

MY UTERUS, MY CHOICE: ABORTION BANS AND PROPERTY INTERESTS IN THE FEMALE BODY

Abstract: For fifty years, people who can become pregnant have relied on the ability to access abortions as a part of ordinary, safe, and quality medical care. Abortions are low-risk medical procedures that provide people who can become pregnant with the ability to control their health and well-being. The Supreme Court stripped women of their reproductive freedom in holding that the constitutional right to privacy does not extend to abortion. This means that legislatures can subject women to the host of physical and fiscal consequences of pregnancy. Alternative legal strategies are needed to secure women’s ability to participate equally in society. Property rights protect property owners from undue interference at the hands of both private and public actors. This Note argues that providing women with a legally recognized property interest in their uteruses comports with a modern understanding of bodily autonomy, accords with present day uses of women’s reproductive capacities, and protects their personhood from undue governmental interference.

INTRODUCTION

“My body, my choice.”¹ This adage has become synonymous with bodily autonomy and reproductive freedom.² But the possessive pronouns that empower the speakers of this phrase may do so only figuratively.³ That is, without

¹ See Suzannah Weiss, *5 Things That Are #MyBodyMyChoice*, BUSTLE (Sept. 25, 2015), <https://www.bustle.com/articles/113094-5-things-that-are-mybodymychoice-because-respecting-them-is-essential-for-creating-a-culture-of-consent> [<https://perma.cc/7UY9-Y25F>] (describing the applicability of the phrase to the reproductive rights movement and to consent culture). This Note generally refers to people who can become pregnant as women but would like to acknowledge that not all people with uteruses who can become pregnant identify as women and this Note by no means intends to exclude those people from the conversation. See Harmeet Kaur, *The Language We Use to Talk About Pregnancy and Abortion Is Changing. But Not Everyone Welcomes the Shift*, CNN (Sept. 4, 2022, 6:01 AM), <https://www.cnn.com/2022/09/04/us/abortion-pregnant-people-women-language-wellness-cec/index.html> [<https://perma.cc/YKJ9-BTYA>] (discussing arguments for and against expanding the language used in these discussions).

² See ROBIN STEVENSON, *MY BODY MY CHOICE: THE FIGHT FOR ABORTION RIGHTS 2* (2019) (describing abortion as a woman’s right to control her body and outlining the history and future trajectory of the fight for reproductive freedom).

³ See Elizabeth Hira, *The Government Has a Long History of Controlling Women—One That Never Ended*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021) (quoting *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103d Cong. 207 (1993) (statement of Ruth Bader Ginsburg) (“[T]he decision whether or not to bear a child is central to a woman’s life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully

the ability to make decisions about one's own reproductive future, is it really "my body, my choice" after all?⁴

Reproductive freedom took a serious blow in June of 2022 when the U.S. Supreme Court overturned fifty years of precedent in *Dobbs v. Jackson Women's Health Organization* by holding that the constitutional right to privacy does not guarantee a right to an abortion.⁵ This decision opened the doors to state abortion restrictions and, in some cases, outright bans with limited exceptions.⁶ In these states, women and other people who can become pregnant are left without guaranteed access to basic health care.⁷ Additionally, despite hold-

adult human responsible for her own choices.")), <https://www.brennancenter.org/our-work/analysis-opinion/government-has-long-history-controlling-women-one-never-ended> [<https://perma.cc/5G3F-VE2V>].

⁴ See Liz Borkowski, *An Illegitimate Court Strips Us of Bodily Autonomy*, PUMP HANDLE (June 26, 2022), <https://www.thepumphandle.org/2022/06/26/an-illegitimate-court-strips-us-of-bodily-autonomy/#.Y7rtLuzMKEs> [<https://perma.cc/5BFV-LFNX>] (detailing how bodily autonomy is one of the primary arguments levied against abortion restrictions). Some abortion rights advocates describe abortion bans as "forced birth." E.g., M. Gregg Bloche & Sarah K. Werner, Opinion, *Abortion Bans Are a Threat to Patients. Doctors Can and Should Resist Them.*, WASH. POST (Aug. 18, 2022), <https://www.washingtonpost.com/opinions/2022/08/18/abortion-bans-threat-doctors-standards-overcome/> [<https://perma.cc/92AY-ZMCN>]. Violence against women frequently takes the form of control over women's bodies. See Press Release, U.N. Population Fund, *Nearly Half of All Women Are Denied Their Bodily Autonomy*, Says New UNFPA Report, My Body Is My Own (Apr. 14, 2021), <https://www.unfpa.org/press/nearly-half-all-women-are-denied-their-bodily-autonomy-says-new-unfpa-report-my-body-my-own> [<https://perma.cc/53W6-WAKU>] (finding that almost half of all women in a sample of developing countries did not have the freedom to consent to engage in sex, use birth control, or access reproductive health care). A 2021 United Nations Population Fund report revealed that, in fifty-seven developing nations, women are denied bodily autonomy. See *id.* (citing sexual assault, forced sterilization, forced testing of virginity, and genital mutilation as examples). Additionally, a mere 55% of women retain full power to make choices over their own health care, birth control, and ability to consent to sexual activity. *Id.* In the wake of the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, it is not clear that the United States fits into this 55% anymore. See 142 S. Ct. 2228, 2242 (2022) (declaring that the Constitution does not provide a right to obtain an abortion at any stage in a pregnancy). Women who retain control over their own bodies have a greater chance of feeling empowered in other areas of their lives. Press Release, U.N. Population Fund, *supra*.

⁵ 142 S. Ct. at 2242. The decision in *Dobbs* narrowed the scope of bodily autonomy. See *Supreme Court Strips Women of Bodily Autonomy*, LEAGUE OF WOMEN VOTERS OF HUDSON (June 24, 2022), <https://my.lwv.org/ohio/hudson/supreme-court-strips-women-bodily-autonomy> [<https://perma.cc/J7VL-VGYZ>] (describing how the Court's ruling deprives women of the ability to participate equally in democracy).

⁶ See Allison McCann et al., *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/BE3F-MGA7>] (Oct. 24, 2023) (tracking the fourteen states that now ban most abortions, the two states that have a six-week abortion ban, and the four states that have seen attempted abortion bans blocked by state judges at the time of publication). The fight over access to abortion continues to unfold both in statehouses and in courtrooms. *Id.*

⁷ See Laurie C. Zephyrin & David Blumenthal, *The Loss of Abortion Rights Will Send Shockwaves Through the U.S. Health Care System*, COMMONWEALTH FUND (June 24, 2022), <https://www.commonwealthfund.org/blog/2022/loss-abortion-rights-will-send-shockwaves-through-us-health-care-system> [<https://perma.cc/P9JQ-5LN2>] (describing how women in the United States have a greater chance of dying from pregnancy complications than their counterparts in other wealthy nations).

ing that abortion regulation should be left to the states, the *Dobbs* majority opinion did not foreclose the possibility of Congress passing a national abortion ban.⁸ Not only do these abortion restrictions strip women of the ability to make meaningful decisions about their own reproductive futures, they also hand state governments the power to make unilateral decisions about the bodies of their constituents.⁹ In essence, *your body, my choice*.¹⁰

Notions of bodily autonomy and integrity are deeply intertwined with the concept of property.¹¹ That said, there is no consistent approach for classifying bodies and body parts as property.¹² Although certain critics are concerned with the moral and legal consequences of commodifying body parts, allowing

Abortion bans limit the ability to manage conditions such as ectopic pregnancies, miscarriages, and other complications. *See id.* (raising concerns about a chilling effect, where women may be reluctant to seek care that falls outside the scope of the abortion restriction, and doctors may be reluctant to provide it). Not only will women suffer as a result of these new laws, but states are also less likely to commit time to training and hiring reproductive health care professionals who provide lifesaving care to women and provide treatment in the wake of sexual assaults. *See id.* (highlighting how abortion bans and restrictions are likely to have the greatest impact on communities of color, groups who already disproportionately receive lower quality health care services).

⁸ *See* 142 S. Ct. at 2318 (Breyer, Sotomayor & Kagan, JJ., dissenting). Members of Congress have already proposed a national abortion ban which would prohibit abortions after fifteen weeks with limited exceptions. Amy B. Wang & Caroline Kitchener, *Graham Introduces Bill to Ban Abortions Nationwide After 15 Weeks*, WASH. POST (Sept. 13, 2022), <https://www.washingtonpost.com/politics/2022/09/13/abortion-graham-republicans-nationwide-ban/> [<https://perma.cc/B2AX-EMJM>]. This proposed bill includes the possibility of jail time and criminal penalties for doctors who provide abortion services. Maggie Jo Buchanan, *What You Need to Know About the Bill to Ban Abortion Nationwide*, CTR. FOR AM. PROGRESS (Sept. 16, 2022), <https://www.americanprogress.org/article/what-you-need-to-know-about-the-bill-to-ban-abortion-nationwide/> [<https://perma.cc/PHV6-77UR>]. This piece of legislation would strip pro-choice states of the ability to decide to permit abortions after fifteen weeks, which would run counter to the logic of the majority's opinion in *Dobbs* that individual states ought to make decisions about abortion. *Id.*

⁹ *Dobbs*, 142 S. Ct. at 2345 (Breyer, Sotomayor & Kagan, JJ., dissenting).

¹⁰ *See* Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1232 (2017) (describing states compelling a woman to remain pregnant as subjecting her to the fate they determine, which in this instance is to operate as a "womb or incubator").

¹¹ *See Dobbs*, 142 S. Ct. at 2328 (Breyer, Sotomayor & Kagan, JJ., dissenting) (evoking themes of bodily autonomy and self-ownership). In 1992, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* discussed the concept of bodily integrity and evoked property law themes in quoting a portion of the Court's 1891 opinion of *Union Pacific Railroad Co. v. Botsford*, which stated that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others" *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 926 (1992) (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)), *overruled by Dobbs*, 142 S. Ct. 2228. *Union Pacific* addressed whether a court could compel a plaintiff to undergo surgical examinations of an alleged injury. 141 U.S. at 251. The Court held that a court could not compel the plaintiff to submit to such an examination. *Id.* at 257.

¹² *See* Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549 (2013) (positing that clarifying the legal status of human bodies using property law concepts helps to explain the rights and obligations that society has with respect to the human body). The inconsistency in how courts have treated bodies and our ability to use them is confusing. *See id.* (explaining how the lack of a consistent approach has led to circumstantially defined outcomes).

women to reap the full benefits of their reproductive capacities, and protecting this asset from outside interference, may nevertheless provide an empowering option for women.¹³

According to figures recorded prior to the *Dobbs* decision, eighteen percent of pregnancies terminate in an abortion and one in four women under the age of forty-five in the United States are estimated to have had one.¹⁴ Women have relied on the availability of these procedures to order their lives and to make decisions about whether a pregnancy would be in the best interest of their own health and general well-being.¹⁵ Governments are free to make decisions about abortion care for women when there is no constitutional right in place.¹⁶ The majority opinion in *Dobbs* discounts the reliance on the ability to access care, arguing that the reliance on the promises of the U.S. Supreme Court's 1973 decision in *Roe v. Wade* and its 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* are not concrete.¹⁷ The opinion called for the kind of tangible economic reliance found in contract or property

¹³ See Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 433 (2000) (distinguishing privacy rights from property rights by articulating how property rights both safeguard against governmental intrusion into one's property and provide individual rights over fellow citizens). In this respect, a constitutional protection of property rights is more empowering than a constitutional right to privacy. *Id.* Scholars argue that the law ought to consider how it fosters or subverts core societal values like bodily autonomy. JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 5 (2011). Property offers both rhetorical and legal power. See Laura S. Underkuffler, Essay, *On Property: An Essay*, 100 YALE L.J. 127, 129 (1990) (describing property as central to an individual's life and the broader legal system, reaching an emotional importance in society).

¹⁴ *Dobbs*, 142 S. Ct. at 2343–44 (Breyer, Sotomayor & Kagan, JJ., dissenting) (citing Katherine Kortsmitt et al., CDC, *Abortion Surveillance—United States, 2019*, 70 MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES 7 (2021)); Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae Supporting Respondents at 9, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

¹⁵ See *Casey*, 505 U.S. at 856 (describing a refusal to recognize that women have relied on the ability to access an abortion as a refusal to “face the fact[s]”). Women and their partners have constructed their private relationships, economic futures, and professional lives based on the notion that, in the event of an unplanned pregnancy, they do not have to carry that pregnancy to term. *Id.* *Roe v. Wade* established a constitutional right to an abortion fifty years ago and since 1973, women have ordered their lives in reliance on this right. Leila Abolfazli, *This Is the First Roe v. Wade Anniversary Where There Is No Roe*, NAT'L WOMEN'S L. CTR. (Jan. 20, 2023), <https://nwlc.org/this-is-the-first-ro-e-v-wade-anniversary-where-there-is-no-ro-e/> [https://perma.cc/KA8Q-FJYF].

¹⁶ See *Dobbs*, 142 S. Ct. at 2243 (holding that elective officials ought to decide the permissibility of abortion). In the wake of this decision, states have the ability to force a woman to continue a pregnancy, regardless of the cost for the woman and her life. See *id.* at 2318 (Breyer, Sotomayor & Kagan, JJ., dissenting) (describing how courts will uphold most abortion bans under a rational basis review level of scrutiny because states are free to claim a rational interest in protecting the life of a fetus).

¹⁷ See *id.* at 2346 (Breyer, Sotomayor & Kagan, JJ., dissenting) (describing the majority's preference for concrete reliance interests because reliance on the ability to make intimate choices seemed too intangible). This Note echoes the dissenting Justices' criticism that a tangible economic interest has not traditionally been necessary to establish a reliance interest. See *id.*

law.¹⁸ Embracing the uterus as the woman's property could further advance abortion litigation in a post-*Roe* legal landscape by demonstrating the tangible economic harms of forced birth.¹⁹

This Note argues that in the wake of the Court's decision in *Dobbs*, it is essential that courts clarify that women are in charge of their own reproductive health.²⁰ One possible way to do so is by establishing that women have a property interest in their uteruses.²¹ Part I of this Note provides background on the basic principles of property law and how property law concepts have become entangled with matters concerning the human body.²² Part II applies traditional property law concepts to various human biological material, outlines where women already retain ownership-like control over their bodies, and addresses potential concerns with the commodification of bodies.²³ Part III suggests that based on society's existing treatment of women's reproductive capacities and the need for clarity and creativity in both the law of the body and reproductive justice lawyering moving forward, women ought to have a recognized property interest in their uteruses.²⁴

I. THE ANATOMY OF THE LAW OF THE BODY

Courts and scholars disagree on the intersection of property law and the human body.²⁵ The current status of the law governing the human body is an amalgamation of property rights, quasi-property rights, family law, contract law, and privacy interests.²⁶ The applicability of each of these frameworks varies with whether the body is alive or dead, whether it is a whole body or a specific part at issue, and whether that part is still attached to the rest of the anat-

¹⁸ See *id.* (describing the majority's focus on commercial reliance as "impoverished" and too narrow a perspective on the reliance issues at stake).

