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BETWEEN A ROCK AND A HARD PLACE:
Prenatal Personhood and the Right of Procreation

Dominíca Aranaga

About the Author

J.D., 2025, UCLA School of Law. My thanks to Alix Olson for awakening my love for this field of scholarship and demonstrating its power; to Pavel Wonsowicz for rigorous instruction in constitutional law that encouraged and empowered me to push the bounds of its meaning and possibilities; to Maria Trubetskaya for endless intellectual inspiration, generosity, and comradeship; to the participants in the Reproductive Justice seminar at UCLA School of Law for their thoughtful comments on this unruly brainchild; and, most deeply, to Bradley Hawley, who made my path in scholarship possible.

Table of Contents

Introduction 2
A. *Describing the Double-Bind* 5
I. Restricting IVF Violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution 10
A. *Explanation of the Due Process Clause and Fundamental Rights* 10
B. *DPC Argument for Protecting IVF* 12
1. Does it concern a fundamental right? 13
2. Has the right been infringed? 18
3. Is there a compelling interest that justifies infringement? 20
4. Are the means narrowly tailored to achieve the interest? 21
5. Conclusion 23

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II. ALABAMA SENATE BILL 159 VIOLATES THE EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE ALABAMA CONSTITUTION 24
A. *EPC Argument for Protecting Extrauterine Embryos* 24
1. What level of scrutiny should be used? 25
2. Conclusion 29
B. *DPC Argument for Protecting Extrauterine Embryos* 30
1. Does it concern a fundamental right? 31
2. Has the right been infringed? 31
3. Is there a compelling interest that justifies infringement? 32
4. Are the means narrowly tailored to achieve the interest? 32
5. Conclusion 33
III. Between a Rock and a Hard Place 33
A. *The Elephant in the Room: DPC Argument for Protecting Prenatal Personhood* 33
IV. Conclusion 36

Introduction

On February 16, 2024, in *LePage v. Center for Reproductive Medicine, P.C.*,[1] the Alabama Supreme Court held that extrauterine embryos are children for the purposes of Alabama's Wrongful Death of a Minor Act (the Act).[2] As a result, killing extrauterine embryos by any wrongful act, omission, or negligence constitutes the wrongful death of a minor. The extrauterine embryos in this case were created for in vitro fertilization (IVF), an assisted reproductive technology (ART) procedure in which eggs are fertilized by sperm in a petri dish—that is, outside of a biological womb.[3] IVF is a widely accepted and supported procedure in the U.S. According

1. *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022–0515, 2024 WL 656591, at *1 (Ala. Feb. 16, 2024), *reh'g denied,* No. SC-2022–0515, 2024 WL 1947312 (Ala. May 3, 2024).

2. Ala. Code § 6–5-391 (1975). The Act bestows liability "When the death of a minor child is caused by the wrongful act, omission, or negligence of any person, persons, or corporation, or the servants or agents of either, the father, or the mother . . . or, if the father and mother are both dead or if they decline to commence the action, or fail to do so, within six months from the death of the minor, the personal representative of the minor may commence an action . . . Any damages recovered in an action under this section shall be distributed according to the laws of intestate succession." Ala. Code § 6–5-391.

3. Z. Huang, J. Li, L. Wang, J. Yan, Y. Shi & S. Li, *Brief Co-Incubation of Sperm and Oocytes for In Vitro Fertilization Techniques*, Cochrane Database of Systematic Reviews, 2013, No. 4, Art. No. CD009391, doi:10.1002/14651858.CD009391.pub2, PMID 23633370.

to a 2013 survey conducted by the Pew Research Center, nearly 80 percent of U.S. adults say using IVF is either morally acceptable or not a moral issue.[4] Only 12 percent believe it is morally wrong.[5] Considering the widespread support for IVF, it is unsurprising that the *LePage* decision sparked outrage and confusion across the country.[6]

By finding that extrauterine embryos are unborn children, the Alabama Supreme Court affirmed the soundness of a very simple argument: *Extrauterine embryos are children. Children are people. So, extrauterine embryos are people.*

Being a person matters because persons cannot "be deprived of life, liberty, or property, without due process of law."[7] The personhood status of embryos (and other prenatal life[8]) matters because, if embryos are persons, they too cannot be deprived of this constitutional right.[9] In states that recognize prenatal personhood, the

4. Pew Research Center, *Abortion Viewed in Moral Terms* (Aug. 15, 2013), https://www.pewresearch.org/religion/2013/08/15/abortion-viewed-in-moral-terms/ (last visited May 8, 2024).

5. *Id.*

6. This Paper discusses United States (U.S.) law. When I reference "the country" or do not specify the type of law or history, I am referring to U.S. law or history.

7. U.S. Const. amend. V.

8. There are various viewpoints on what constitutes "life" and "being alive." For instance, certain denominations of the Christian Church believe life begins at conception, when the egg is fertilized by sperm. *See* Lindsey Disney & Larry Poston, *The Breath of Life: Christian Perspective on Conception and Ensoulment*, 92 Anglican Theological Rev. 92, 92 (2010). Generally, traditional Jewish texts do not consider a fetus to be alive until at least 40 days into pregnancy. *See* George Riddell, *Medico-Legal Problems* 38–39 (1929) (explaining that "Rabbis were of the opinion that before the 40th day there was no animation in the ovum, which was, therefore, considered as merely a bladder of water (Niddah, 30a; K'rithoth, 7b, Rashi). After the 40th day, although the foetus is already an animate object, it is—so long as the mother is alive—not yet a separate life until labour has set in."). Islamic scholars generally believe that ensoulment happens between 40 and 120 days into the pregnancy. *See* Abdulaziz Sachedina, *Islamic Biomedical Ethics: Principles and Application* (2009). For the purposes of this Paper, I adopt the following definition: "Any system capable of replication and mutation is alive." Aleksandr Ivanovich Oparin, *Life: Its Nature, Origin and Development* (1961). I do not have to adopt this understanding of life. Embryos may not meet the criteria for many definitions of life. *See* Carlos Mariscal, *Life*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Winter 2021 Edition), https://plato.stanford.edu/archives/win2021/entries/life/ (last visited May 7, 2024). I use this definition because I want to refer to embryos as "alive." It is easier to follow my argument if I give embryos this status.

9. This Paper assumes that extrauterine embryos have standing. The state, acting as *parens patriae*, may be able to represent extrauterine embryos

right to abortion is eliminated: you cannot kill a person without due process of law.[10]

Granting embryos legal personhood creates issues for supporters of IVF. Given current technological conditions, the IVF process inherently poses risk of damage and death to extrauterine embryos. To achieve fertilization during the IVF process, eggs are mixed with sperm in a petri dish.[11] These embryos must survive two to five days in culture to reach a stage that is transferable.[12] Because days-old embryos are a very fragile form of life, the survival of any given embryo in culture is uncertain. Hinging the success of IVF on the creation and survival of only one embryo risks rendering the invasive, painful, and expensive IVF process pointless.[13] To account for this risk, as well as IVF patients' desire to have additional children,[14] multiple embryos are usually created. These extra embryos are either disposed of or cryogenically preserved[15] for use at a later

in court or protect their legal interests. *See Prince v. Massachusetts*, 321 U.S. 158 (1944). Thank you to Gabriela Gura for this suggestion.

10. This is only theoretically true. In practice, most states that recognize fetal personhood still permit abortion in certain cases, such as when necessary to save the life of the pregnant person or in cases of rape or incest. There is obvious tension in recognizing the legal personhood of a class while simultaneously permitting members of that class to be killed, despite their posing no threat or bearing no culpability. Historically, the government has not sanctioned the deliberate killing of innocent individuals, except in extraordinary circumstances, such as unavoidable casualties during wartime. In the case of abortion, however, embryos and fetuses are not collateral damage of an external conflict; their termination is intentional and permitted by law despite their recognized personhood. This drastically deviates from the traditional principle of protecting innocent life wherever possible. This will be discussed further in Part II.B.

11. Jacqueline Ho, MD, *In Vitro Fertilization: Procedure*, UpToDate (Nov. 15, 2023), https://www.uptodate.com/contents/in-vitro-fertilization-procedure?search=In%20vitro%20fertilization%3A%20Procedure&source=search_result&selectedTitle=1%7E150&usage_type=default&display_rank=1 [*https://perma.cc/5T57-LH2R*] (last visited May 8, 2024).

12. *Id.*

13. *Id.*

14. IVF patients may want to have more than one child. Or they might not want to have more than one child now, but may want the option of having additional children in the future, without having to repeat the entire IVF process. In some cases, repeating the IVF process may be impossible, such as where one of the intended parents loses the ability to produce gametes. This can happen for a number of reasons, including medical treatments like chemotherapy, radiation, genetic conditions, autoimmune disorders, or aging (as with menopause). *See Infertility FAQs*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/reproductive-health/infertility-faq (May 15, 2024).

15. Cryopreservation pauses biological activity by preserving embryos at extremely low temperatures. This method enables the long-term storage of

time. When *LePage* was first decided, extrauterine embryos could no longer be disposed of once patients finished the IVF process, because disposing of or otherwise killing excess embryos would constitute the wrongful death of a minor. Instead, the embryos would have to be cryogenically preserved indefinitely.

A. *Describing the Double-Bind*

In *LePage*, the Alabama Supreme Court held that the "Wrongful Death of a Minor Act applies to all children, born and unborn, including frozen embryos kept in a cryogenic nursery."[16] Concerned about incurring legal liability for the death of extrauterine embryos, Alabama fertility clinics immediately stopped offering IVF services.[17] In a hasty effort to undo the harm, the Alabama state legislature passed Senate Bill 159 (SB159).[18] Alabama Governor Kay Ivey signed SB159 into law within an hour of it passing the Alabama Senate.[19] This legislation states that "no action, suit, or criminal prosecution for the damage to or death of an embryo shall be brought or maintained against any individual or entity when providing or receiving services related to in vitro fertilization."[20] In other words, SB159 creates an exception for killing

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biological material in a stable state, with the potential for use in the future. *See* Tae Hoon Jang et al., *Cryopreservation and Its Clinical Applications*, 6 Integr. Med. Res. 12 (2017), https://doi.org/10.1016/j.imr.2016.12.001. And for those who don't want to read yet another academic article, instead imagine what happened to Han Solo in *Star Wars: Episode V - The Empire Strikes Back* (Lucasfilm Ltd. 1980).

