Spring 2024

Unintended Consequences of Fetal Personhood Statutes: Examples from Tax, Trusts, and Estates

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UNINTENDED CONSEQUENCES OF FETAL PERSONHOOD STATUTES: EXAMPLES FROM TAX, TRUSTS, AND ESTATES

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ABSTRACT

The laws of taxation, trusts, and estates are new fronts in the culture wars over abortion. After the Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health Organization, *some anti-abortion states enacted fetal personhood statutes that have the potential to unsettle and destabilize longstanding legal doctrines that otherwise create predictability and stability in the laws of taxation and succession. This Article makes three principal claims: descriptive, predictive, and normative. First, the Article explores how* Dobbs *opened the door for states like Georgia to treat zygotes-embryos-fetuses as "dependents" for state income tax purposes. Second, the Article identifies some of the most salient ways fetal personhood laws could upend longstanding rules concerning property ownership and taxpayers' determination of their fiscal obligations to the government. Unless carefully circumscribed, fetal personhood laws will disrupt the orderly transmission of property at death, the ability to administer a trust, and any durational limits on trusts. Third, the Article argues that state lawmakers should explicitly limit the scope of fetal personhood laws. Somewhat counterintuitively, both those with anti-abortion views and those who wish to secure access to the procedure share an interest in narrowing these laws' applicability.*

For symbolic-political reasons, however, it is unlikely that lawmakers in anti-abortion states will place voluntary boundaries on the applicability of fetal personhood statutes. Therefore, the Article proposes rules of construction that judges should adopt in jurisdictions that have enacted fetal personhood laws. These include presumptions that a zygote-embryo-fetus is not the beneficiary of an estate or trust, disregarding in vitro embryos for purposes of the rule against perpetuities, and fixing the generational assignment of a zygote-embryo-fetus for generation-skipping transfer tax purposes at one generation below that of the intended parents. The Supreme Court is not likely to reverse the Dobbs *decision for many decades, if at all. Therefore, making fetal personhood statutes*

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inapplicable to matters of taxation (other than the state income tax deduction for dependents or a child tax credit), trusts, and estates represents a pragmatic approach that simultaneously permits states to signal their anti-abortion commitments while limiting disruptions to the legal system and the spread of encroachments on the bodily autonomy of those with the capacity to become pregnant.

INTRODUCTION

In the wake of the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* which overturned longstanding federal constitutional protections for abortion,[1] much commentary has understandably focused on the changing state-law landscape in the battle over abortion rights.[2] The country is sharply divided between states that ban or dramatically limit access to abortions, on the one hand, and states that protect access to the procedure, on the

1. Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022).

2. *See, e.g.*, John Dinan, *The Constitutional Politics of Abortion Policy After* Dobbs*: State Courts, Constitutions, and Lawmaking*, 84 MONT. L. REV. 27 (2023).

other.[3] On a related front, both before and after *Dobbs*, several states enacted fetal personhood laws that intend to award full legal rights and recognition from either the moment of conception or an early stage in gestation.[4]

Fetal personhood statutes likely will have far-reaching and unintended consequences, well beyond the fight over abortion. In the current political and legal landscape where abortion opponents seek all available means to ban the procedure nationwide,[5] issues of inheritance and property law are hardly top of mind.[6] But affording legal recognition to zygotes, embryos (including those that are never implanted), and fetuses—arguably all included in the definition of what Justice Alito refers to in the *Dobbs* decision as "prenatal life"[7]—could disrupt longstanding income tax rules concerning deductions and many significant aspects of the law pertaining to trusts and estates. This Article identifies some of the most salient areas likely to be impacted and then considers how lawmakers could minimize disruptions to long-standing doctrines.[8] Absent legislative guidance, the Article proposes rules of construction that judges could adopt in trust and estate matters in jurisdictions that have adopted fetal personhood laws. While

3. As of this writing, there fourteen states where abortion is banned completely (Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia); two states that ban abortions at approximately six weeks, which is frequently before a missed period (Georgia, South Carolina); two states that restrict abortion after twelve weeks (Nebraska, North Carolina); and three states that restrict access after fifteen to eighteen weeks (Arizona, Florida, Utah). *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Jan. 8, 2024, 09:30 AM), https://perma.cc/7Y3H-67UU. Several states are likely to follow suit. *See id.* (indicating temporary blocks of abortion bans in Iowa, Montana, Wyoming). In twenty-four states, a combination of ballot initiatives and new laws have strengthened rights and access to abortion. *See id.* On April 9, 2024, the Supreme Court of Arizona ruled, however, that abortions are prohibited in all cases, except to save the life of the mother, but then stayed its decision for fourteen days to permit the trial court to hear additional arguments. *See* Planned Parenthood Arizona, Inc. v. Mayes, CV-23-005-PR, 2024 WL 1517392 (Ariz. 2024). The Arizona legislature responded by enacting a new law reinstating the fifteen-week rule. *See* Gloria Rebecca Gomez, *The AZ Senate Has Repealed the 1864 Abortion Ban, After 2 Republicans join Dems*, AZ MIRROR (May 1, 2024), https://perma.cc/3KSD-HSTV.

4. *See infra* notes 52–64 and accompanying text.

5. *See, e.g.*, Matt Berg, *Pence: "We Must Not Rest" Until Abortion is Outlawed in Every State*, POLITICO (June 24, 2023), https://perma.cc/2AW3-LAFJ (quoting former Vice President Mike Pence's reaction to the Supreme Court's decision in *Dobbs* in saying, "we must not rest and must not relent until the sanctity of life is restored to the center of American law in every state of the land").

6. There is some early and innovative work in this area, though. *See* Samantha J. Prince, *Deducting* Dobbs*: The Tax Treatment of Abortion-Related Travel Benefits*, 98 TUL. L. REV. 1, 52 (2023) (arguing that, in light of restrictions placed on women's access to abortion care itself, "[t]here is no need to compound the burdens that states put on women by removing the ability to take a medical care deduction or use HSA/FSA money, or by disallowing business deductions for employers who offer these [abortion-related travel] benefits") and James A. Naumann, *Tax Law and Fetal Personhood Post-*Dobbs, 69 WAYNE L. REV. 509 (2024). *See also* Carole Bass & Cara Koss, *Assisted Reproduction and Estate Planning in a Post-*Dobbs *Landscape*, ALI-CLE.ORG (Nov. 9, 2023), https://perma.cc/ZZN9-YCMR (advertising a continuing legal education course by saying, "Estate planners with clients considering the use of assisted reproduction technology (ART) must take into account their state's abortion law and definition of personhood, as it may particularly impact an estate plan, including inheritance rights as well as the attendant fiduciary duties").

7. 142 S. Ct. at 2284.

8. *See infra* Part IV.

popular support for abortion rights has seemingly increased since the *Dobbs* decision,[9] federal protections for these rights likely have been lost for decades to come.[10] By drawing attention to the unintended—and even absurd—consequences of fetal personhood statutes, especially in the context of taxation, trusts, and estates, it nevertheless may be possible to stop the spread or enforcement of fetal personhood statutes in some states.

Part I provides a brief overview of the *Dobbs* decision and selected state fetal personhood statutes. Part II narrows the focus to the Georgia Living Infants and Equality ("LIFE") Act, which became effective in 2022.[11] That law opened the door for the Georgia Department of Revenue to issue guidance providing that a taxpayer is entitled to a dependency deduction for an embryo after approximately the sixth week of pregnancy.[12] This Part includes commentary (written with student Alexis Borders and marked as such) exploring the implications of the Georgia statute and questions about its future implementation.[13]

Part III then explores the potential impact of fetal personhood statutes on selected trust and estate matters, including intestacy and trust administration.[14] Also implicated are inheritance rights, the interpretation of class gifts such as those to "my children" or "my descendants," the availability of certain exemptions for taxable transfers, durational limits on trusts, and the income taxation of trusts and estates.[15] Fetal personhood statutes would disrupt longstanding, well-settled tax and property concepts. Indeed, these statutes might make all existing estate plans unworkable. Therefore, Part IV recommends that state lawmakers explicitly limit the scope of fetal personhood statutes.[16] Given that legislators are unlikely—for political reasons—to voluntarily limit the scope of fetal personhood laws, however, future courts will be called upon to address the reach of such laws.[17] To guide future courts in deciding the applicability of fetal personhood laws to tax, trust, and estate matters, this Part also establishes three rules of interpretation. First, unless evident from the express written terms of a will or trust instrument, a decedent shall be conclusively presumed to intend that an embryo

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9. *See, e.g.*, Laura Santhanam, *Support for Abortion Rights Has Grown in Spite of Bans and Restrictions, Poll Shows*, PBS NEWSHOUR (Apr. 26, 2023, 5:00 AM), https://perma.cc/LHA8-EMUK (reporting results of a PBS NewsHour/NPR/Marist poll showing that, in 2023, 61% of U.S. adults support abortion rights, with 34% agreeing that "abortion should be allowed at least up until the first six months of pregnancy, if not throughout the entire pregnancy;" in 2009, only 14% of all U.S. adults supported abortion during the first six months or an entire pregnancy).

10. *Cf.* Elaine Kamarck, *The Right to Abortion Will Be Secured by the End of the Decade*, BROOKINGS (Apr. 5, 2023), https://perma.cc/W6UT-GS6H (predicting that the right to an abortion "will keep winning [at the polls] for the rest of the decade until the right to abortion is secured state by state in all but the deepest red states and the U.S. Supreme Court's decision is rendered moot").

11. *See* GA. CODE ANN. § 1-2-1 (West, Westlaw current through 2023 Reg. Sess.) and *infra* Part II.

12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. *See infra* Part III.

15. *See id.*

16. *See infra* Part IV.

17. *See id.*

is not the beneficiary of an estate or trust. Second, embryos fertilized in vitro are not treated as "measuring lives" for purposes of the rule against perpetuities unless implanted in vivo at the time the perpetuities period starts to run. Third, suppose an embryo is legally adopted before that embryo develops into a living child born alive. In that case, the living child shall be treated as a child of the adoptive parents for generation-skipping transfer tax purposes.[18]

Part V (written with student Katherine Keating and marked as such) theorizes about the role of "money law" in the culture wars over abortion.[19] The laws of taxation, trusts, and estates have expressive, social-political functions, so the arrival of fetal personhood laws is hardly surprising, given the contested nature of reproductive rights.[20] To be sure, tax law has always done more than raise revenue; the law of trusts and estates has always gone beyond providing for the orderly transfer of property during lifetime and death (trusts and estates).[21] These laws reflect social and cultural values, represent aspirational values, and have political dimensions.[22]

The Article concludes with reflections on the surprising convergence of interests of abortion opponents and supporters. Both sides have different reasons for wanting to limit the scope of fetal personhood laws. Ultimately, law reform organizations like the American Law Institute, the Uniform Law Commission, state lawmakers, and judges will play a crucial role in ensuring that fetal personhood laws do not disrupt longstanding and well-known rules that facilitate fair and stable tax and property law principles.

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18. *See infra* Part IV.B.

19. "Money law" is Alice Abreu's excellent term for "areas traditionally viewed as comprising the business curriculum: tax, corporations, securities, commercial law (UCC), securities, banking, antitrust and the like." Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENVER U. L. REV. 575, 575 (2001). For a discussion of the Supreme Court's abortion jurisprudence as part of the "culture wars," see, e.g., Andrew Chung & Lawrence Hurley, *Analysis: Supreme Court Jumps into U.S. Culture Wars with Abortion, Gun Cases*, REUTERS (May 18, 2021, 1:00 PM), https://perma.cc/2PP3-7FV2; *see also* Jack M. Balkin, *How to Do Constitutional Theory While Your House Burns Down*, 101 B.U. L. REV. 1723, 1751, 1755 (2021) (tracing the "beginning of the cultural wars" to the 1960s, a time of "racial realignment between the two major [political] parties" and explaining that the impact of the "culture wars in the 1960s and 1970s" was that "politics slowly reorganized around questions of identity").

20. *See* ANTHONY C. INFANTI & BRIDGET J. CRAWFORD, *Introduction*, *in* CRITICAL TAX THEORY: AN INTRODUCTION at xxi (2019) (identifying the "fundamental assumption" of critical tax theorists that "[t]ax law is political"). *Cf.* EDWARD MCCAFFERY, TAXING WOMEN 165 (1997) (stating a preference for optimal tax theory as "a solid, more or less 'objective' groundwork for criticizing the way we do things," implying that tax law can be understood largely in financial terms). *See also Tracking Abortion Bans Across the Country*, *supra* note 3 and accompanying text.

21. *See* ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD LAW REFORM THAT MIRRORS OUR BETTER SELVES 108 (2018) (explaining the ways that the tax system implicates larger social values and choices) and Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts and Estates*, 49 REAL PROP. TR. & EST. L.J. 317, 318–19 (2014) (advocating for an extension of the critical tax theory lens to wills, trusts, and estates, because "understanding (1) how 'money law' operates to benefit certain groups and (2) who those groups are, will help to reveal structural barriers to economic flourishing and to expose inequality. Economic inequality often tracks social and political inequality as well").