¹⁹ See David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1, 2 (2022), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2022/08/Cohen-et-al.-75-Stan.-L.-Rev.-Online-1.pdf> [<https://perma.cc/V8EQ-T5B9>] (calling for greater creativity in abortion litigation strategies).

²⁰ See *Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor & Kagan, JJ., dissenting) (expressing sorrow for women who, without a protected right to access abortion care, are left without access to an important constitutional right).

²¹ See generally Render, *supra* note 12 (outlining the areas where body parts have already been treated as property).

²² See *infra* notes 25–140 and accompanying text.

²³ See *infra* notes 141–232 and accompanying text.

²⁴ See *infra* notes 233–278 and accompanying text.

²⁵ See Render, *supra* note 12, at 549 (noting the myriad way bodies are treated as property and the societal norms that render courts and scholars wary of such classifications).

²⁶ See *id.* at 555 (providing examples of where corpses are treated as quasi-property, certain disembodied biological materials are treated as traditional property, and how family and contract law govern surrogacy). Alternatively, interests in human bodies are sometimes described as rooted in privacy and bodily autonomy concerns. See generally Rao, *supra* note 13 (describing the legal treatment of human bodies).

omy.²⁷ One of the creative arguments advanced for achieving bodily autonomy focuses on the interplay between property interests and human bodies.²⁸ The most powerful feature of a property interest is the set of rights that are associated with it.²⁹ This set is generally referred to as a “bundle of rights” or “bundle of sticks” which include the right to possession, use, exclusion, profit, and disposal of one’s property.³⁰

This Part of the Note provides a general background on property theory and discusses the various ways courts have approached property interests in bodies.³¹ It also details how women’s reproductive capabilities have been capitalized on for their economic and social benefits along with relevant restrictions imposed by the legislature and the judiciary.³² Section A of this Part provides a brief overview of property law, the rights that come with a property interest, and how property is determined.³³ Section B of this Part outlines the scope of legally recognized property interests in the body and the distinct categories courts have created to limit the scope of the rights affiliated with different bodies, body parts, or bodily processes.³⁴ Section C describes the way in which the capabilities of the female anatomy have been used for economic gain.³⁵ Section D discusses the physical and economic impact of pregnancy and how the U.S. Supreme Court’s 2022 decision in *Dobbs v. Jackson Women’s Health Organization* will exacerbate these burdens by allowing state governments to exercise control over the physical bodies of their bodies politic.³⁶

A. Property Law and the “Bundle of Rights” Metaphor

Property rights have historically been defined as a collection of more specific rights which include possession, use, exclusion, profit, and disposal.³⁷ All

²⁷ See generally Render, *supra* note 12 (outlining the various court decisions that have addressed laws that govern human bodies).

²⁸ See generally *id.*

²⁹ See Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 249 (2007) (describing how the metaphor of property as a bundle of rights indicates that property law addresses more than simple ownership and the relationship between the owner and the owned and instead encompasses legal relationships between persons).

³⁰ See *id.* at 250 (reflecting on the evolution of the metaphor of property rights in America as a “bundle of rights” or a “bundle of sticks”).

³¹ See *infra* notes 33–140 and accompanying text.

³² See *infra* notes 33–140 and accompanying text.

³³ See *infra* notes 37–49 and accompanying text.

³⁴ See *infra* notes 50–92 and accompanying text.

³⁵ See *infra* notes 93–117 and accompanying text.

³⁶ See *infra* notes 118–140 and accompanying text.

³⁷ See *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991) (describing the relatively amorphous concept of property in the law as associated with a list of rights). The Supreme Court has recognized that this view of property rights as a bundle of sticks serves as the dominant legal framework. See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (discussing the right to exclude as an essential component of the bundle of rights that make up property); Johnson, *supra* note

of the property rights do not need to be present to give rise to an ownership interest.³⁸ Rather, the “bundle of rights” describes the rights and responsibilities that flow from ownership.³⁹ Today, property can include not only physical objects, but any resource which may have market value.⁴⁰ The law’s concept of what constitutes property has expanded and retracted over time.⁴¹ The expansion generally stems from either the uncovering of a new item or a meaningful change in the ability to use a previously discovered item.⁴² This expansion unfolds in the following ways: first, society uncovers a new item or use of an item and that entity is brought under the concept of property.⁴³ Second, one looks to principles of ownership to ascertain who owns the entity.⁴⁴ Lastly, one examines the nature of the entity, its use, and any conflicts with the rights of others in order to understand the scope of the ownership rights.⁴⁵

Property rights flow from the item itself and the mere existence of a thing one can easily identify as owned puts others on notice of what their duties are in relation to that thing.⁴⁶ This provides personal security for the owner.⁴⁷ Property

29, at 247. A.M. Honoré’s essay on property rights listed eleven elements of ownership which comprised the bundle of rights. See A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 112–13 (A.G. Guest ed., 1961) (including rights of possession, use, management, income, capital, security, transmissibility, absence of a term, prohibition of harmful use, liability to execution, and residuary character).

³⁸ See Rebecca L. Rausch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 38–39 (2012) (describing how use, acquisition, and disposal are commonly affiliated with property but the right to dispose by sale can be limited without destroying the property interest in the resource).

³⁹ Johnson, *supra* note 29, at 247.

⁴⁰ See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 381 (1997) (articulating how in modern American society, there is a trend toward intangible assets as the more valuable resources).

⁴¹ See Render, *supra* note 12, at 569 (using the example of the printing press and how property expanded to accommodate both an interest in the book and in the contents of the book). The legal consensus on what counts as property narrowed with the passing of the Thirteenth Amendment and the prohibition on owning another as an enslaved person. See U.S. CONST. amend. XIII.

⁴² Render, *supra* note 12, at 569. In the example above, the book was a known piece of property when the printing press was invented but the printing press changed how books could be used and called for a new property interest in the content of the book separate from the physical book. *Id.*

⁴³ See *id.* (citing Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. STATE L.J. 1075, 1076 (1997)) (discussing how new property interests arise and the law’s role in defining that interest).

⁴⁴ See *id.* (articulating how this step involves determining how ownership interests can be distributed for the entity).

⁴⁵ See *id.* (describing this final step as determining the “incidents of ownership”) (quoting Sherwin, *supra* note 43, at 1076).

⁴⁶ See *id.* at 562 (citing Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001)) (describing how, without knowing who the owner is, one still knows not to enter, use, or take a piece of property).

⁴⁷ See Merrill & Smith, *supra* note 46, at 359 (describing the way in which property imposes duties on others in addition to the owners). These non-owners ought to be able to easily identify property and thus will be on notice about any obligations they may have. *Id.*

interests are not absolute; they can be constrained by common law or statutes that are designed to promote societal interests.⁴⁸ Courts have attempted to employ these tenants of property law to resolve controversies surrounding the human body.⁴⁹

B. The Legal Landscape of Property Interests in the Body

Courts have historically refused to recognize a general property interest in the body despite isolated incidents of courts granting specific body parts and biological material some property protections.⁵⁰ Subsection 1 details the contexts in which courts and legislatures have been willing to recognize property interests in body parts and human biological matter.⁵¹ Subsection 2 of this Section outlines where courts have declined to recognize a property interest in the human body.⁵²

1. Recognized Property Interests in Bodies and Biological Material

Human bodies and body parts are considered the property of the individual inhabiting the body in a number of contexts.⁵³ Prior to medical advances in procedures such as organ transplants and in vitro fertilization, courts and legislatures almost exclusively discussed the potential property implications of bodies in the context of corpses.⁵⁴ Although there is no legally recognized property interest in a living person's entire body, there are quasi-property rights that at-

⁴⁸ See Johnson, *supra* note 29, at 254 (listing environmental, public health, and safety concerns as motivating factors behind constraints on property rights). Nuisance law prevents owners from using their property in a way that negatively impacts the rights of others. *Id.* Additionally, the Civil Rights Movement gave rise to legislation that prohibits restaurant owners from refusing to accommodate people on the basis of race and prohibits homeowners from refusing to sell property on account of the race of the prospective buyer. *Id.* at 255–56. The government has the power to take private property from its citizens for public good so long as they receive just compensation. U.S. CONST. amend. V.

⁴⁹ See Rao, *supra* note 13, at 371 (describing the judiciary's application of property law concepts to bodies and biological materials).

⁵⁰ See Render, *supra* note 12, at 549 (chronicling the instances where bodies are treated as property and circumstances where courts are wary of such classifications).

⁵¹ See *infra* notes 53–72 and accompanying text.

⁵² See *infra* notes 73–92 and accompanying text.

⁵³ See Rao, *supra* note 13, at 371 (describing blood and sperm as commercialized objects, the overlap between property law and organ donation, and arrangements for post-mortem disposal of bodies according to the will of the deceased or their heirs).

⁵⁴ See William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 705 (1995) (describing the concern with how dead bodies would be interned or otherwise disposed of). One exception to the notion that early body property discussions were limited to corpses is coverture laws, where women were also considered the property of either their fathers or their husbands. See Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO L.J. 2127, 2127 (1994) (describing the legal ramifications of this as preventing women from owning property and entering into contracts).

tach to corpses.⁵⁵ Laws that did address bodies were primarily concerned with what would happen to the body and its severable parts after the person's death.⁵⁶ These quasi-property rights included the heir's rights to possess the body for burial and the right to donate the body for research and the organs for transplants.⁵⁷

Courts have declined to recognize a commercial property interest in dead bodies.⁵⁸ The Uniform Anatomical Gift Act (UAGA) provides individuals with the ability to arrange for post-mortem donations of their bodies and body parts for transplant, scientific research, or medical education.⁵⁹ The decedent can arrange to donate their body at their death or their family members can decide to donate the body after their relative has passed.⁶⁰ Some scholars argue that the UAGA departs from the common law notion of bodies as quasi-property, and instead provides for traditional property rights.⁶¹ Individuals are permitted to participate in medical education and scientific research while alive, but other people cannot possess the authority to make this decision on their behalf.⁶²

Biological materials such as sperm, blood, and organs are subject to certain traditional property law concepts.⁶³ In 1980, in *Green v. Commissioner of*

⁵⁵ Render, *supra* note 12, at 555.

⁵⁶ Boulter, *supra* note 54, at 705.

⁵⁷ *Id.* at 709.

⁵⁸ See *Culpepper v. Pearl St. Bldg., Inc.* 877 P.2d 877, 880 (Colo. 1994) (en banc) (describing how corpses cannot be bought or sold and that the property interests are limited to managing the disposal of the body). Although courts generally describe these rights as quasi-property, they disagree on how meaningful this distinction is from full property rights. Rao, *supra* note 13, at 384.

⁵⁹ Rao, *supra* note 13, at 377–78. Each of the fifty states has adopted some variation of the Uniform Anatomical Gift Act (UAGA). *50th Anniversary of the Uniform Anatomical Gift Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/aboutulc/spotlightulc> [<https://perma.cc/R8TH-J4UB>]. Congress amended the UAGA both in 1987 and in 2006. *Uniform Anatomical Gift Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/uniform_anatomical_gift_act#:~:text=The%20act%20allows%20a%20decedent,address%20shortages%20and%20encourage%20donation [<https://perma.cc/BV6A-VDVK>]. Subsequent changes were primarily aimed at encouraging donation. *Id.*

⁶⁰ See Rao, *supra* note 13, at 382 (describing how this constitutes a future interest in an individual's body after death which can be transferred to the deceased's heirs). This concept rejects the notion that bodies are not property. *Id.*

⁶¹ See *id.* (arguing that in providing individuals with future interests in their own bodies post-mortem and permitting this interest to be transferred to other persons or to descend to the heirs, the UAGA treats corpses as private property). Some scholars suggest that courts should treat donated organs as market-inalienable property. See Erin Colleran, Comment, *My Body, His Property?: Prescribing a Framework to Determine Ownership Interests in Directly Donated Human Organs*, 80 TEMP. L. REV. 1203, 1221 (2007) (advocating that the law treat organs as property capable of being gifted to another but not sold).

⁶² See U.S. CONST. amend. XIII (ending the practice of legal slavery in the United States, which was the owning of persons by other persons whereby an individual could make decisions for another person's living body).

⁶³ See, e.g., *Hecht v. Superior Ct.*, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (describing frozen sperm as property and employing traditional property concepts to its disposal); see also *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (en banc) (describing blood plasma as tangible property); Render, *supra* note 12, at 555. In 1979, in *United States v. Garber*, the U.S. Court of Appeals for the

Internal Revenue, the U.S. Tax Court held that an individual's blood plasma could be a tangible product.⁶⁴ Blood has achieved full property status because it has been commercialized.⁶⁵ In 1990, in *Moore v. Regents of the University of California*, the California Supreme Court also suggested that the spleen cells at issue were considered the property of the researchers not the donor.⁶⁶ The National Organ Transplant Act (NOTA) prohibits the sale or receipt of human organs in exchange for consideration.⁶⁷ Nevertheless, the original user of the organs can donate these parts for transplant or potentially even sell the parts for non-transplant purposes such as education or research.⁶⁸

One person or government entity cannot compel another person to donate their organs, regardless of the degree of risk to the potential donor and the degree of need of the recipient.⁶⁹ In 1978, in *McFall v. Shimp*, the Common Pleas Court of Allegheny County, Pennsylvania, held that no one could require a man who was a suitable donor for a bone marrow transplant to donate his mar-

Fifth Circuit indicated that transferring blood plasma could be a sale of property because compensation was related to the number of antibodies. 607 F.2d at 97.