16. *LePage*, 2024 WL 656591 at *(insert page number).

17. *See e.g.*, Julia Harte, *Three Alabama Providers Halt IVF After High Court Rules Embryos Are Children*, Reuters (Feb. 22, 2024), https://www.reuters.com/world/us/three-alabama-providers-halt-ivf-after-high-court-rules-embryos-are-children-2024–02–22/; Laura Kusisto, *Major Alabama Health System Pauses IVF Treatments After State Court Says Frozen Embryos Qualify as Children*, Wall St. J. (Feb. 21, 2024), https://www.wsj.com/us-news/law/major-alabama-health-system-pauses-ivf-treatments-after-state-court-says-frozen-embryos-qualify-as-children-71ed704e.

18. *See* Emily Cochrane, *Alabama Lawmakers Pass Legislation to Protect IVF Treatment*, N.Y. Times (Mar. 6, 2024), https://www.nytimes.com/2024/03/06/us/politics/alabama-ivf-law.html.

19. Liz Baker, Debbie Elliott & Susanna Capelouto, *Alabama Lawmakers Pass IVF Immunity Legislation*, NPR (Mar. 6, 2024, 10:56 PM ET), https://www.npr.org/2024/03/06/1235907160/alabama-lawmakers-pass-ivf-immunity-legislation (last visited May 8, 2024).

20. Ala. S.B. 159, 2024 Leg., Reg. Sess. (enacted), available at https://alison.legislature.state.al.us/files/pdf/SearchableInstruments/2024RS/SB159-enr.pdf, *at* 2. Notably, the legislation does not protect "the manufacturer of goods used to facilitate the in vitro fertilization process or the transport of stored embryos" from civil liability.

embryos involved in IVF, precluding liability for causing the death of a specific class of unborn children.

This carve-out stands in stark contrast to Alabama's broad recognition of prenatal personhood. The Alabama Constitution "recognize[s] and support[s] the sanctity of unborn life and the rights of unborn children, including the right to life."[21] It further seeks to "ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate."[22] The Alabama legislature has established that "[t]he public policy of the State of Alabama is to protect life, born, and unborn. This is *particularly true concerning unborn life that is capable of living outside the womb*."[23] (It should be noted that extrauterine embryos are very capable of living outside the womb—in fact, they can be cryogenically preserved indefinitely.)[24] Furthermore, the word "person" has been interpreted to include unborn children in four different Alabama statutes.[25] As seen in *LePage*, this number appears to be growing.

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21. "(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life. (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate. (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion." Ala. Const. art. I, § 36.06. It should be noted that extrauterine embryos, particularly those preserved in a cryogenic nursery, are capable of living outside the womb "indefinitely." *See LePage*, 2024 WL 656591, at *1.

22. *Id.*

23. Ala. Code § 26–22–1 (1975) (emphasis added).

24. C.H. Stone et al., *Long-Term Cryopreservation of Pronuclear Embryos: A Case Report*, 94 Fertility & Sterility 190, 190–92 (2010), https://doi.org/10.1016/j.fertnstert.2010.01.019 (reporting a live birth from an embryo cryopreserved for nearly 20 years); S. A. Vajta et al., *Embryo Viability Following Long-Term Cryopreservation*, 34 Hum. Reprod. 52, 52–56 (2019), https://doi.org/10.1093/humrep/dey301 (documenting a 74% post-thaw survival rate and successful pregnancies from embryos cryopreserved for 12 to 17 years).

25. Ala. Code § 13A-6–1 (1975) ("The term, when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability."); *LePage*, 2024 WL 656591, at *8 (Ala. Feb. 16, 2024) ("[Ala. Code § 6–5-391(1975)] applies to all children, born and unborn, without limitation."); *Ex parte Phillips*, 287 So. 3d 1179 (Ala. 2018), *reh'g denied*, *cert. denied*, 140 S. Ct. 184 ("the definition of 'person' as used in statute defining terms for the homicide statutes [Ala. Code § 13A-5–40(10) (1975)], which is a definition that includes unborn children in utero at any stage of development, regardless of viability, is applicable to the capital offense of murder of two or more persons pursuant to one scheme or course of conduct"); *Phillips v. State*, 287 So. 3d 1063, 1087 (Ala. Crim. App. 2015), *aff'd sub nom. Ex parte Phillips*, 287 So. 3d 1179 (Ala. 2018) ("like § 13A-5–40(10), we construe § 13A-5–49(9) as including unborn children

Alabama not only recognizes prenatal personhood, but also affirms that prenatal persons have an *equal* right to life as all other persons. The Alabama Human Life Protection Act (AHLP) states that "all human beings are equal from creation,"[26] noting that "[a]bortion advocates speak to women's rights, but they ignore the unborn child, while medical science has increasingly recognized the humanity of the unborn child."[27] The inference is clear: under Alabama law, all unborn children are human beings, and all human beings are equal. Similar to the Equal Protection Clause of the Fourteenth Amendment (EPC), the Alabama Constitution recognizes the principle of equal treatment of similarly situated individuals.[28] All unborn children have a right to life, so it follows that all unborn children have the same right to life.[29]

On one hand, Alabama recognizes the right to life of all unborn children (indeed, it has recognized "the sanctity"[30] of this life). On the other hand, SB159 prohibits extrauterine embryos from recovering against those who cause their death during the IVF process, enabling extrauterine embryos to continue being destroyed without incurring legal liability. This raises an equal protection problem. Intrauterine embryos are able to recover against anyone who causes their death (unless their death is medically necessary to

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as 'persons.'"); *Hicks v. State*, 153 So. 3d 53, 65 (Ala. 2014) ("the chemical-endangerment statute [Ala. Code § 26–15–3.2 (1975)] unambiguously protects all children, born and unborn, from exposure to controlled substances."); Ala. Code § 26–23H-3 (1975) (defining "person" as "A human being, specifically including an unborn child in utero at any stage of development, regardless of viability.")

26. Ala. Code § 26–23H-2(d) (1975) ("In the United States Declaration of Independence, the principle of natural law that "all men are created equal" was articulated. The self-evident truth found in natural law, that all human beings are equal from creation, was at least one of the bases for the anti-slavery movement, the women's suffrage movement, the Nuremberg war crimes trials, and the American civil rights movement. If those movements had not been able to appeal to the truth of universal human equality, they could not have been successful.").

27. Ala. Code § 26–23H-2(e) (1975).

28. Ala. Const. art. I, § 1 ("That all men are equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."); Ala. Const. art. I, § 6 ("That no person shall be deprived of life, liberty, or property, without due process of law.").

29. I am not going to address whether all unborn children have the same right to life as any other born person, although I think this argument could be made.

30. Ala. Const. art. I, § 2.

save the life of the pregnant person), while extrauterine embryos are not. So, someone could argue that extrauterine embryos do not receive the equal protection of the law that is afforded to all other unborn children, in violation of Alabama's constitution. Moreso, someone could also argue that extrauterine embryos are denied the right to life guaranteed to them by the Alabama Constitution. The Alabama Constitution represents "the supreme law of the state" and "all statutes 'must yield' to it, whether or not they were enacted prior to its adoption."[31] Consequently, if it was found that SB159 deprived extrauterine embryos of their right to life under the Alabama Constitution, SB159 would be found unconstitutional and would be struck down. IVF practitioners and patients would no longer be protected from liability for the death of an extrauterine embryo during the IVF process, and IVF would no longer be possible in Alabama.

But, it does not end there. I suggest there is a plausible Due Process Clause (DPC) argument in favor of protecting the right to use IVF. If restricting IVF impermissibly infringes a right guaranteed by the U.S. Constitution, the restriction will not be allowed to stand. Although the Alabama Constitution is "the supreme law"[32] in Alabama, it too is subject "to restraints resulting from [the] Federal Constitution."[33] If Alabama recognizes the personhood of all unborn children—including extrauterine embryos—but continues to allow IVF, it may violate the right to life and equal protection of extrauterine embryos under the law.[34] But if Alabama does not allow IVF, it may violate the right to procreation guaranteed by the U.S. Constitution. The question that remains is whether Alabama can recognize the personhood of unborn children without impermissibly infringing upon a fundamental right guaranteed by the U.S. Constitution. And that is the question this Paper explores.

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31. *LePage*, 2024 WL 656591, at *6 ("as part of our Constitution, § 36.06 represents 'the supreme law of the state,' meaning that all statutes 'must yield' to it, whether or not they were enacted prior to its adoption."); *Alexander v. State ex rel. Carver*, 274 Ala. 441, 446 (1963) ("The Constitution is the supreme law, limiting the power of the legislature and binding departments of State government and the people themselves subject only to restraints resulting from Federal Constitution and the people themselves.") (citation omitted).

32. *Alexander v. State ex rel. Carver*, 274 Ala. 441, 446 (1963).

33. *Id.*

34. Remember, affording extrauterine embryos different treatment from intrauterine embryos is impermissible under the Alabama Constitution. There is no way around this trap. If "the sanctity of unborn life" is recognized across the board, there can be no difference in protection afforded extrauterine and intrauterine embryos, and therefore no way to justify IVF treatment.

Part I argues that restricting IVF treatment impermissibly infringes the fundamental right of procreation, in violation of the Due Process Clause of the Fourteenth Amendment. Since the IVF process inherently poses risks to extrauterine embryos, classifying these embryos as children would require prohibiting IVF to protect them. Therefore, classifying extrauterine embryos as children effectively imposes a restriction on IVF that impermissibly infringes the fundamental right of procreation.

Part II claims that SB159, which protects IVF patients and providers from legal liability for the damage to or death of an embryo during the IVF process,[35] violates the due process and equal protection guarantees of the Alabama constitution. This argument places Alabama in a double-bind as it juggles the so-called competing[36] interests of procreation on the one hand and unborn life on the other.

Part III explores the possibility that, in the aftermath of *Dobbs v. Jackson Women's Health Organization*[37] and given the current composition of the U.S. Supreme Court, along with its particular construction of history, the Court could recognize a fundamental right to life for all unborn children.

