procreate and other due process concerns, trump the utilitarianism valued by American property law.

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137. *See id*. at 255–56.

138. *See* Knight, *supra* note 7, at 164.

139. *See* Miller, *supra* note 7, at 2169 (suggesting that abortion bans that restrict a pregnant person's ability to get an abortion may be a per se taking under the Fifth Amendment).

140. *See* Denise Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 251–53 (2007).

141. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 789 (2004) (quoting JOHN LOCKE, *Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 285, 308 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690) (discussing the history of the right to destroy in English common law and American jurisprudence up to the early 20th century)).

142. *See id*. at 837.

Even though embryos may be subject to heightened restrictions, such as the right of sale, state regulation would not take away property status. In the context of human body parts, choices about what property is alienable versus inalienable is largely a public value judgment that can change with the times.[143] For example, federal law bans the sale of organs in the United States,[144] yet it does not ban the sale of blood plasma, cadaver skin tissues, unfertilized reproductive eggs, and sperm. In another example, New York recently passed a law establishing a financial program to cover lost wages and medical expenses for people who altruistically donate their kidneys and livers.[145] Programs that use alternative compensation models to encourage the alienability of otherwise non-sellable goods show that society does treat some body parts, organs, and embryos like property, even if the legal term offends many people's sensibilities.

For embryos specifically, the most restricted "stick" in the bundle is the power to sell. Many states have banned the sale of embryos or their donation to embryonic research based on moral, philosophical, and religious objections,[146] but an embryo's inalienability does not mean that it is not property. As Margaret Radin argues in her seminal article, *Property and Personhood*, each person has objects that are intricately tied up with the way they perceive and express their identities, and whose value can only be measured by their loss.[147] She gives the example of a person who loses a wedding ring that is intimately tied to their personhood: while it has a set monetary value that an insurance provider could compensate, its loss feels like the loss of oneself, something that is not compensable.[148] This example rings true for many genetic parents who have a similar object relationship to their embryos. Parents who contribute their sperm and ova to the production of embryos have a genetic and biological tie to the embryo; this, plus the physically intrusive, expensive, and emotionally weighty process of IVF treatment causes many parents to view the embryo as an extension of the self. This object relationship is one reason why many courts, like that of *Davis v. Davis*, have recognized embryos as quasi-property. And if a court considers an embryo to be personal property, then it may be subject to a taking.[149]

B. PUBLIC USE: RESTRICTING THE DESTRUCTION OF EMBRYOS IS LIKELY LEGAL

Restricting the destruction of embryos is likely a legally valid public use, especially after *Dobbs*, where the Court declared it would defer to state legislatures in

143. *See* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1856–57 (1987).

144. *See* National Organ Transplantation Act of 1984, 42 U.S.C. § 274e(a).

145. *See* New York State Living Donor Support Act, S. 1594, 2021 Reg. Sess. (N.Y. 2021).

146. *See* Matthews & Morali, *supra* note 25, at 17–18 (identifying Arkansas, Kentucky, Louisiana, Minnesota, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, and South Dakota).

147. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982).

148. *See id.*

149. *See* Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) (holding that Fifth Amendment takings apply to personal property, stating that "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home").

regulating abortion and gave example state interests that would pass rational basis review.[150] Rational basis review similarly applies to the Fifth Amendment's "public use" requirement.[151]

In *Hawaii Housing Authority v. Midkiff*, the Court clarified that the "public use" requirement for a Fifth Amendment taking means the taking only must be rationally related to some conceivable public purpose.[152] It is only the taking's purpose that matters, not whether the government ever actually uses the property or makes it available to the public. Courts will not consider the wisdom of the public purpose, including whether it is supported by empirics or likely to be successful.[153] The hands-off approach to the public use requirement means that the government could seize all cryopreserved embryos that a genetic parent does not intend to use and hold them indefinitely, as long as the government cites some conceivable, legitimate state interest. Identifying a legitimate state interest became much easier after *Dobbs*, when the Supreme Court offered several possible justifications, including "respect for and preservation of prenatal life at all stages of development."[154]

Advocates should still attack restrictions on the right to destroy because indefinite embryo cryopreservation may not be a rational public use. Indefinite embryo cryopreservation is very costly for storage centers and genetic parents who might be forced to bear the cost; if state legislatures are forced to reckon with the true cost of embryo cryopreservation, legislation regulating the right to destroy may not survive rational basis review.[155] Additionally, past case law on whether it is permissible for the government to use one person's body to benefit another individual is very fact specific and does not offer a clear answer: a person cannot be forced to donate an organ, yet individuals can be forced to serve in the draft.[156] But ultimately, attacks based on public use are unlikely to succeed because the

150. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022).

151. 467 U.S. 229, 241 (1984).

152. *See id.*

153. *See id.* at 242–43.