22. *See* INFANTI, OUR SELFISH TAX LAWS, *supra* note 21, and Crawford & Infanti, *supra* note 21.

I. *DOBBS* AND FETAL PERSONHOOD

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court of the United States upheld a Mississippi law that generally prohibits abortions after the fifteenth week of pregnancy.[23] Writing for the majority, Justice Alito reasoned that there is no federal right to abortion because abortion is not mentioned in the Constitution, and the right to terminate a pregnancy is not a right "deeply rooted . . . in history and tradition" and "implicit in the concept of ordered liberty."[24] Accordingly, the Court overruled *Roe v. Wade*, which had relied on a trimester framework in asserting a privacy right to abortion, balanced against the government's interest in protecting the health and the potential life of the fetus.[25] It also overruled *Planned Parenthood of Southeastern Pa. v. Casey*, which had used an undue burden standard in deciding whether a legal restriction on abortion was constitutional.[26]

Days after the *Dobbs* decision, the Mississippi Attorney General certified that the repeal of *Roe* and *Casey* meant that the state's "trigger ban" took immediate effect, making access to abortion even more restricted.[27] Under current Mississippi law, all abortions are banned except to save the life of the mother or in cases of rape or incest that have been reported to law enforcement.[28] Those who need an abortion must travel out of state for this healthcare, an obstacle for many residents of Mississippi, where roughly nineteen percent of the state population lives in poverty.[29]

As for the question of when life begins, the *Dobbs* decision did not explicitly opine. However, as scholars like Glenn Cohen, Rachel Rebouché, Mary Ziegler, and others have noted, the majority opinion has important implications for the future of in vitro fertilization.[30] That is, if the right to abortion is not "deeply

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23. 142 S.Ct. 2228, 2243, 2284 (2022).

24. *Id.* at 2242 (citing Washington v. Gluckberg, 521 U.S. 702 (1997)).

25. Roe v. Wade, 410 U.S. 113 (1973).

26. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

27. *See, e.g.*, *Abortion in Mississippi*, CTR. FOR REPROD. RTS., https://perma.cc/D2SZ-NUT6 (explaining Mississippi Attorney General's certification of the state's trigger ban on abortion) and *13 States Have Abortion Trigger Bans—Here's What Happens When Roe is Overturned*, GUTTMACHER INST. (June 6, 2022), https://perma.cc/Q7C7-QZ6S (describing effect of trigger bans generally).

28. MISS. CODE § 41-41-151 (West, Westlaw current with 2024 1st Extra. Sess. through Jan. 22, 2024).

29. *See, e.g.*, *FAQ: Abortion in Mississippi Post-*Roe v. Wade, MISS. TODAY (June 29, 2022), https://perma.cc/524G-7Z8G ("For many Mississippians, the closest place to obtain a legal abortion will be southern Illinois. Every neighboring state is also set to ban abortion in almost all cases."). *See also* Quick Facts About Mississippi, U.S. CENSUS BUREAU, https://perma.cc/D8A7-BRN7 (showing 19.1% of the Mississippi population as living in poverty) and *Poverty Rate in Mississippi in the United States From 2000 to 2022*, STATISTICA, https://perma.cc/S89D-72KB (showing fluctuations in the poverty rate in Mississippi for years 2000 to 2022). For a family of four, the weighted poverty threshold for U.S. Census purposes was $31,428 in 2023. *See* Poverty Thresholds for 2023 by Size of Family and Number of Related Children Under 18 Years, U.S. CENSUS BUREAU, https://perma.cc/QL6Z-PGNV.

30. *See* I. Glenn Cohen, Judith Daar & Eli Y. Adashi, *What Overturning* Roe v Wade *May Mean for Assisted Reproductive Technologies in the U.S.*, 328 J. AM. MED. ASS'N 15 (2022); I. Glenn Cohen, *Reproductive Technologies and Embryo Destruction After* Dobbs 2–3, *in* ROE V. DOBBS: THE PAST, PRESENT AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Geoffrey R. Stone & Lee Bolinger

rooted," then in vitro fertilization, which was first used successfully in the United States in 1981, is even less so.[31] This is true even though Justice Alito's majority opinion explicitly warns that "to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[32] Justice Alito suggested that the cases on which *Roe* and *Casey* relied retain vitality, because "[w]hat 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.'"[33] Yet the transformation of "potential life" (in *Roe* and *Casey*) into "an unborn human being" (in *Dobbs*) may mean that the same precedents offer no protection for in vitro fertilization, either, because any destruction of embryos incident to the in vitro fertilization process, whether due to a genetic abnormality or because the intended parents decide not to proceed with implantation, would involve the destruction of "potential life."[34] So, too, if a zygote or fetus is an "unborn human being," then the *Dobbs* opinion opens the door to the legal recognition of embryos and fetuses as having cognizable legal rights because of the "moral question" involved. One notable aspect of the majority opinion in *Dobbs* is its insistence that the Court was "return[ing] the power" to "the people and their elected representatives" to weigh moral questions like abortion.[35] In other words, in the views of the Court's majority, abortion is a matter for states to decide as they see fit.

Reflective of a lack of total uniformity among abortion opponents, state abortion bans tend to fall into three categories: near total bans that are currently in effect, bans applicable to pregnancies of specified durations and currently in effect, and other bans that have been temporarily blocked.[36] As of this writing, there are fourteen states with near-total bans on abortion and two states where abortion is banned after fifteen to twenty weeks of gestation; two states prohibit the procedure after twelve weeks, and two states ban abortion sometime between

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eds., 2023); Rachel Rebouché & Mary Ziegler, *Fracture: Abortion Law and Politics After* Dobbs, 76 SMU L. REV. 27, 27 (2024); Kerry Lynn Macintosh, Dobbs, *Abortion Laws, and In Vitro Fertilization*, 26 J. HEALTH CARE L. & POL'Y 1, 2 (2023) ("*Dobbs* begs this question: if legislators are now free to ban or restrict abortion, can they also ban or restrict IVF because of the threat it poses to human embryos and fetuses?").

31. *See* Cohen, Daar & Adashi, *supra* note 30, at 15; *The US' First Test Tube Baby*, PBS.ORG, https://perma.cc/U94L-SE7N (chronicling the first live birth in the United States of a child conceived after in vitro fertilization).

32. 142 S. Ct. at 2277–78.

33. *Id.* at 2258.

34. *See, e.g.*, Rebouché & Ziegler, *supra* note 30, at 66 ("Abortion bans that apply from conception threaten the practice of IVF generally (regardless of whether selective reduction occurs). Already, fertility agencies have moved from states with bans or have changed their protocols.").

35. 142 S. Ct. at 2259.

36. *See Tracking Abortion Bans Across the Country*, *supra* note 3.

six and twelve weeks of pregnancy.[37] Finally, there are three states where abortion restrictions have been enacted but are temporarily stayed by the courts.[38] On the other side of the debate are twenty-four states where state law, court decisions, or the state constitution itself protects the right to abortion.[39] Several states have gone further and enacted laws shielding those who seek or perform abortions within their state lines from the laws of other states, although the efficacy of these statutes has yet to be tested.[40] Such shield laws likely will be opposed by those states that seek to prevent their citizens from seeking abortions in other states.[41]

Although *Dobbs* does not explicitly refer to fetal personhood, it presumably leaves that subject, like abortion, to the states. Just a few months after the *Dobbs* decision, the Supreme Court denied certiorari in a case decided by the Rhode Island Supreme Court that had declined, on standing grounds, to hear a challenge to the state's statutory protections for abortion brought by a group of plaintiffs that purportedly included two unborn fetuses.[42] The petitioners argued that the Supreme Court "should grant the writ to finally determine whether prenatal life, at any gestational age, enjoys constitutional protection–considering the full and comprehensive history and tradition of our Constitution and law supporting personhood for unborn human beings."[43] Although the Supreme Court did not take up that particular challenge, it may take a similar case in the future.[44] In fact, the Alabama Supreme Court recently held that, for purposes of the state Wrongful Death of a Minor Act, in vitro embryos are "extrauterine children" and treated the same as children who were born alive, "without exception based on developmental

37. *See id.*

38. *See Tracking Abortion Bans Across the Country, supra* note 3 (indicating temporary blocks of abortion bans in Montana, Wyoming, and Iowa).

39. Note that because the way gestational weeks are counted from the first day of the last menstrual cycle, a person might technically be in the sixth week of pregnancy after missing only one monthly period. *See id.*

40. *See id.;* H.B. 455, 151st Gen. Assemb. (Del. 2022) (codified as amended in scattered sections of titles 10, 11, 18, and 24); H.B. 455, 151st Gen. Assemb. §§ 1, 2, 5 (Del. 2022) (codified as amended at DEL. CODE tit. 18, § 2535 (2022)) (providing protections for those seeking abortions); DEL. CODE tit. 24, §§ 1702, 1731(b)(26), 1733(c), 1922(d), 1935(b)(5) (2022) (providing protections for abortion providers).

41. *See, e.g.*, H.B. 242 (Id. 2023) (codified as amended in IDAHO CODE ANN. § 18-8602 and criminalizing "recruiting, harboring, or transporting" minors for the purpose of an abortion, including an out-of-state abortion, without parental consent). David Cohen, Greer Donley and Rachel Rebouché have observed that, "Though targeting cross-border abortion provision has been almost nonexistent until this point, antiabortion states are likely to attempt it in the post-*Roe* future. This is hardly far-fetched: The antiabortion movement has been clear that the endgame is outlawing abortion nationwide." David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–23 (2023).

42. *See* Benson v. McKee, 273 A.3d 121 (R.I. 2022), *cert denied*, 143 S.Ct. 309 (Mem) (Oct. 11, 2022) (No. 2022-201).

43. Petition for a Writ of Certiorari at 22–23, *Benson* (WL 4096782).

44. *See, e.g.*, Ariane de Vogue & Devan Cole, *Supreme Court Declines to Hear Fetal Personhood Case*, CNN.COM (Oct. 11, 2022 4:16 PM EST), https://perma.cc/AJ2C-DE8G.

stage, physical location, or any other ancillary characteristics."[45] It would not be surprising, then, if other courts in states with abortion bans follow suit and the Supreme Court is forced to address the issue.[46]

Despite the seismic shift that the *Dobbs* decision represents,[47] fetal personhood laws are not new.[48] In both tort and criminal law, courts and legislators in several states have for decades accorded unborn persons certain legal recognition so that pregnancy loss can be recognized in limited cases (e.g., wrongful death and homicide).[49] But as part of the political quest to outlaw abortion, several states have gone further and enacted what legal scholar Cynthia Soohoo calls "general personhood" laws.[50] These laws purport to grant full legal status, equivalent to the rights of a living child, from the moment of conception.[51]

In 2021, in Arizona, the state legislature passed a bill that provides that all state statutes "shall be interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens, and residents of the state."[52] The same bill also amended the state's criminal laws to make it a felony to perform an abortion where the procedure is sought "solely because of a genetic abnormality of the child."[53] Two doctors represented by the American Civil Liberties Union challenged these new laws,[54] but the plaintiffs' case, which argued that the ban was

45. LePage v. Ctr. for Reprod. Med., Nos. SC-2022-0515, SC-2022-0579, 2024 WL 656591 at *3, *4 (Ala., Feb. 16, 2024) (holding that mistaken destruction of frozen embryos gave rise to claim under the state's Wrongful Death of a Minor Act). *See also* Dan Rosenzweig-Ziff, *Frozen Embryos are Children, Ala. High Court Says in Unprecedented Ruling*, WASH. POST (Feb. 19, 2023, 5:06 PM EST), https://perma.cc/G579-PX9J (calling the decision a "first-of-its-kind ruling" and noting that the decision "could have implications across the country for fertility treatments such as IVF . . . or even contraceptives").

46. *See* Rosenzweig-Ziff, *supra* note 45.

47. *See supra* notes 1–2 and accompanying text.

48. *See, e.g.*, Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. REV. 437, 441 (2020) ("Starting in the 1850s, state legislatures created wrongful death claims, thus enabling parents to sue the tortfeasor who killed their minor child.").

49. *See* Cynthia Soohoo, *An Embryo is not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAWNOW 81, 94–95 (2023) (discussing fetal personhood in the context of wrongful death claims and homicide charges). *See also* Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. J. 599 (1986).

50. *See* Soohoo, *supra* note 49, at 103–05.

51. *See id.* (listing Kentucky, Pennsylvania, Missouri, Kansas, Georgia, and Arizona as the states that have "general personhood" laws that "purport to require that all laws of the state be interpreted to include a zygote-embryo-fetus in the definition of a person or human being, or . . . require that the unborn enjoy equal protection under the law").