Ultimately, I conclude that the Court cannot find that unborn children have legal personhood and therefore a fundamental right to life. Doing so would open the can of worms that has been popped in Alabama: the unborn have a right to life, but procreation—either with ART or without—necessarily poses risk of death.

35. On March 6, 2024 (not even a month after *LePage* was decided), Alabama Gov. Kay Ivey signed a bill proscribing liability for IVF patients and providers. The bill reads, in part, "no action, suit, or criminal prosecution for the damage to or death of an embryo shall be brought or maintained against any-individual or entity when providing or receiving services related to in vitro fertilization." Alabama Senate Bill 159. However, this was not enough for some clinics. *See University of Alabama Pauses IVF Services After Court Rules Embryos Are Children*, NBC News (Feb. 21, 2024, 6:00 PM; updated Feb. 22, 2024, 7:20 PM), https://www.nbcnews.com/health/health-news/university-alabama-pauses-ivf-services-court-rules-embryos-are-childre-rcna139846 (last visited May 8, 2024).

36. I do not actually think these interests are competing. *See* Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 *Nw. U. L. Rev.* 451 (2000). But for the purposes of this Paper, I discuss them as if they are.

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

I. Restricting IVF Violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution

A. *Explanation of the Due Process Clause and Fundamental Rights*

When a right is guaranteed by the U.S. Constitution, it is considered fundamental. The Due Process Clause of the Fourteenth Amendment has been interpreted to include unenumerated fundamental rights, among them the right of procreation.[38] Any government decision that restricts a fundamental right is subject to strict scrutiny,[39] a standard of review often described as "strict in theory, but fatal in fact."[40] It is very difficult for a law to survive this rigorous level of judicial scrutiny.

When a right is not guaranteed by the Constitution, it is subject to rational basis review. Unlike strict scrutiny, rational basis review is easy to satisfy. Under this standard, any conceivable purpose is enough to justify a state's decision or restriction,[41] even if that purpose was not the actual motivation behind the law.[42] This is why a battle has been waged over whether abortion is a fundamental right—whether it is fundamental determines if, and how, it can be restricted.

Fundamental rights are infringed when there is "direct and substantial interference" with the right.[43] When a fundamental right is infringed, the government must show two things to pass strict scrutiny. First, it must show that the law furthers a compelling

38. *See generally Skinner v. State of Okl. ex rel. Williamson,* 316 U.S. 535 (1942).

39. *Clark v. Jeter*, 486 U.S. 456, 461 (1988), citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966) ("classifications affecting fundamental rights [. . .] are given the most exacting scrutiny").

40. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Powell, J., concurring).

41. *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end."). In *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), the Supreme Court upheld a New York City ordinance that prohibited advertising on vehicles unless the advertisements were about the products being transported by the vehicles themselves. Because the government argued this ordinance could promote less traffic hazards, the Supreme Court found the ordinance passed rational basis review.

42. *Fritz*, 449 U.S. at 179 ("It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute."), citing *Flemming v. Nestor*, 363 U.S. 603, 612 (1960).

43. *See e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 386–87 & n.12 (1978); *Califano v. Jobst*, 434 U.S. 47, 58 (1977); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

interest.[44] Compelling interests include preserving human life,[45] protecting health and safety,[46] protecting the welfare of children,[47] preserving national security,[48] among other things. Second, the government must show that the law is narrowly tailored to achieve that stated interest. Narrow tailoring is demanding. The law will be held unconstitutional if it is found to be overinclusive,[49] underinclusive,[50] fails to achieve its desired ends,[51] or in fact exacerbates the problem it is meant to solve.[52] Additionally, the existence of any less restrictive alternative—one that has less of an impact on the fundamental right—is also fatal to narrow tailoring.[53] If the government cannot show that the law furthers a compelling interest and that it is narrowly tailored to achieve that interest, the law will be held unconstitutional.

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44. *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'")

45. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), quoting *Cruzan by Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 262 (1990) (finding the State "has an unqualified interest in the preservation of human life").

46. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905), quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1890) ("The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.")

47. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

48. *See e.g.*, *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33 (2010); *Korematsu v. United States*, 323 U.S. 214, 218, 65 S. Ct. 193, 195, 89 L. Ed. 194 (1944), abrogated by *Trump v. Hawaii*, 585 U.S. 667, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018).

49. *See e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Brown v. Ent. Merchants Ass'n,* 564 U.S. 786, 802, 804 (2011). "Overinclusive" means the law applies to people who do not need to be included for the government to achieve its purpose. For instance, in the notorious case *Korematsu v. United States*, 323 U.S. 214 (1944), three-year-old Japanese Americans were included in a restriction meant to hinder invading soldiers. Three-year-old Japanese Americans were certainly not invading soldiers.

50. *Id.* "Underinclusive" means the law does not apply to individuals similar to those whom the law targets. In *Korematsu*, the restriction did not apply to German and Italian Americans, even though the U.S. was also at war with Germany and Italy, and even though German and Italian Americans were just as likely to be invading soldiers.

51. *Croson Co.*, 488 U.S. at 496–97; *Brown v. Ent. Merchs. Ass'n*, 564 U.S. at 800.

52. *Id.*

53. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.")

There are multiple steps to arguing that the government has impermissibly infringed a fundamental right. First, there is a question of whether the restriction concerns a fundamental right. Second, whether the right has been infringed. Third, whether a compelling interest warrants infringement of the right. Fourth, whether the means are narrowly tailored to achieve the identified interest. Below, I apply this framework to what happened after *LePage*, before SB159 was signed into law.

B. *DPC Argument for Protecting IVF*

Before SB159[54] was signed into law, Alabama state law demanded an end to IVF services.[55] The IVF process is very dangerous for extrauterine embryos, and always involves a risk of damage and death.[56] There is no certainty that extrauterine embryos will survive in culture long enough to reach a transferable state, or that they will survive transfer and implantation once they are transferable.[57] This risk is increased when multiple embryos are created, as excess embryos will oftentimes intentionally be discarded.[58] Since *LePage* held that extrauterine embryos are minor children, IVF patients and providers would frequently kill minor children (extrauterine embryos) through their participation in IVF. These deaths would likely be attributed to "the wrongful act, omission, or negligence" of the provider and patient, since these risks (being inherent in the process) were known to the provider and patient.[59] Continuing with the IVF process despite knowing those risks would *at least* fall

54. SB159 reads, in part, "no action, suit, or criminal prosecution for the damage to or death of an embryo shall be brought or maintained against any individual or entity when providing or receiving services related to in vitro fertilization." Alabama Senate Bill 159.

55. I am going to proceed with this discussion as if SB159 had not been passed.

56. *Study Finds Why Many IVF Embryos Fail to Develop*, COLUMBIA UNIV. IRVING MED. CTR. (Apr. 24, 2024), https://www.cuimc.columbia.edu/news/study-finds-why-many-ivf-embryos-fail-develop.

57. *Id.*

58. See, e.g., *Disposition of Unclaimed Embryos: An Ethics Committee Opinion* (2021), AM. SOC'Y FOR REPROD. MED., https://www.asrm.org/practice-guidance/ethics-opinions/disposition-of-unclaimed-embryos-an-ethics-committee-opinion-2021/ (last visited Jan. 19, 2025); *What to Do with Frozen Embryos*, LOMA LINDA UNIV. CTR. FOR FERTILITY & IVF, https://lomalindafertility.com/resources/what-to-do-with-frozen-embryos/ (last visited Jan. 19, 2025); M. Simopoulou et al., Discarding IVF Embryos: Reporting on Global Practices, 36 J. ASSIST. REPROD. GENETICS 2447, 2447–57 (2019), https://doi.org/10.1007/s10815–019–01592-w.

59. Or at least, they *should* be known to the patient, and will be known if the patient has given informed consent to the process.

below the reasonable standard of ordinary care.[60] Accordingly, IVF providers could not perform IVF services, and IVF patients could not benefit from them.

1. Does it concern a fundamental right?

The most direct way to establish IVF as a fundamental right is to argue that IVF is part of the fundamental right of procreation. Procreation is already recognized as a fundamental right.[61] In *Skinner*,[62] the Supreme Court considered the constitutionality of an Oklahoma law that permitted the sterilization of "habitual criminal[s]."[63] Striking down the law, the Court wrote: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[64] IVF is part of procreation, enabling people to conceive and have biological children. IVF is a fertility treatment,[65] so it follows that most IVF patients are infertile or otherwise unable to have biological children (such as single people or same sex couples). IVF is often their only means of having biological children.[66]

Someone could object that IVF is not part of the fundamental right of procreation. The fundamental right of procreation was established in *Skinner*, where the government was forcibly sterilizing people convicted of certain felonies. In *Skinner*, these people would

60. Here is a straightforward illustration. Suppose a caregiver locks a two-year-old child in a sealed car on a hot summer day, knowing there is a high likelihood that the child could die from heat exposure, and does so without any compelling reason. This action clearly falls below the reasonable standard of care because the risk of death is both foreseeable and avoidable, and no reasonable person would act in this way under similar circumstances. Similarly, if extrauterine embryos are considered minor children, knowingly proceeding with IVF, despite the inherent and significant risk of embryo loss, could be viewed as a violation of the standard of care, as the participants are choosing to engage in an action where death is a foreseeable and avoidable outcome.

61. *See generally*, *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942).

62. *Id.*

63. *Id.* at 536.

64. *Id.* at 541.

65. *See e.g.*, *In Vitro Fertilization (IVF)*, MedlinePlus (last visited Jan. 18, 2025), https://medlineplus.gov/ency/article/007279.htm; *In Vitro Fertilization (IVF)*, Yale Med. (last visited Jan. 18, 2025), https://www.yalemedicine.org/conditions/ivf; *IVF by the Numbers*, Penn Med. Fertility Blog (Mar. 2018), https://www.pennmedicine.org/updates/blogs/fertility-blog/2018/march/ivf-by-the-numbers.