⁶⁴ See 74 T.C. 1229, 1234 (1980) (describing how the petitioner's rare blood type made her blood plasma a profitable product akin to other animal byproducts such as eggs, milk, or honey). The blood plasma transfer constituted a sale of tangible property because the compensation reflected the quantity of plasma. *Id.* The court acknowledged that there was perhaps a moral distinction between human byproducts and those of other animals, but that there was no basis for a legal distinction. *Id.* The court's ruling meant that the payments the woman received for her blood constituted taxable income. *Id.* at 1235. In finding the blood plasma to be a taxable object, the U.S. Tax Court revealed that it considered blood plasma to be a tangible product, subject to this taxation. *Id.*

⁶⁵ See Rao, *supra* note 13, at 373 (describing blood as a prime example of how bodies can be considered property).

⁶⁶ 793 P.2d 479, 479 (Cal. 1990). Importantly, the court declined to provide the man whose body the spleen cells came from with a property interest in the excised material. *Id.* But upon removal, cells may be used to create cell-lines that can be patented, which provides property rights over that material for the scientists seeking the patents. Rao, *supra* note 13, at 373. This exemplifies the paradox of *Moore*, which on the one hand states that individuals do not have property interests in body parts, but on the other hand, provides scientists with an interest in those same parts once removed from the person. *Id.* at 374.

⁶⁷ 42 U.S.C. § 274(e).

⁶⁸ Rao, *supra* note 13, at 376. The dead donor rule prevents people from donating organs necessary to sustain life. Robert D. Truog & Walter M. Robinson, *Role of Brain Death and the Dead-Donor Rule in the Ethics of Organ Transplantation*, 31 CRITICAL CARE MED. 2391, 2391 (2003). This rule does not extend to biological materials such as blood, sperm, and eggs. Browne Lewis, "You Belong to Me": *Unscrambling the Legal Ramifications of Recognizing a Property Right in Frozen Human Eggs*, 83 TENN. L. REV. 645, 668 (2016).

⁶⁹ Lewis, *supra* note 68, at 667–68. Courts have analogized the right to refuse to donate an organ to a pregnant woman's right to decline medical attention. Rao, *supra* note 13, at 395. In 1994, in *In re Baby Boy Doe*, the Appellate Court of Illinois determined that a pregnant woman was free to decline a cesarean section even though the decision may not be in the best interest of the fetus. 632 N.E.2d 326, 326 (Ill. App. Ct. 1994). The court pointed to the prohibition on forcing family to donate bone marrow or kidneys for the benefit of a relative as a reason to permit pregnant women to decline a cesarean section for the benefit of a fetus. *Id.* at 333.

row to save the life of his relative.⁷⁰ The safe removal theory from body property law limits property rights to body parts and biological materials that can be removed from the person without causing serious harm.⁷¹ A safe removal theory allows for matter that cannot be sold to nonetheless constitute property if they can be safely fragmented from the body.⁷²

2. Judicial Refusal to Recognize a Property Interest in One's Body

The leading case on the intersection of law and the human body concerns a property claim over extracted spleen cells.⁷³ In *Moore*, the California Supreme Court specifically declined to grant a patient a property interest in his own spleen.⁷⁴ John Moore's spleen was removed as part of his treatment for hairy-cell leukemia.⁷⁵ Unbeknownst to Moore, his physicians did not dispose of his spleen and instead utilized white blood cells extracted from his spleen to ultimately create a cell line.⁷⁶ Moore sued the physicians for conversion.⁷⁷ He

⁷⁰ See 10 Pa. D. & C.3d 90, 90–92 (Ct. Com. Pl. Allegheny 1978) (describing how such a requirement would run afoul of the notion of a free society and harken back to historical horrors such as Nazi Germany). Although *McFall* is not binding on other courts, it is a useful example of judicial articulation of bodily autonomy. See *id.*

⁷¹ See Rausch, *supra* note 38, at 44 (describing how property rights have been recognized in body parts that can be extracted without resulting in death or dismemberment).

⁷² See *id.* (advocating for a property interest in materials such as organs because, despite being unavailable for sale, they can be removed from the body while still keeping the donor alive and in good health). The inability to sell does not foreclose the possibility of a property interest because an individual need not possess all the rights in the bundle to have a property right. See *id.* at 45 (promoting the idea that a property right in the uterus would afford women the rights of use, exclusion, and non-commercial disposal). The safe removal theory expands the scope of what would be permissible under a renewable resource theory regarding the relationship between property and body. See *id.* at 43 (describing blood, hair, and sperm as renewable resources within the body). The renewable resource theory, which requires that the body part be naturally regenerative, would preclude uteruses from inclusion in the definition of property and likely would exclude eggs as well because, unlike sperm, eggs exist in finite quantities within the body. See *id.* at 43–44 (arguing that the ability to donate and sell eggs, despite their limited quantities, refutes the notion that renewability is a pre-requisite to recognizing a property interest in biological materials).

⁷³ See generally *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (standing for the proposition that patients do not have a legally recognized property interest in their excised biological material).

⁷⁴ See *id.* at 479 (holding that the plaintiff could not bring a conversion claim against the researchers who used his excised spleen cells).

⁷⁵ *Id.* at 480.

⁷⁶ *Id.* at 481. Moore's T-lymphocytes, which are white blood cells, were unique because they overproduced lymphokines, which made it easier to identify the specific genes responsible for a specific lymphokine. *Id.* The cell line that came from Moore's extracted cells had a potential value of roughly three billion dollars. *Id.* at 482. Immortal cell lines replace primary cells in research because of their ability to consistently and indefinitely proliferate on their own due to a mutation. Gurvinder Kaur & Jannette M. Dufour, *Cell Lines: Valuable Tools or Useless Artifacts*, 2 SPERMATOGENESIS 1, 1 (2012).

⁷⁷ *Moore*, 793 P.2d at 487 (describing conversion as a tort cause of action which protects individuals' possession and ownership interests in their personal property); see also *Conversion*, BLACK'S

claimed that using his cells for medical research without his consent interfered with his proprietary interest in his spleen and he had a property interest in products created from his cells or the cell line.⁷⁸ In order to prevail on his conversion claim, Moore had to show that he had either title or possession of the allegedly converted property, in this case, his spleen.⁷⁹ Moore consented to the removal of his spleen and did not expect to keep the excised tissue.⁸⁰ Therefore, Moore would have to have retained a property interest after removal to sustain a conversion claim.⁸¹

The court did not find the requisite ownership interest Moore needed to support a claim of conversion.⁸² According to the California Supreme Court, the law governing the disposition of human bodies should not be subject to the more generalized realm of property law.⁸³ The court held that it was possible to protect the dignity and bodily autonomy of patients without concluding that interfering with these interests constituted a conversion.⁸⁴ The court found that Moore's rights had been infringed upon, but it was a violation of his ability to make medical decisions about his body, which is a right found in a fiduciary duty and informed consent doctrines, not property.⁸⁵ The opinion rested on privacy rights, rather than property concerns.⁸⁶

LAW DICTIONARY (11th ed. 2019) (defining conversion as the unlawful taking of property from another individual).

⁷⁸ *Moore*, 793 P.2d at 487 (arguing that he was entitled to share in the financial gains stemming from the development of the cell line).

⁷⁹ *Id.* at 488.

⁸⁰ *Id.* 488–89.

⁸¹ *See id.* at 489 (pointing to the absence of any reported judicial decision supporting a retained interest in excised tissue and to state laws limiting patients' interests in their extracted cells). These state laws treat human biological matter as *sui generis*, which refers to an independent legal classification. *Id.*; *Sui generis*, BLACK'S LAW DICTIONARY, *supra* note 77.

⁸² *Moore*, 793 P.2d at 488. The court declined to extend the bounds of conversion claims to cover Moore's circumstances for three reasons. *Id.* at 493. First, the court looked to the policy issues at hand which disfavored extending the claim. *Id.* Second, this area of law was seemingly better suited for legislative action than judicial action, and third, there are alternative means such as informed consent to protect patient autonomy. *Id.*

⁸³ *See id.* at 489 (describing how specific state statutes deal with the disposition of bodily matter and that these statutes are intended to attain certain policy goals). The opinion was particularly concerned with the possibility that imposing liability on researchers who use human cells may curb medical research, which is a social good. *See id.* at 493 (describing how researchers could be liable even in the absence of knowledge that a cell sample was taken without express consent).

⁸⁴ *See id.* at 494 (suggesting that the existing duty to disclose could serve as the appropriate basis for liability and declining to extend conversion claims to cover the human biological matter at issue).

⁸⁵ *See id.* at 493 (pointing to the duty of informed consent whereby a physician has to disclose things such as the economic value of one's cells that may cloud the doctor's judgment).

⁸⁶ *See id.* at 494 (describing how Moore's right to privacy and bodily autonomy could be better protected under informed consent laws than the allowance of conversion claims).

Moore is considered the archetypal example of judicial reluctance to extend property law concepts to the human body.⁸⁷ The court expressly declined to provide *Moore* with a legally recognized property interest in his cells.⁸⁸ Yet scholars have argued by extending the duty of informed consent to the disclosure of fiscal and research interests, the opinion implicitly endorses a property interest in the spleen.⁸⁹ Had *Moore* been aware of the value of his cells, he could have protected his bodily interests by determining what would happen with his spleen cells after their removal.⁹⁰ The ability to decide what happens to his spleen after its removal does seem to imply an affirmative property right in the excised biological material.⁹¹ This has led some scholars to argue that the true role *Moore* plays in the landscape of body and property law is to demonstrate the concept of abandonment of bodily matter.⁹²

C. Commercialization of the Female Body

There is a general reluctance to see human bodies as commercial objects, capable of being utilized for financial gain.⁹³ Yet there are numerous examples

⁸⁷ *Render, supra* note 12, at 570. *Moore* serves as the best example of squarely confronting whether body parts and biological materials are ownable entities whose owners enjoy property rights. See *Evanston Ins. Co. v. Legacy of Life, Inc.* 645 F.3d 739, 748 (5th Cir. 2011) (describing *Moore* as the most detailed illustration of the body property issue).

⁸⁸ *Moore*, 793 P.2d at 488.

⁸⁹ *Render, supra* note 12, at 571; see *Moore*, 793 P.2d at 485. Some scholars have criticized the court's decision not to recognize the conversion claim. See Gina M. Grandolfo, Comment, *The Human Property Gap*, 32 SANTA CLARA L. REV. 957, 969 (1992) (faulting the California Supreme Court for finding that *Moore* did not have a property claim to his own body parts but that someone else could exercise the requisite level of property rights required to patent a cell line).

⁹⁰ See *Render, supra* note 12, at 571–72 (describing how the court explained *Moore*'s interest in his spleen as an interest in his own bodily integrity, not personal property).

⁹¹ See *id.* (arguing that *Moore*'s ability to choose what happens to his own biological material implies that his ownership interest could have survived the removal procedure).

⁹² See *id.* at 572 (articulating how, in the absence of express conditions for disposition of bodily matter, when a patient consents to removal of bodily matter it is considered abandoned upon removal).

⁹³ See *id.* at 594 (recounting rationales behind objections to the notion that the body is an entity that has value for its usefulness and for its marketability, namely that marketability renders the body legally alienable where it otherwise wouldn't be). Those opposed to the commodification of the body are concerned that, among other things, designating the body as a commercial object will degrade personhood. Peter Halewood, *On Commodification and Self-Ownership*, 20 YALE J.L. & HUMANS. 131, 133–34 (2008). To commodify something means to transform something into an economic good. *Commodify*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/commodify> [<https://perma.cc/29JW-2E3W>]; *Commodity*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/commodity> [<https://perma.cc/L8W2-69TR>]. Similarly, to commercialize something refers to the exercise of exploiting an entity for profit. *Commercialize*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/commercialize> [<https://perma.cc/R4AS-RXTT>].

in modern society of the female body being used for precisely that purpose.⁹⁴ In addition, as reproductive technology improved, the opportunity to capitalize on women's fertility became increasingly prevalent.⁹⁵ Subsection 1 of this Section outlines the lucrative nature of the biological material produced by women and men's reproductive organs and how the law has historically treated them.⁹⁶ Subsection 2 of this Section explores the history of surrogacy arrangements in the United States and the earning potential it generates for women willing to enter into these arrangements.⁹⁷

1. Egg and Sperm Donation

Egg donation is a misnomer that refers to the practice of selling one's eggs.⁹⁸ Women who chose to donate their eggs are generally compensated

⁹⁴ See Render, *supra* note 12, at 597 (describing sex work, surrogacy, and adult entertainment as the commercialization of a capacity of the body). In these instances, the body's capacities have become objects of trade. *Id.*

⁹⁵ See *id.* (pointing to new developments in biotechnology that have made it possible to alienate the abilities of the human body). The development of in vitro fertilization (IVF) has led to the ability to use one's reproductive capacity not only to benefit oneself, but to benefit others as well. *Id.* at 600. The first child born from via IVF was Louise Brown, born in England on July 25, 1978. John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 942–43 (1986). In the United States, the first baby born via IVF arrived three years later, becoming the fifteenth child born worldwide using this new technology. See Ashley M. Eskew & Emily S. Jungheim, *A History of Developments to Improve In Vitro Fertilization*, 114 MO. MED. 156 (2017) (describing the evolution of IVF globally, which now accounts for one to three percent of births annually in America and Europe).

⁹⁶ See *infra* notes 98–106 and accompanying text.

⁹⁷ See *infra* notes 107–117 and accompanying text.