52. *See* ARIZ. REV. STAT. ANN. § 1-219 (2021).

53. *See* S.B. 1457 (Ariz. 2021) codified at ARIZ. REV. STAT. ANN. § 13-3603.02(A)(2).

54. Order, Isaacson v. Brnovich, D. Ariz. No. CV-21-01417 (Sept. 28, 2021). *See also Paul A. Isaacson, M.D., et al. v. Mark Brnovich, et al.*, AM. C. L. UNION, https://perma.cc/5WTF-3YT5. The United States District Court for the District of Arizona issued an injunction concerning the fetal personhood statute on the grounds that it was void for vagueness. The Attorney General for the State of Arizona did not appeal that decision. However, the District Court's initial grant of a stay against the enforcement of the so-called "reason ban" was vacated by the Supreme Court of the United States in the wake of the *Dobbs* decision. Brnovich v. Isaacson, 142 S. Ct. 2893 (Mem) (No. 21-1609) (June 30,

an impermissible restriction on abortion that was otherwise allowed under state law, has not been decided as of this writing. In a separate case decided in April, 2024, the Supreme Court of Arizona ruled that, under a law enacted in 1864, state law prohibits all abortions, except to save the life of the mother; the Arizona legislature responded by reinstating the fifteen-week ban on abortions.[55] Other states that are considering adopting forms of fetal personhood statutes may look for guidance to the group Nullify Abortion, an organization whose mission is to "nullify, abolish, and criminalize the murder of preborn children, and secure equal justice of the same–for the glory of God and the advancement of Christ's Kingdom on Earth."[56] That organization features on its website a model "Act to Nullify and Abolish Abortion" containing a fetal personhood provision: "A living human child, from the moment of fertilization upon the fusion of a human spermatozoon with a human ovum, is entitled to the same rights, powers, and privileges as are secured or granted by the laws of the state to any other human child."[57] The Abolition of Abortion in Texas Act, introduced in 2019, mirrors this language precisely (although it is unclear whether the Model Act or Texas's bill was introduced first).[58]

The question of fetal personhood will continue to be debated in the courts and the public sphere. The *Dobbs* decision has opened the door for states to pass laws that restrict or ban abortion. Likely, many of those same states will strengthen existing fetal personhood laws or adopt new ones. It remains to be seen whether reproductive rights advocates will attempt to narrow the laws' scope to create a new weapon in the abortion wars. Georgia's fetal personhood statutes, discussed in the next Part, illustrate the implications of these laws for a seemingly unrelated area of law: federal income tax.

II. EMBRYOS AS DEPENDENTS FOR INCOME TAX PURPOSES

A. OVERVIEW

In 2019, the Georgia state legislature enacted the Living Infants, Fairness and Equality ("LIFE") Act.[59] This law both buoys and complicates the state's anti-abortion stance. The LIFE Act prohibits abortion after the "unborn child" has a "detectable human heartbeat" traditionally considered to be approximately the

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2022). The Ninth Circuit Court of Appeals then remanded the District Court's decision. Isaacson v. Brnovich, D. Ariz. No. CV-21-01417 (Sept. 28, 2021), 2022 WL 2425784; Isaacson v. Brnovich, 610 F. Supp.3d 1243 (D. Ariz. 2022).

55. *See* Planned Parenthood Arizona, Inc. v. Mayes, *supra* note 3. The decision was stayed for fourteen days to allow further arguments before the trial court. *See id.* Subsequently the Arizona legislature reinstated the fifteen-week limitation. *See* Gomez, *supra* note 3.

56. *See About Nullify Abortion*, NULLIFYABORTION.ORG, https://perma.cc/2QW2-A3AT; *Model Legislation to Nullify and Abolish Abortion*, NULLIFYABORTION.ORG, https://perma.cc/W54Y-KGSB.

57. *See id.* (providing full text of "An Act to Nullify and Abolish Abortion").

58. *See* H.B. 948 (Tx. 2019).

59. *See* 2019 GA. LAWS ACT 235 (H.B. 481).

sixth gestational week.[60] However, recent scholarship suggests that the precise window in which an embryonic heart starts beating is unclear, making it difficult to use a calendar method to determine whether the procedure is legal.[61] The LIFE Act also provides that for purposes of state law, the phrase "natural person" means "any human being including an unborn child" and that any "unborn child with a detectable human heartbeat ... shall be included in population-based determinations."[62] An unborn child is defined as "a member of the species Homo sapiens at any stage of development who is carried in the womb," which presumably includes embryos carried in vivo but excludes embryos fertilized and maintained in vitro, as these are not "carried in the womb."[63] The LIFE Act also extends child support obligations, income tax deductions, and applicable wrongful death statutes to include embryos after approximately six weeks of gestation.[64]

In 2020, the United States District Court for the Northern District of Georgia enjoined enforcement of the LIFE Act.[65] That court also found that the LIFE Act violated the Fourteenth Amendment because it prohibited abortions in a manner that was inconsistent with *Roe* and *Casey* and that the Act was void for vagueness.[66] Shortly after the Supreme Court's decision in *Dobbs*, however, the United States Court of Appeals for the Eleventh Circuit vacated and reversed the decision of the District Court; the LIFE Act took effect immediately.[67]

Less than two weeks after the Circuit Court issued its opinion on July 20, 2022, the Georgia Department of Revenue issued a press release on August 1, 2022,

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60. *See id.* at § 4(b) (prohibiting abortion if an "unborn child" has been determined "to have a detectable human heartbeat," except in highly limited circumstances). GA. CODE ANN. § 1-2-1 (West, Westlaw current through 2023 Reg. Sess.). *See also* Jane Chertoff, *How Early Can You Hear Baby's Heartbeat on Ultrasound and By Ear?* HEALTHLINE.COM (Sept. 26, 2018), https://perma.cc/YS8D-CA6D ("A fetal heartbeat may first be detected by a vaginal ultrasound as early as 5 1/2 to 6 weeks after conception. That's when a fetal pole, the first visible sign of a developing embryo, can sometimes be seen.").

61. *See* 2019 GA. LAWS ACT 235 (H.B. 481) §4 and Jörg Männer, *When Does the Human Embryonic Heart Start Beating?* 9 J. CARDIOVASCULAR DEV. & DISEASE 187, 188, 206 (2022) (reporting the "current textbook knowledge" that the human embryonic heart starts beating at approximately 21 to 23 days after fertilization but suggesting that the precise time window in which the human embryonic heart likely starts pumping "is unknown at the present time").

62. The LIFE Act, H.B. 481, 154th Leg., at 4 (Ga. 2019) *codified at* GA. CODE ANN. § 1-2-1(b) (defining "natural person") and (d) (including unborn persons in population counts (West 2023)).

63. *Id. codified at* GA. CODE ANN. § 1-2-1(e)(2).

64. *See* 2019 GA. LAWS ACT 235 (H.B. 481) § 5 (amending GA. CODE ANN. § 19-6-15) (relating to child support); § 6 (amending GA. CODE ANN. § 19-7-1) (concerning wrongful death); §12 (amending GA. CODE ANN. § 48-7-26(a), (b)(3)) (extending the state income tax definition of a "dependent" to include an embryo with a heartbeat).

65. SisterSong Women of Color Repro. Justice Collective v. Kemp, 472 F.Supp.3d 1297, 1303 (2020) *reversed and vacated by* SisterSong Women of Color Repro. Justice Collective v. Kemp, 40 F.4th 1320 (11th Cir. 2022).

66. 472 F.Supp.3d at 1315–18.

67. *See* SisterSong Women of Color Repro. Justice Collective v. Kemp, 40 F.4th 1320 (11th Cir. 2022). *See also Georgia's Six-Week Abortion Ban to Take Effect*, CTR FOR REPROD. RTS (July 20, 2022), https://perma.cc/7P2X-C74H.

stating that taxpayers were entitled to take a dependency deduction on their state income tax returns for "any unborn child (or children) with a detectable human heartbeat (which may occur as early as six weeks' gestation)."[68] The guidance accompanying the press release specifies that any embryo "must be transplanted into the mother" and "reach six weeks gestation," making clear that embryos created through in vitro fertilization but not implanted are ineligible for the deduction.[69] Otherwise, taxpayers may take a deduction of $3,000 for "each unborn child," presumably opening the door to the possibility of multiple deductions in the same calendar year in the event of miscarriages or stillbirths followed by another pregnancy.[70]

The Georgia Department of Revenue further clarifies that a social security number is not required to take the deduction but that "relevant medical records or other supporting documentation shall be provided to support the dependent deduction claimed if requested by the Department."[71] For a pregnancy being carried by a surrogate, the Department's guidance is somewhat opaque. The Department specifies that only one taxpayer may claim the deduction and that the deduction "*could* be claimed by a surrogate mother whose unborn child reached six weeks gestation on or after July 20, 2022, as long as the child was not born until 2023."[72] This language does not rule out the possibility that the allocation of the deduction between a gestational carrier and the intended parents is something for which the parties could bargain and presumably contract. The 2023 Georgia state income tax returns now include a line for the "unborn" dependent exemption.[73]

B. QUESTIONS AND FUTURE DIRECTIONS (WITH ALEXIS C. BORDERS)

1. Eligibility for the Dependency Deduction

In the months following *Dobbs*, the Georgia Department of Revenue built out its website to answer many of the nuts-and-bolts questions that taxpayers might

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68. *Guidance Related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act*, GA. DEPT. OF REV. (Aug 1, 2022), https://perma.cc/461X-RZSL.

69. *See id. See also* Claire Simms, *Georgia Parents Can Claim Unborn Children on 2022 State Taxes*, FOX 5 ATLANTA (Mar. 24, 2023), https://perma.cc/TJ4Y-D8W7 (clarifying that only one parent may claim the child as a dependent and that the deduction is available even if there was a miscarriage) and *Frequently Asked Questions*, GA. DEPT. OF REV., https://perma.cc/HBD6-HM52 (answering the question, "What does this mean for IVF/egg freezing/embryo freezing?")

70. *See Guidance Related to House Bill 481*, *supra* note 68.

71. *See* GA. CODE ANN. § 48-7-26(a); *Guidance Related to House Bill 481*, *supra* note 68 (answering the question, "How will you file for an Exemption for a dependent without a Social Security number, or name for the baby?").

72. *See Guidance Related to House Bill 481*, *supra* note 68 (answering the questions "What are the implications of this law for parents having a pregnancy via surrogate or IVF/embryo freezing? Would the surrogate claim the baby as a dependent? Can parents claim all the viable eggs/embryos as dependents?" and including the guidance that "There can only be *one* dependent exemption claimed in a single tax year per dependent child") (emphasis added).

73. *See* Form 500, Individual Income Tax Return, GA. DEPT. REV. (2023), https://perma.cc/4FRH-Z2CC (containing line 7b for "Number of Unborn Dependents").

have about the Living Infants, Fairness and Equality ("LIFE") Act. Without elaboration, the agency answers a terse "Yes" to the question of whether a miscarriage or stillbirth gives rise to the dependency deduction.[74] Furthermore, in the case of an unmarried couple (filing separate returns), only one taxpayer is eligible for the deduction.[75] In the case of a multiple pregnancy (e.g., twins, triplets, etc.), each zygote-embryo-fetus gives rise to one deduction.[76]

Logistically speaking, it is not clear what evidence of pregnancy is sufficient to substantiate a claimed "unborn" dependency deduction. The Department of Revenue's website advises that taxpayers do not have to attach any proof of eligibility to their tax return and that "[p]rovision of medical documentation is only necessary if audited by the Department."[77] The guidance continues: "In accordance with the advice of medical professionals and physicians, the Department recommends that people maintain accurate and appropriate medical records for the health and well-being of themselves and their families."[78] Practically speaking, though, not every person who becomes pregnant will have their pregnancy (and an embryonic heartbeat) confirmed by a healthcare professional if a loss occurs early in the pregnancy. In fact, close to eight million home pregnancy tests are sold each year in the United States,[79] while the rate of miscarriages in the United States is between ten and thirty percent of all pregnancies.[80] These figures suggest that there likely are tens of thousands of people who may become pregnant, take a home pregnancy test, and later miscarry before consulting a

74. *Frequently Asked Questions*, *supra* note 69 (answering the question, "In the event of miscarriage or stillbirth, is claiming a deceased dependent on your tax return allowed?").

75. *See id.* (answering the question, "Can an unmarried couple, filing separately, each claim the unborn child as a dependent?").

76. *See id.* (answering the question, "Can a woman pregnant with more than one child claim each child?" with a one-word answer: "Yes").

77. *See id.* (answering the question, "Is documentation required to prove a pregnancy or the loss of a pregnancy?" and elaborating: "This deduction would not trigger an audit on its own").