154. *Dobbs*, 597 U.S. at 301 (collecting cases and listing "the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability" as legitimate state interests).

155. *See* Maggie Davis, *Indefinite Freeze?: The Obligations a Cryopreservation Bank Has to Abandoned Frozen Embryos in the Wake of the Maryland Stem Cell Research Act of 2006*, 15 J. HEALTH CARE L. & POL'Y 379, 397 (2012). *But see* Shelly R. Petralia, *Resolving Disputes Over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 108–09 (2002) (arguing that embryo's use, rather than waste, should be promoted in the interests of a more efficient society and the embryo should be awarded to the party that will put it to the most use and has given it the most value, e.g., the parent who underwent IVF and provided the ova).

156. Rao, *supra* note 7, at 441–42 (citing, among other cases, McFall v. Shimp, 10 Pa. D. & C. 3d 90, 91 (1978) (declining to force a donor to donate lifesaving bone marrow)); Selective Draft Law Cases, 245 U.S. 366, 367, 378–79 (1918) (holding that "compelled military service is neither repugnant to a free government nor in conflict with the constitutional guaranties of individual liberty").

Court has upheld almost any restriction on the right to destroy as backed by a valid public purpose.[157]

C. THE TAKING: WOULD NEW RESTRICTIONS BE ENOUGH FOR A TAKING? LEARNING FROM THE RIGHT TO EXCLUDE

Restricting the right to destroy would take away an additional power of an owner to control their property. While most states already restrict the right to sell embryos, preventing genetic parents from destroying their embryos would be novel and would affect the thousands of frozen embryos currently in storage, upsetting genetic parents' reliance on existing policies. This leads to the question: would new restrictions on the right to destroy be enough to constitute a taking?

This Section first gives an overview of the U.S. Supreme Court's physical takings jurisprudence. It addresses whether restricting the usage of one traditional stick in the bundle could be enough for the Court to find a taking. It then applies *Cedar Point Nursery v. Hassid*,[158] one of the Court's most recent Fifth Amendment cases, to embryo cryopreservation laws that restrict the right to destroy.

1. Doctrinal Overview

Fifth Amendment takings jurisprudence varies as to whether taking one stick from the bundle is enough. When the government seizes or occupies private property, even in a very small way, courts are likely to find this is a "physical" taking. The classic example of a physical taking is eminent domain, where the government removes property from private ownership for some public use.[159] Meanwhile, in "regulatory" takings, a statute or regulation so restricts an owner's property interests that it amounts to a taking. The first Supreme Court case to recognize regulatory takings found that a Pennsylvania statute prohibiting mining underneath residences unconstitutionally infringed on a mining company's right to use their property as they wished.[160] *Penn Central Transportation Co. v. New York City* created the modern test for regulatory takings, holding that courts must consider a regulation's (1) economic impact, (2) interference with distinct investment-backed expectations, and (3) the character of the government action.[161] Because regulatory takings require considering diminution of value, an owner's investment in their property, and the purpose of the taking, a regulatory

157. *See Dobbs*, 597 U.S. at 301 (collecting cases supporting the proposition that a wide variety of health and welfare laws are sustained on rational basis review); *see also* Rao, *supra* note 7, at 440 (giving examples of valid public uses in the takings context and postulating that takings of organs could have a valid public use because they would save other individuals and benefit greater society).

158. 594 U.S. 139 (2021).

159. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 36 (1954) (finding that government seizure of privately owned properties in a Washington, D.C., neighborhood as part of development plan to eliminate urban blight was a lawful exercise of eminent domain power); Kelo v. City of New London, 545 U.S. 469, 480, 490 (2005) (finding that government seizure of privately owned land to create a new research facility in the economically depressed city of New London, Connecticut, was a lawful exercise of eminent domain power).

160. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

161. 438 U.S. 104, 124 (1978).

infringement that does not significantly impact any of these criteria may not be a taking, even if the statute restricts multiple sticks in the bundle. Problems arise because the line is often blurred between physical and regulatory takings—most governmental action is regulatory, yet a regulation can have a physical effect. Analysis of both physical and regulatory takings is necessary to understand how a court would approach embryo cryopreservation regulation.

In the regulatory takings case *Andrus v. Allard*, petitioners sued the Secretary of the Interior after they were prosecuted under the Eagle Protection Act and the Migratory Bird Treaty Act for selling eagle feathers, even though the bird the feathers came from was killed lawfully before the law's passage.[162] The Supreme Court rejected the petitioners' argument that the prohibition on sale was a Fifth Amendment taking, reasoning that the petitioners still retained the rights to possess, transport, donate, and devise the eagle feather artifacts, even if they could not sell them.[163] And "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[164] If the Supreme Court analyzed a restriction on embryo cryopreservation as a potential regulatory taking, *Andrus* suggests that restricting the right to destroy an embryo may not violate the Fifth Amendment because it is only one right in the bundle, and genetic parents still retain other rights: the ability to possess, transfer, devise, and so on.