⁹⁸ See Lewis, *supra* note 68, at 657 (describing how donor women can be paid as much as \$50,000 for their eggs). Oocyte transfers are becoming increasingly popular. See Jennifer F. Kawwass et al., *Trends and Outcomes for Donor Oocyte Cycles in the United States, 2000–2010*, 310 J. AM. MED. ASS'N 2426, 2428 (2013) (describing an increase in transfer cycles from 10,801 in 2000 up to 18,306 in 2010). The boundaries of these arrangements vary country to country. *Egg Donation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Egg_donation [<https://perma.cc/6FEG-BALV>] (Oct. 27, 2023) (describing the different laws regarding compensation and anonymity for egg donation). Laws vary in requiring that the donations be anonymous or requiring that they be non-anonymous, and in requiring that the donations be gratuitous, or permitting compensation. *Id.* The United States allows donations to be anonymous or non-anonymous, and compensated or gratuitous. *Id.* The United States is one of the only countries that allows compensation in exchange for egg donation. Robert Klitzman, *Buying and Selling Human Eggs: Infertility Providers' Ethical and Other Concerns Regarding Egg Donor Agencies*, 17 BIOMED CENT. MED. ETHICS 71, 72 (2016). Oocytes are eggs that have not reached maturity. *Oocyte*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/oocyte#:~:text=Medical%20Definition%20oocyte,before%20maturation%20%3A%20a%20female%20gametocyte> [<https://perma.cc/E4LM-DTQP>]. There is an important legal distinction between eggs, or oocytes, and embryos. Lewis, *supra* note 68, at 670. Embryos have already been fertilized and therefore have the potential to become a human being. *Id.* Oocytes by themselves do not have the capacity for personhood. See *id.* at 671 (justifying a different legal category for oocytes based on this distinction).

within a \$5,000 to \$10,000 range per cycle.⁹⁹ In order to donate eggs, a woman must take medication to stimulate egg production and undergo a removal procedure to extract the eggs.¹⁰⁰ Informed consent is required before doctors can extract eggs from a woman's body.¹⁰¹ Similar to organs, women cannot be forced to donate eggs to infertile people.¹⁰²

Courts have not yet explicitly classified a woman's oocytes as personal property.¹⁰³ Courts have, on the other hand, recognized sperm as a form of personal property which can be donated, devised, or sold.¹⁰⁴ In 1996, in *Hecht v. Superior Court*, the Court of Appeal of the Second District of California examined whether a woman was entitled to the donated sperm of her deceased boyfriend, which he had expressly stated should be given to her at his death.¹⁰⁵ The opinion describes the sperm as property distinct from the estate's assets.¹⁰⁶

⁹⁹ *Egg Donor Compensation*, EGG DONOR AM., <https://www.eggdonoramerica.com/become-egg-donor/egg-donor-compensation> [<https://perma.cc/RX55-VL4R>]. The American Society for Reproductive Medicine recommends that any compensation in excess of \$10,000 would be inappropriately high. Michelle J. Bayefsky, Alan H. DeCherney & Benjamin E. Berkman, *Compensation for Egg Donation: A Zero-Sum Game*, 105 CONCEPTIONS 1153, 1154 (2016).

¹⁰⁰ *Fact Sheet: Egg Donation*, AM. SOC'Y FOR REPROD. MED. (2016), https://www.reproductivefacts.org/globalassets/_rf/news-and-publications/bookletsfact-sheets/english-pdf/egg_donation_factsheet.pdf [<https://perma.cc/5UA7-5BJC>].

¹⁰¹ See Lewis, *supra* note 68, at 666 (describing how this leads to the inference that women have an ownership interest in their eggs when they are inside of her body). It is less clear what the ownership interest looks like after eggs have been extracted and or frozen. *Id.*

¹⁰² See *id.* (describing the illegality of removing a woman's eggs without her consent).

¹⁰³ See *id.* at 672 (explaining that although women are able to dispose of their eggs in a manner of their choosing, they do not enjoy the other rights and protections associated with a property interest in their eggs). The absence of a clear description of eggs as property has tax consequences as well when women are compensated for their donation. Richard Gano, Comment, *Egg Donation: Whether a Woman Has a Property Right in Her Own Egg and How Donors Should Be Taxed*, 50 LOY. L.A. L. REV. 523, 523 (2017).

¹⁰⁴ See *Hecht v. Superior Ct.*, 59 Cal. Rptr. 2d 222, 226 (Ct. App. 1996) (depublished) (holding that the sperm of a deceased donor constituted a type of property). Although sperm and eggs are both sexual gametes, men can produce sperm throughout their lifetime, whereas women will produce a finite number of eggs. Lewis, *supra* note 68, at 672.

¹⁰⁵ See 59 Cal. Rptr. 2d at 223 (describing how the deceased's will expressly left his donated sperm to Hecht). Hecht and the deceased's adult children later entered into a settlement agreement to divide up the decedent's assets, which left Hecht entitled to 20% of the estate. *Id.* at 224. The litigation primarily focused on whether, in light of this agreement, Hecht was still entitled to all fifteen vials of the deceased's sperm. *Id.* at 225.

¹⁰⁶ See *id.* at 226 (articulating how only Hecht could use the sperm, she would not be able to sell, donate, or dispose of the sperm of her own accord, and the sperm could only be considered property of the deceased). The framing of sperm as the deceased's property limited Hecht from being able to use the sperm in any manner of her choosing other than reproduction. *Id.* The opinion also briefly mentions that women's eggs would be subject to similar treatment under the law, but no such biological material was at issue in the case. *Id.* Some scholars have argued that a property interest in ova or oocytes could exist prior to the extraction from the woman's body. Rausch, *supra* note 38, at 42–43. This is because the contract for eggs predates the retrieval procedure, which undermines the theory that removal generates the property interest. See *id.* (describing how contracts for egg donation can

2. Surrogacy Arrangements

The market has placed an economic value on women's reproductive labor.¹⁰⁷ Surrogacy arrangements arise when one woman carries and delivers a baby for another person or couple who either does not wish to or cannot do so themselves.¹⁰⁸ Although surrogacy arrangements have been around since biblical times, in the United States, the first legal surrogacy agreement was not drafted until 1976 and the agreements could not include consideration until 1980.¹⁰⁹ Since then, the use of gestational surrogacy has significantly increased.¹¹⁰

As of 2022, the global surrogacy industry had a market value of \$175.79 million dollars.¹¹¹ Women who provide surrogacy services are generally com-

explicitly state that the donor retains ownership over her eggs while inside of her ovaries and how similar to blood and hair, the property right to dispose of the eggs predates the removal).

¹⁰⁷ See Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 534 (2020) (describing how states have an economic interest in women's reproductive capacities). Treating surrogacy arrangements as similar to other labor in the market promotes fair compensation and labor protections. Lindsay Beyerstein, *Why Gestational Surrogacy Should Be Legalized and Unionized*, CITY & STATE N.Y. (June 18, 2019), <https://www.cityandstateny.com/opinion/2019/06/why-gestational-surrogacy-should-be-legalized-and-unionized/177244/> [<https://perma.cc/T762-J6S8>].

¹⁰⁸ *Surrogacy*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER: SPECIAL RAPPORTEUR ON THE SALE AND SEXUAL EXPLOITATION OF CHILDREN, <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy> [<https://perma.cc/F8K7-NQ3J>]. Surrogacy is often discussed either as gestational surrogacy or traditional surrogacy. *About Surrogacy: Traditional vs Gestational Surrogacy—What's Best for My Family?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/> [<https://perma.cc/JLU8-SUJE>]. A traditional surrogate is one who shares a genetic link to the fetus and a gestational surrogate does not have any biological connection to the fetus. *Id.* State approaches to surrogacy and its enforceability vary but fall into five general categories. *The US Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> [<https://perma.cc/8EK4-XLE2>]. Forty-one states and D.C. permit surrogacy arrangements with zero or minimal procedural hurdles for pre-birth orders or for placing the names of the intended parents on the birth certificates. *Id.* Four states practice surrogacy but with potential legal hurdles and inconsistent results and two states practice surrogacy but have statutes in place that declare surrogacy contracts void and unenforceable. *Id.* Finally, three states have, either via case law or statute, prohibited compensated surrogacy. *Id.* The modern trend tilts in favor of legalizing surrogacy, with New Jersey, Washington, New Hampshire, Nevada, New York, and D.C. all expressly legalizing commercial surrogacy in recent years and only one state enacting legislation that prohibited an aspect of surrogacy since 1993. Alexandra Holmstrom-Smith, *Free Market Feminism: Re-Reconsidering Surrogacy*, 24 U. PA. J.L. & SOC. CHANGE 443, 454 (2021); Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1288 (2014).

¹⁰⁹ *The History of Surrogacy: A Legal Timeline*, WORLDWIDE SURROGACY SPECIALISTS LLC (Apr. 12, 2021), <https://www.worldwidesurrogacy.org/blog/the-history-of-surrogacy-a-legal-timeline> [<https://perma.cc/UG9K-TQWM>]. In the Bible, Sarah, an older woman struggling to get pregnant with her husband Abraham, used their servant Hagar as a sort of surrogate to have a child. *Genesis* 16:1–16.

¹¹⁰ Kiran M. Perkins, Sheree L. Boulet, Denise J. Jamieson & Dmitry M. Kissin, *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435, 435 (2016).

¹¹¹ *Global Surrogacy Market Grows at a Staggering CAGR of 6.25%*, STRAITS RSCH., [https://straitsresearch.com/press-release/global-surrogacy-market-size#:~:text=Key%20Highlights,period%](https://straitsresearch.com/press-release/global-surrogacy-market-size#:~:text=Key%20Highlights,period%20)

pensated somewhere between \$30,000 and \$60,000 for carrying and delivering the baby.¹¹² Although there is limited data collection on the number of live births resulting from surrogacy arrangements, roughly one thousand babies were birthed by women acting as surrogates in 2012.¹¹³ Surrogacy is sometimes colloquially referred to as a womb-for-rent arrangement.¹¹⁴ Despite the language of renting a womb evoking property principles, contract and family law doctrines generally govern surrogacy relationships.¹¹⁵ The enforceability of a surrogacy arrangement is generally justified under contract law principles.¹¹⁶ Disputes concerning parental rights to children conceived through surrogacy arrangements are framed as issues of family law.¹¹⁷

20(2023%2D2031) [https://perma.cc/YXL7-HM5M]. New reports suggest that the surrogacy market value will continue to grow, reaching \$129 billion by 2032. See Glob. Insights Inc., *Surrogacy Market Worth USD 129 Billion by 2032*, Says Global Market Insights Inc., GLOBENEWSWIRE (Nov. 22, 2022), https://www.globenewswire.com/en/news-release/2022/11/22/2560691/0/en/Surrogacy-Market-worth-USD-129-billion-by-2032-says-Global-Market-Insights-Inc.html#:~:text=Surrogacy%20industry%20is%20anticipated%20to,increasing%20number%20of%20infertility%20cases [https://perma.cc/Y3R8-6ZN8] (attributing the growth to increased public awareness about infertility and the advantages of surrogacy).

¹¹² See Beth Braverman, *How Much Surrogacy Costs and How to Pay for It*, U.S. NEWS & WORLD REP. (May 30, 2023), https://money.usnews.com/money/personal-finance/family-finance/articles/how-much-surrogacy-costs-and-how-to-pay-for-it [https://perma.cc/TKP9-R78F] (describing how these numbers fluctuate based on the volume of benefits provided to the surrogate). The total cost for people retaining the services of a surrogate can range from \$100,000 to \$200,000, which includes insurance, legal and agency fees, and embryo creation and/or egg donation. *Id.* Because of the high costs associated with surrogacy arrangements in the United States, international surrogacy arrangements have become appealing options. See Harriet Newman Cohen, *Surrogacy: From 'Baby M' to Today's 'Baby-Making Technology'*, N.Y. L.J. ONLINE (July 22, 2022), https://www.law.com/newyorklawjournal/2022/07/22/surrogacy-from-baby-m-to-todays-baby-making-technology/?slreturn=20230922172043 [https://perma.cc/PF4P-N7EX] (detailing how Ukraine has become a popular place for surrogacy arrangements because of its low costs and favorable laws).

¹¹³ See Kim L. Armour, *An Overview of Surrogacy Around the World: Trends, Questions and Ethical Issues*, 16 NURSING FOR WOMEN'S HEALTH 231, 233 (2012) (noting that media coverage of surrogacy is also increasingly positive in its discussion of these agreements).

¹¹⁴ *Wombs for Rent: The Legalization of Commercial Surrogacy*, RADIO HEALTH J. (June 12, 2022), https://radiohealthjournal.org/wombs-for-rent-legalization-of-commercial-surrogacy/ [https://perma.cc/5QF6-LLGU].

¹¹⁵ Render, *supra* note 12, at 555 (first citing Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995); and then citing Christen Blackburn, Note, *Family Law—Who Is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349, 351 (2009)).

¹¹⁶ See Epstein, *supra* note 115, at 2308 (describing contracts as the appropriate way to capture the unique contours of surrogacy relationships). Contract law advocates for the enforceability of surrogacy arrangements, not based the surrogate's property right to use her uterus productively, but rather the two parties' right to enter into valid contracts. *Id.*

¹¹⁷ See Blackburn, *supra* note 115, at 351 (suggesting surrogacy arrangements could be better protected by revising state parentage statutes). Family law addresses a different aspect of surrogacy than property touches, namely the way courts can establish legal parentage in cases where the intended mother and the birth mother are not the same. *Id.*

D. Abortion Access and the Physical and Fiscal Consequences of Pregnancy

There are a myriad of reasons why a pregnant person may seek an abortion, including a desire or need to avoid the potentially debilitating physical and fiscal consequences of pregnancy.¹¹⁸ Subsection 1 of this Section details the toll pregnancy takes on women's physical and financial well-being.¹¹⁹ Subsection 2 of this Section describes the current abortion landscape in the United States after *Dobbs*.¹²⁰

1. Physical and Economic Impact of Pregnancy

Roughly 385,000 babies are born in the world every day.¹²¹ Despite the ubiquity of pregnancy and childbirth, reproduction is still a dangerous and expensive undertaking.¹²² In the United States, pregnancy carries fourteen times the risk of death compared to having an abortion.¹²³ The dissenting Justices in *Dobbs* and *Amici Curiae* highlighted the significant physical consequences of pregnancy and childbirth for both complicated and uncomplicated pregnancies.¹²⁴ Carrying a pregnancy to term can aggravate preexisting health condi-

¹¹⁸ See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 110 (2005) (mentioning how a lack of interest in or ability to raise a child is not the only reason why women may seek abortions and adoption is an inadequate remedy to an inability to access abortion care).

¹¹⁹ See *infra* notes 121–132 and accompanying text.

¹²⁰ See *infra* notes 133–140 and accompanying text.