78. *Id.*

79. *See* Usage of Home Pregnancy Tests in the U.S. in 2020, STATISTICA (Nov. 2020), https://perma.cc/ZRT3-5AHU (calculating in 2020 that 7.92 million U.S. women used a home pregnancy test in the last twelve months). The market for digital home pregnancy tests, in particular, is predicted to have a compound annual growth rate of 4.8% from 2023 to 2033. *See United States of America Digital Pregnancy Test Kits Market*, FUTURE MARKET INSIGHTS (June 2023), https://perma.cc/5L54-SACM ("The United States of America's digital pregnancy test kits market reached a valuation of US$207.6 million in 2023. It is anticipated to expand steadily with a CAGR of 4.8% from 2023 to 2033, reaching a value of US$333.2 million by 2033.").

80. *See, e.g.*, Jonah Bardos, Daniel Hercz, Jenna Friedenthal, Stacey A Missmer, and Zev Williams, *A National Survey on Public Perceptions of Miscarriage*, 125 OBSTET. & GYNECOL. 1313, 1314 (2015) (reporting that "in 15–20% of clinically-recognized pregnancies, or 750,000–1,000,000 cases annually") and Thomas C. Michels & Alvin Y. Tiu, *Second Trimester Pregnancy Loss*, 76 AM. FAM. PHYSICIAN 1341 (2007) ("Overall, about 10 to 20 percent of all recognized pregnancies and 30 to 40 percent of all conceptions end in pregnancy loss."). *See also Miscarriage*, MARCH OF DIMES, https://perma.cc/5ZP5-29NU ("For women who know they're pregnant, about 10 to 20 in 100 pregnancies (10 to 20 percent) end in miscarriage. Most miscarriages—8 out of 10 (80 percent)—happen in the first trimester before the 12th week of pregnancy. . . . Some research suggests that more than 30 percent of pregnancies end in miscarriage, and many end before a person even knows they're pregnant.").

healthcare professional such that there would be a formal medical record of pregnancy and embryonic heartbeat. In such a case, what evidence will be sufficient to withstand an audit by the Georgia taxing authorities? Should taxpayers retain their positive home pregnancy tests or at least time-stamped photographs of them? How will the taxpayer prove that the test belongs to them or their partner? Because a positive pregnancy test does not necessarily mean that a human heartbeat was detectable at the time of administration, is a positive test sufficient evidence of eligibility for the deduction, which applies only after *approximately* the sixth week of gestation?[81] Are taxpayers allowed to claim two "unborn" dependency deductions in one year, such as in the event of a miscarriage or stillbirth followed by a subsequent pregnancy? Might claiming a deduction that is *not* followed by the birth of a child invite scrutiny from the government and suspicion of abortion, criminally punishable under Georgia law by imprisonment for between one and ten years?[82] These practical questions remain unanswered in Georgia, although as discussed in the next subsection, at least two other states have attempted to answer some of these questions with regard to legislation modeled after Georgia's.[83]

Looking to the future administration of the tax deduction, consider how issues of class, geography, race, disability, and their multiple intersections may arise in the context of audits of the "unborn" dependency deduction. Low-income pregnant people are less likely to seek prenatal care and more likely to suffer miscarriages than their higher-income counterparts.[84] Low-income taxpayers may not be able to afford to go to a doctor for a pregnancy test and detection of an embryonic heartbeat, let alone prenatal care, and thus may not have official medical records of an eligible pregnancy.[85] Similarly, pregnant taxpayers who live in communities underserved by medical providers or without access to reliable transportation are less likely to receive prenatal care, again leading to a potential

81. *See supra* note 61 and accompanying text.

82. *See* GA. CODE ANN. § 16-12-140 ("A person commits the offense of criminal abortion when, in violation of Code Section 16-12-141 [restricting abortion after the time a heartbeat can be detected, unless medically necessary], he or she administers any medicine, drugs, or other substance whatever to any woman or when he or she uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion."). *See also Georgia*, CTR. FOR REPROD. RTS., https://perma.cc/ET9K-N6H5 (explaining Georgia's anti-abortion laws).

83. *See infra* Part II.B.2.

84. *See also* Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059, 1063 (2021) (" . . . women of color and poor women also face a higher likelihood of miscarrying their pregnancies and giving birth to a stillborn baby.").

85. Even after the passage of the Affordable Care Act, there are some states where a woman may not enroll in Medicaid before becoming pregnant. *See, e.g.*, Elizabeth Kukura, *Giving Birth Under the ACA: Analyzing the Use of Law as a Tool to Improve Health Care*, 94 NEB. L. REV. 799, 824–25 (2016) (explaining that prior to the enactment of the Affordable Care Act, "non-pregnant, non-elderly adults without children were not eligible for Medicaid in most states regardless of income, though some states provided coverage for parents of dependent children at very low income levels. One of the ACA's greatest contributions in terms of increasing access to health insurance is the expansion of Medicaid to all adults with incomes up to 138%" of the federal poverty level).

absence of a medical record of pregnancy.[86] Miscarriage rates also differ by race.[87] For example, between the tenth and twentieth weeks of pregnancy, Black women are twice as likely as white women to have a miscarriage.[88] Rates of miscarriage for women with disabilities are also higher than for those without disabilities.[89] Among women with disabilities, miscarriage rates vary further by race, disability type (e.g., hearing, vision, cognitive, physical), and receipt (or not) of miscarriage prevention care services.[90] Given these multiple data points, the most vulnerable members of society likely will lack formal medical records of pregnancy and an embryonic heartbeat and thus become the target of income tax audits (and disallowances of the deduction).

2. Implication of "Unborn" Dependents for Other Tax Rules

In addition to questions about the implementation of the new Georgia income tax deduction, it is reasonable to ask whether the Georgia legislature might, in the future, extend the state childcare tax credit to expenses attributable to what Georgia law calls an "unborn child," i.e., a zygote, implanted embryo, or fetus.[91] Generally speaking, Georgia does not have a state *child* tax credit (i.e., an offset against the cost of childrearing generally), but it does have a state *childcare* credit (i.e., an offset against the cost for "qualified child and dependent care expenses").[92] While state income laws impose obligations that are distinct from those imposed by federal income tax laws (i.e., typically a taxpayer must file both state and federal income tax returns), there are situations where a state defines eligibility for a particular state law credit or deduction by reference to eligibility for the counterpart federal credit or deduction.[93] In Georgia, a taxpayer is eligible for a state childcare

86. *See, e.g.*, Denisse S. Holcomb, MD, Yolande Pengetnze, MD, Ashley Steele, MEd, Albert Karam, MS, Catherine Spong, MD, & David B. Nelson, MD,*Geographic Barriers to Prenatal Care Access and Their Consequences*, 3 AM. J. OF OBSTET. & GYNECOL. MFM 1, 1 (2021) (finding higher rates of negative birth outcomes among women who did not have prenatal care and the absence of prenatal care being linked to reliance on public transportation and long travel times).

87. *See, e.g.*, Sudeshna Mukherjee, Digna R. Velez Edwards, Donna D. Baird, David A. Savitz, & Katherine E. Hartmann, *Risk of Miscarriage Among Black Women and White Women in a US Cohort Study*, 177 AM. J. EPIDEMIOLOGY 1271, 1276 (2013) ("Our primary finding was that black women have a nearly 2-fold higher risk of miscarriage compared with white women during gestational weeks 10–20, while there was no apparent difference in the risk of earlier miscarriage."). *See also* Lens, *supra* note 84, at 1071–73 (discussing differences in risks for miscarriage and stillbirth by race and economic class).

88. *See* Mukherjee, Edwards, Baird, Savitz, & Hartmann, *supra* note 87.

89. *See, e.g.*, Mekhala V. Dissanayake, MPH, Blair G. Darney, PhD, MPH, Aaron B. Caughey, MD, PhD, & Willi Horner-Johnson, PhD, *Miscarriage Occurrence and Prevention Efforts by Disability Status and Type in the United States*, 29 J. WOMEN'S HEALTH 345, 345 (2020) ("Overall, 31.63% of women with disabilities and 21.83% of women without disabilities had had a miscarriage within the past five years. Compared to women without disabilities, women with any, cognitive, physical, or independent living disability had higher adjusted odds of experiencing miscarriage.").

90. *See, e.g.*, Dissanayake, Darney, Caughey, & Horner-Johnson, *supra* note 89, at 348–49.

91. *See Guidance Related to House Bill 481, Living Infants and Fairness Equality (LIFE) Act*, *supra* note 68 (providing for a state income tax dependency deduction with respect to an "unborn child").

92. *See* GA. CODE ANN. § 48-7-29.10. *See also Georgia*, TCWF.ORG, https://perma.cc/CQQ7-D6RM (providing a plain-language explanation of Georgia's childcare-related tax credits).

93. GA. CODE ANN. § 48-7-29.10.

income tax credit (in addition to any federal income tax credit) in an amount up to thirty percent of the credit allowed for federal income purposes under IRC § 21, not in excess of the taxpayer's income tax liability.[94] The taxpayer can then take the state childcare income tax credit on their Georgia state income tax return and the federal childcare income tax credit on their federal income tax return (Form 1040). Note, though, that unless Georgia further tinkers with its childcare credit, a taxpayer likely would be ineligible for state childcare tax credit, even if extended to a zygote, implanted embryo, or fetus, because of the interplay between the state and federal tax statutes. Georgia law treats a zygote-unimplanted embryo-fetus as a "child" but the federal law does not, and so it would appear that the Georgia taxpayer is out of luck for state income tax purposes.[95]

To explain in more technical detail, under IRC § 21, a taxpayer is allowed a federal income tax credit equal to a percentage of "employment-related expenses" for a "qualifying individual," capped at a maximum of $3,000 or $6,000, depending on whether there is one or two or more qualifying individuals with respect to the taxpayer.[96] Employment-related expenses include "expenses for the care" of a qualifying individual if incurred to enable the taxpayer to be gainfully employed.[97] A "qualifying individual" includes a "dependent of the taxpayer," as defined in IRC § 152(a)(1), who has not attained the age of thirteen.[98] For federal purposes, an unborn child is never treated as a dependent.[99] If not a "dependent" under the federal definition, then the zygote-embryo-fetus is not a "qualifying individual" for purposes of IRC § 21, and the taxpayer would not receive a Georgia state

94. *See id. See also* 26 U.S.C. § 21 (providing an income tax credit for certain "employment-related expenses" including "expenses for the care of a qualifying individual").

95. According to the Internal Revenue Service, state or local law must treat a child as "born alive" for a taxpayer to claim a newborn as a dependent. *See* IRS Frequently Asked Questions, *Dependents*, INTERNAL REV. SVC., https://perma.cc/W6PT-XBK7 ("In order to claim a newborn child as a dependent, state or local law must treat the child as having been born alive, and there must be proof of a live birth shown by an official document like a birth certificate. Due to these requirements, you may not claim a stillborn child as a dependent.").

96. 26 U.S.C. § 21(a), (c).

97. *Id.* at § 21(b)(2)(A)(ii). The taxpayer must have earned income to be eligible for the child and dependent care credit. *See* Publication 504, *Child and Dependent Care Expenses*, INTERNAL REV. SVC., (2023), https://perma.cc/RB42-U2HH ("To claim the credit . . . you (and your spouse if filing jointly) must have earned income during the year."). Thus, a person who incurs childcare expenses associated with volunteer work outside the home will be ineligible for the deduction. *See* Rev. Rul. 73-597, 1973-2 C.B. 69 (characterizing expenses for childcare while a taxpayer renders charitable services as "not related to gainful employment"). *See also* JOEL S. NEWMAN, DOROTHY A. BROWN & BRIDGET J. CRAWFORD, FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 381 (7th ed. 2019) (containing a problem where a taxpayer who does volunteer work for a nonprofit organization and is not treated as "gainfully employed" within the meaning of § 21(b)(2)(A)).

98. IRC § 152(a)(1), (c) (defining a "dependent" as a qualifying child or qualifying relative, where "qualifying child" means an individual who bears a certain relationship to the taxpayer (i.e., son, daughter, etc.); has the same principal place of abode as the taxpayer for more than half the taxable year; who is under the age of nineteen or, if a student, under the age of 24; does not provide over one-half of their own support; and has not filed a joint return with their spouse for the taxable year).