But if an embryo cryopreservation statute is framed as a physical invasion or occupation, like in *Kaiser Aetna v. United States*, restricting even one of the traditional "sticks" may be enough to violate the Fifth Amendment.[165] In that case, Kaiser Aetna leased a private pond and obtained government consent to dredge a channel between the pond and a bay, forming a private marina.[166] The government then sued Kaiser Aetna after it excluded the public from the marina, arguing that the channel had created a navigable servitude that had to be open to the public for navigation under the Rivers and Harbors Appropriation Act of 1899.[167] The Court found that the government's imposition of a navigational servitude was a taking because it was a "physical invasion" of the land, unlike the regulatory taking in *Andrus v. Allard*.[168] Recognizing the right to exclude the public as one of an owner's most important property interests, the Court found there was a taking "even though the owner retained all of the other sticks in the metaphorical bundle."[169] *Kaiser Aetna* indicated that restricting one right in the bundle could be enough for a taking when it results in a physical invasion or limits the right to exclude. New government restrictions on embryo destruction could be considered

162. 444 U.S. 51, 52–54 (1979).
163. *See id.* at 65.
164. *Id.* at 65–66.
165. *See* 444 U.S. 164, 179–80 (1979).
166. *See id.* at 167.
167. *See id.* at 168–69.
168. *Id.* at 180.
169. Sprankling, *supra* note 127, at 17 (citing *Kaiser Aetna*, 444 U.S. at 176).

a physical taking because they interfere with a genetic parent's ability to control their embryo.

The Court's view on individual sticks was further elaborated in *Loretto v. Teleprompter Manhattan CATV Corp.*, which found that a permanent physical restriction on the right to exclude was a taking because it affected all sticks in the bundle.[170] Justice Marshall found that a New York state law requiring landlords to allow cable companies to run a one-half-inch diameter cable wire on their property for tenant use was a per se taking, regardless of the economic loss imposed by the taking or the physical size of the cable.[171] Even the small size of the cable was enough for a taking because it was a physical invasion and a permanent one.[172] *Loretto* distinguished the cable wire from the eagle feather artifacts in *Andrus* based on its permanent restriction of the right to exclude: future purchasers would never be able to use, transfer, or sell the area on which the wire was placed and would have to accept the the cable wire as a type of encumbrance.[173] Justice Marshall characterized the New York law mandating the cable wire as not just taking one "'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand," "effectively destroy[ing]" "the rights 'to possess, use and dispose of'" property.[174] *Loretto*'s outcome suggests that any indefinite restriction on embryo cryopreservation, if it is considered a physical invasion that prevents genetic parents from controlling their bodily material, may be a physical taking. As Looper-Friedman states in her analysis of *Loretto*'s application to abortion, "[i]t can hardly be denied that the occupation of one's uterus by a fetus is a more intrusive physical occupation than installation of a cable box on one's roof."[175] While forced pregnancy is almost certainly a greater imposition than a restriction on embryo destruction, the commonality is that both parents lose the right to exclude. Like the homeowner in *Loretto* who could not prevent the cable company from installing a wire, genetic parents would not be able to exclude the government from controlling the disposition of their frozen embryos.

Under the Roberts Court, it is more likely that an embryo cryopreservation restriction would be analyzed as a physical taking than a regulatory one. In 2016, John G. Sprankling pointed out that the Supreme Court has strengthened the Takings Clause by consistently applying sweeping categorical rules, such as the one posited in *Loretto*, rather than applying the balancing test for regulatory takings articulated in *Penn Central*.[176] One of his key examples is *Stop the Beach*,

170. *See* 458 U.S. 419, 435 (1982).

171. *See id.* at 421–22, 438.

172. *See id.* at 436–37.

173. *See id.* at 436.

174. *Id.* at 435 (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)).

175. Looper-Friedman, *supra* note 7, at 281.

176. *See* Sprankling, *supra* note 127, at 16 (first citing Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010) (plurality opinion); then citing Horne v. Dep't of Agric., 576 U.S. 350, 358 (2015); and then citing Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013)). *Compare id. with* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)

where the Court found that judicial action could also constitute a taking.[177] The petitioners argued that Florida state courts took their "special rights" as littoral owners to the ocean and foreshore, which are akin to easements, when it rejected their lawsuit against a state's beach restoration project.[178] Justice Scalia agreed, suggesting that even the loss of a minor property right like an easement (which is not a full ownership interest and does not grant a user the full bundle of sticks), would require compensation because it is a property right established under state law.[179] It would be a Fifth Amendment violation for a judge or any other state actor to contravene the state's property doctrine and invalidate a once-valid property interest.[180] Any judicial decision interpreting a personhood law to prohibit the disposition of embryos as property, in a state that has traditionally treated embryos as such, would substantially change property law and affect genetic parents' expectations that they possessed exclusive control over their embryos. Genetic parents who have already undergone IVF and stored their embryos have a strong reliance interest in being able to destroy them when they wish. A judicial reinterpretation of state law that would restrict a genetic parent's property interest in their embryos may be enough for a taking.