¹²¹ *How Many Babies Are Born Each Day?*, WORLD COUNTS, <https://www.theworldcounts.com/stories/how-many-babies-are-born-each-day> [<https://perma.cc/2J4Z-V9YG>] (discussing the U.N.'s estimate).

¹²² See Boone, *supra* note 107, at 573 (describing how, given the economic difficulties and physical dangers associated with reproduction, it is important that the government sufficiently value this undertaking).

¹²³ *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 618 (2016), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); Brief for American College of Obstetricians & Gynecologists et al. as *Amici Curiae* Supporting Respondents, *supra* note 14, at 18. In Mississippi, the state whose abortion restriction sparked the controversy in *Dobbs v. Jackson Women's Health Organization*, carrying a pregnancy to term is seventy-five times more dangerous than an abortion. See 142 S. Ct. at 2340 (Breyer, Sotomayor & Kagan, JJ., dissenting) (highlighting the poor health outcomes for pregnant women and for children, pointing to the infant mortality and maternal death rates).

¹²⁴ See *Dobbs*, 142 S. Ct. at 2338 (Breyer, Sotomayor & Kagan, JJ., dissenting) (describing the physical changes in women's bodies, potential for life-changing physical illness, pain, and potential for death that all stem from pregnancy). Abortion bans are estimated to raise maternal mortality statistics by 21%. *Id.* (citing Lisa H. Harris, *Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of Roe v. Wade*, 386 NEW ENG. J. MED. 2061, 2063 (2022)). This decision will disproportionately impact low-income women and women of color. See *id.* at 2338–39 (describing the costs associated with pregnancy and the lack of paid family leave as particularly detrimental to low wage earners).

tions or induce new medical issues.¹²⁵ In addition to the health concerns associated with carrying a child, labor and delivery come with significant risk of hemorrhage, hysterectomy, postpartum pain, and other complications.¹²⁶

In addition to pregnancy being a significant physical undertaking, it also has enormous economic ramifications.¹²⁷ The average cost of pregnancy is \$18,865, which includes care during pregnancy, childbirth, and post-partum medical attention.¹²⁸ According to the U.S. Department of Agriculture, the national average cost of raising a child is around \$13,125 per year.¹²⁹ Women experience a one-third decrease in expected earnings after having children while their male counterparts' earnings are generally unaffected by their new role as fathers.¹³⁰ Although not every woman who carries a pregnancy to term will chose to raise the baby, there are still economic consequences for the nine months she is pregnant.¹³¹ Women who are pregnant are unable to provide surrogacy services or donate their eggs during this time, which forecloses potential participation in the market.¹³²

2. Abortion Access in the United States

In 2022, in *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern*

¹²⁵ See Brief for American College of Obstetricians & Gynecologists et al. as Amici Curiae Supporting Respondents, *supra* note 14, at 19 (offering gestational diabetes and preeclampsia as examples of debilitating medical conditions that can arise during pregnancy).

¹²⁶ *Id.* The brief also describes the frequency of cesarean procedures, with one in three women giving birth via this method. *Id.* Cesarean sections are considered major surgeries that come with a host of risks. *Id.*

¹²⁷ See *Dobbs*, 142 S. Ct. at 2338 (Breyer, Sotomayor & Kagan, JJ., dissenting) (noting that many women lack adequate insurance coverage before, during, and after pregnancy). The dissenting Justices in *Dobbs* also note that pregnancy can negatively impact a woman's earning potential. *Id.* at 2339.

¹²⁸ Matthew Rae, Cynthia Cox & Hanna Dingel, *Health Costs Associated with Pregnancy, Childbirth, and Postpartum Care*, PETERSON-KFF HEALTH SYS. TRACKER (July 13, 2022), [<https://perma.cc/KS98-EGSE>]. These costs vary depending on geographic location and the complexity of the procedure. *Id.* A vaginal delivery will cost around \$14,768 and a cesarean section will cost an average of \$26,280. *Id.* Factoring in the possibility of employer-sponsored health insurance, these costs still come out to an average of \$2,655 for a vaginal delivery and \$3,214 for a cesarean section. *Id.*

¹²⁹ MARK LINO, KEVIN KUCZYNSKI, NESTOR RODRIGUEZ & TUSA REBECCA SCHAP, U.S. DEP'T OF AGRICULTURE EXPENDITURES ON CHILDREN BY FAMILIES, 2015, at i (2017).

¹³⁰ See Brief for Economists as Amici Curiae Supporting Respondents at 19, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (citing Henrik Kleven et al., *Child Penalties Across Countries: Evidence and Explanations*, 109 AM. ECON. ASS'N PAPERS & PROC. 122, 123 (2019)) (pointing to the disparate impact of parenthood on men and women).

¹³¹ Boone, *supra* note 107, at 537.

¹³² See *id.* (describing pregnancy as resulting in a forfeit of income). Unlike other industrialized countries, the United States does not guarantee paid pregnancy or medical leave, which may also lead to missed work and lost wages. See *Paid Leave in the U.S.*, KAISER FAM. FOUND. (Dec. 17, 2021) [<https://www.kff.org/womens-health-policy/fact-sheet/paid-leave-in-u-s/>] [<https://perma.cc/HLK3-4BHK>] (describing how only 35% of non-federal employees had access to paid parental leave).

Pennsylvania v. Casey, the two cases which together protected abortion access in the United States under the Constitution.¹³³ *Dobbs* evaluated the constitutionality of Mississippi's law banning abortion after the first fifteen weeks of pregnancy.¹³⁴ The Court overruled *Roe* to hold that the Due Process Clause's guarantee of privacy did not extend to the ability to obtain an abortion.¹³⁵ The Fourteenth Amendment's guarantee of privacy has historically operated at the core of reproductive autonomy and the decision of if, when, and how to bear children.¹³⁶ In 1972, in *Eisenstadt v. Baird*, the U.S. Supreme Court famously described that at the heart of the right to privacy was the individual's choice, unconstrained from governmental interference, to decide whether to have a child.¹³⁷

Almost immediately following the decision in *Dobbs*, thirteen state laws banning abortion which previously would have been unconstitutional went into effect.¹³⁸ Additionally, states with early gestational limits on abortions functionally serve as blanket state bans given that the average individual is not aware they are pregnant until five and a half weeks gestation, with a quarter of pregnant people not discovering this fact until the seven week mark.¹³⁹ Abortion is

¹³³ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling the Court's abortion precedent); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming the central holding of *Roe v. Wade* and prohibiting states from placing an undue burden on women seeking pre-viability abortions), overruled by *Dobbs*, 142 S. Ct. 2228 (2022); *Roe*, 410 U.S. 113, 154 (1973) (declaring that under substantive due process's constitutional right to privacy, women have a constitutional right to an abortion), overruled by *Dobbs*, 142 S. Ct. 2228 (2022).

¹³⁴ 142 S. Ct. at 2242; see MISS. CODE ANN. § 41-41-191 (2020).

¹³⁵ See *Dobbs*, 142 S. Ct. at 2248 (examining the history of the Fourteenth Amendment to determine that because a right to abortion is not deeply rooted in history, it is not protected under the Fourteenth Amendment).

¹³⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a Connecticut law prohibiting the use of contraceptives violated the right to privacy guaranteed by the Bill of Rights).

¹³⁷ See 405 U.S. 438, 453 (1972) (decoupling the right to reproductive choice from marriage and writing: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"). In *Eisenstadt v. Baird*, the Court struck down a Massachusetts law outlawing the distribution of contraceptives to unmarried persons. See *id.* (holding that providing different treatment for persons based on their marital status violated the Equal Protection Clause).

¹³⁸ NICOLE DUBE, JAMES ORLANDO & JESSICA SCHAEFFER-HELMECKI, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH., STATE ABORTION LAWS ENACTED POST-*DOBBS* DECISION 1 (Sept. 29, 2022). Only some of the laws immediately following the *Dobbs* decision included exceptions for rape or incest. *Id.* at 2. Additionally, after the opinion was leaked in May of 2022, fourteen states initiated changes to their existing abortion laws, with some states restricting access and others expanding or protecting access. *Id.* at 7. The following states expanded abortion access in the wake of the leaked draft opinion: California, Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, and New York. *Id.* at 7–13. The following states restricted abortion access: Indiana, Louisiana, Oklahoma, Pennsylvania, South Carolina, Tennessee, and West Virginia. *Id.*

¹³⁹ *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 582 (2021) (Sotomayor, J., dissenting); McCann et al., *supra* note 6.

no longer a reality in many parts of the country, resulting in a significant rolling back of women's ability to assert their bodily autonomy and self-ownership.¹⁴⁰

II. POSSESSION AND CONTROL OVER BODIES

This Part of the Note discusses what is gained and lost for bodily autonomy and self-determination when property law and commercialization mix with the human body.¹⁴¹ Section A of this Part details how the property concept of the bundle of rights can be used to understand the legal treatment of the human body.¹⁴² Section B of this Part reviews the interplay between the marketplace and the female body and women's reproductive capacity.¹⁴³ Section C addresses arguments levied against the applicability of property law to the human body.¹⁴⁴

A. The Bundle of Rights as Applied to Bodily Organs

The definition of property is not static, rather it is a dynamic term that stretches and shrinks to accommodate societal evolution.¹⁴⁵ Historically, the law resisted the notion that bodies could be considered property.¹⁴⁶ The Latin

¹⁴⁰ *Supreme Court Strips Women of Bodily Autonomy*, *supra* note 5. Although the ability to travel out of state to access safe abortions, or to receive abortion pills in the mail, remains theoretically possible, these options are, in reality, out of reach for many pregnant persons due to prohibitively high costs and precarious life circumstances for individuals of reproductive age. See Liza Fuentes, *Inequity in US Abortion Rights and Access: The End of Roe Is Deepening Existing Divides*, GUTTMACHER INST. (Jan. 17, 2023), <https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides> [<https://perma.cc/S4GZ-L2GA>] (noting how this is particularly true for low-income people and people of color). At the time this Note is being written, litigants have brought suit against the Federal Drug and Food Administration's approval of mifepristone, one of the two drugs commonly used in a medication abortion. Pam Belluck & Abbie VanSickle, *The Abortion Pill Case: What's Happened, What's at Stake, What's Next*, N.Y. TIMES (Sept. 11, 2023) <https://www.nytimes.com/article/supreme-court-abortion-pill-ruling.html> [<https://perma.cc/63KU-YM6X>]. The Fifth Circuit affirmed portions of the lower court's decision regarding the impermissibility of the 2016 and 2021 decisions to lower barriers to accessing mifepristone. *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 222 (5th Cir. 2023). This ruling could further jeopardize women's ability to terminate a pregnancy both in states with bans and across the country. Belluck & VanSickle, *supra*.

¹⁴¹ See *infra* notes 142–232 and accompanying text.

¹⁴² See *infra* notes 145–170 and accompanying text.

¹⁴³ See *infra* notes 171–210 and accompanying text.

¹⁴⁴ See *infra* notes 211–232 and accompanying text.

¹⁴⁵ Jennifer Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 202 (2000). This flexibility and the rights that stem from a legally recognized property interest may better protect patients than the traditional fiduciary duties that govern the doctor/patient relationship. See Elizabeth E. Appel Blue, *Redefining Stewardship Over Body Parts*, 21 J.L. & HEALTH 75, 87–88 (2008) (describing the existing fiduciary duties as limited and often inadequate, particularly in the face of emerging biomedical research).

¹⁴⁶ Amitpal C. Singh, *The Body as Me and Mine: The Case for Property Rights in Attached Body Parts*, 66 MCGILL L.J. 565, 565 (2021) (providing a summary of the legal and academic history of bodies and property across jurisdictions such as England, Canada, and the United States).

maxim *dominus membrorum suorum nemo videtur* stands for the proposition that no individual ought to be considered as the owner of their own limbs.¹⁴⁷ This is because bodies have not traditionally been understood as property.¹⁴⁸ Advances in technology forced this understanding to shift over time.¹⁴⁹ Specifically, the maxim has relaxed for separated body parts incapable of reattachment.¹⁵⁰ As technology expanded and organ donation became a possibility, the federal government clarified that this particular biological material could not be sold.¹⁵¹ Nevertheless, the fact that NOTA and Congress felt the need to clarify that organs could not be bought or sold for transplant seems to imply that these body parts are marketable objects which otherwise could be commercialized.¹⁵² Regulations have not yet caught up to the reality that many biological materials are capable of extraction and have thus been introduced into the marketplace.¹⁵³ This expansion prompts an inquiry into who owns the body parts.¹⁵⁴

There are three primary theories to determine the owner of property, and who subsequently possess the rights in the bundle that accompany ownership.¹⁵⁵ The determination that an object is both ownable and owned is critical

¹⁴⁷ *R v. Bentham* [2005] UKHL 18 [14], [2005] WLR 1057 (Lord Rodger of Earlsferry) (appeal taken from Eng.). This maxim comports with the notion that the body is *res nullis*, nobody's thing. Singh, *supra* note 146, at 565. John Locke disagreed with the notion that an individual does not own their own body. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305–06 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690) (describing how an individual owns their own body and subsequently its exertions). This likely stems from the notion that because one occupies one's own body, under Locke's labor theory, an individual is the first possessor using their body and therefore entitled to ownership. Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1227–28 (1979).

¹⁴⁸ Render, *supra* note 12, at 554. An important caveat to this is the period before the enactment of the Thirteenth Amendment where black people's bodies were treated as the property of their white enslavers. See U.S. CONST. amend. XIII.

¹⁴⁹ See Render *supra* note 12, at 597 (describing new developments in biotechnology that have allowed for alienation of body parts and biological material without damage to the human donor).

¹⁵⁰ *Id.* at 575. The present state of the law is such that one cannot own one's own body part until that part is separated. *Id.* This distinction explains the result in cases such as the 1990 California Supreme Court case, *Moore v. Regents of the University of California*, where the court found that Moore did not have a property interest in his cells prior to removal, but subsequent to the surgery, the researchers did have a property interest in them. See 793 P.2d 479, 501 (Cal. 1990) (Broussard, J., concurring in part and dissenting in part) (noting that were someone to steal the excised cells from the researchers, they would be entitled to bring a conversion claim).