99. *See* IRS Frequently Asked Questions, *supra* note 95.

childcare credit either (because eligibility for the state law credt currently is pinned to eligibility for the federal credit).[100]

Even if Georgia revised its law to decouple the state and federal childcare tax credit, there would still be a question about the scope and definition of eligible "employment-related" expenses. Under federal law, typical childcare-related deductible expenditures include the cost of a child's attendance at a dependent care center, nursery school, before-school or after-school programs, and fees paid to an agency that supplies a care provider.[101] It is not clear what the analogous expenses associated with a zygote-embryo-fetus are. Might a pregnant person in Georgia be eligible for the credit on account of child-birthing or prenatal yoga classes? Although the pregnant person does not need to (and cannot, as a biological matter) leave the zygote-implanted embryo-fetus in the literal care of another person, they would not be taking such classes but for the fact of pregnancy. Alternately, might the zygote-embryo-fetus be treated as a separate taxpayer, required to file a return if their income is over a certain level? It is not impossible to imagine certain wealthy families opening bank or brokerage accounts in the name of an "unborn dependent," which might generate income.[102] If zygotes-embryos-fetuses are separate taxpayers for income tax purposes, might they be eligible for a deduction for medical expenses under state law? As with the deduction for childcare expenses, the eligibility for the Georgia state tax deduction for medical expenses is determined by reference to the federal statute.[103] Because the zygote-embryo-fetus is not a separate taxpayer for federal purposes, there should be no deduction for medical expenses under Georgia law.[104] But, as with a state childcare tax credit, Georgia could choose to decouple its rules from the federal law to allow zygotes-embryos-fetuses to deduct medical expenses.

Based on Georgia's example, it is not surprising that other states are considering ways of using the tax law to pursue an anti-abortion agenda. Two states—Louisiana and Montana—have enacted new legislation designed to incentivize donations to so-called "crisis pregnancy centers" that seek to divert people from

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100. *See* GA. CODE § 48-7-29.10.

101. *See* Publication 503, Child and Dependent Care Expenses 6–8, INTERNAL REV. SVC. (2023), https://perma.cc/GB9M-VA74.

102. Generally speaking, a social security number is required to open an account for the benefit of a child. See *infra* Part III.B. However, interest in creating accounts for unborn children is strong enough that websites providing information about college savings programs specifically address the question (by responding that it is not possible to create an account in the name of a zygote-embryo-fetus) and provide a "work around" (i.e., opening a specific type of account in the parent's name and later naming a child born alive as the beneficiary). *See, e.g.*, Mark Kantrowitz, *How To Open a 529 Plan Before the Baby Is Born, Saving for College* (Dec. 1, 2023), https://perma.cc/DX9X-PXKQ.

103. *See* GA. STAT. § 48-7-27(a) (allowing a deduction, at the taxpayer's election, of either the "sum of all itemized nonbusiness deductions used in computing such taxpayer's federal taxable income" or the standard deduction of $24,000 for a married couple filing jointly or $12,000 for a single taxpayer, head of household, or a taxpayer who is married and filing separately).

104. *See supra* notes 95–99 and accompanying text.

abortion services.[105] Following Georgia's example, Utah has passed legislation providing a state tax benefit for zygotes-embryos-fetuses.[106] Legislation introduced in March 2023 in a fourth state, Alabama, has stalled in that state's Ways and Means Education Committee.[107] The Alabama bill is similar to Georgia's in redefining "dependent" to include "any unborn child," but differs in several respects.[108] The proposed Alabama law seemingly permits a deduction from the moment of conception, as opposed to the Georgia law permitting a deduction only after "cardiac activity is detectable in an embryo."[109] Furthermore, under the Alabama proposal, the deduction must be substantiated by a verification of the taxpayer's pregnancy by a "licensed health care professional" who verifies that a taxpayer's pregnancy via a state-promulgated form.[110] The Alabama bill expressly provides that a taxpayer is eligible for one "unborn" dependency deduction per year unless the taxpayer has a multiple pregnancy (e.g., twins, triplets, etc.).[111] In other words, a taxpayer who miscarries one pregnancy or has a stillbirth and becomes pregnant again in the same taxable year would be entitled to one deduction only.[112] As of this writing, the future of the Alabama bill is unclear. What is certain is that other states will take up similar legislation.[113]

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105. *See generally* Liz Farmer, *After Enacting Strict Abortion Laws, Many States are Turning to Tax Breaks for Expectant Parents*, ROUTE FIFTY (Aug. 2, 2023), https://perma.cc/XE6C-9HH1 (describing newly-enacted tax credits for the "unborn" in Georgia and Utah, as well as Louisiana and Missouri laws that provide new state tax credits equal to half of a taxpayer's contribution to a crisis pregnancy center, up to $5,000).

106. *See* UT. H.B. 54, Sess. L. 459 (May 3, 2023). *See also* Ben Winslow, *Cox Signs Bills Offering Millions in Tax Cuts*, FOX13NOW.COM (Mar. 22, 2023, 7:42 PM), https://perma.cc/A4Z3-ZJRA (quoting Utah governor Spencer Cox as saying, "We talk about being a pro-life state, we believe in life, and I felt if we're going to give a tax exemption for a child that is born, we should give a tax exemption for the unborn child as well").

107. *See* ALA. HB 182 (Reg. Sess. 2023).

108. *See id.*

109. *See supra* notes 59–63 and accompanying text.

110. *See* ALA. HB 182 (Reg. Sess. 2023) ("The Department of Revenue shall establish a form by administrative rule to be signed by a licensed health care professional and submitted by the taxpayer to verify that a taxpayer claiming a dependent pursuant to this subparagraph was pregnant during the tax year. The Alabama Department of Public Health shall post this form on the department's public website.").

111. *See id.* at § 1.

112. *See id.*

113. *See, e.g.*, Farmer, *supra* note 105 (reporting that "nearly a dozen more are considering" tax legislation designed to shore up their restrictions or bans on abortion). In 2022, before the *Dobbs* decision, Republicans introduced in the United States House of Representatives a bill that would treat a zygote-implanted embryo-fetus as a dependent for certain federal income tax purposes. *See* H.R. 6505, 117th Cong. 2d Sess. (Jan. 25, 2022). That legislation is not likely to pass in an evenly divided or narrowly-majority Democratic United States Senate. *Cf.* Amanda Becker, *Why Didn't Congress Codify Abortion Rights?* 19THNEWS.ORG (Jan. 26, 2022), https://perma.cc/29G6-KBH9 (explaining pre-*Dobbs* that pro-choice legislation "is unlikely to pass the evenly divided 100-seat chamber, where nearly all legislation needs 60 votes to overcome the filibuster").

III. FETAL PERSONHOOD MEETS TAX, TRUSTS, AND ESTATES

Fetal personhood statutes raise novel questions of law, as the preceding discussion makes plain. Moving from the discussion of Georgia's "unborn" dependent deduction, this Part considers some of the ways that fetal personhood statutes would potentially disrupt many settled aspects of "money law."[114] Although not a comprehensive treatment, this Part sketches four areas of trust and estate rules notably impacted by a state's declaration that human life begins either after the detection of a heartbeat (approximately six weeks of gestation) or at conception:[115] intestacy, trust administration, trust duration, and generation assignment for wealth transfer tax purposes.

A. INTESTACY

When a person dies without a will, the laws of intestacy determine who will inherit the decedent's property. Although intestacy laws vary from state to state, if an intestate decedent is survived by a spouse and descendants, the property typically passes either all to the surviving spouse or in specified percentages to the spouse and descendants.[116] At the intersection of the law of intestacy and fetal personhood statutes, consider what rights a zygote-embryo-fetus has to inherit if treated as a "person" for all purposes of state law.[117] A zygote-embryo-fetus would have the same rights as a living child, entitled to inherit by intestacy from and through their parents (i.e., from their mother, father, aunts, uncles, grandparents, etc.).[118] From an estate administration perspective, this raises several complications. Typically, the personal representative of an intestate decedent's estate must give notice of the estate administration proceeding to the decedent's heirs (and creditors). But if a zygote-embryo-fetus is treated the same as a living person (and thus would be an heir for purposes of the intestacy statute), the personal representative might also need to determine who among surviving family members

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114. *See supra* note 19.

115. *See, e.g., supra* notes 59–63, 109–111 and accompanying text (discussing Georgia statute and Alabama proposed legislation, respectively).

116. *Compare, e.g.*, N.Y. EST., POW. AND TR. L. § 4-1.1 (providing that if an intestate decedent is survived by a spouse and issue, $50,000 plus half of the residue passes to the surviving spouse and the balance to the issue by representation) *with* UNIF. PROB. CODE §§ 2-102, 103 (UNIF. L. COMM'N 2019) (providing that if an intestate decedent is survived by a spouse and descendants, and all of the surviving descendants are descendants of both the decedent and the surviving spouse, the entire estate will pass to the surviving spouse).

117. *See, e.g.*, UNIF. PROB. CODE §§ 2-103(b)-(g) (UNIF. L. COMM'N 2019) (providing that any part of the intestate estate not passing to the decedent's surviving spouse passes to the decedent's descendants by representation, or if none, to the decedent's parents' descendants, or if none, to the decedent's surviving grandparents).

118. *See, e.g., id.* By parity of reasoning, a zygote-embryo-fetus also would be able to inherit under a will or become a beneficiary of a trust. *See* 76 AM. JUR. 2d. *Trusts* § 53 ("Among the essential elements for the creation of a valid express trust is a person for whose benefit the trust property is held—that is, a designated, certain and identifiable beneficiary or beneficiaries to whom the trustee owes equitable duties to deal with the trust property for his or her benefit.").

were pregnant or had pregnant partners at the time of the decedent's death.[119] For example, assume that Helen, a widow, dies intestate survived by her adult daughter Jane and her adult son Joe. At the time of Helen's death, Joe's partner is pregnant with their first child. Just a few days after Helen dies, Joe himself is killed in a tragic accident. Helen's intestate heirs are Jane and the zygote-embryo-fetus in gestation. Unless the personal representative inquires whether Joe's partner was pregnant, the personal representative might erroneously believe that Jane is Helen's sole surviving heir and distribute the entire estate to Jane. It is easy to imagine that Joe's partner might not be especially eager to disclose their pregnancy status to the personal representative of Helen's estate, especially early in the pregnancy,[120] or if they do not intend to carry the pregnancy to term and risk approbation or even criminal prosecution for getting an abortion.[121] It is equally possible that Joe could be estranged from his partner, may not have introduced his partner to the family,[122] or that he himself does not know that his partner is pregnant.[123] An administrator who makes distributions from the estate without

119. *See, e.g.*, 31 AM. JUR. 2d *Executors and Administrators* § 317 (2024) ("A personal representative of an estate is under a duty to use reasonable diligence to ascertain potential heirs, and breaches this duty by making no effort to discover the identity of a child where he or she has information of its existence . . . Further, the personal representative has a duty to see that a fair process is utilized to identify heirs. However, in some jurisdictions, an executor has no duty to search out unknown heirs.") and 31 AM. JUR. 2d *Executors and Administrators* § 318, (2024) (explaining that "reasonable diligence" is required in notifying legatees).

120. *See, e.g.*, Stina Lou, Michal Frumer, Mette M Schlütter, Olav B Petersen, Ida Vogel, & Camilla P. Nielsen, *Experiences and Expectations in the First Trimester of Pregnancy: A Qualitative Study*, 20 HEALTH EXPECTATIONS 1320 (2017) (finding in a qualitative study of twenty pregnant women in their first trimester that that "[b]eing in the first trimester of pregnancy was the major reason for keeping the pregnancy relatively secret. The women all referred to a higher risk of miscarriage in the first trimester as common knowledge").

121. *See, e.g.*, Arwa Mahdawi, *Worried that Will be Prosecuted for Using Abortion Pills? It's Already Happening*, (U.K.) GUARDIAN (Mar. 3, 2023), https://perma.cc/T6MA-B3DG (reporting the pre-*Dobbs* arrest of a South Carolina woman accused of a misdemeanor for a self-managing the termination of her own pregnancy) and Gabe Whisnant, *Woman Arrested for Abortion Sees Charges Dismissed*, NEWSWEEK (Dec. 3, 2023, 8:17 PM), https://perma.cc/6CCA-M8AZ (reporting on the dropping of the charge against the woman who self-managed her own abortion, which had been increased post-*Dobbs* to a felony charge punishable by a $5,000 fine and at least two years' imprisonment).

122. On the foundational value of sexual privacy, *see* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1874 (2019) (defining sexual privacy as "the social norms (behaviors, expectations, and decisions) that govern access to, and information about, individuals' intimate lives" and locating sexual privacy "at the apex of privacy values because of its importance to sexual agency, intimacy, and equality").