A taking's duration also implicates whether a categorical physical taking applies. A permanent restriction is more likely to result in a judicial finding of a taking, whereas a temporary regulation is only subject to the *Penn Central* balancing test.[181] For example, in *Tahoe-Sierra*, the Court found no per se physical taking occurred when the government imposed two complete moratoria on real estate development, the longest of which would last thirty-two months.[182] Even though the moratoria restricted all use of the property, the Court held that they were only temporary regulations subject to the *Penn Central* regulatory taking test, in part because the properties would regain their value after the thirty-two months.[183] *Tahoe-Sierra* showed that temporary takings are predicated on an eventual return to the property's status quo, rather than being indefinite.

Most recently, the Court circled back to its question from *Loretto* of how much regulation of the bundle of sticks constitutes a taking in *Cedar Point Nursery v. Hassid*.[184] There, a California law permitted union organizers to speak to workers on privately owned farms for three hours per day, 120 days per year.[185] In an opinion authored by Chief Justice Roberts, the Court determined that this "right

(establishing a three-prong test to determine whether a regulation is a taking, including its (1) economic impact, (2) interference with reasonable investment-backed expectations, and (3) the character of the government action).

177. *See* Sprankling, *supra* note 127, at 18–19 (citing *Stop the Beach*, 560 U.S. at 713–15).

178. *See Stop the Beach*, 560 U.S. at 712.

179. *See* Sprankling, *supra* note 127, at 18 (citing *Stop the Beach*, 560 U.S. at 712–14).

180. *See Stop the Beach*, 560 U.S. at 715.

181. *See Penn Central*, 438 U.S. at 124.

182. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 306, 337 (2002).

183. *See id.* at 303, 341–42.

184. 594 U.S. 139 (2021).

185. *Id.* at 144.

of access" statute "appropriated" the private farm owner's right to exclude for the enjoyment of the third-party union organizers, and thus constituted a per se physical taking.[186] The Court rejected the *Penn Central* test usually applied to temporary regulatory takings, instead characterizing the statute permitting union organizers to enter farms as the "appropriation[] of a right to invade."[187] In accounting for the statute's temporary nature, the majority analogized that there was no constitutionally relevant difference between a statute regulating land for 364 versus 365 days.[188] It determined that this statute did not merely regulate because it granted third-party organizers a formal entitlement to the land, unlike other health and safety codes that grant the government a limited right of access in return for a benefit like a health certificate or license.[189] The dissent, in response, argued that the California statute was distinguishable from *Loretto* because it regulated only the right to exclude and did not infringe on all other rights in the bundle.[190]

2. *Cedar Point*'s Application to Embryos

First, in deciding whether an embryo cryopreservation statute is a taking, a court would have to analyze whether the statute is a physical invasion or occupation, or a regulatory invasion of property interests under *Penn Central*. *Penn Central* imagined a three-pronged approach to determine when a use restriction constitutes a taking, including (1) the regulation's economic impact, (2) its interference with distinct investment-backed expectations, and (3) the character of the government action.[191] Because most states do not allow the sale of embryos, embryos already have no economic value, and a genetic parent would not necessarily lose money if a state restricted destruction. If the state required a genetic parent to pay all storage costs going forward, then there could be a significant economic impact because annual storage fees range from $500 to $1,000.[192] There likely would be no interference with investment-backed expectations, because again, embryos generally cannot be sold; therefore, there would be no difference in potential profit pre-regulation versus post-regulation. Finally, like in *Loretto*, the "character of the government action" in regulating embryos is physical in nature: nothing is more physical, or more related to a personhood expression of property, than a body part or embryo created using the property owner's

186. *Id*. at 152.

187. *Id*. at 158. *Contra id*. at 173 (Breyer, J., dissenting) (arguing that the *Penn Central* test should be applied to temporary occupations).

188. *See id*. at 152–53 (majority opinion).

189. *See id*. at 161–62.

190. *See id*. at 169 (Breyer, J., dissenting).

191. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

192. *See* Yeganeh Torbati, *With Egg Freezing Increasingly Common, Fertility Clinics Hike Storage Fees*, WASH. POST (Apr. 14, 2023, 10:04 AM), https://www.washingtonpost.com/business/2023/04/12/egg-freezing-storage-prices (listing embryo storage prices in 2023 ranging from $600 to $1560 annually); *see also* Dani Blum & Nicole Stock, *What to Know Before You Freeze Your Eggs*, N.Y. TIMES (Dec. 23, 2022), https://www.nytimes.com/2022/12/23/well/family/egg-freezing-risks-cost.html (estimating the price of annual storage to be $500 or more).

gametes. In Nicole Knight's and Susan E. Looper-Friedman's applications of the Fifth Amendment Takings Clause to abortion, both agree that "[f]orced pregnancy . . . is undeniably a physical occupation of a woman's body."[193] Knight explains this by outlining the many physical changes that happen to a person when they become pregnant, including significant medical conditions.[194] While IVF alone does not carry the same risks as gestation, the procedure is also extremely physically and emotionally invasive. IVF's impact on a person's body counsels that any restriction on embryos should be considered a physical invasion. And unless an embryo restriction requires genetic parents to pay significant costs, the second and third prongs of *Penn Central* suggest that the taking is more physical than regulatory in nature, and *Cedar Point v. Hassid* may apply.

In effect, *Cedar Point* expands *Loretto* and implies that many health and safety regulations could be takings when they infringe on an individual's right to exclude.[195] Whereas *Loretto* implied that a physical taking restricting the right to exclude must permanently affect *all* sticks in the bundle, *Cedar Point* does not adequately explain how the rights to use, possess, transfer, or destroy were infringed by the California statute. Instead, it manipulates the language of exclusion and says that the government granted union organizers a "right to invade" the growers' farms, and this was enough to find a taking.[196] *Cedar Point*'s expansive protections for the right to exclude lead to the question of whether the right to destroy embryos can hold the same power in front of the Supreme Court.

Like Looper-Friedman and Rausch argued—in the abortion context—that an unwanted fetus is like a trespasser in the uterus that the gestational carrier has the right to exclude,[197] plaintiffs wishing to prevent the government from regulating their right to destroy an embryo could characterize the regulation as giving the government a "right to invade" the body. Like the California right to access statute in *Cedar Point*, a restriction on the right to destroy would confer no benefit to genetic parents who wished not to procreate using the embryos. *Cedar Point* distinguished the California right to access regulation from run-of-the-mill health and safety legislation because it granted the "right to invade" to third parties (union organizers), without conferring a traditional license or operation benefit like that from health inspections.[198] The Court explained that a permit or license

193. Knight, *supra* note 7, at 181 (alteration in original) (quoting Looper-Friedman, *supra* note 7, at 281).

194. *See id.* at 181–84.

195. *See, e.g.*, Carolyn Liziewksi, *The Supreme Court's All-or-Nothing Approach to the Right to Exclude in* Cedar Point Nursery v. Hassid, COLUM. BUS. L. REV. ONLINE (Nov. 24, 2021), https://journals.library.columbia.edu/index.php/CBLR/announcement/view/455 [https://perma.cc/B9JU-NHB2] (arguing that *Cedar Point* will empower business interests because almost any access regulation will now constitute a per se taking); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (reasoning that when there is a per se physical taking, no government interest is compelling enough to justify it).

196. Cedar Point Nursery v. Hassid, 594 U.S. 139, 149, 158 (2021).

197. Rausch, *supra* note 7, at 31; Looper-Friedman, *supra* note 7, at 281.

198. *See Cedar Point*, 594 U.S. at 161.

must bear an "'essential nexus' and 'rough proportionality' to the impact of the proposed use of the property" to avoid causing a taking.[199]

In states that extend personhood to embryos or justify restrictions on bodily autonomy based on potential life interests, an embryo is like a third party. The state places storage restrictions on the genetic parent's property with no benefit or health advantage to the parent; instead, it "appropriates" a genetic parent's rights for the sole benefit of the person that an embryo theoretically would become. While a state theoretically could regulate IVF by requiring parents to obtain a license to undergo the procedure, and condition that license on an agreement that they would never destroy their embryos, the procedure likely would not be a permissible benefit for two reasons. It goes far beyond the run-of-the-mill health and safety inspections discussed in *Cedar Point*, and it is unclear how a procedure helping parents procreate is closely tied or proportional to a restriction on embryo destruction. Genetic parents could characterize the restriction as an almost permanent imposition on the right to exclude; it would be a permanent encumbrance on parents' extra frozen embryos. Imposing a licensing requirement on IVF users also likely would infringe on the fundamental right to procreate.[200] A regulation that burdens individuals who want to procreate would be subject to strict scrutiny,[201] calling into question whether an IVF license would be narrowly tailored when a state could pass general legislation prohibiting embryo destruction (like Louisiana's existing laws).

Still, *Cedar Point*'s application may be limited because of *Dobbs*'s heightened protections for potential life. Courts may determine that embryos have a special status as potential life. Or courts may choose not to characterize embryos as third parties, finding that genetic parents and embryos are joined entities in receiving the benefit of preserving potential life, even if the genetic parents have no desire to use their embryos. Applying *Dobbs* in this way would create dueling interests: a genetic parent's right to procreate (and to not procreate) versus a state interest in potential life. The *Dobbs* majority promised that the ruling would not affect other fundamental rights outside of the abortion context,[202] and advocates undoubtedly will have to emphasize *Dobbs*'s promise when arguing that destruction of embryos should not be considered abortion and that other fundamental rights should remain untouched.