66. A.M. Eskew & E.S. Jungheim, *A History of Developments to Improve In Vitro Fertilization*, 114 Mo. Med. 156, 156–59 (2017), https://pmc.ncbi.nlm.nih.gov/articles/PMC6140213/.

have been able to have children without medical intervention. This is not the case where patients rely on IVF, as their inability to achieve a pregnancy is a pre-existing condition. In other words, they are unable to have children *without* medical intervention. However, this distinction does not meaningfully differentiate these instances. The means of restricting procreation might differ, but the end result is the same. The *Skinner* plaintiffs would be able to have children if the government did not forcibly sterilize them. Similarly, IVF patients would be able to have children if the government did not restrict IVF. While *Skinner* involves actual sterilization, the IVF case involves constructive sterilization. Most IVF patients would be completely unable to have children without IVF, so by prohibiting IVF, the government completely removes these peoples' ability to procreate.

Furthermore, whether someone is able to procreate without medical intervention does not and should not matter in deciding whether they have this fundamental right. Many non-ART pregnancies[67] require technological assistance to successfully procreate.[68] For example, from 2014–2018, labor was induced in 23.9 percent of pregnancies.[69] Research suggests that 9.2 percent of labor inductions are unexplained (not medically necessary).[70] Still, in 14.7 percent of all labors between 2014–2018, induction *was* medically necessary. Similarly, Cesarean sections (C-sections) are very common in the U.S. In 2021, 32.1 percent of all deliveries in the U.S. were by C-section.[71] Although only about 10 percent of C-sections are medically necessary,[72] that still represents 10 percent of cases where medical intervention is essential to achieve a live birth. If the government banned C-sections or labor inductions, it would be hard-pressed to argue that this measure is acceptable because persons who require C-sections or induced labor are unable to have children. The need for medical assistance to achieve a live birth does not negate a person's right to procreate.

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67. What is usually conceptualized as "traditional" or "non-assisted" pregnancies.

68. For the purposes of this Paper, I define successful procreation as that which achieves a live birth.

69. Emma M. Swift et al., *Trends in Labor Induction Indications: A 20-Year Population-Based Study*, 101 Acta Obstetricia et Gynecologica Scandinavica 1422 (2022), https://doi.org/10.1111/aogs.14447.

70. *Id.*

71. Centers for Disease Control and Prevention, Nat'l Ctr. for Health Statistics, *Fast Stats: Delivery*, https://www.cdc.gov/nchs/fastats/delivery.htm (April 9, 2024).

72. *Id.*

Someone could also attempt to distinguish the use of C-sections or labor inductions from the use of IVF. The difference that would seemingly matter most (as emphasized by the Court)[73] is that procreation using C-sections or other forms of medical intervention do not pose a risk of death to unborn life, whereas procreation using IVF case does.[74] However, "[t]here are approximately 5 million pregnancies per year in the USA, with 1 million ending in miscarriage (a loss occurring prior to 20 weeks of gestation) and over 20,000 ending in stillbirth at or beyond 20 weeks of gestation."[75] Even more, it is established that "[m]ore than 50% of embryos die within eight weeks of conception [. . .] On the basis of this evidence, it has been estimated that there are more than 220 million natural embryo deaths worldwide each year."[76] So, unassisted pregnancy itself causes *at least* a twenty percent risk of death to unborn children, with it likely that the actual risk is significantly higher.

Someone could instead argue that procreation does not accurately encapsulate the right in question. As outlined in *Dobbs*, the Court should define the right narrowly and ask whether the right has been traditionally protected.[77] So, instead of the right at issue being "procreation," it should be "the use of assisted reproductive technology that will almost definitely cause the death of embryos." To assess whether the right is traditionally protected, the Court focuses on the period of time spanning from English common law to about 1868, when the Fourteenth Amendment was enacted.[78]

73. At least, it would matter most to the Court, *see Dobbs*, 597 U.S. at 257 ("What sharply distinguishes the abortion right from the rights recognized in the cases on which Roe and Casey rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being.")

74. This distinction was emphasized by the *Dobbs* majority: "Abortion is different [from other substantive Due Process rights] because it destroys what *Roe* termed 'potential life' and what the law challenged in this case calls an 'unborn human being.'" 597 U.S. at 218.

75. Beatrix B. Thompson, Parker H. Holzer & Harvey J. Kliman, *Placental Pathology Findings in Unexplained Pregnancy Losses*, 31 Reprod. Sci. 488, 488–504 (2024), https://doi.org/10.1007/s43032–023–01344–3.

76. Thomas Douglas & Julian Savulescu, *Destroying Unwanted Embryos in Research: Talking Point on Morality and Human Embryo Research*, 10 EMBO Rep. 307, 307 (2009), citing Henri Leridon, *Human Fertility: The Basic Components* (1977); C.E. Boklage, *Survival Probability of Human Conceptions from Fertilization to Term*, 35 Int'l J. Fertility 75 (1990); Toby Ord, *The Scourge: Moral Implications of Natural Embryo Loss*, 8 Am. J. Bioethics 12 (2008).

77. *See e.g.*, *Dobbs*, 597 U.S. at 216; *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992); *Cruzan*, 497 U.S. at 277–278.

78. *Dobbs*, 597 U.S. at 216–17.

According to the Court, if the right was not protected then, it should not be protected now.[79] This reliance on historical protection presents a challenge to recognizing IVF as a protected right. IVF did not exist in 1868, and certainly was not legally protected at that time. The first baby created through IVF was born in 1978,[80] over a hundred years after the Fourteenth Amendment was enacted. IVF did not have clinical success in the U.S. until 1981.[81] Consequently, someone could conclude that the right cannot be "deeply rooted in the nation's history and tradition."[82]

However, this interpretation of the history and traditions test warrants some pressure testing. First, I think this interpretation of the history and traditions test fails to accurately reflect the manner in which the Court has historically assessed a right's constitutional status. The Court recognizes fundamental rights that were not protected in 1868, including (but not limited to) the right to use contraceptives,[83] the right to marry a person of a different race,[84] and the right to marry a person of the same sex.[85] The *Dobbs* court "stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion,'"[86] claiming that the fundamental status of these rights is not threatened. But this cannot be so when these rights fail the test the Court uses to determine a right's fundamental status. As the *Dobbs* dissent writes:

> The majority could write just as long an opinion showing, for example, that until the mid-20th century, 'there was no support in American law for a constitutional right to obtain [contraceptives].' [. . .] So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[87]

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79. *Id.* at 237.

80. Steptoe, P. C. & Edwards, R. G., *Birth After the Reimplantation of a Human Embryo*, 2 *Lancet* 366 (1978).

81. C. Thompson, IVF Global Histories, USA: Between Rock and a Marketplace, 2 *Reprod. Biomed. Soc. Online* 128, 128–135 (2016), https://doi.org/10.1016/j.rbms.2016.09.003.

82. *Dobbs*, 597 U.S. at 216.

83. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

84. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

85. *Obergefell v. Hodges*, 576 U.S. 644, 647 (2015).

86. *Dobbs*, 597 U.S. at 295.

87. *Id.* at 363 (internal citation omitted).

The *Dobbs* majority seems to suggest that these rights *would* fail the history and traditions test, but would be saved because "the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence."[88] The fact that the Court has to rely on a technicality to acknowledge the continuing validity of these rights is concerning. But importantly, as of now, the Court "*unequivocally*"[89] recognizes that certain fundamental rights exist that were not contemplated in 1868.

Second, defining a right *this* narrowly does not align with the Court's approach to historically protected rights implicated by modern technology. For example, the Court has held that the First Amendment right to free speech extends to social media websites such as Facebook and Twitter.[90] Social media websites like Facebook and Twitter certainly did not exist in 1791, when the First Amendment was ratified.[91] Likewise, the right to make decisions about the education of one's children includes the ability to decide whether children should attend school online. Certainly, this is not the type of decision that was contemplated in 1868, or when this right was recognized by *Meyer v. Nebraska*[92] in 1923 and *Pierce v. Society of Sisters*[93] in 1925. It would be very impractical if every evolution of a fundamental right demanded new scrutiny by the Supreme Court. But that is what a narrow framing of the fundamental right of procreation entails. If the right to practice IVF must

88. *Id.* at 295.

89. *Id.* ("we have stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.'") (internal citations omitted).

90. *Packingham v. North Carolina*, 582 U.S. 98, 108 (2017). I thank Carolyn Stephens for this example.

91. Granted, unlike the right to procreation, the right of free speech is enumerated in the Constitution. But fundamental rights deserve the same protection as enumerated rights. *See Obergefell*, 576 U.S. at 663 ("The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. [. . .] In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."). So, modern technology that implicates fundamental rights deserves the same treatment as modern technology that implicates enumerated rights.

92. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); s*ee also Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("More than 75 years ago, in *Meyer v. Nebraska*, [. . .] we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'")

93. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925) (reaffirming that the "liberty of parents and guardians"

includes the right "to direct the upbringing and education of children under their control.").

be separately scrutinized, so must the right to let one's child attend school online. I think the more practical approach, and the one thus far taken by the Supreme Court, is to recognize that fundamental rights create umbrellas under which new ways of exercising these rights emerge as technology advances.[94] I suggest that for the fundamental right of procreation, IVF is one of those new ways.

All of this is to show that there are no meaningful differences between IVF and the fundamental right of procreation. Moreover, recognizing IVF as part of the fundamental right of procreation aligns with the Court's approach to historically protected rights implicated by modern technology. IVF may be a new way to practice procreation, but it should still be part of the fundamental right of procreation.

If the Court defines the right in question as "the right to use assisted reproductive technology that will almost definitely cause the death of embryos," separate from the right to procreation, IVF will likely fail the history and traditions test. Like online social media websites and online schooling, IVF was not contemplated in 1868.[95]

2. Has the right been infringed?

A fundamental right is infringed if there is direct and substantial interference with the right. [96] Under Alabama state law (before SB159), IVF providers could not offer IVF services—and patients could not receive IVF treatments—because any IVF procedure could lead to the death of an extrauterine embryo. Since most IVF patients have no other means to procreate, a ban on IVF means that that these patients are "absolutely prevented"[97] from exercising their fundamental right of procreation. Furthermore, restricting IVF is "a serious intrusion into [IVF patients'] freedom

94. *See Dobbs*, 597 U.S. at 234 ("consider[ing] whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.").