123. *See, e.g.*, Benjamin C. Carpenter, *Sperm is Still Cheap: Reconsidering the Law's Male-Centric Approach to Embryo Disputes After Thirty Years of Jurisprudence*, 34 YALE J.L. & FEMINISM 1, 54 ("For a woman experiencing a natural pregnancy, gestational parenthood occurs shortly after intercourse, before the woman even knows she is pregnant."). *See also* Latoya Gayle, *Mother Who Got Pregnant After a One-Night Stand is Advised not to 'Open a Can of Worms' by Tracking Down Her Son's Father After 18 Years - But Do YOU Think the Father Has a Right to Know?* (U.K.) DAILY MAIL (Jan. 26, 2021), https://perma.cc/HJE7-LWPH (describing a situation where a man had never been informed after a "one night stand" that he was a father).

verifying the existence of a putative embryo-zygote-fetus heir could be found in breach of their fiduciary duty.[124]

Consider also the fact that treating a zygote-embryo-fetus as a full legal person might result in its more favorable treatment compared to a living child born alive who had been posthumously conceived through assisted reproductive technology ("ART"). Under the current laws of some states, posthumously conceived children may be treated as a deceased parent's descendants for intestacy purposes if certain conditions are met.[125] Usually, there must be more than a mere genetic connection.[126] In Massachusetts, for example, for a posthumously conceived child to be treated as an intestate decedent's heir, the decedent must have affirmatively consented to both the posthumous conception of children and to their posthumous support.[127] Otherwise, the child is unable to inherit via intestacy.[128] Yet, if a state with a Massachusetts-like rule for posthumously conceived children also has a fetal personhood statute, there might be a situation where a zygote-embryo-fetus (in utero at the time of a deceased parent's death) inherits as a matter of right under the fetal personhood law, presumably even if a live birth does not result, but a child posthumously conceived via ART and subsequently born alive could not inherit via intestacy in the absence of a showing of the requisite affirmative consent.[129]

Suppose a zygote-embryo-fetus inherits via intestacy or even under a will, but the pregnancy later fails. Must a second estate administration take place for the assets "owned" by the zygote-embryo-fetus? Presumably, a zygote-embryo-fetus from a failed pregnancy would be intestate, as most states require a testator to be eighteen years of age or older.[130] Add to this puzzle an exponentially complicated

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124. *See, e.g.*, Dunlap v. First Nat'l Bank of Danville, 76 F. Supp. 2d 948, 958 (C.D. Ill. 1999) (finding that a bank, acting as the administrator of an intestate estate, had acted with diligence in attempting to locate heirs after publishing a notice of death and claims in a local newspaper, reviewing hospital records, and hiring an heir-search firm). *See generally* Reid Kress Weisbord, *Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis*, 53 UC DAVIS L. REV. 2561 (2020) (discussing the multiple responsibilities and duties of estate executors and administrators).

125. *See, e.g.*, CAL. PROB. CODE § 249.5 (West, Westlaw through Ch. 1 of 2023-2024 1st Ex. Sess.) (providing that "a child of the decedent conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent" if certain requirements are met, including that the decedent consented in writing to the use of their genetic material for posthumous conception and that the child was in utero within two years of the decedent's death). *Cf.* Khabbaz v. Comm'r, 930 A.2d 1180, 1182 (N.H. 2007) (denying inheritance rights to a child conceived via ART after her father's death).

126. *See, e.g.*, Woodward v. Commissioner of Social Security, 760 N.E.2d 257 (Mass. 2022) (providing for a balancing test and requiring evidence that the decedent "affirmatively consented to posthumous conception and to the support of any resulting child").

127. *See id.*

128. *See id.*

129. *See supra* note 118 and accompanying text.

130. *See, e.g.*, UNIF. PROB. CODE (UNIF. L. COMM'N) § 2-501 (1990, as amended 2010) ("An individual 18 or more years of age who is of sound mind may make a will."). *See also* Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 70 (2014) (critiquing the categorical exclusion of minors from will-making as lacking a "coherent and compelling policy rationale").

estate administration if a pregnant person or gestational parent—who would be an intestate taker, a legatee under a will, or beneficiary of a trust—dies in an accident or common disaster with a zygote-embryo-fetus. Depending on the applicable state simultaneous death rules, if the pregnant person or gestational parent were deemed to predecease the zygote-embryo-fetus, the zygote-embryo-fetus might step into the parent's shoes and become entitled to the property.[131] But then there would need to be a second estate administration for the assets deemed to pass to the (temporarily) surviving zygote-embryo-fetus, generating undesirable costs and inefficiencies. This problem of potentially cascading intestate administrations could be solved through careful drafting. Still, many people in the United States do not have a will, so confusion, disarray, and lack of clarity about asset ownership would become the norm at death in these cases.[132]

B. TRUST AND ESTATE ADMINISTRATION

Likewise, consider the challenges that fetal personhood presents for trust administration. In the future, a state might extend personhood status to all embryos, not just those implanted in the womb; indeed the Alabama Supreme Court arguably has done just that in extending the state's wrongful death statute to embryos in vitro (although the state legislature responded by enacting a law protecting certain fertility clinics from liability).[133] If embryos are "persons" for almost all purposes of state law, then frozen embryos likely would be entitled to distributions from a trust that, for example, provides for mandatory income payments to a grantor's "descendants." But how might a trustee make a distribution to a zygote-embryo-fetus? There are familiar vehicles for ownership of minors' property, such as guardianships, custodianships, and Uniform Gifts to Minors Act/Uniform Transfers to Minors Act accounts.[134] Historically, the ward/beneficial owner must be a living person (and, practically speaking, may even need a social security number).[135]

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131. *See generally* RESTATEMENT (THIRD) PROP.: WILLS AND DONATIVE TRANSFERS § 1.2 (Am. L. Inst. 1999) and Unif. Simultaneous Death Act § 2, 8B U.L.A. 148 (1993).

132. Long ago, one Texas court explained the purpose of estate administration: "An estate is administered for the purpose of satisfying the claims which may be held against it out of its assets, and passing what remains after this is done to the heirs, devisees, and legatees of the decedent." Houston v. Mayes' Estate, 66 Tex. 297, 17 S.W. 729 (1886). While there is no reliable data on the number of Americans without a will, estimates show that the rate of testation is well below fifty percent. *See* Bridget J. Crawford, Kelly Purser & Tina Cockburn, *Wills Formalities in a Post-Pandemic World: A Research Agenda*, 2021 U. CHI. L. FORUM 93, 103 n. 43 (noting that there is some evidence to suggest that "testate estates move through the probate system more quickly than intestate estates" and "between 31 and 57 percent of all adults in the United States have a will").

133. *See, e.g.*, Rebouché & Mary Ziegler, *supra* note 30, LePage v. Ctr. for Reprod. Med., *supra* note 45, and Joseph Choi, *Alabama Legislature Passes Protections for IVF Providers*, THEHILL (Feb. 29,2024, 1:46 PM ET), https://perma.cc/83SY-VKAZ.

134. *See generally* Grayson M.P. McCouch, *Custodianships, Trusts, and Guardianships*, 40 VA. TAX REV. 475 (2021) (providing an overview of multiple forms of ownership of property for the benefit of a minor and detailing the different tax consequences of these arrangements).

135. *See generally id.*

Personhood for zygotes-embryos-fetuses could dramatically complicate trust distribution patterns. In the case of a discretionary trust, how should a trustee account for the needs of a zygote-embryo-fetus? Might the trustee be open to a claim for breach of fiduciary duty from other living trust beneficiaries if the fiduciary does (or does not) treat a zygote-embryo-fetus on par with a living beneficiary?[136] How will the trustee become aware of the full extent of the class of beneficiaries if zygotes-embryos-fetuses are included?[137] There is little or no precedent to help answer these questions.[138]

C. TRUST DURATION

One of the most obvious ways a fetal personhood statute might disrupt trust law is by upending typical limits on trust duration. At common law, the maximum amount of time that a trust may continue is fixed by what is known as the rule against perpetuities.[139] Practically speaking, that means that irrevocable trusts are permitted to last for "lives in being plus twenty one years" from the date of the trust creation, or approximately two generations.[140] Although the traditional common law approach has been repealed or substantially abrogated in many jurisdictions,[141] some states still retain it in some form: either a ninety-year

136. *See, e.g.*, RESTATEMENT (SECOND) TRUSTS § 183 (Duty to Deal Impartially with Beneficiaries) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.") and BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, *General Duties—Duty to Exercise Ordinary Skill and Diligence* § 541 (2023) ("A trustee who manages a trust for multiple beneficiaries must comply with the duty of impartiality, the duty to administer the trust with impartial consideration for the interests of all the beneficiaries."). *But see* RESTATEMENT (SECOND) TRUSTS § 183 cmt. a ("By the terms of the trust the trustee may have discretion to favor one beneficiary over another. The court will not control the exercise of such discretion, except to prevent the trustee from abusing it.") For a discussion of the trustee's duty of impartiality, among others, *see* Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497 (2015) (exploring ways that the trustee's duties including impartiality contribute to a perception that the fiduciary deserves trust).

137. *See supra* notes 116–124 and accompanying text (discussing similar concerns in the estate administration context).

138. Perhaps the closest analogous authority is *In re Martin B.*, 841 N.Y.S.2d 207, 212 (N.Y. Sup. 2007), a New York County Surrogate decision. In that case, the court held that a grantor's grandchildren were permissible beneficiaries of a discretionary trust for the grantor's "issue" or "descendants," even though the grandchildren were conceived via ART after the death of their father (the grantor's son) and after the creation of the trust. *See id.* at 205 ("In view of such overall dispositive scheme, a sympathetic reading of these instruments warrants the conclusion that the Grantor intended all members of his bloodline to receive their share.").

139. *See, e.g.*, Bridget J. Crawford, *Magical Thinking and Trusts*, 50 SETON HALL L. REV. 289, 324 (2019) (providing a general explanation of the rule against perpetuities).

140. *Id.*

141. *See, e.g.*, RICHARD W. NENNO, STATE PERPETUITIES STATUTES (Dec. 15, 2022) (listing ten states that constitutionally prohibit perpetuities, some of which may also have statutes explicitly limiting trust duration; twenty-four states plus the District of Columbia that allow perpetual trusts; thirteen states that permit "very long trusts;" three states that follow the common law rule against perpetuities; and one state that mandates trusts termination upon the death of last member of certain family members of the grantor). For a compact historical account of the demise of the rule against perpetuities, *see* Jack H.L. Whiteley, *Perpetuities in an Unequal Age*, 117 NW. U. L. REV. 1477 (2023).

in-gross limitation, modeled after the Uniform Statutory Rule Against Perpetuities,[142] or the common law tempered by certain presumptions.[143]

If an embryo is a person for purposes of state law, then as long as the embryo remains frozen—which might be for longer than ninety years or traditional "lives in being" plus twenty-one years—then the trust can continue. Indeed, it is conceptually possible that some trust assets might never vest absolutely in any beneficiary at all, thus depriving the government of possible tax revenue otherwise collectible if the trust were to terminate and the assets were then owned outright.[144] Keeping an embryo "on ice" would make it easy for wealthy families to do an end-run around both perpetuities and taxes. Therefore, those concerned about the practical and policy impacts of perpetual trusts could be expected to oppose treating frozen embryos as legal persons on these grounds.[145]

D. GENERATION-SKIPPING TRANSFER TAX

Consider a fourth context in which fetal personhood laws could disrupt long-settled rules of wealth transfer taxation. In addition to federal taxes on lifetime gratuitous transfers (i.e., the gift tax) and transfers of property at death (i.e., the estate tax), there is a third type of wealth transfer tax known as the generation-skipping transfer tax ("GSTT").[146] In broad terms, GSTT is imposed—in addition to the estate or gift tax—on certain transfers to or for the benefit of persons two or

142. *See* Richard W. Nenno, *Choosing a Domestic Jurisdiction for a Long-Term Trust*, Tax Mgmt. (BNA) No. 867-2d, worksheet 4, State Perpetuities Statutes (Oct. 2019) (listing as the states that follow the Uniform Statutory Rule Against Perpetuities as California, Hawaii for certain trusts, Indiana, Kansas, Massachusetts, Minnesota, Montana, New Mexico, North Dakota for certain trusts, Oregon for certain trusts, South Carolina, and West Virginia).

143. *See id.* (listing as the states that follow the common-law rule against perpetuities as Iowa, New York, Texas, and Vermont).

144. *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2470 (2006) ("Although the rise of the perpetual trust might be viewed as evidence of a dynastic impulse, our findings suggest instead that the modern perpetual trust is primarily a creature of the federal transfer taxes."). Professors Schanzenbach and Sitkoff explain how the tax saving works: "By funding a trust with the amount of the transferor's exemption [or other assets], successive generations can benefit from the trust fund and any appreciation therein, free from federal wealth transfer taxes, for as long as state perpetuities law will allow the trust to endure." *Id.* at 2477.

145. There are many scholarly critiques of perpetual trusts; for some of the most recent, *see, e.g.*, Eric Kades, *A New Feudalism: Selfish Genes, Great Wealth, and the Rise of the Dynastic Family Trust (DFT)*, 55 CONN. L. REV. 19 (2022), Felix B. Chang, *How Should Inheritance Law Remediate Inequality?*, 97 WASH. L. REV. 61 (2022), and Carla Spivack, *The Estate Tax, Inequality, and the Problem of Public Choice*, 20 PITT. TAX REV. 397 (2023). *Cf.* Danny Fein, *In Defense of Perpetual Trusts*, 47 ACTEC L.J. 215, 216 (2022) ("The unsavory nature of both Dynasty Trusts and the legal reform movement that spawned them has blinded critics to a universe of perpetual trusts that are socially beneficial.") and Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?*, 111 MICH. L. REV. 79, 79 (2012) (calling critiques of perpetual trusts "misplaced and exaggerated").