¹⁵¹ See 42 U.S.C. § 274(e) (clarifying that under the National Organ Transplant Act, organs cannot be sold).

¹⁵² Lewis, *supra* note 68, at 668. This is distinct from the Thirteenth Amendment in the Constitution, the presence of which cannot support an inference that humans are otherwise ownable. See U.S. CONST. amend. XIII.

¹⁵³ See Appel Blue, *supra* note 145, at 111 (describing blood, hair, and sperm as regenerating and extractable biological material that can be sold).

¹⁵⁴ See Halewood, *supra* note 93, at 134 (advocating for self-ownership and describing how self-ownership can encompass both personal autonomy as well as the capacity to commodify one's own body or body parts).

¹⁵⁵ CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 11–12 (1994). The first theory, derived from John Locke's concept of

because ownership is a prerequisite for a standard commercial transaction.¹⁵⁶ An owner of property is free to exercise rights included in the bundle such as possession, use, exclusion, profit, and disposal.¹⁵⁷ The law governing separated body parts and biological materials has dealt with the boundaries of exercising each of these rights, specifically possession, use, disposal, and exclusion.¹⁵⁸

In 1990, in *Moore v. Regents of the University of California*, the California Supreme Court defined the boundaries of a right to possess spleen cells.¹⁵⁹ The court did not grant a legally recognized property interest in the spleen or the cells to the person whose body housed the spleen.¹⁶⁰ Nevertheless, the court's discussion of the researcher's interest in the extracted spleen cells reveals that possession over biological material and organs is a legal possibility.¹⁶¹ Bodies and biological material are in perpetual use.¹⁶² In 1996, in *Hecht v. Superior Court*, the Court of Appeal of California expressly afforded Hecht the right to use her deceased boyfriend's sperm.¹⁶³ The absolute prohibition on forced organ or bone marrow donation constitutes a right to exclusion.¹⁶⁴

ownership, argues that ownership is determined by looking at the individual who combines their labor with the previously unowned object. *Id.* at 11. It is this mixing that establishes an ownership interest. *Id.* The second theory which arose concurrently with Locke's describes ownership as arising through consent given by the rest of society. *Id.* The final theory derived from common law articulates a theory of ownership of property stemming from possession and occupancy. *Id.* at 12.

¹⁵⁶ See B. Bjorkman & S.O. Hansson, *Bodily Rights and Property Rights*, 32 J. MED. ETHICS 209, 209 (2006) (describing a need to clearly articulate the extent that biological matter is ownable in order to understand emerging questions regarding economics and human biological material). In order for a human biological material to enter a commercial market, one must be capable of owning that material, meaning that some of the bundle of rights must attach to that entity. *See id.* (describing property and ownership as synonymous for analyzing the possibility of owning biological materials).

¹⁵⁷ Johnson, *supra* note 29, at 247. It is important to note that an individual does not need to be capable of exercising each of these rights to establish ownership. Honoré, *supra* note 37, at 113. The rights included in the bundle together may be sufficient to give rise to an ownership interest but are not each individually dispositive of ownership. *Id.*

¹⁵⁸ *See generally* Render, *supra* note 12 (outlining the various ways the rights included in the bundle of sticks have interacted with corpses, body parts, and biological material).

¹⁵⁹ *See generally* 793 P.2d 479 (Cal. 1990).

¹⁶⁰ *Id.* at 489. In holding that Moore could not bring a claim of conversion, the court declared that Moore did not have possession or title of the spleen. *Id.* at 488.

¹⁶¹ *See id.* at 501 (Broussard, J., concurring in part and dissenting in part) (writing that were someone to steal the cells out of the laboratory, the researchers could bring a conversion claim).

¹⁶² *See* Render *supra* note 12, at 594 (describing the usefulness and marketability of the human body).

¹⁶³ *See* 59 Cal. Rptr. 2d 222, 226 (Ct. App. 1996) (depublished) (describing how Hecht's rights to the sperm were limited to use and that she was not permitted to sell, donate, or dispose of the sperm, which would still be considered property of the deceased). Nevertheless, the court granted a right to use human biological material, implying that rights from the bundle of sticks can indeed be applied to human byproducts like sperm. *Id.* This extended the right to use past one's own byproducts to the biological materials of another. *Id.*

¹⁶⁴ *See* McFall v. Shimp, 10 Pa. D. & C.3d 90, 90–92 (Ct. Com. Pl. Allegheny 1978) (holding that a relative of an individual requiring a bone marrow transplant could not be compelled to donate despite the unlikelihood that another match would be found); *see also* Lewis, *supra* note 68, at 666 (de-

The right to profit from one's body, although controversial, is also ingrained in several socially acceptable practices.¹⁶⁵ Selling blood plasma, breast milk, sperm, eggs, and surrogacy services all intimately and invasively involve the use of one's living body in exchange for economic gain.¹⁶⁶ Early property law dealing with bodies primarily discussed the right of disposal, specifically with regard to corpses.¹⁶⁷ Courts repeatedly affirmed the right for individuals or their heirs to arrange for the disposal of their bodies after death.¹⁶⁸ Additionally, in *Moore*, the court illustrated the importance of informing the plaintiff of the value of his spleen cells because he could then have made arrangements for the disposal of the cells after their removal.¹⁶⁹ Disposal is a critical right in the bundle of rights that accompany property, and although the court rejected a property interest in *Moore*, the opinion is unable to escape the important role property rights play in the treatment of biological material.¹⁷⁰

B. The Economics of Pregnancy

Women's bodies, specifically their uteruses, simultaneously house enormous possibilities for economic gain and economic deprivation.¹⁷¹ Subsection 1 provides an overview of where uteruses have already entered the market-

scribing the impermissibility of forcible organ donation regardless of the minimal degree of risk the procedure poses). For more discussion on the importance of consent in the area of organ donation, see generally Cara Cheyette, Note, *Organ Harvests from the Legally Incompetent: An Argument Against Compelled Altruism*, 41 B.C. L. REV. 465 (2000).

¹⁶⁵ Render, *supra* note 12, at 555. Although the National Organ Transplant Act criminalizes the sale of human organs under federal law, this is limited to organs and does not address the permissibility of selling other biological material. See 42 U.S.C. §§ 273–274(e). Additionally, many states exclude replenishable biological materials from their statutes prohibiting the sale of other bodily matter. See Sarah E. Waldeck, *Encouraging a Market in Human Milk*, 11 COLUM. J. GENDER & L. 361, 387–88 (2002) (describing breast milk as exempt from many state laws prohibiting the sale of human biological material).

¹⁶⁶ See *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (en banc) (describing blood plasma as tangible property); see also Bayefsky, DeCherney & Berkman, *supra* note 99, at 1153 (describing the guidelines the American Society for Reproductive Medicine promulgates to influence the cost of oocytes); see also *The US Surrogacy Law Map*, *supra* note 108 (detailing the majority of states that implicitly or explicitly endorse compensated surrogacy arrangements). Although some may argue that altruism motivates these exchanges, they are nonetheless compensated endeavors which result in enrichment to the seller. See Appel Blue, *supra* note 145, at 84 (describing how the United States generally discusses exchange of biological materials as part of an altruistically motivated arrangement, but that compensation is permitted).

¹⁶⁷ Render, *supra* note 12, at 555.

¹⁶⁸ Boulter, *supra* note 54, at 705.

¹⁶⁹ Render, *supra* note 12, at 571. Patients are permitted to outline express conditions for the disposal of biological material, and in the absence of such conditions, the material is considered abandoned upon removal. *Id.* at 572.

¹⁷⁰ See Render, *supra* note 12, at 572 (describing how an important facet of ownership includes the right to determine dispossession).

¹⁷¹ See *infra* notes 174–210 and accompanying text.

place and how they offer women an opportunity for economic gain.¹⁷² Subsection 2 addresses the other end of the spectrum in unpacking how pregnancy, and the ability to carry children within their uteruses, can lead to serious economic loss for women.¹⁷³

1. Uteruses in the Marketplace

Surrogacy as a form of assisted reproduction surfaced in the United States in 1976.¹⁷⁴ Surrogacy accompanied other reproductive health care options for individuals or couples struggling with fertility.¹⁷⁵ Much like the compensation men received for donated sperm, women received compensation for their services as surrogates.¹⁷⁶ From a contract perspective, the product sold is not the baby but instead the service of carrying the baby.¹⁷⁷

Surrogacy was relatively controversial back in the 1970's and continues to generate criticism today.¹⁷⁸ From the onset, critics analogized surrogacy arrangements to sex-work.¹⁷⁹ Contracts where sex is offered as consideration are generally considered invalid as a matter of public policy.¹⁸⁰ The consideration

¹⁷² See *infra* notes 174–203 and accompanying text.

¹⁷³ See *infra* notes 204–210 and accompanying text.

¹⁷⁴ See Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U. L. REV. 1807, 1827 (2022) (pointing to Noel Keane's 1976 negotiation of an unpaid surrogacy agreement).

¹⁷⁵ *Id.* Surrogacy, like donor insemination, offered a solution for those people facing reproductive challenges. *Id.* Surrogacy functioned as a counterpart to donor insemination, which focused on solutions for infertile men, where surrogacy offered a solution for women who could not conceive or carry a child. *Id.* In traditional surrogacy arrangements, the surrogate is artificially inseminated with a donor's sperm. *Id.* Generally, the person retaining the services of the surrogate chooses the sperm. *Id.* In the early years of surrogacy in the U.S., this was traditionally sperm of a husband who was one half of a married couple struggling to conceive. *Id.* In a traditional surrogacy arrangement, women provide space in their uteruses and pass their genes onto the child. See *id.* (describing this practice as inviting significant debates and legal controversies over who is the true mother of the child). This controversy received a great deal of attention in *In re Baby M. Id.* In 1988, in *In re Baby M*, the Supreme Court of New Jersey evaluated a dispute between William Stern, the father who provided sperm, his partner and the intended mother, Elizabeth Stern, and the surrogate Mary Beth Whitehead who refused to give up the child she carried. See 537 A.2d 1227, 1237 (N.J. 1988) (describing how Whitehead had previously agreed to surrender the infant but after giving birth refused to relinquish the child).

¹⁷⁶ Antognini & Frelich, *supra* note 174, at 1827.

¹⁷⁷ CAROLE PATEMAN, *THE SEXUAL CONTRACT* 212 (1988); see also, e.g., Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 893 (1985) (“[P]ayments [for surrogacy arrangements] are not to purchase a child, but to compensate for personal services.”).

¹⁷⁸ *Understanding Surrogacy Controversy: What's the Big Deal?*, AM. SURROGACY BLOG (Sept. 10, 2018), <https://www.americansurrogacy.com/blog/understanding-surrogacy-controversy-whats-the-big-deal/> [https://perma.cc/2NS5-D8X6]; Gregory L. Weiss, *Public Attitudes About Surrogate Motherhood*, 6 MICH. SOCIO. REV. 15, 15 (1992).

¹⁷⁹ See Antognini & Frelich, *supra* note 174, at 1826 (classifying surrogacy agreements as “sex-adjacent agreements” whereby participants agree to engage in activity that will hopefully lead to the birth of a baby).

¹⁸⁰ *Id.* at 1807.

exchanged in a surrogacy arrangement is not precisely sex but it is sex-adjacent in that payment is exchanged for bodily services involving reproductive sex organs.¹⁸¹ Contracts for sex and contracts for surrogacy were both originally understood as operating outside the traditional realms of contract law.¹⁸² Over-time, surrogacy contracts, unlike sex work, have shed the reputation of illegality and instead moved toward a reputation of legitimacy.¹⁸³

Surrogacy is an extremely lucrative undertaking for women willing to serve as surrogates.¹⁸⁴ Judge Richard Posner applied a law and economics approach to support the enforceability of surrogacy contracts.¹⁸⁵ The ability to make a relatively large sum of money for nine months of work provides many women with more money than they could earn in nine months of more traditional employment.¹⁸⁶ This alternate source of income and ability to capitalize on the unique physical capabilities of a woman's body is empowering.¹⁸⁷

¹⁸¹ *Id.* at 1826. Anti-surrogacy advocates levied these criticisms against parties seeking to enforce surrogacy contracts. *See id.* at 1828 (describing Carole Pateman, an individual described as a feminist anti-surrogacy advocate, stating that surrogacy is like prostitution where women were selling their bodies for services).

¹⁸² *Id.* at 1826–27.

¹⁸³ *See id.* at 1827 (describing surrogacy contracts as generally enforceable today). There are a number of possible reasons for this increased legitimacy, among them is the medicalization of surrogacy. *Id.* at 1829. Gestational surrogacy requires the use of IVF and can be framed as a treatment for infertility. *Id.* Surrogacy also enjoys the benefit of fitting in with traditional notions of women desiring motherhood and men desiring to father heirs. *Id.* at 1830. From a more modern standpoint, surrogacy also supports non-traditional family models by offering a method for same-sex couples to have children. *Id.*

¹⁸⁴ *See Braverman, supra* note 112 (describing how women can make between \$30,000 and \$60,000 for providing surrogacy services).

¹⁸⁵ *See* Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 23 (1989) (describing surrogacy contracts as mutually beneficial arrangements that ought to be enforced).

¹⁸⁶ *See* JESSICA SEMEGA & MELISSA KOLLAR, U.S. CENSUS BUREAU, REP. NO. P60-276, INCOME IN THE UNITED STATES: 2021 (2022), <https://www.census.gov/library/publications/2022/demo/p60-276.html> [<https://perma.cc/Z5A2-8YG5>] (highlighting that the median income for women working in full-time, year-round positions in 2021 was \$51,226, compared with the median annual income for men similarly employed which was \$61,180). An added benefit of the surrogacy arrangement is the lack of competition from other potential workers in this field given that only women who can become pregnant can provide these services. *See* Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1084 (2014) (describing these features of surrogacy as particularly appealing for women working lower paying jobs).

¹⁸⁷ *See* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 1092, 1102 (D. Kelly Weisberg ed., 1996) (arguing that permitting women to receive compensation for surrogacy services promotes self-determination and fair compensation for the arduous and risky undertaking that is pregnancy). Upholding surrogacy contracts also recognizes that women are competent and capable of making decisions pertaining to their reproductive abilities. *See* Book Note, 90 COLUM. L. REV. 1177, 1178 (1990) (reviewing CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989)) (describing how it is paternalistic to refuse to validate surrogacy contracts and deprive women of their individual autonomy).