95. It could be argued that, since its history began, the history, legal traditions, and practices of IVF in the U.S. supports finding that IVF is a fundamental right. IVF has been openly practiced in the U.S. since 1981, when it experienced its first clinical success in the U.S. *See* J. Cohen, A. Trounson, K. Dawson, H. Jones, J. Hazekamp, K.-G. Nygren & L. Hamberger, *The Early Days of IVF Outside the UK*, *Hum. Reprod. Update* 11(5): 439–59 (2005), doi:10.1093/humupd/dmi016 (epub May 27, 2005), PMID 15923202. Until February 16, 2024, when *LePage* was decided, no law had ever even impacted the ability to practice IVF. Rather, laws aimed at regulating the practice, ensuring it complied with standards for health and safety. Additionally, the Alabama legislature quickly remedied the interference, passing SB159 on March 6, 2024. However, since the Court focuses on the treatment of a right in 1868, this argument is likely weak.

96. *See e.g.*, Zablocki, 434 U.S. at 386–87 & n.12; Lyng, 477 U.S. at 638.

97. *Zablocki*, 434 U.S. at 387.

of choice in an area [procreation] in which [the Court] ha[s] held such freedom to be fundamental."[98] Additionally, restricting IVF can irreparably remove a person's ability to have biological children, which the Court has found unacceptable.[99] As females[100] age, their number of viable eggs decreases, eventually depleting completely.[101] Sometimes, IVF patients will undergo a medical treatment, such as hormone therapy, cancer treatment, gender affirmation surgery, that kills their remaining eggs.[102] An IVF restriction, even if the restriction itself is reversible, can eliminate someone's ability to have children if they are unable to access IVF services before their reproductive cells expire. And, a permanent restriction on IVF would permanently inhibit an IVF patient from having children. There is no way around Alabama's IVF ban; it is even more restrictive than laws the Court has previously found to directly and substantially interfere with fundamental rights.[103]

Someone could argue that IVF restrictions do not directly and substantially interfere with IVF patients' fundamental right to procreation because IVF patients have alternative methods of

98. *Skinner*, 316 U.S. at 541.

99. In *Skinner,* the case in which the Supreme Court first recognized the right of procreation, the Court underscored the profound harm of sterilization, emphasizing its irreversibility: "There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty." 316 U.S. at 541.

100. In this Paper, "male" and "female" refer to biological sex while "man" and "woman" refer to gender identity.

101. Nicole D. Ulrich & Erica E. Marsh, *Ovarian Reserve Testing: A Review of the Options, Their Applications, and Their Limitations*, 62 Clin. Obstet. & Gynecol. 228, 228–37 (2019), https://doi.org/10.1097/GRF.0000000000000445 (stating that it is an "accepted notion that the number of oocytes within a woman's ovary declines over time.")

102. *Freezing Embryos*, Johns Hopkins Medicine, https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/freezing-embryos (last visited Jan. 19, 2025); National Cancer Institute, *Fertility Issues in Girls and Women with Cancer*, Cancer.gov, https://www.cancer.gov/about-cancer/treatment/side-effects/fertility-women (May 9, 2024).

103. In *Zablocki*, the U.S. Supreme Court struck down a Wisconsin law that prohibited certain parents from remarrying without first obtaining a court order granting permission to marry. 434 U.S. at 375–77. The Court emphasized that the law "absolutely prevented" parents who could not meet the law's requirements from getting married. *Id.* at 387. It further reasoned that even those "able in theory to satisfy the statute's requirements" would face such a significant burden that they would "in effect be coerced into forgoing their right to marry." *Id.* Finally, the Court found that "even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental." *Id.* This was sufficient to find that the Wisconsin law "clearly [did] interfere directly and substantially with the right to marry." *Id.*

procreation, such as adoption. In this line of reasoning, prohibiting IVF makes IVF a "less welcome"[104] choice than adoption or "may have an impact on a [person's] desire to [procreate],"[105] but these impacts are not sufficient to find the right is infringed.[106] However, the fundamental right in question in *Skinner* was the right to have biological children.[107] The plaintiffs in *Skinner* also could have had children through other means, such as adoption. However, the availability of alternative methods of procreation did not affect the Court's conclusion that their right had been infringed; it did not factor into the decision at all.

Accordingly, a court would likely rule that the Act causes a "direct and substantial interference" with IVF patients' fundamental right of procreation.

3. Is there a compelling interest that justifies infringement?

Alabama would argue that the Act protects human life, which is a compelling interest.[108] However, *Dobbs* held that the state has *legitimate* interests in "respect for and preservation of prenatal life at all stages of development"[109] and in "protecting fetal life."[110] The Court likely called these interests "legitimate" because it had just ruled that abortion is not a fundamental right, so it did not need to concern itself with anything other than legitimate interests—those sufficient to pass rational basis review. The Court likely believes that "respect for and preservation of prenatal life at all stages of development"[111] and "pro-

104. *Califano*, 434 U.S. at 58.

105. *Id.*

106. In *Califano*, the Court upheld a Social Security provision that terminated benefits for a dependent child who married someone ineligible for benefits. 434 U.S. at 58. The Court reasoned that, although the rule could "impact [someone's] desire to marry, and may make some suitors less welcome than others," it did not directly and substantially interfere with the right to marry. *Id.* The *Zablocki* Court later commented on *Califano in dicta*, remarking that, unlike in *Zablocki*, the *Califano* rule "placed no direct legal obstacle in the path of persons desiring to get married, and [. . .] there was no evidence that the laws significantly discouraged, let alone made 'practically impossible,' any marriages." *Zablocki*, 434 U.S. at 387 n.12. This distinction demonstrates the level of interference required to trigger strict scrutiny.

107. *Skinner*, 316 U.S. at 541.

108. *Cruzan*, 497 U.S. at 262 (finding the State "has an unqualified interest in the preservation of human life").

109. *Dobbs*, 597 U.S. at 301, citing *Gonzales v. Carhart*, 550 U.S. 124, 157–158 (2007).

110. *Id.* at 263.

111. *Id.* at 301, citing *Gonzales*, 550 U.S. at 157–158.

tecting fetal life"[112] are more than legitimate interests. But *Dobbs* overruled prior precedent that gave these interests a higher status. It overruled *Roe*, which held that the state has an "important and legitimate interest in protecting the potentiality of human life."[113] And it overruled *Casey*, which found that "there is a substantial state interest in potential life throughout pregnancy."[114] Until the Court makes it explicit that the "respect for and preservation of prenatal life at all stages of development"[115] and "protecting fetal life"[116] are more than legitimate interests, I will assume that these interests are just legitimate.[117] And a legitimate interest—like protecting prenatal life—is not enough to infringe upon a fundamental right. Accordingly, there is no compelling interest that justifies this infringement.

This is a frighteningly tenuous position. In *Dobbs*, the Court compared the "State's interest in protecting prenatal life" to "the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women," asserting that all of "[t]hese are important concerns" deserving "similar regard."[118] Based on the history and traditions test that has come to determine much of recent constitutional jurisprudence, and the Court's observations in *Dobbs*, the Court could decide that protecting prenatal life rises to the level of a compelling interest. And if that happens, both IVF and abortion could be prohibited across the board.

4. Are the means narrowly tailored to achieve the interest?

Under Alabama law, no one can provide IVF services because the IVF process might kill embryos. However, this law is underinclusive because it encompasses only one cause of death for embryos and ignores others. Pregnancy itself causes a risk of death to embryos. Miscarriage occurs in approximately twenty percent

112. *Id.* at 263.

113. *Roe v. Wade*, 410 U.S. 113, 162 (1973), overruled by *Dobbs*, 597 U.S. 215, and holding modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

114. *Casey*, 505 U.S. at 876, overruled by *Dobbs*, 597 U.S. 215.

115. *Dobbs*, 597 U.S. at 301, citing *Gonzales*, 550 U.S. at 157–158.

116. *Id.* at 263.

117. The Supreme Court itself called respect for and preservation of prenatal life at all stages of development a "legitimate" interest. *See Dobbs*, 597 U.S. at 301 ("These legitimate interests include respect for and preservation of prenatal life at all stages of development . . . ").

118. *Id.* at 263 ("The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life.")

of pregnancies in the U.S.[119] So, there is no guarantee that a pregnant person will carry a pregnancy to term. Additionally, Alabama law allows abortion when it is necessary to save the life of the mother.[120] So, Alabama itself has a law that permits the death of embryos and even fetuses. If the desired ends are preventing death to unborn children, Alabama has failed to capture all instances where this occurs.

Furthermore, the law is also overinclusive because it fails to allow for instances in which the success rate of IVF meets the success rate of non-ART pregnancies. The success rate for non-ART pregnancies is 70 percent.[121] Under certain conditions, IVF success rates are between 70 to 80 percent.[122] Under these conditions, every single embryo has a 70 to 80 percent chance of resulting in a live birth. Furthermore, there is a way to determine whether any given egg carries a high probability of resulting in a live birth. Polar body biopsy can be performed on a harvested egg to determine the presence of an abnormal number of chromosomes in a cell (a condition called "aneuploidy") before it is fertilized.[123] If the egg is euploid, it can be used to create an embryo that then has a 70 percent chance of resulting in a live birth.[124] If the oocyte is aneuploid, it can be discarded without any moral concern, since it is simply an unfertilized egg. In short, IVF patients could create a *single embryo* using either a donor egg (if they are fine with their

119. Thompson, *supra* note 75.

120. AL Code § 26–23H-4 (2022).

121. It is most appropriate to compare the success rate of IVF with the success rate for *all* pregnancies, not just pregnancies that can be confirmed clinically. Pregnancies confirmed through nonclinical methods, such as an at home pregnancy test, are still pregnancies. Because these pregnancies are confirmable at an earlier stage, the type of life in nonclinical pregnancies (where the unborn is less than six weeks old) is most similar to the type of life created for IVF (which is definitely less than six weeks old).