The permanence of any statute restricting the destruction of an embryo also counsels that it would constitute a per se physical taking under *Loretto* and *Cedar Point*. There are reports of frozen embryos in Louisiana dating from the late

199. *Id.* (quoting Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994)).

200. This argument assumes parents have a fundamental right to procreate using assisted reproductive technologies.

201. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) ("[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests.").

202. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 289–90 (2022).

1980s when the Human Embryo Statutes were passed,[203] and under Louisiana law, neither genetic parents nor clinics may destroy them, regardless of whether a genetic parent dies or stops paying their storage fees.[204] *Cedar Point* held that three hours per day, 120 days per year—which could be recharacterized as 4% of the hours in a year—was a permanent, not temporary, taking.[205] An indefinite ban on embryo destruction certainly would (and has) endured longer than that. States like Louisiana may argue that genetic parents chose to undergo IVF in jurisdictions where embryo destruction is not allowed and could otherwise forego parentage or seek out another state to store their embryos, but *Loretto* weighs against such an argument. Justice Marshall rejected the argument that a landlord could avoid a taking by ceasing to rent out her property and held that any indefinite taking of private property would be a per se physical taking, implying that any public use of property without just compensation was a slippery slope that would lead only to larger and larger takings.[206] Parents similarly cannot be expected to "take their business elsewhere" or not undergo IVF at all.

Cases like *Kaiser*, *Loretto*, *Stop the Beach*, and *Cedar Point* show the U.S. Supreme Court has increasingly protected property rights under the Takings Clause, even for individual sticks in the bundle and fractional property interests. Advocates looking to defend genetic parents' right to control their embryos should rely on this case law when arguing any new restriction is a taking. This would be true for any piece of legislation restricting embryo cryopreservation as well as judicial decisions interpreting state personhood statutes after *Stop the Beach*. Giving the government the "right to invade" genetic parents' bodily interests, without giving them any benefit for restricting their embryos, would resemble the taking in *Cedar Point*. Arguments that characterize a restriction as permanent would be persuasive to a court that blurred the line between temporary and permanent with *Cedar Point*.

While *Cedar Point* was a decidedly libertarian, pro-property owner decision, it is still important to hedge the takings argument in light of who sits on the Court. The Court retains its conservative majority since *Cedar Point* and *Dobbs* were

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203. *See* Reedy, *supra* note 56, at 383, 388 (citing Britney Glaser, *The Fertility Dilemma: Frozen Embryos*, KPLC NEWS (Mar. 27, 2009, 8:57 AM), https://www.kplctv.com/story/10081861/the-fertility-dilemma-frozen-embryos [https://perma.cc/VST9-6GKV]); Loeb v. Vergara, 313 So. 3d 346, 391–92 (La. Ct. App. 2021) (holding that (1) after dissolution of a marriage, embryos stored in Louisiana were not "children" despite being juridical persons and (2) resultingly their genetic father could not file for child custody, suggesting that embryos must stay in storage indefinitely absent consent to use by both parties).

204. *See supra* Section I.D.1.

205. Cedar Point Nursery v. Hassid, 594 U.S 139, 143 (2021). *Contra id.* at 164 (Breyer, J., dissenting) (recharacterizing the application of the code as "four months of the year, one hour before the start of work, one hour during an employee lunch break, and one hour after work").

206. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 n.17 (1982). Justice Marshall's argument also draws to mind Judith Jarvis Thomson's *A Defense of Abortion*, where she compares the anti-abortion argument that women assume responsibility to carry out their pregnancies when they engage in consensual sex to an argument that a homeowner is responsible for a burglary if they leave their windows open during the summer. *See* Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 57–59 (1971).

decided, with only Justice Ketanji Brown Jackson replacing Justice Stephen Breyer.[207] As such, it remains unlikely that a conservative Court will unabashedly apply *Cedar Point*'s principles to protect individual rights of privacy and bodily autonomy against government intrusion. Many advocates doubt that the Supreme Court will cabin *Dobbs* to the abortion context and fear that its reasoning will work to undermine other fundamental rights grounded in substantive due process, including same-sex marriage, interracial marriage, private sexual intimacy, and contraceptives.