But not all scholars take this positive view of surrogacy arrangements.¹⁸⁸ Some argue that surrogacy reinforces the notion that women's most valuable societal offerings lie in their ability to reproduce.¹⁸⁹ This diminishes the myriad of contributions women make outside of their ability bear children.¹⁹⁰ Additionally, scholars have raised concerns over whether surrogacy agreements economically exploit women.¹⁹¹ Despite these criticisms, carefully drawn empirical studies indicate that a majority of surrogates in America are not from marginalized backgrounds, nor do they feel coerced into the arrangement.¹⁹²

¹⁸⁸ See MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 148 (1996) (criticizing surrogacy writing "paid surrogacy within the current gender structure may symbolize that women are fungible babymakers for men").

¹⁸⁹ *Id.* Some scholars have tried to analogize the enforceability of surrogacy arrangements to the enforceability of contracts for sperm donation. Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303, 306 (1993). This is an imperfect comparison, however, because of the unique nature of pregnancy and labor. *Id.* at 307. Surrogacy acutely raises the issue of commodification. See *id.* at 308 (arguing that surrogacy invites the commodification of women). There are costs and benefits associated with this commodification. See *id.* at 309 (describing the "double bind" of surrogacy: rendering women's bodies as fungible coupled with the risk of robbing women of the ability to commercialize their reproductive capacity and respecting their right to contract).

¹⁹⁰ See Elizabeth Yuko, *Not All Women Want to Be Mothers. Finally, Our Culture Is Recognizing That.*, WASH. POST (June 20, 2016), <https://www.washingtonpost.com/news/soloish/wp/2016/06/20/not-all-women-want-to-be-mothers-finally-our-culture-is-recognizing-that/> [<https://perma.cc/7PCD-6DQK>] (describing how shifting notions of what family and success mean have contributed to growing acceptance of women who chose not to become mothers).

¹⁹¹ See Ainsworth, *supra* note 186, at 1080 (describing how women serving as surrogates experience the risks of surrogacy in exchange for consideration most acutely and that they have less power in these contractual relationships). Additionally, in the notorious *Baby M* case, prominent feminists, including Gloria Steinem and Betty Friedan, filed an amicus brief opposing the commercialization of women's reproductive capacities. See Elizabeth Mehren, *Feminists Fight Court Ruling in Baby M Decision: Steinem, Friedan, Chesler, French Among Supporters*, L.A. TIMES (July 31, 1987), <https://www.latimes.com/archives/la-xpm-1987-07-31-vw-147-story.html> [<https://perma.cc/W42S-P2HV>] (describing compensated surrogacy as casting low-income women as breeders). These feminists argued that compensated surrogacy is dehumanizing and dangerously commodifies women's bodies. See Holmstrom-Smith, *supra* note 108, at 446–47 (citing Brief for The Foundation on Economic Trends et al. as Amici Curiae, Matter of Baby M, 537 A.2d 1227, 1232 (N.J. 1988) (writing in support of the surrogate mother, arguing that she should be permitted to maintain custody of the child)). Critical race scholars also raised concerns that given America's history of exploiting Black women's bodies and reproductive capacities, permissive compensated surrogacy may lead to further exploitation of women of color. Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER L.J. 17, 18–19 (1991). As sociologist and law professor Dorothy Roberts explained, during the time of slavery, Black women's ability to bear children was severed from their ability to parent children because they were forcibly impregnated by their white enslavers and their children subsequently became that man's property. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 22 (1997).

¹⁹² Ainsworth, *supra* note 186, at 1086. Most women offering surrogacy services in America are Christian, white women from a variety of socio-economic backgrounds. Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 42–44 (2010). Modern-day feminists are generally supportive of commercial surrogacy agreements, as evidenced by the Women's Bar Association of New York's support of a 2018 bill legalizing commercial surrogacy. *Position Statement-2018: Child Parent Secu-*

Similar to surrogacy arrangements, selling eggs can be a lucrative, albeit arduous undertaking.¹⁹³ Unlike sperm, women have a finite number of eggs, which means there is a limit on their ability to profit from this biological resource.¹⁹⁴ The American Society for Reproductive Medicine has suggested a limit of no more than six ovum donations to account for the health risks associated with the undertaking.¹⁹⁵

America is one of only a few countries that allows for compensation in exchange for egg donation.¹⁹⁶ Altruism and economic incentives both play a role in women's decisions to sell their eggs.¹⁹⁷ The prevalence of an altruistic centered narrative reflects a general discomfort with the idea of exchanging

city Act, WOMEN'S BAR ASS'N OF N.Y., <https://www.wbasny.org/legislation/2018-a-6959-a-s-17-a/> [<https://perma.cc/UT8M-UE7Y>]. There are a significant number of military wives who act as surrogates while their husbands are deployed. Ainsworth, *supra* note 186, at 1100. The inability to conceive a child with their husbands during deployment and an altruistic or financial motivation to capitalize on this window of time likely drives this result. *Id.* at 1100–01.

¹⁹³ See *Egg Donor Compensation*, *supra* note 99 (detailing compensation which typically ranges from \$5,000 up to \$10,000). The earning potential stemming from this procedure makes the colloquial framing of this as egg donation a misnomer. See Lewis, *supra* note 69, at 657 (outlining the possible compensation for egg donors). Women wishing to sell their eggs must generally be in good physical and mental health, abstain from smoking and psychoactive drugs, experience regular menstruation, not utilize hormonal contraceptives, be willing to receive injections, and be willing and able to attend regular appointments. *Become an Egg Donor*, EGG DONOR AM., <https://www.eggdonoramerica.com/become-egg-donor> [<https://perma.cc/WM7H-DZA5>]. Additionally, women who have previously sold eggs or who have “exceptional qualities” may stand to earn even more money from the sale. *Egg Donor Compensation*, *supra* note 99.

¹⁹⁴ See Eric Nagourney, *What Happened to All Those Eggs?*, N.Y. TIMES (Feb. 1, 2013), <https://www.nytimes.com/2013/02/01/booming/womens-eggs-diminish-with-age.html> [<https://perma.cc/M9R8-NDUN>] (describing how women are born with all the eggs they will produce in their lifetime and by the time girls reach puberty, they only have roughly 300,000 eggs remaining). The cyclical nature of egg donation also limits the frequency with which eggs can be donated. *Id.* Egg donation comes with short- and long-term risks to women's health. See Donna De La Cruz, *Should Young Women Sell Their Eggs?*, N.Y. TIMES (Oct. 20, 2016), <https://www.nytimes.com/2016/10/20/well/family/young-women-egg-donors.html> [<https://perma.cc/8FTU-5K27>] (explaining that women may experience side effects associated with the required hormone treatments, long term issues with ovaries such as ovarian hyperstimulation syndrome, and possibly jeopardized long-term fertility). This is all in addition to the transvaginal ovarian aspiration procedure required to extract the eggs, which is as invasive an experience as the name of the procedure suggests. *Id.*

¹⁹⁵ See Saylor S. Soinski, Comment, *Paid Donation: Reconciling Altruism and Compensation in Oocyte Transfer*, 20 YALE J. HEALTH POL'Y L. & ETHICS 513, 519 (2021) (citing *FAQ: Common Questions for Egg Donors*, UCSF HEALTH, <https://www.ucsfhealth.org/education/faq-common-questions-for-egg-donors#9> [<https://perma.cc/LHE3-42HN>]). These risks include pain and swelling, allergic reactions, and a slight risk of ovarian hyperstimulation syndrome. *Id.* at 518.

¹⁹⁶ See Klitzman, *supra* note 98, at 72 (describing the United States as an outlier in this area and how the possibility of compensation has created an international market for eggs based in the United States).

¹⁹⁷ See De La Cruz, *supra* note 194 (quoting Elizabeth Yuko, a bioethicist who analogized egg donation to other physically risky endeavors people undertake such as participation in professional sports or firefighting). Yuko argues that society's acceptance of this capitalization on people's bodies to make money ought to translate to an endorsement of a woman's decision to sell her eggs. *Id.*

reproductive materials for compensation.¹⁹⁸ Given the lack of concrete statutory law governing egg donations, there has not been a tremendous amount of litigation in this area.¹⁹⁹ In 2016, in *Kamakahi v. American Society for Reproductive Medicine*, the U.S. District Court for the Northern District of California oversaw a settlement between plaintiffs who had donated eggs and the regulatory organization that set guidelines for reproductive medicine.²⁰⁰ The plaintiffs' original complaint questioned the validity of the American Society for Reproductive Medicine's guidelines limiting the price donors could receive in exchange for their eggs.²⁰¹ The plaintiffs challenged this practice as a violation of the Sherman Act, which would imply that the eggs were considered commercial objects.²⁰² Ultimately the parties reached a settlement agreement, which leaves this area of law unexplored.²⁰³

2. Fiscal Consequences of Forced Birth

The ability for women to control whether they are using their uterus to carry a child has serious long-term economic ramifications.²⁰⁴ This runs counter to the narrative proffered up by Mississippi in *Dobbs v. Jackson Women's Health Organization*.²⁰⁵ During the year in which women carry and deliver a baby, the health expenditures and lost opportunity costs can be astronomical.²⁰⁶

¹⁹⁸ See Soinski, *supra* note 195, at 516 (articulating how altruism is generally thought to be the primary motivator for egg donations, which perhaps explains the characterization of this exchange as a donation instead of a sale). Altruism also comports with society's image of women as unselfish suppliers of reproductive labor. *Id.*

¹⁹⁹ See *id.* at 520–21 (listing the limited number of states that have regulated in this area and pointing to the complete absence of federal statutes governing oocyte transfers).

²⁰⁰ No. 11-CV-1781, 2016 WL 7740288, at *2 (N.D. Cal. Aug. 26, 2016).

²⁰¹ See *Kamakahi v. Am. Soc'y for Reprod. Med.*, No. C 11-01781, 2012 WL 892163, at *1 (N.D. Cal. Mar. 14, 2012) (describing the limitation as price fixing in violation of the Sherman Act, which forbids the restriction of commerce and competition).

²⁰² *Id.*; see 15 U.S.C. §§ 1–7. The Sherman Act is intended to prohibit unreasonable restraints on trade. *Id.* It expressly covers restraints on trade or commerce. *Id.* In order for an entity to be subject to regulation under the Sherman Act, it must be considered trade or commerce. *Id.* Trade is defined, similarly to commerce, as the practice of purchasing and selling commodities. *Trade*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/trade> [<https://perma.cc/BWA3-AAJB>].

²⁰³ See *Kamakahi*, 2016 WL 7740288, at *1 (accepting the terms of the Settlement Agreement).

²⁰⁴ See CATHERINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 143 (2005) (detailing how forcing women to bear children creates sex inequality).

²⁰⁵ See Brief for Petitioners at 5, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (arguing that abortion access has no bearing on women's ability to participate equally in the economy).

²⁰⁶ See Jessica A. Peterson, Benjamin B. Albright, Haley A. Moss & Angela Bianco, *Catastrophic Health Expenditures with Pregnancy and Delivery in the United States*, 139 *OBSTETRICS & GYNECOLOGY* 509, 509 (2022) (describing how low-income parents are more likely to face disastrously high medical expenses associated with pregnancy and delivery proportionate to their income).

In addition to incurred costs, as previously discussed, there is significant economic value in women's reproductive capacities.²⁰⁷ When women are pregnant, they are unable to simultaneously serve as surrogates for another person and they are precluded from donating their eggs.²⁰⁸ In addition to this market alienation, women also experience a decrease in workplace earnings stemming from pregnancy.²⁰⁹ Although many women may voluntarily undertake certain economic losses when voluntarily choosing to deliver a child, these costs are experienced very differently if choice is removed.²¹⁰

C. Addressing Concerns with Body Property

The human body is unique in its conception as both a literal object and the physical embodiment of one's personhood.²¹¹ This duality gives rise to a number of potential problems in trying to map property law onto the body.²¹² Subsection 1 discusses the possibility for conflict with the Thirteenth Amendment and a legally recognized property interest in a human body part.²¹³ Subsection 2 reaches a second concern with body property, being that legally recognizing the body as an object offends the unique nature of the body as the physical symbol of one's sense of personhood.²¹⁴

1. Thirteenth Amendment

Some of the hesitancy with understanding attached body parts as property is rooted in the notion that once something is property, it is capable of being owned by another person.²¹⁵ It is almost impossible to juxtapose property and

²⁰⁷ *Egg Donor Compensation*, *supra* note 99 (outlining compensation for egg donation ranging from \$5,000 to \$10,000); Braverman, *supra* note 112.

²⁰⁸ *See Become an Egg Donor*, *supra* note 193 (describing how in order to be eligible to donate, women must have regular monthly menstrual periods, which women who are actively pregnant do not).

²⁰⁹ Brief for Economists as Amici Curiae Supporting Respondents, *supra* note 130, at 19 (pointing to the decrease in earnings for women who have children). The Family and Medical Leave Act does not require employers to provide paid leave, only unpaid leave. *See* Family and Medical Leave Act of 1993 § 2, 29 U.S.C. § 2601(b)(2) (describing a purpose of the Act as providing employees "reasonable leave" without specifying compensation). People working in lower wage jobs are less likely to have access to paid sick leave. *Paid Leave in the U.S.*, *supra* note 132.

²¹⁰ *See* Boone *supra* note 107, at 573 (warning that given the economic difficulties associated with reproduction, it is essential that the government sufficiently value this undertaking).

²¹¹ *See* Render, *supra* note 12, at 582 (describing the human body as unique in its ability to house these dual truths).

²¹² *Id.*

²¹³ *See infra* notes 215–224 and accompanying text.

²¹⁴ *See infra* notes 225–232 and accompanying text.