146. *See* JOSEPH M. DODGE, WENDY C. GERZOG, BRIDGET J. CRAWFORD, JENNIFER BIRD-POLLAN, & VICTORIA J. HANEMAN, FEDERAL TAXES ON GRATUITOUS TRANSFERS: LAW AND PLANNING 64–67 (2d ed. 2023) (providing an overview of the GSTT).

more generations "younger" than the taxpayer.[147] Practically speaking, this typically means that transfers to grandchildren or more remote descendants are subject to GSTT.[148] A transferor's spouse is treated as belonging to the same generation as the transferor, without regard to any age difference between the spouses.[149] For non-relatives, persons born less than 12.5 years after the transferor have the same generation assignment as the transferor; those born more than 12.5 years but less than 37.5 years after the transferor are treated as one generation younger than the transferor.[150] Similar rules repeat every 25 years.[151]

With this background, it is essential to ask how embryo adoption could potentially upset usual generational assignments, even if the embryos remain frozen but are treated as a full legal person by state law. What happens if a grandparent, for example, adopts an embryo that a predeceased child had preserved before that child's death? Arguably, IRC § 2651 already supplies the answer: adoptees are treated the same as a "relationship by blood," so the embryo would then become the grandparent's child for GSTT purposes.[152] A transfer by the grandparent to or for the benefit of the embryo—if such a transfer were possible—would not be subject to GSTT.[153] But what if the same grandchild subsequently adopts their predeceased parent's frozen embryos, essentially becoming the parent of their genetic sibling? Are later transfers to or for the benefit of that adoptee's children exempt from GSTT, as transfers to a niece or nephew, or are the transfers subject to the GSTT, as transfers to skip-persons (i.e., deemed grandchildren)?[154] The questions seem mostly academic and more like a logic puzzle than impending

147. *See* 26 U.S.C. §§ 2601 (imposing of GSTT on any "generation-skipping transfer") and 2611 (defining "generation-skipping transfer"). *See generally* Carol A. Harrington, Generation-Skipping Transfer Tax, Tax Mgmt. (BNA 850-2d (providing a detailed analysis of the generation-skipping transfer tax).

148. *See* 26 U.S.C. §§ 2601 (imposing of GSTT on any "generation-skipping transfer"), 2611(a) (defining "generation-skipping transfers" as a "taxable distribution," a "taxable termination" and a "direct skip"). A taxable distribution is "any distribution from a trust to a skip person (other than a taxable termination or a direct skip)." 26 U.S.C. § 2612(a). A taxable termination is "the termination. . .of an interest in property held in trust" under certain circumstances. *Id.* at 2612(a). A direct skip is a transfer to a skip person. 26 U.S.C. § 2612(c). A skip person is "a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor or a trust (A) if all interests in such trust are held by skip persons, or (B) if (i) there is no person holding an interest in such trust, and(ii) at no time after such transfer may a distribution (including distributions on termination) be made from such trust to a nonskip person." 26 U.S.C. § 2613(a). All persons who are not skip persons are "non-skip persons." 26 U.S.C. § 2613(b).

149. *See* 26 U.S.C. § 2651(c)(1) ("An individual who has been married at any time to the transferor shall be assigned to the transferor's generation.").

150. *See* 26 U.S.C. § 2651(d) (Generation Assignment).

151. *See id.*

152. 26 U.S.C. § 2651(b)(3) ("For purposes of this subsection . . . [a] relationship by legal adoption shall be treated as a relationship by blood . . . [and a] relationship by the half-blood shall be treated as a relationship of the whole-blood.").

153. *See supra* notes 130–132 and accompanying text (speculating whether a zygote-embryo-fetus can legally own property).

154. See 26 U.S.C. §§ 2601 (imposing a generation-skipping transfer tax), 2651 (generational assignment and adoption), and 2613(a)(1) (defining a "skip person").

reality, but these hypotheticals suggest opportunities for strategic avoidance of GSTT presented by fetal personhood laws.

This Part has outlined four longstanding, well-settled tax, trust, and estate laws that broad fetal personhood statutes will threaten and destabilize. Indeed, one can imagine fetal personhood laws making it virtually impossible for any property owner to plan for the future with any degree of certainty.[155] Such a legal climate would be undesirable.[156]

IV. LIMITING THE SCOPE OF FETAL PERSONHOOD LAWS

Having identified a few of the unintended consequences of fetal personhood laws for tax, trusts, and estates, this Part considers how to minimize the disruptions that fetal personhood laws may cause. This is not to say that reproductive justice activists should drop their advocacy or that scholars who embrace the right to control one's own body as foundational to political, social, and economic equality for all people should abandon their work.[157] Instead, drawing attention to the unintended, far-reaching, and disruptive consequences of fetal personhood statutes is a pragmatic and parallel (if incrementalist) line of advocacy and scholarship advancing gender justice.[158] Furthermore, even people (and states) with anti-abortion stances might consider fetal personhood laws unnecessary or distracting; they may have genuine reasons to limit the negative impact of fetal protection laws or otherwise risk voters' rejection of the larger anti-abortion agenda.[159]

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155. *See generally* Paul B. Miller, *Freedom of Testamentary Disposition*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TRUSTS 176–200 (Simone Degeling, Jessica Hudson & Irit Samet eds., 2023) (reviewing many theoretical justification for the commitment in U.S. law to the freedom of disposition including fostering human autonomy, the morality of providing for one's family, and the virtue-enhancing value of gift-giving), and Emily E. Beach, Note, *Nudging Testators Toward Holistic Estate Planning*, 26 OH. ST. J. DISPUTE RESOL. 701, 713–14 (2011) (identifying estate planning as an opportunity to provide "a model for adult children of an open and communicative family in which every member's thoughts and feelings are respected" and minimizing will contests).

156. *See* Miller, *supra* note 155, at 196 ("Testamentary dispositions hold a special significance, morally and existentially. They are our final dispositions and so final opportunity to recognise and provide for persons and causes that mattered to us during our lives."). *See also* Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 429 (2012) (discussing the "positive psychological consequences of preparing an estate plan" including "the satisfaction that the testator experiences from knowing that his desired testamentary scheme is legally memorialized and that his estate will be distributed according to his wishes").

157. A more traditional description for these advocates and scholars might be "pro-choice." *But see generally* Jackie Calmes, *Advocates Shun 'Pro-Choice' to Expand Message*, N.Y. TIMES (July 28, 2014), https://perma.cc/B3W3-Y69K (noting that, for many advocates of access to abortion, "the term pro-choice, which has for so long been closely identified with abortion, does not reflect the range of women's health and economic issues now being debated").

158. *Cf.* Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. TIMES (Aug. 21, 2022), https://perma.cc/8E2G-T7VL (quoting Professor Mary Ziegler as saying, "Personhood has always been the ultimate ambition of the anti-abortion movement. The movement very much wants a declaration that abortion is a human rights and constitutional rights violation. Not just that it's a crime; that it's unconstitutional. From a symbolic standpoint, that's a really big deal . . . .").

159. *See, e.g.*, Pooja Salhotra, *Does a Fetus Count in the Carpool Lane? Texas' Abortion Law Creates New Questions About Legal Personhood*, TX. TRIB. (Sept. 13, 2022), https://perma.cc/VY7Y-B4G6 (observing that "While certain conservative legislators are advancing bills granting legal rights for

A. THE ROLE OF LEGISLATORS

With this further context, consider in more detail the argument that anti-abortion forces should limit fetal personhood laws, such as the state income tax deduction/credit rules for dependents. From a technical perspective, there is no doubt that a statute like Georgia's raises many answered questions about the interpretation and implementation of the "unborn" dependency exemptions, yet these issues could be addressed through detailed administrative guidance.[160] But unless Georgia also wishes to send its other tax, trust, and estate rules into chaos, legislators should pass another statute limiting the reach of fetal personhood laws.[161] Making clear that fetal personhood does not apply to tax law (beyond the dependency deduction) or to any aspect of trusts or estates would allow Georgia to continue providing benefits for pregnant people while minimizing disruptions to longstanding, basic tax and property law concepts.[162]

That being said, voluntary action by anti-abortion states to restrict the impact of their fetal personhood laws is unlikely.[163] Given the profoundly polarizing nature of abortion debates, lawmakers in anti-abortion states likely will be hesitant to appear to compromise in any way on the protection of the "unborn."[164] Expecting proactive legislative or executive measures to mitigate these laws' unintended consequences is unrealistic. Thus, the responsibility for addressing the reach and implications of fetal personhood laws will likely fall to the courts.

B. THE ROLE OF JUDGES

Judges will be called upon to interpret and apply fetal personhood laws to specific cases; disputes will arise at the intersections between and among fetal personhood, tax, trusts, and estates.[165] On the one hand, judges are uniquely

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the fetus, [some] anti-abortion activists said fetal personhood is not a priority.") *and* Judith Levine, *To Defeat Anti-Abortion "Moderation," Mobilize Fear*, INTERCEPT (Nov. 9, 2023, 3:55 PM), https://perma.cc/7CTJ-5X9V ("after 18 months of watching its take-no-prisoners politics repudiated at the polls, the anti-abortion movement has adopted a new look: 'moderation.'").

160. *See supra* Part II.A.

161. *See supra id.* and Part III.

162. *See supra* Part II.A.

163. *See, e.g.*, Mary Ziegler, *The Next Step in the Anti-Abortion Playbook Is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), https://perma.cc/8RCE-SUZV ("For the anti-abortion movement, the emerging plan is an all-out fight for fetal personhood. . . .[S]ince the 1960s, the movement's ultimate goal has been to secure legal protections for fetuses and embryos, despite the harm that could be done to the health and livelihoods of pregnant women."). *See also* Zernike, *supra* note 158 (quoting Professor Mary Ziegler on the goals of the anti-abortion movement).

164. *See, e.g.*, Patricia Mazzei & Alan Blinder, *Georgia Governor Signs "Fetal Heartbeat" Abortion Law*, N.Y. TIMES (May 7, 2019), https://perma.cc/V3CS-FSM7 (quoting Georgia Governor Brian Kemp saying after signing the "fetal heartbeat bill" in the years before *Dobbs* that "Our job is to do what is right, not what is easy. We are called to be strong and courageous, and we will not back down").

165. The traditional view is that "[j]udges ought to remember that their office is *jus dicere*, and not *'jus dare'*–to interpret law, and not to make law, or give law." Francis Bacon, *Of Judicature*, *in* SELECTED WRITINGS OF FRANCIS BACON 138 (Mod. Lib. ed. 1955). Although the notion of a judge as a "legislator" is controversial in many respects, the fact of the common law tradition is always reasoning by analogy and addressing novel issues. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *69

qualified to interpret laws.[166] They have institutional competence and experience shaping legal frameworks, particularly in contentious areas.[167] On the other hand, the proliferation of cases could clog the courts and become an undue burden on the judiciary.[168] Indeed, asking judges to interpret the scope of fetal personhood statutes seems, at least at some initial level, to be at odds with Justice Alito's goal of "return[ing] the power" to weigh moral questions "to the people and their elected representatives."[169]

As future courts grapple with the complexities and unintended consequences of fetal personhood laws, courts must strike a balance between protecting the rights of the zygotes-embryos-fetuses that the state has chosen to recognize as persons, on the one hand, and maintaining stability in tax, estate planning, and inheritance matters, on the other. Lawmakers must go beyond slogans about protecting life to limit the applicability of fetal personhood laws or risk throwing longstanding rules about property ownership into chaos.

To provide clarity that permits people to plan for the future, law reform and improvement organizations, scholars, and forward-thinking policymakers should

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(describing judges as "the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land"). Judge Richard Posner famously takes a slightly different view: "The rules are created . . . out of materials that include constitutional and statutory language and previous cases, but these conventional materials of judicial decision making quickly run out when an interesting case arises . . . but they do not determine . . . the outcome." Richard A Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006).

166. *Cf.* Cass Sunstein, *The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2582 (2006) ("There is no reason to believe that in the face of statutory ambiguity, the meaning of federal law should be settled by the inclinations and predispositions of federal judges.").

167. *But see* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780, 816 (2001) (reporting the results of a survey of 167 federal magistrate judges and finding that "the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations" so that "judicial decision making, like the decision making of other experts and laypeople, is influenced by [certain] cognitive illusions . . . ").