D. JUST COMPENSATION FOR EMBRYOS AND ITS DANGERS

Fifth Amendment protections for human embryos will always be limited. The greatest danger of any takings argument is that the government can provide just compensation for the taking of property, and the taking will be constitutional. This leads to the question: what would be just compensation for restricting the right to destroy frozen embryos? Just compensation for Fifth Amendment takings is usually "market value,"[208] but generally speaking, embryos are not market alienable. Would just compensation be the approximately $500 to $1,000 paid by parents for annual storage fees?[209] Or if a state required genetic parents to either indefinitely freeze or donate their embryos, would compensation include donation costs?[210] Donation, usually facilitated by private fertility agencies, can include screening for infectious diseases, shipping fees, legal fees, and costs to implant the embryo into the recipient gestational carrier's uterus.[211]

Just compensation is of particular concern considering *Loretto*, where on remand the court found the respondent Commission on Cable Television cured its constitutional intrusion on the right to exclude by paying $1 per owner.[212] Any financial compensation for embryos would likely be insufficient because of some genetic parents' strong moral, emotional, and religious connections to their embryos, which are closely tied to genetic parents' conception of their own

207. Dan Mangan & Kevin Breuninger, *Ketanji Brown Jackson Sworn in as Supreme Court Justice, Replacing Stephen Breyer*, CNBC (June 30, 2022, 2:31 PM), https://www.cnbc.com/2022/06/30/supreme-court-justice-ketanji-brown-jackson-sworn-in-replaces-breyer.html [https://perma.cc/254C-SG8P].

208. *See, e.g.*, Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 725, 731 (1993) (explaining that the baseline standard for just compensation is "market value," or making a property owner "in as good a position pecuniarily as she would have been if the government had not taken her property").

209. *See* Torbati, *supra* note 192; Blum & Stock, *supra* note 192.

210. Because donations are usually facilitated by private agencies, costs seem to vary widely, from free to tens of thousands of dollars. *See, e.g.*, *Embryo Donation: What Does It Cost*, EMBRYO ADOPTION AWARENESS CTR., https://embryoadoption.org/embryo-donation/cost-of-embryo-donation [https://perma.cc/SX9B-AAH8] (last visited May 22, 2025) (free); Miranda Stomp, *Breaking Down the Costs: Embryo Adoption vs. Embryo Donation*, DONOR NEXUS (Feb. 12, 2024), https://donornexus.com/blog/donor-embryo-cost [https://perma.cc/5HVB-JQEU] ($9,400 per cycle).

211. Marni Denenberg, *Embryo Donation Explained: What You Need to Know*, CARROT (Sept. 25, 2023), https://www.get-carrot.com/blog/embryo-donation-explained-what-you-need-to-know [https://perma.cc/NX3F-K5TF].

212. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982).

personhood. Further, regardless of the unique status of embryos to some parents, emotional distress damages are usually excluded from just compensation in Fifth Amendment cases.[213]

Jeffrey D. Goldberg and Susan E. Looper-Friedman have argued that requiring just compensation for a "taking" of the uterus would be a way to sour anti-abortion statutes in the public eye and discourage legislatures from restricting abortion because they would have to account for the true costs of forcing pregnant people to have children.[214] In turn, scholars like Rebecca Rausch have criticized Goldberg and Looper-Friedman for missing the point.[215] Rausch argues that financial compensation for forced pregnancy commodifies someone's personhood and "stinks of slavery."[216] Rausch is correct that just compensation for use of someone's body or a body part against their will is morally reprehensible. Nicole Knight further points out an access-to-justice issue with Fifth Amendment takings in the abortion context: poor people of color are the most likely to be impacted by anti-abortion statutes, yet filing a lawsuit requires significant funds that the most impacted are least likely to have.[217] But in the post-*Dobbs* world where there is no fundamental right to privacy when it comes to potential life, all viable legal defenses are on the table. While no person should be forced to place a cash value on their embryos to make a point, this Note seeks to encourage creative legal argumentation against further restrictions on abortion and contraception.

The just compensation requirement is also dangerous because it likely does not apply to embryos that are abandoned in storage. Abandoned embryos may be regarded as a communal form of property, in which case the government could seize them without implicating the Fifth Amendment Takings Clause.[218] Embryos become abandoned when genetic parents stop paying storage fees, the IVF clinic cannot reach the genetic parents, or the genetic parents fail to provide the clinic with guidance for the embryos' disposition.[219] It is estimated that there are hundreds of thousands of abandoned embryos frozen in storage in the United States.[220] Many clinics require patients to fill out consent forms, which set out

213. *See* Marisa Fegan, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 CONN. PUB. INT. L.J. 269, 286 (2007).

214. *See* Goldberg, *supra* note 7, at 1645–48; Looper-Friedman, *supra* note 7, at 283.

215. *See* Rausch, *supra* note 7, at 47.

216. *Id.* at 47.

217. *See* Knight, *supra* note 7, at 198.

218. Rao, *supra* note 7, at 459; *see also, e.g.*, City of Eagle Grove v. Cahalan Invs., LLC, 904 N. W.2d 552, 561, 566 (Iowa 2017) (holding that seizure of abandoned real property was not a taking requiring just compensation).