122. *See e.g.* Jason M. Franasiak, Eric J. Forman, Kathleen H. Hong, et al., *The Nature of Aneuploidy with Increasing Age of the Female Partner: A Review of 15,169 Consecutive Trophectoderm Biopsies Evaluated with Comprehensive Chromosomal Screening*, 101 *Fertil. Steril.* 656, 656–663. e1(2014); Donor Nexus, *Success Rates*, https://donornexus.com/about/success-rates (last visited May 7, 2024); Santa Monica Fertility, *Success Rates*, https://www.santamonicafertility.com/about-santa-monica-fertility/success-rates (last visited May 7, 2024) (reporting success rates above 70 percent where donor eggs are used). One fertility clinic reported positive pregnancy test rates of 78% in 2021 and 81% in 2019 following embryo transfers. *See also* Genetics & Fertility Center, *IVF Statistics Single Euploid Embryo Transfer Program 2021*, https://geneticsandfertility.com/services/ivf/ivf-statistics-single-euploid-embryo-transfer-2021 (last visited April 10, 2024).

123. Franasiak et al., *supra* note 122, at 656–663.e1.

124. *Id.*

child having the genetic material of only one parent) or polar body biopsy, and have the same chance of achieving a live birth as a non-ART pregnancy—and posing the same risk of death to the embryo as a non-ART pregnancy. To not allow IVF in these instances, while still allowing non-ART pregnancies, shows the overinclusiveness of the law. Since IVF could be allowed in these instances while still achieving Alabama's objective of protecting prenatal life, a less restrictive alternative exists.

In summary, the means are not narrowly tailored because they are both underinclusive and overinclusive, and there are less restrictive alternatives available.

5. Conclusion

Because there is no compelling state interest that justifies the infringement and the means are not narrowly tailored, Alabama would likely fail to show that the Act's classification of extrauterine embryos as children causes a permissible infringement on the right of procreation.

I should briefly note that restricting IVF also poses an equal protection problem under the Equal Protection Clause of the Fourteenth Amendment. Restricting access to IVF creates a distinction between those who can conceive without ART (but perhaps require medical intervention to achieve a live birth) and those who cannot. In this way, the state prevents only people with fertility problems, same sex couples, and single people from exercising their right to have biological children. The crux of this argument would depend on whether people who can conceive without ART are similarly situated to those who can only conceive with ART. Based on my previous discussion,[125] there is a solid argument that these two groups are similarly situated. If these two groups are similarly situated, the Court would determine whether a classification based on the inability to conceive without ART is suspect, requiring heightened scrutiny.[126] Because the due process argument does not require all this heavy lifting to earn the highest level of scrutiny (strict scrutiny), I do not pursue the equal protection argument further.

125. *See supra* Part I.B.1.

126. Heightened scrutiny is a term used to describe intermediate scrutiny and strict scrutiny. It just means something greater than rational basis.

II. ALABAMA SENATE BILL 159 VIOLATES THE EQUAL PROTECTION AND DUE PROCESS GUARANTEES OF THE ALABAMA CONSTITUTION

A. *EPC Argument for Protecting Extrauterine Embryos*

An EPC argument is not a particularly promising route. A court would likely find that extrauterine embryos are not similarly situated to other types of unborn life, thus concluding that dissimilar treatment is appropriate. Instead of trying to articulate a successful EPC claim, the point of this Part is to show how one might argue that extrauterine embryos are a "suspect class" that deserve heightened scrutiny. I do not apply a particular level of scrutiny to the classification of extrauterine embryos. The DPC section will apply strict scrutiny, which is a higher threshold than what would be applied under equal protection doctrine.

The Alabama Supreme Court has repeatedly found that "Sections 1, 6, and 22 of the Alabama Constitution combine to guarantee equal protection of the laws."[127] Analysis under Alabama equal protection doctrine is lacking. Rather, when evaluating equal protection challenges raised under the Alabama Constitution, the Alabama Supreme Court has considered whether these challenges would succeed under its federal counterpart.[128] If a challenge fails

127. *City of Hueytown v. Jiffy Chek Co. of Alabama*, 342 So. 2d 761, 762 (Ala. 1977); *see e.g. Black v. Pike Cnty. Comm'n*, 360 So. 2d 303, 306 (Ala. 1978); *Plitt v. Griggs*, 585 So. 2d 1317, 1325 (Ala. 1991); *see also* Albert P. Brewer & Robert R. Maddox, *Equal Protection under the Alabama Constitution*, 53 ALA. L. REV. 31, 66 (2001) ("One may conclude that Alabama citizens do enjoy the guarantee of equal protection of the laws under the Alabama Constitution."); *Jefferson Cnty. v. Braswell*, 407 So. 2d 115 (Ala. 1981) (holding that the "Act did not violate equal protection and due process principles under Alabama Constitution," which implies that the Alabama constitution has equal protection and due process principles); *but see Hutchins v. DCH Reg'l Med. Ctr.*, 770 So. 2d 49, 59 (Ala. 2000), citing *Ex parte Melof,* 735 So.2d 1172 (Ala.1999) ("The question whether §§ 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws remains in dispute.").

128. *Jefferson*, 407 So. 2d at 122 ("We consider our analysis of the equal protection and due process issues under the United States Constitution equally applicable to those same issues under the Alabama Constitution."); *Plitt*, 585 So. 2d at 1325 (Ala. 1991) ("[plaintiff] states no reason, and we are aware of none, that our analysis of the equal protection issue under the United States Constitution should not be equally applicable to her equal protection issue regarding the Alabama Constitution; therefore, we consider the above analysis to apply equally to that issue."); *Hutchins.*, 770 So. 2d at 59 ("we consider our analysis stated above regarding the plaintiff's challenge based on the United

under federal equal protection doctrine, it also fails under Alabama equal protection doctrine.[129]

SB159 permits IVF practitioners to continue causing the death of extrauterine embryos, and prohibits extrauterine embryos from recovering against IVF practitioners and patients who cause their death. No similar law permits the death of intrauterine embryos (and other unborn life) and prohibits intrauterine embryos from recovering against the persons who cause their death. In Alabama, it is only appropriate to kill an intrauterine embryo or other unborn life if doing so is necessary to save the life of a pregnant person. SB159 does not have similar constraints. So, Alabama treats extrauterine embryos dissimilarly.

1. What level of scrutiny should be used?

As I have previously alluded to,[130] there are multiple standards of review used in constitutional law: rational basis, intermediate scrutiny, and strict scrutiny.[131] Rational basis is the most lenient, and is applied to all classifications that do not get heightened (intermediate or strict) scrutiny. To determine whether a classification deserves heightened scrutiny, the Court pays particular attention to whether the law targets a "suspect class,"[132] which includes classes of people with immutable characteristics,[133] little political power,[134] a history of discrimination,[135] or subjection to stereotyping and

States Constitution to apply equally to her challenge to § 6–5–549 based on the Alabama Constitution").

129. Under federal law, extrauterine embryos (and other types of unborn life) are *not* considered persons. So, even though we are applying federal equal protection analysis to this case, our results do not suggest that the rights of extrauterine embryos are violated under federal constitutional law. Currently, because they are not persons under federal constitutional law, extrauterine embryos cannot raise a U.S. constitutional equal protection claim.

130. *See supra* Part I.A.

131. Some scholars argue that there is an unspoken fourth standard. For discussion of these standards, *see* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161 (1984).

132. According to the Alabama Supreme Court, "[t]he [U.S. Supreme] Court applies the 'strict scrutiny test' where the classification is based on 'suspect criteria' or affects some fundamental right." *Hutchins v. DCH Reg'l Med. Ctr.*, 770 So. 2d 49, 58 (Ala. 2000).

133. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

134. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 367 (1971); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

135. *See, e.g.*, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

stigma.[136] A suspect classification might earn intermediate scrutiny (or rational basis with teeth), a higher standard of review.[137] To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.[138] Unlike rational basis, under intermediate scrutiny, the "burden of justification is demanding and [. . .] rests entirely on the state."[139] Traditionally, intermediate scrutiny applies to classifications based on sex or illegitimacy (whether a child is born out of wedlock).[140] The concern is that the government will discriminate against these classes not because of some legitimate reason, but rather because of impermissible stereotyping or something outside of the class's control.[141] Strict scrutiny, as previously discussed,[142] is the highest and most exacting standard of review.

In *LePage*, the Alabama Supreme Court acknowledged that unequal treatment of IVF infants might "offend the Equal Protection Clause of the 14th Amendment to the United States Constitution, which prohibits states from withholding legal protection from people based on immutable features of their birth or ancestry."[143] While the Court declined to resolve this question, it

136. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

137. *See* Shaman, *supra* note 131.

138. *See*, *e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

139. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

140. *See*, *e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (sex); *Clark*, 486 U.S. 456 (illegitimacy); *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy).

141. *See Clark*, 486 U.S. at 461 (1988), quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (finding that illegitimacy "bears no relation to the individual's ability to participate in and contribute to society" and that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.").

142. *See supra* Part I.A.

143. *LePage*, 2024 WL 656591, at *3, citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208 (2023) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.") (citations omitted).

recognized that "[t]hese are weighty concerns,"[144] legitimizing the idea that the classification of IVF-conceived children[145] is suspect.

The U.S. Supreme Court's jurisprudence also provides reason to think extrauterine embryos might be a suspect class. Being conceived through the IVF process is an immutable characteristic—extrauterine embryos have no control over whether or not they are located in utero.[146] They also have little political power, being organisms with no consciousness and no ability to participate in the political process.[147] Furthermore, they have also been faced with a significant history of discrimination.[148] From 1973 through 2022, their interest in life was ruled not "constitutionally adequate"[149] to warrant protection. As *Dobbs* was celebrated by anti-abortion advocates for protecting unborn life, *LePage* was criticized by many of these same anti-abortion advocates.[150] While pro-life, anti-abortion advocates were willing to come to bat for intrauterine embryos and fetuses, they were actively against the decision that recognized and protected the lives of extrauterine embryos. This demonstrates the lack of political and social support for extrauterine embryos, and their marginalized position vis-à-vis other types of unborn life. Finally, the right at stake is extremely important, since the law impacts the *lives* of extrauterine embryos.[151]

144. *LePage*, 2024 WL 656591, at *4.

145. Including extrauterine embryos, since they are children under Alabama law.

146. *See, e.g.*, *Fullilove*, 448 U.S. at 496; *Frontiero*, 411 U.S. at 686.

147. *See, e.g., Graham*, 403 U.S. at 367; *San Antonio Independent School Dist.*, 411 U.S. at 28.