168. *See, e.g.*, Brian Lee, *New York's Pending Court Caseload Has Increased 15% From Pre-Pandemic Numbers*, LAW.COM (July 25, 2022), https://perma.cc/EJM2-VQQN (reporting in 2022 that "New York State Unified Court System has an active caseload of more than 453,000 pending civil, criminal felony and Family Court cases, a 15% increase compared to the end of February 2020, just before the onset of the pandemic, when the combined workload was just shy of 393,000 pending cases") and Merritt McAlistera, Adalberto Jordána, & Kimberly J. Muellera, *What Can Be Done About Backlogs?* 107 JUDICATURE 50, 51 (2023) ("No new judgeships have been authorized for the federal courts of appeals in more than 40 years, resulting in a system that is burdened by large caseloads: By 2021, filings per judge had increased nearly 22 percent."). For more detailed data about the caseloads of federal courts, *see, e.g.*, JUDICIAL BUSINESS 2022, U.S. COURTS, https://perma.cc/7ZXF-4ZQ6.

169. 142 S.Ct. at 2309. In his confirmation hearings before the United States Senate Judiciary Committee, then Judge (now Justice) John Roberts said, "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005), https://perma.cc/L455-YQRH (statement of John G. Roberts, Jr.). Judge Posner takes a different view. *See* Posner, *supra* note 165 ("No serious person thinks that the rules that the judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires. *The rules are created by the judges themselves.*").

strive for continued clarification, refinement, and limitation of the scope of fetal personhood laws.[170] This Part outlines three rules of interpretation worthy of study by law reformers and potential adoption in all states with fetal personhood laws.

1. Live Birth Required

The first rule of interpretation is that, unless explicitly provided for to the contrary in a will or trust instrument, a transferor should be conclusively presumed to intend that a zygote-embryo-fetus is not the beneficiary of an estate or trust; only persons who live outside the uterus should be entitled to inherit or otherwise own property. This presumption would function as a default position that aligns with the prevailing legal understanding of personhood and protects against potential uncertainties and conflicts.[171]

This rule safeguards the testator's autonomy and allows for consistent application of the decedent's intentions by placing the burden on those seeking to establish a zygote-embryo-fetus' entitlement to inheritance or trust benefits.[172] It also considers the practical challenges of ascertaining the decedent's desires regarding unborn entities and avoids potential conflicts arising from the changing circumstances and preferences of the beneficiaries.

2. Invalid Measuring Lives

The second rule of interpretation concerns treating in vitro embryos as the equivalent of a child *in utero* for purposes of the rule against perpetuities. Unless an in vitro embryo is implanted in vivo time when the perpetuities period commences, the embryo should not be considered a "measuring life" for perpetuities purposes.

The rule against perpetuities aims to prevent the creation of interests that may vest too remotely in the future. Applying this rule to in vitro embryos that have not been implanted acknowledges the uncertainties surrounding their development and potential viability. It also avoids perpetuating trust or estate arrangements that may last indefinitely without any practical termination point.

3. Fixed Generational Assignments

The third rule of interpretation anticipates situations in which embryos are adopted or become the legal property of a person other than the persons whose gametes lead to the creation of the embryo. Under this rule, if an embryo is legally adopted or its "ownership" transfers before developing into a living child

170. *See supra* notes 155–156 and accompanying text (recommending that fetal personhood laws be deemed to apply to no taxation laws except a state dependency deduction trusts; or estates).

171. *Cf.* Bridget J. Crawford, *Less Trust Means More Trusts*, 76 WASH. & LEE L. REV. ONLINE 74, 91–93 (2019) (discussing Louisiana law's treatment of an in vitro fertilized egg as a legal person while also treating them as property, insofar as embryos can be transferred and held in trust).

172. *See supra* Part III.A., B.

born alive, the living child should be treated, for GSTT purposes, as a child of the adoptive parents. This is consistent with existing law.[173]

This rule recognizes the legal significance of adoption and ensures that the adopted child receives equitable treatment within the GSTT framework. Treating the adopted child as a biological descendant aligns with the intent of the adoptive parents. It avoids undue complications and complexities in determining the child's legal status for tax purposes.

These rules of interpretation would address some of the most apparent complications of fetal personhood statutes for tax, trusts, and estates, but they are almost certainly incomplete. Nevertheless, the policy undergirding these rules is to limit the application of fetal personhood statutes beyond the narrow confines of anti-abortion laws and the state income tax deduction or credit. Guided by this policy, judges will have the flexibility to address complicated fact patterns arising in the future.

V. UNDERSTANDING LAWS OF TAXATION, TRUSTS, AND ESTATES AS MULTI-FUNCTIONARY (WITH KATHERINE KEATING)

Although the majority of adults in the United States support some access to abortion care, it is an issue that deeply divides the country and will continue to do so for years to come.[174] Anti-choice "abortion abolitionists" will seek aggressive expansion of restrictions on abortion, and reproductive justice advocates will need to make their case to the so-called "muddled middle," including people who believe there should be some limitations on abortion.[175] Neither group will be satisfied by limiting the application of fetal personhood statutes, but this approach is pragmatic. Writing over thirty years ago, Margaret Jane Radin explained that "there are two ways to think about justice. One is to think about justice in an ideal world, the best world that we can now conceive. The other is to think about non ideal justice; given where we find ourselves, what is the better decision?"[176]

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173. *See* 26 U.S.C. § 2651(b)(3)(A) (treating relationships by legal adoption the same as blood relationships).

174. *See, e.g.*, *supra* note 3 and accompanying text and Rebouché & Ziegler, *supra* note 30, at 31 (predicting that repealing *Roe* "will not reassure those who already felt disenfranchised by the Supreme Court and will galvanize a new generation of abortion-rights supporters. Erasing a constitutional right to choose will touch off a series of consequential battles between and within states and competing social movements").

175. *See generally* Rebouché & Ziegler, *supra* note 30, at 33 (describing the goals of "abortion abolitionists" as including criminalization) and Rachel M. Cohen, *The Challenge of Turning Pro-choice Americans Into Pro-choice voters*, VOX.COM (July 13, 2022, 12:50 pm EDT), https://perma.cc/6WSE-2LH2 (identifying as a challenge for "pro-choice candidates, elected officials, and advocates" the need to "make the best case for abortion access in a world where there is no longer a nationwide right, and in an environment where many pro-choice Americans have deep reservations about abortion").

176. Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699–1700 (1990) (writing in the context of "the double bind in the context of contested commodification of sexuality and reproductive capacity" and debates about whether the selling of sex and reproductive serves "is a threat to the personhood of women," as the "owners" of their bodies, or whether prohibitions on such activity "is a threat to liberation" by denying women the right to make decisions about their own bodies).

Given that the Supreme Court is not likely to reverse the *Dobbs* decision for many decades, if at all, and may one day be called upon to decide whether (and when) a zygote-embryo-fetus is a "person" for legal purposes, the pragmatic approach is to "decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on."[177] Thus, this Article sounds in a pragmatic feminism with its call to restrict the extension of fetal personhood laws beyond the state income tax dependency deduction or child tax credit: "The pragmatist solution is to confront each dilemma separately and choose the alternative that will hinder empowerment the least and further it the most."[178]

The laws of taxation, trusts, and estates might be unlikely arenas for applying fetal personhood laws, but the Georgia experience suggests that "money law" is a new front in the cultural conflicts. As critical tax theorists on the left have insisted for years, taxation is not neutral.[179] Forces on the right have confirmed this most recently by weaponizing the tax law in support of the anti-abortion movement.[180] Indeed, the Georgia income tax dependency statute should be understood as more motivated by symbolism than economics. After all, there were over 126,000 live births in Georgia in 2022.[181] Assuming (conservatively) a miscarriage rate of ten percent and that only half of all pregnant persons and parents of children born alive took the $3,000 state dependency deduction, Georgia's LIFE Act represents the shrinking of the tax base by more than $210 million.[182] Assuming (aggressively) a miscarriage rate of fifty percent and that all pregnant persons and parents of children born alive took the deduction, that would mean a $756 million reduction in the tax base.[183] While the actual cost likely is somewhere between these two figures, the use of the tax system to bolster the anti-abortion agenda is ironic in a state where legislators have so far declined to repeal the state's four percent sales tax on menstrual products, representing approximately $6.1 million in revenue.[184] Providing financial benefit to those

177. *Id.* at 1700.

178. *Id.* at 1704 (also calling for a dissolution of the "dominant social conception of the meaning of gender" while recognizing "the social empowerment that the dominant social conception of gender keeps us from achieving").

179. *See, e.g.*, Infanti & Crawford, *Introduction*, *supra* note 20, at xxi (identifying as the goals of critical tax theory "(1) to uncover bias in the tax laws; (2) to explore and expose how the tax laws both reflect and construct social meaning; and (3) to educate nontax scholars and lawyers about the interconnectedness of taxation, social justice, and progressive political movements").

180. *See* Winslow, *supra* note 106 and accompanying text (quoting Utah governor Spencer Cox).

181. *See Maternal/Child Health* Online Analytical Stat. Info. Sys. Web Query Tool, Ga. DEPT. OF PUB. HEALTH, https://perma.cc/2AZD-XS6L (select "number of births," "Georgia," and "get data" to show 126,001 live births in Georgia in 2022).

182. This figure represents an estimated 140,000 total pregnancies in Georgia in 2022, 10% of which resulted in miscarriage, and a $3,000 deduction taken by 70,000 taxpayers. *See id. See also Guidance Related to House Bill 481*, *supra* note 68 (providing $3,000 as the amount of the deduction for a "dependent unborn child").

183. This figure represents an estimated 252,000 total pregnancies in Georgia in 2022, 50% of which resulted in miscarriage and a $3,000 deduction taken by 252,000 taxpayers.

184. *See* Brianna Cook, *Georgia Women Continue to Pay Extra 4% Sales Tax on Menstrual Products Until Law is Passed*, WGXA. NEWS (Apr. 14, 2023), https://perma.cc/6W2D-ZRFL (quoting state lawmaker Nabliah Islam as saying that Georgia's sales tax revenue on menstrual products is

who are capable of reproduction is apparently less politically appealing in Georgia than financial benefits for embryos-zygotes-fetuses.

That the tax system both reflects and shapes social values is not a new concept, either. Professor Anthony Infanti has explained, "The construction of a tax system . . . involves political, social and cultural questions that different countries answer differently—and in ways that send messages about how those societies see themselves, what and whom they value, and how they wish to be seen in the future."[185] In states that have adopted them, fetal personhood laws, along with tax deductions or credits for embryos-zygotes-fetuses, solidify and telegraph the state's anti-abortion agenda. By affording the same tax benefit for a zygote-embryo-fetus as for a child born alive (or even stillborn), the state signals within and beyond state borders its anti-abortion commitments.[186] While abortion supporters should seek to limit the expansion of fetal personhood laws to other areas of tax or to any aspect of trusts and estates, a pragmatic approach tolerates the state income tax deductions/credits. To be sure, the tax system should be a constituent part of the social, legal, and political structures targeted by those who "see access to abortion and other reproductive health services as central to the equality, dignity, autonomy, and liberty of people who can get pregnant."[187]

CONCLUSION

The rules of interpretation outlined in this Article aim for clarity and guidance at the intersection between and among fetal personhood statutes and the law of taxation, trusts, and estates. The approach is decidedly pragmatic; it recognizes that anti-abortion laws, including fetal personhood statutes, are likely to be part of the legal landscape for the foreseeable future. Absent voluntary action by anti-abortion states to limit the scope of fetal personhood laws, the interpretative guidelines aim to achieve fairness, predictability, and stability in tax and property law rules in place of a comprehensive approach to fetal personhood. This discussion of the anticipated challenges for tax, trusts, and estates is non-exhaustive; it establishes a foundation for further thought and scholarship. Law reform organizations such as the American Law Institute and the Uniform Law Commission, as well as bar associations, lawmakers, judges, academics, and everyday people of all political viewpoints, have an interest in avoiding destabilizing and unintended consequences of fetal personhood statutes.

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approximately $6.1 million, or 0.01% of state tax revenue) and Maya T. Prabhu, *Georgia Oks Providing Menstrual Products to Low-Income Girls, Women*, ATLANTA J.-CONST. (Apr. 10, 2019), https://perma.cc/CA44-MWTC (reporting decision of Georgia legislature to allocate $1 million to low-income school districts to provide free menstrual products for students in lieu of repealing the state sales tax on menstrual products).

185. INFANTI, OUR SELFISH TAX LAWS, *supra* note 21, at 108. *See also* Kitty Richards, *An Expressive Theory of Tax*, 27 CORNELL J. OF LAW & PUB. POL'Y 301 (2017) (discussing the many ways that tax laws express larger social values) and Tsilly Dagan, *The Currency of Taxation*, 84 FORDHAM L. REV. 2537, 2537 (2016 (arguing that "the currency of taxation necessarily sorts through attributes and actions and measures and arranges them along the income tax scale").

186. *See supra* Part II.A.

187. Roubché & Ziegler, *supra* note 30, at 30.