219. *See* Beth E. Roxland & Arthur Caplan, *Should Unclaimed Frozen Embryos Be Considered Abandoned Property and Donated to Stem Cell Research?*, 21 B.U. J. SCI. & TECH. L. 108, 113–14 (2015).

220. *See id.* at 110 (citing Susan B. Apel, *Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent,* 39 FAM. L.Q. 663, 664 (2005)); *see also* Simopoulou et al., *supra* note 26, at 2448 (reporting that in the early 2000s, countries already reported extremely high numbers of abandoned embryos: 52,000 (UK, 1996); 71,000 (Australia, 2000); and 400,000 (USA, 2003)).

guidelines for abandoned embryos and explain procedures for embryo destruction.[221] However, many other clinics simply do not know what to do with abandoned embryos and leave them in storage.[222]

Generally, under common law, abandoned personal property operates on a finders-keepers system, meaning that the first finder of the abandoned property becomes the owner. In most embryo cryopreservation settings, this would likely be the IVF clinic, which could then gain title to the embryo and have the right to use, transfer, destroy, or otherwise control it.[223] Compare this to some state statutes that designate the government as the owner of abandoned property.[224] Either scenario raises serious concerns about genetic parents' right to control their embryos indefinitely. While the common law suggests that theoretically states could seize abandoned embryos without just compensation, the right not to procreate and substantive due process likely would trump involuntary embryo donation. Medical privacy and discrimination concerns may counsel against donation for stem cell research.[225]

CONCLUSION

Property-based defenses to abortion and its related rights, like IVF and embryo cryopreservation, are essential tools in the reproductive justice toolbox. While getting voters to the polls is the top strategy for change in the post-*Dobbs* world, especially in states with conservative benches, advocates always need creative lawyering in the toolbox to affirm access to reproductive justice on all fronts, for all people. For legal advocates who wish to make a Fifth Amendment takings argument to protect embryos or any health practice that is collateral to procreation and abortion, there are four key doctrinal points to argue:

(1) *An Inch Is a Mile*. Restricting even a singular stick in the metaphorical bundle of property rights may be a taking. Fifth Amendment jurisprudence has been trending towards a categorical, sweeping rule that restrictions on physical property, particularly the right to exclude, are impermissible.

(2) *Permanence*. The more permanent or restrictive a regulation is, the more likely it is to be a taking.

(3) *Word Choice*. Like any good lawyer knows, the lines are manipulable between whether an action is an example of the right to destroy versus the

221. *See* Roxland & Caplan, *supra* note 219, at 113.

222. *See* Mary Pflum, *Nation's Fertility Clinics Struggle with a Growing Number of Abandoned Embryos*, NBC NEWS (Aug. 12, 2019, 4:34 AM), https://www.nbcnews.com/health/features/nation-s-fertility-clinics-struggle-growing-number-abandoned-embryos-n1040806 [https://perma.cc/U8LS-SHFX].

223. *See* Valerie A. Mock, *Getting the Cold Shoulder: Determining the Legal Status of Abandoned IVF Embryos and the Subsequent Unfair Obligations of IVF Clinics in North Carolina*, 52 WAKE FOREST L. REV. 241, 255 (2017).

224. *See, e.g.*, Roxland & Caplan, *supra* note 219, at 111 (citing 72 PA. CONS. STAT. § 1301.2(a), the Pennsylvania statute that designated the Commonwealth as the owner of all abandoned property).

225. *See id.* at 130–31.

right to exclude, and *Cedar Point* shows us that characterizing a normal health and safety code as an "appropriation" of a right or a granting of the "right to invade" can be a persuasive reframing when arguing a taking.

(4) *Reliance Interests*. Where *Dobbs* indicated that the Supreme Court places a higher value on reliance interests that develop in "cases involving property and contract rights," relying on property law and analogzing to these reliance interests may be effective. Point to the dominant view of state courts, and whether they have traditionally treated a body part or practice to be a form of property.

Takings arguments have very real drawbacks, such as the just compensation issue for embryos, but it is important to emphasize their importance as one tool in the toolbox. The shock value of a takings argument in a society that so highly values individual property rights is immense, and advocates should lean into the media outrage and legislative response that have followed other takings decisions by the U.S. Supreme Court and Alabama's temporary restrictions on IVF.[226] Imagining scenarios where genetic parents do not have exclusive control over their embryos may seem dystopian, but it captures the scientific inaccuracy and danger of fetal personhood statutes and abortion bans. With a conservative U.S. Supreme Court that values enumerated rights, textualism, and history, property rights can be an invaluable defense of bodily freedom.

226. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 484 (2005) (holding that the city's taking of private homes as part of a comprehensive redevelopment plan was a permissible "public use"); *see also* S.B. 159, 2024 Leg., Reg. Sess. (Ala. 2024).