148. *See, e.g.*, *Cleburne*, 473 U.S. at 440; *San Antonio Independent School Dist.*, 411 U.S. at 28.

149. *Casey*, 505 U.S. at 860, overruled by *Dobbs*, 597 U.S. 215 ("viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.").

150. *See e.g.*, Cecelia Smith-Schoenwalder, *GOP Flounders Over How to Handle Alabama Supreme Court's IVF Ruling*, U.S. News & World Report (Feb. 23, 2024, 3:35 PM), https://www.usnews.com/news/politics/articles/2024–02–23/gop-flounders-over-how-to-handle-alabama-supreme-courts-ivf-ruling; The Editorial Board, *IVF, Alabama, and the Dobbs Ruling*, Wall St. J. (Feb. 23, 2024), https://www.wsj.com/articles/ivf-alabama-supreme-court-roe-v-wade-dobbs-abortion-6c0ceaaf; Megan Messerly & Jessica Piper, *Trump Says He Supports IVF After Alabama Court Decision*, Politico (Feb. 23, 2024), https://www.politico.com/news/2024/02/23/trump-says-he-supports-ivf-after-alabama-court-decision-00142994; Julia Harte, *Three Alabama Providers Halt IVF After High Court Rules Embryos Are Children*, Reuters (Feb. 22, 2024), https://www.reuters.com/world/us/three-alabama-providers-halt-ivf-after-high-court-rules-embryos-are-children-2024–02–22/.

151. *Obergefell*, 576 U.S. at 673.

There are a couple counterarguments to the assertion that extrauterine embryos are a suspect class. First, included within the category of "unborn children," extrauterine embryos have an extraordinary amount of political power. Unborn children have attracted an enormous amount of attention from lawmakers.[152] The Court was asked to reconsider or overrule *Roe v. Wade* many times. As the Court remarked in *Dobbs*, "in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions."[153] Even "the United States as *amicus curiae* asked the Court to overrule *Roe* five times in the decade before *Casey*, and then asked the Court to overrule it once more in *Casey* itself."[154] The *Dobbs* decision is evidence of the extreme political power wielded on behalf of extrauterine embryos. Similarly, even if extrauterine embryos have not garnered the same amount of support as other types of unborn life, the *LePage* decision is evidence of the attention they have attracted from lawmakers and judges alike.

The response to this counterargument is that the Alabama legislature immediately enacted a law permitting IVF practitioners to disregard the life of extrauterine embryos, so extrauterine embryos do not have the attention and support of lawmakers in the relevant way.

The second counterargument is that the status of being extrauterine is not immutable. With SB159 enacted, extrauterine embryos may be transferred to the uterus, becoming intrauterine and thereby gaining the same protection of the laws as any other unborn child. This argument is not particularly strong. Extrauterine embryos have no control over whether or not they will be transferred. From 2004 to 2013, 1,954,548 embryos were cryopreserved and only 717,345 embryos were transferred.[155] This means that approximately 63.30 percent of embryos remained in their extrauterine state, suggesting that the majority of extrauterine embryos do not become intrauterine and therefore do not gain equal protection of the laws.

152. *Cleburne*, 473 U.S. at 445 ("the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.").

153. *Dobbs*, 597 U.S. at 230.

154. *Id.* at 279.

155. Mindy S. Christianson et al., Embryo Cryopreservation and Utilization in the United States from 2004–2013, 71–77 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8244341.

If an Alabama court were asked to determine the level of scrutiny that should be used for extrauterine embryos, I suspect the level of scrutiny would be heightened. I cannot imagine that Alabama—which "recognize[s] and support[s] the sanctity of unborn life and the rights of unborn children"[156] and seeks to "ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate"[157]—would decide that extrauterine embryos do not deserve a heightened level of scrutiny.

Ultimately, it does not really matter what level of scrutiny is used for the EPC challenge. Extrauterine embryos can still make a DPC argument for the deprivation of their right to life, which is fundamental. This will earn them strict scrutiny.

2. Conclusion

Regardless of the level of scrutiny used, I do not think extrauterine embryos will succeed on their EPC claim. A court will likely find that they are not similarly situated to other types of unborn life, so their dissimilar treatment is appropriate. Other types of unborn life do not need medical intervention to develop, which is what poses risk of damage and death to extrauterine embryos in the first place. As stated by the U.S. Supreme Court, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"[158] Without shielding IVF practitioners and patients from liability, and simultaneously preventing extrauterine embryos from recovering against the people who may cause their death, extrauterine embryos would never exist[159] and would never develop into a child. This is not a dilemma that faces intrauterine embryos, pregnant people, and doctors who help monitor non-ART pregnancies. Additionally, the object of SB159 is an important one. It aims to enable IVF patients to bear and raise a child. It can hardly be argued that the essence of

156. "(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life. (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate. (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion." Ala. Const. art. I, § 36.06.

157. *Id.*

158. *Reed v. Reed*, 404 U.S. 71, 76 (1971), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

159. IVF practitioners would not create embryos if IVF could not be performed or if doing so could result in legal liability.

people's interest in procreation lies solely in the creation of a small cluster of cells that shares their DNA. The ability to raise the child that will form from that lump of cells is what matters. Therefore, the classification has a fair and substantial relation to furthering procreation and treats all similarly situated people alike.[160]

B. *DPC Argument for Protecting Extrauterine Embryos*

Similar to the U.S. Constitution, the Alabama Constitution contains an express due process guarantee: "no person shall be deprived of life, liberty, or property, without due process of law."[161] Since extrauterine embryos are children under Alabama law, this guarantee extends to them. Consistent with its approach to equal protection challenges, the Alabama Supreme Court evaluates whether due process raised claims under Alabama law would succeed under federal due process law.[162] A DPC claim on behalf of extrauterine embryos would assert that they are deprived of life when exposed to the risk of death during the IVF process, rather than being immediately cryogenically preserved upon their creation, a measure which would preserve their lives indefinitely.[163]

However, this analysis would not follow the conventional due process framework. The deprivation of someone's right to life warrants special treatment. Traditionally, the government can only deprive citizens of life in very specific circumstances, such as where it is "an appropriate and necessary criminal sanction,"[164] or where necessary to address "a threat of serious physical harm, either to [a law enforcement] officer or to others."[165] But these instances

160. *See Reed*, 404 U.S. at 76, quoting *Royster Guano Co.*, 253 U.S. at 415 ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'")

161. Ala. Const. art. I, § 13 (2022).

162. *Tarter v. James*, 667 F.2d 964, 970 (11th Cir. 1982) (applying federal due process law when "[m]any of plaintiff's state constitutional challenges are based upon provisions which essentially mirror those upon which the federal constitutional claims are premised.").

163. *See* C.H. Stone et al., *Long-Term Cryopreservation of Pronuclear Embryos: A Case Report*, 94 Fertility & Sterility 190, 190–92 (2010), https://doi.org/10.1016/j.fertnstert.2010.01.019 (reporting a live birth from an embryo cryopreserved for nearly 20 years); S. A. Vajta et al., *Embryo Viability Following Long-Term Cryopreservation*, 34 Hum. Reprod. 52, 52–56 (2019), https://doi.org/10.1093/humrep/dey301 (documenting a 74% post-thaw survival rate and successful pregnancies from embryos cryopreserved for 12 to 17 years).

164. *Gregg v. Georgia*, 428 U.S. 153, 179 (1976).

165. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to

are far removed from the killing of harmless embryos.[166] The Constitution, specifically the Fifth and Fourteenth Amendments, prohibits the deprivation of life without due process of law. Affirmatively killing an innocent person would fundamentally violate these protections. It is unprecedented for a state, like Alabama, to recognize the legal personhood of a class while simultaneously denying it the guarantee of "the most basic human right—to live."[167]

While the conventional due process framework may not apply, analyzing SB159 through the lens of strict scrutiny can highlight the legal issues with Alabama's inconsistent approach to embryonic personhood. The following analysis demonstrates that *even if* a compelling interest could justify overriding an innocent person's right to life—which the Court has never held—SB159 would still fail strict scrutiny because it is not narrowly tailored.

1. Does it concern a fundamental right?

The right in question is the right to life, which is fundamental.[168]

2. Has the right been infringed?

Under SB159, all IVF practitioners and patients are able to kill extrauterine embryos without risking any legal liability. Even though methods are available to preserve extrauterine embryonic life indefinitely (cryopreservation), IVF practitioners and patients continue to unnecessarily kill extrauterine embryos. And there is no way extrauterine embryos can avoid this.[169] Additionally, the harm caused to extrauterine embryos is irreparable, as they are "forever deprived"[170] of their lives—a fundamental right that is supposed to be constitutionally guaranteed. Consequently, a court would likely

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prevent escape by using deadly force.").

166. Indeed, under constitutional law, "[t]he death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, *no matter how heinous the crime*." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) [emphasis added]. For discussion of the inadequacy of traditional justifications, such as self-defense, necessity, or duress, in the context of abortion, *see* Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution Is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155, 174–75 (2009).

167. *Dobbs*, 597 U.S. at 263; *see also* U.S. Const. amend. XIV, § 1.

168. U.S. Const. amend. V; amend. XIV, § 1.

169. This law is even more restrictive than laws the Court has previously found to directly and substantially interfere with fundamental rights. *See Zablocki*, 434 U.S. at 387 (striking down a law that directly and substantially infringed on a fundamental right, even though those affected could still exercise the right by obtaining a court order).

170. *Skinner*, 316 U.S. at 541.

rule that SB159 causes a direct and substantial interference with extrauterine embryos' right to life.

3. Is there a compelling interest that justifies infringement?

Multiple compelling interests exist that could, in theory, justify such an infringement of a fundamental right in this context. For instance, permitting IVF protects the family unit by enabling the family unit to come into existence.[171] Additionally, research has shown that couples who are unable to conceive a child after years of trying are about three times more likely to divorce than those who succeed in having a child,[172] so allowing IVF protects the family unit by reducing the probability of divorce and separation. Furthermore, permitting IVF upholds the social order,[173] as society would likely fall apart if people stopped being able to have children.[174] These compelling interests could theoretically justify the infringement of a standard fundamental right.

4. Are the means narrowly tailored to achieve the interest?

SB159 states: "no action, suit, or criminal prosecution for the damage to or death of an embryo shall be brought or maintained against any individual or entity when providing or receiving services related to in vitro fertilization."[175] It grants broad immunity to *anyone* "providing or receiving services related to in vitro fertilization."[176]

171. *See Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution

protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.")

172. Trille Kjaer et al., *Divorce or End of Cohabitation Among Danish Women Evaluated for Fertility Problems*, 93 Acta Obstetricia Gynecologica Scandinavica 269, ___ (2014), https://doi.org/10.1111/aogs.12317; Igbaekemen Goddy Osa, *The Effect of Infertility on Marital Instability in Organizational Societies*, 6 Int'l J. Socio. & Anthropology Rsch. 150, __ (2020).

173. *See Obergefell*, 576 U.S. at 669 (emphasizing that upholding the Nation's social order is a compelling interest, with marriage recognized as "a keystone of our social order").

174. The obvious counter to this is not *all* people would be prevented from having children if IVF was restricted. Many people would still be able to have children, so it would be fine. Then again, people are waiting longer to have children. As the age of the average first-time parent increases, ART will become more integral. *See* MICHELLE J.K. OSTERMAN et al., NAT'L VITAL STAT. REP., BIRTHS: FINAL DATA FOR 20222 (2024).

175. S.B. 159, Leg., Reg. Sess. (Ala. 2024. Notably, the legislation does not protect "the manufacturer of goods used to facilitate the in vitro fertilization process or the transport of stored embryos" from civil liability.

176. *Id.*

SB159 permits the broad destruction of extrauterine embryos, so long as these embryos are damaged or killed "related to in vitro fertilization" services. Extrauterine embryos that have a low probability of resulting in a live birth are discarded and killed, and surplus embryos that have a good probability of resulting in a life birth may also be discarded or killed, so long as they are unwanted by the IVF patients. There are many alternative measures that could limit this impact on extrauterine embryonic life. Instead of killing undesirable or excess embryos, SB159 could require that these embryos be cryogenically preserved indefinitely. Currently, the all-encompassing language of SB159 grants immunity for *all* IVF providers, even if they are negligent. SB159 could instead grant immunity only for IVF providers and patients who take all possible steps to ensure the survival of extrauterine embryonic life. Furthermore, SB159 could grant immunity only where polar body biopsy is performed on the oocyte,[177] which would help determine the probability of survival of an embryo created from that oocyte. The biopsy requirement would help ensure that no life is created that may be unwanted and discarded. It would also help decrease the risk of death to extrauterine embryos in the IVF process by ensuring that only embryos with a good chance of survival are created. The presence of these alternatives makes SB159 deplorably overbroad and unnecessary. In other words, it is not narrowly tailored.

5. Conclusion

Even assuming there is a compelling state interest that could justify the routine taking of a person's life, because there are readily available alternatives that would drastically reduce the damage to embryonic life, SB159 would not pass strict scrutiny analysis. Therefore, SB159 would likely violate the due process guarantee of the Alabama Constitution.

III. Between a Rock and a Hard Place

A. *The Elephant in the Room: DPC Argument for Protecting Prenatal Personhood*

In *Dobbs*, the U.S. Supreme Court overruled its prior precedent that had established a constitutional right to pre-viability abortion. The Court found that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional

177. The counterargument here is that polar body biopsy is a costly and resource-consuming procedure. Performing it on every single oocyte that may potentially be fertilized is untenable and not a reasonable alternative.

provision, including [. . .] the Due Process Clause of the Fourteenth Amendment."[178] In making its decision to overturn *Roe* and *Casey*, the Court emphasized that "[t]he abortion right is also critically different from any other [Due Process Clause] right . . . because it destroys what those decisions called 'fetal life' and what the law now before us describes as an 'unborn human being.'"[179] The Court further explained, "[t]he exercise of the rights at issue in *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* does not destroy a 'potential life,' but an abortion has that effect."[180] But, as we have seen, that is not so. Procreation, even without using IVF, results in the death of an unborn child at least 20 percent of the time.[181]

For the *Dobbs* court, it was impermissible to equate abortion with these other rights because "if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey*, the implication is clear: The Constitution does not permit the States to regard the destruction of a 'potential life' as a matter of any significance."[182] Put differently, the Court feared that granting constitutional protection to abortion would preclude the recognition of unborn children as persons. The Court did not want to enforce a singular notion regarding the inception of life and the rights attributed to it.[183] Accordingly, it decided that "[t]he permissibility of abortion, and the limitations[] upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[184] Those of us in the U.S. now find ourselves in a peculiar and inconsistent legal landscape, where unborn children are recognized as people in some states, such as Alabama, but not in others.

Dobbs is a scary decision. It upended abortion jurisprudence, leaving many persons capable of becoming pregnant without

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

179. *Id.* It also must be noted that the abortion right is *not* critically different from any other Due Process Clause right. As we have seen, procreation (whether assisted or not) *also* destroys prenatal life.

180. *Id.* at 262.

181. Thompson, *supra* note 75.

182. *Id.*

183. *See Dobbs*, 597 U.S. at 263 ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin.").

184. *Id.* at 232.

adequate reproductive care[185] or protection from forced pregnancies.[186] It also suggested that protecting prenatal life is "deeply rooted in this Nation's history and tradition," focusing on a long and wrong history of civil and criminal liability for abortions.[187] This is alarming because it opens the door for the argument that the unborn have a fundamental right to life under the federal constitution.[188] If such a right is found, it would leave *all* persons capable of becoming pregnant without adequate reproductive care or protection from forced pregnancies—not to mention how this would exacerbate existing inequities and further the effects of structural racism.[189] It could also ban IVF.

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185. *See e.g.*, Melissa Montoya & Beverly A. Gray, *See None, Do None, Teach None: How Dismantling* Roe *Impacts Medical Education and Physician Training*, 22 AM. J. BIOETHICS 52, ___ (2022); Kavita Vinekar et al., *Projected Implications of Overturning Roe v. Wade on Abortion Training in U.S. Obstetrics and Gynecology Residency Programs*, 140 OBSTETRICS & GYNECOLOGY 146, 146 (2022), https://doi.org/10.1097/AOG.0000000000004832; Miranda R. Waggoner & Anne Drapkin Lyerly, *Another Consequence of Overturning Roe: Imperiling Progress on Clinical Research in Pregnancy*, 22 AM. J. BIOETHICS 59 (2022).

186. *See e.g.*, Grace Keegan et al., *Trauma of Abortion Restrictions and Forced Pregnancy: Urgent Implications for Acute Care Surgeons*, 8 TRAUMA SURGERY. ACUTE CARE OPEN (2023), https://doi.org/10.1136/tsaco-2022–001067; Elizabeth Miller & Jay G. Silverman, *Reproductive Coercion and Partner Violence: Implications for Clinical Assessment of Unintended Pregnancy*, 5 EXPERT REV. OBSTETRICS & GYNECOLOGY 511 (2010), https://doi.org/10.1586/eog.10.44.

187. *See* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1128–50 (2023) ("as many as 12 of the 28 states on the majority's list actually continued the centuries-old, common-law tradition of permitting pre-quickening abortions"); Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 67 (2023) ("[T]he Court . . . miscounted the number of states that banned abortion altogether. Dobbs's assertion that twenty-eight out of thirty-seven states banned all abortion as of the Fourteenth Amendment's adoption—a claim Dobbs calls the 'most important historical fact' in its analysis—rests on a series of historical errors." (footnote omitted) (quoting *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2267 (2022))).

188. For an examination of the proposition that the preservation of "potential human life" is a compelling state interest, *see generally* Jed Rubenfeld, *On the Legal Status of the Proposition that Life Begins at Conception*, 43 STAN. L. REV. 599, ___ (1991).

189. Not to mention how this would exacerbate existing inequities and further the effects of structural racism. *See e.g.*, Lynn M. Paltrow et al., *Beyond Abortion: The Consequences of Overturning Roe*, 22 AM. J. BIOETHICS 3 (2022), https://doi.org/10.1080/15265161.2022.2075965; Taylor Riley et al., *Abortion Criminalization: A Public Health Crisis Rooted in White Supremacy*, 112 AM. J. PUB. HEALTH , 1662 (2022), https://doi.org/10.2105/AJPH.2022.307014.

What has happened in Alabama acts as a warning against establishing the legal personhood—and therefore, the right to life—of the unborn. Once a DPC argument for the unborn's right to life reaches the Supreme Court, the Court faces a difficult yet straightforward decision. Even if the Court recognizes the fundamental right to life of the unborn, it must find that the interest in procreation outweighs the risk of harm to this life. In other words, it must find that even if the unborn have a fundamental right to life, this right is overridden by the fundamental right to procreation.

IV. Conclusion

This Paper articulates and explores a double-bind facing lawmakers who recognize prenatal personhood. Part I argues that IVF is part of the fundamental right of procreation and that restricting IVF impermissibly infringes the fundamental right of procreation, violating the Due Process Clause of the Fourteenth Amendment. Because of the existing risks to extrauterine embryos inherent in the IVF process, classifying extrauterine embryos as children necessitates a restriction of IVF in order to protect their right to life. Accordingly, classifying extrauterine embryos as children impermissibly infringes the fundamental right of procreation. Part II argues that Alabama Senate Bill 159, which protects IVF patients and providers from legal liability for the damage or death of an embryo during the IVF process, violates the due process and equal protection guarantees of the Alabama Constitution. This argument demonstrates the double-bind states face as they try to juggle the interests of procreation on the one hand and prenatal life on the other. Part III addresses the possibility post-*Dobbs* that, with the current construction of the U.S. Supreme Court and its focus on a specific construction of American history, the Court could find that all unborn children have a fundamental right to life.

Ultimately, this Paper argues that granting legal personhood to unborn children is impossible under U.S. constitutional law. Under such a scheme, unborn children would have a right to life, despite the fact that procreation—either with assisted reproductive technologies or without—necessarily poses a risk of their death. Instead, lawmakers and laypersons alike should direct their efforts toward reinforcing the rights of persons making reproductive decisions. By focusing on the rights of these individuals, we can ensure that our legal system supports ethical and autonomous decision-making in reproductive health, unencumbered by unworkable and illogical legal constraints posed by prenatal personhood.