²¹⁵ *See* Rao, *supra* note 13, at 455 (arguing that expanding the definition of property to include attached body parts gives rise to a potential conflict between the property rights held by the owner of the attached body part and the right to privacy held by the person whose body houses the attached part). Separating ownership over a body part with the body in which the part resides has the potential

human bodies without evoking the horrors of slavery.²¹⁶ The Thirteenth Amendment's ban on slavery narrowed society's definition of property.²¹⁷ Black bodies could no longer legally be considered chattel for white enslavers.²¹⁸ Slavery robbed enslaved individuals of their own self-determination and instead their entire bodies, their work, and their lives were subject to ownership.²¹⁹ There is a concern that should the law permit owning one's own body part or biological material, this could extend to an abhorrent ability to own other people.²²⁰

Modern advocates of recognizing a property interest in the body take care to distinguish this from a property interest that would run afoul of the Thirteenth Amendment.²²¹ The dehumanization of people through rhetoric of chattel served as a means of normalizing slavery and reinforcing a racial hierarchy.²²² Indeed, reproductive autonomy was not a reality for enslaved Black women during the Antebellum Period.²²³ Current body property proposals distance themselves from Thirteenth Amendment concerns by clarifying the ways in which a legally recognized property interest in one's body or body parts may not necessarily open the door for that part to be owned by another.²²⁴

to endow an owner with power over another person's body in a way that offends society's conception of equality. *Id.* at 456.

²¹⁶ See Render, *supra* note 12, at 553–54 (pointing to the Thirteenth Amendment as a point of concern for the creation of a property law framework applied to human bodies).

²¹⁷ See U.S. CONST. amend. XIII. The Thirteenth Amendment expressly states that the practices of slavery and involuntary servitude are abolished in the United States. *Id.* Slavery is defined as the practice of holding human beings as chattel against their will. *Slavery*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/slavery> [<https://perma.cc/PC2F-2TLW>]. Per *Black's Law Dictionary*, chattel is synonymous with property. *Chattel*, BLACK'S LAW DICTIONARY, *supra* note 77.

²¹⁸ See U.S. CONST. amend. XIII (outlawing the ownership of persons by others).

²¹⁹ See Render, *supra* note 12, at 589–90 (describing America's history with slavery as a devastating criticism of the danger of commodification and the way in which this history operates as a specter looming in cases like *Moore* that deal with how and if property can be held in bodies and biological material). Enslavers robbed slaves of their self-ownership because, by virtue of law at the time, the enslaver was entitled to not only exploit the enslaved person's body, but also to control their time and effort in all facets of their life. *Id.* at 592.

²²⁰ *Id.* at 582. For example, if an individual can own their own organs or limbs, what is the limiting principle preventing other people from owning that part of another person's body and thereby exercising an undue level of influence and control? See *id.* at 583 (expressing disdain for the idea of owning other people in violation of the Thirteenth Amendment).

²²¹ See *id.* at 593 (articulating how slavery robbed the enslaved people of their self-ownership and converted humans to chattel).

²²² Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J. LEGAL COMMENT. 649, 672 (2010).

²²³ See Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17, 33 (2016) (describing how Black women's status as chattel meant that the enslavers had a property interest in the woman's reproductive capacity).

²²⁴ Render, *supra* note 12, at 593. Some scholars believe that one can avoid Thirteenth Amendment concerns with “an exclusive and inalienable property interest” which affords the greatest possible legal protection. *Id.* A property interest need not always give rise to a right to engage in a com-

2. Does Property Offend Personhood?

Bodily autonomy is a fragile yet essential tenant in modern society.²²⁵ Scholars are reluctant to endorse any legal framework that diminishes the sanctity of the body.²²⁶ Some scholars argue that even without Thirteenth Amendment concerns, calling one's body property debases it.²²⁷ A property-based conceptualization of the body inherently fragments the relationship between the corporeal and the spiritual aspects of personhood.²²⁸ This dissection may be distressing and cuts in favor a privacy framework which recognizes an indivisible body and identity.²²⁹ Property laws govern objects, and object seems like poor terminology for sentient entities like the human body.²³⁰

Others argue that body parts and biological materials can be extracted from a person who chooses to give or sell them without sacrificing one's dignity and personhood.²³¹ Those who are comfortable with a classification of body

mercial transaction. *See id.* at 596 (arguing that treating a body as property may actually better protect against sale because property generates a right to exclusive use and can be inalienable). Others argue this kind of recognition flies too close in the face of the Thirteenth Amendment and instead suggest that property be recognized in alienable body parts. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1982). Still others suggest that renewability should serve as the litmus test for whether biological matter ought to be considered property. Rausch, *supra* note 38, at 43. Finally, some scholars argue that the correct way to ascertain if a body part can be recognized as property is if that part can be safely removed from the body in which it resides without harming the individual. *Id.* at 44. Inalienability does not defeat the possibility for an entity to be considered property. *See Andrus v. Allard*, 444 U.S. 51, 63 (1979) (holding that the removal of the bundled property right of market-alienability did not render eagle feathers incapable of being considered property).

²²⁵ *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1904 (1987) (describing the freedom to make one's own choices as an essential feature of personhood).

²²⁶ *See id.* at 1905–06 (expressing concerns that rendering the human body a fungible good disrespects what it means to be human).

²²⁷ Boulrier, *supra* note 54, at 717. Common law cases point to the religious undertones of this argument that the body is a temple and ought not to be treated as mere property. *See In re Johnson's Estate*, 7 N.Y.S.2d 81, 84 (Sur. Ct. 1938) (expressing the notion that the body is a sacred object and the "temple of the Holy Ghost"). Modern day concerns have likely evolved to a grievance rooted in respect for the individual and their personhood, which are intimately intertwined with their physical body. Boulrier, *supra* note 54, at 717.

²²⁸ Rao, *supra* note 13, at 429. In order to conceive body parts as property, the body must be uncoupled from the person. *Id.*

²²⁹ *Id.* Under a privacy model, the body is inextricably linked to the person, rendering any intrusions or invasions to the physical self an affront to personhood. *Id.*

²³⁰ *See* Render, *supra* note 12, at 582 (articulating how likening a human body to an object contradicts the normative distinction drawn between persons and things).

²³¹ Rao, *supra* note 13, at 429. The bifurcation allows not only for the fragmentation of the body, but also for the rights included in the bundle to be distributed in parts. *Id.* at 434. Recognition of a property right must also include careful assessment of matters such as disparities in bargaining power to guard against exploitation and inequality. *See id.* at 443 (pointing to inequalities in power as a natural byproduct of property laws); *see also* Halewood, *supra* note 93, at 160 (describing how partial market-inalienability may produce a better balance between self-ownership and commodification and safeguard against exploitation of vulnerable persons).

parts as property question how it could be debasing to accurately describe the attributes of the body.²³²

III. PROPERTY LAW AND REPRODUCTIVE JUSTICE

Reproductive justice seeks to help people achieve bodily autonomy and exercise control over their reproductive health.²³³ This Part of the Note argues that providing women a property interest in their uteruses helps achieve bodily autonomy and provides legal remedies that address some of the harms that stem, after the U.S. Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, from a woman's inability to make decisions about her body.²³⁴ Section A of this Part addresses how the law can work to foster bodily autonomy.²³⁵ Section B of this Part contextualizes this discussion in the post-*Dobbs* legal landscape and suggests specific legal challenges available to those impacted by abortion bans under a property law framework.²³⁶

A. Empowering Reproductive Freedom Through Property Law

Property law's language of ownership and reproductive justice's emphasis on autonomy and self-ownership may coalesce to reveal the economically and spiritually empowering possibilities of true bodily autonomy.²³⁷ Subsection 1 demonstrates where property law already promotes bodily autonomy and highlights where the commercialization of women's body parts has provided a lucrative and empowering option for exercising this autonomy.²³⁸ Subsection 2 focuses on the movement to decriminalize sex work, its parallels to other commercial uses of female bodies, and the modern push to allow women to make decisions about how to use their bodies and their sexuality.²³⁹

²³² See Render, *supra* note 12, at 588 (articulating how one need not ignore the moral respect due to our bodies, as it is not incompatible to acknowledge that some of these same special attributes have great social utility). Regardless of whether one sees a person as a sum of matter and biological processes or something more metaphysical, property may still be a useful legal framework for understanding a person's relationship to their own body. *Id.* at 589.

²³³ See *Reproductive Justice*, SISTERSONG WOMEN OF COLOR REPROD. JUST. COLLECTIVE, <https://www.sistersong.net/reproductive-justice/> [<https://perma.cc/RGD7-YC6U>] (describing reproductive justice as essential for the maintenance of bodily autonomy).

²³⁴ See *infra* notes 235–278 and accompanying text.

²³⁵ See *infra* notes 237–262 and accompanying text.

²³⁶ See *infra* notes 263–278 and accompanying text.

²³⁷ See *infra* notes 238–262 and accompanying text (evaluating this intersection between commodification of female bodies, property law, and bodily autonomy).

²³⁸ See *infra* notes 240–252 and accompanying text.

²³⁹ See *infra* notes 253–262 and accompanying text.

1. Bodily Autonomy

Those who defend reproductive justice also defend bodily autonomy as inextricably linked.²⁴⁰ It is my claim that bodily autonomy and a legally recognized property interest are not mutually exclusive ways of understanding the relationship between one's sense of self and one's body.²⁴¹ Commodification and fiscal gain cannot and need not capture the full value of a property for the owner.²⁴²

Privacy rights, which have historically protected reproductive freedom and bodily autonomy, talk about liberties in the negative.²⁴³ Property rights, on the other hand, protect the rights holder from outside intrusion *and* endow the holder with a positive right to utilize one's body productively.²⁴⁴ Powerfully, property law obligates the government to be limited in their dealings with private property, and bestows certain individuals with governmental authority over others.²⁴⁵ Grounding bodily autonomy in positive property rights helps to align the constellation of ways the law and regulations interact with the human body.²⁴⁶

²⁴⁰ See *Reproductive Justice*, *supra* note 233 (defining reproductive justice as a right to "maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities").

²⁴¹ See generally Render, *supra* note 12 (examining some of the ways property law already interacts with the human body). Margaret Radin describes the tension between commodification and non-commodification of women's bodies as presenting a "double bind." Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990). There are risks and benefits associated with recognizing the marketability of women's reproductive capacities. *Id.* Radin advocates for a pragmatist approach to change making when faced with this double bind. See *id.* (advising individuals to "look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on"). In the current post-*Dobbs v. Jackson Women's Health Organization* legal landscape, where women across the United States are denied access to basic health care, the scales tip in favor of a legally recognized property interest. See Cohen et al., *supra* note 19, at 1 (advocating for new litigation strategies to defend the right to access abortion care).

²⁴² See Appel Blue, *supra* note 145, at 90 (describing how society assigns monetary values to objects such as engagement rings which have greater value than this number attributed to them).

²⁴³ See Rao, *supra* note 13, at 432 (articulating how privacy rights protect against outside interference as opposed to providing an affirmative positive right to engage in certain activities).

²⁴⁴ See *id.* at 433 (contrasting with privacy's vision of the body as a passive vehicle needing protection from outside interference).

²⁴⁵ See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2064 (2021) (holding that requiring third parties to have access to private property constitutes a governmental taking).

²⁴⁶ See Rao, *supra* note 13, at 438–39 (outlining which rights relating to the body have historically been protected under privacy and where privacy has declined to reach other corporeal matters). Privacy preserves the right to intimate consensual relationships but does not extend to sex work. *Id.* at 438. Privacy also protects access to contraception as a method of family planning but does not include a right to sell one's eggs. See *id.* at 438–39 (describing how privacy covers the right to prevent fetal tissue from developing in one's body using contraception but would not include a right to sell fetal tissue, nor does it include a right to sell bone marrow or one's kidney). Privacy's protection of bodily autonomy arguably extends to a right to refuse to donate a kidney, but it does not empower an individual to sell bone marrow or blood plasma in a commercial transaction. *Id.* at 439. This inconsistency with privacy law and the potential for a clearer framework under property law is exemplified in a

Promoting the usefulness of the human body as a biological resource arguably better honors the abstract and sacred qualities which separate the body from mere objects.²⁴⁷ Modern medicine and society have already technically allowed for the commodification of uteruses and the biological material generated by women's reproductive capacity.²⁴⁸ Despite this, women's uteruses do not enjoy any of the property protections that typically accompany commercialization.²⁴⁹ Uteruses are shielded from a property label under the guise of respect for the body, but other less vital and economically useful organs are given greater legal protection from outside interference.²⁵⁰ Forcing a woman to carry a pregnancy against her wishes does not demonstrate respect for her bodily autonomy.²⁵¹ Endowing women with concrete, textually guaranteed constitutional protections over their autonomous selves is the most appropriate way to demonstrate respect for their bodily freedom and human dignity.²⁵²

2. Decriminalization of Sex Work

As discussed above, bodily autonomy has historically been characterized as a privacy interest.²⁵³ Privacy interests mirror some of the rights included in

hypothetical law prohibiting gifting body parts, like organs, to family members. *Id.* Property law may not take issue with such a statute whereas privacy would hold that the law was unconstitutional. *See id.* (citing George J. Annas, *Life, Liberty, and the Pursuit of Organ Sales*, 14 HASTINGS CTR. REP. 22, 22 (1984)).

²⁴⁷ *See* *Render supra* note 12, at 582 (pointing to the body's ability to donate blood and bone marrow, provide lifesaving organ transplants, and support individuals who wish to become parents but cannot or do not wish to birth one themselves). Understanding the way in which the human body is a valuable resource does not debase it, but rather honors its uniqueness. *See id.* (describing the body as a life-saving and sustaining entity).

²⁴⁸ *See id.* at 597 (highlighting new developments in biotechnology).

²⁴⁹ *See id.* at 549 (pointing to the absence of a clear law of the body).

²⁵⁰ *See* *Chemerinsky & Goodwin, supra* note 10, at 1234 (describing how the state cannot force a woman to use her body to save the life of another in the context of organ or blood donation, correlating this with a woman's decision as to if, when, and how her body, specifically her uterus, can be used to sustain a fetus).

²⁵¹ *See id.* at 1233–34 (articulating the right to decide what happens to one's own body and harkening back to the Nuremberg trials and Tuskegee Syphilis Experiment, which demonstrate the evils of state interference with bodily autonomy).

²⁵² *See generally* Rausch, *supra* note 38, at 38–39 (outlining the benefits and drawbacks of a legally recognized property interest in the uterus).

²⁵³ *See* *Rao, supra* note 13, at 387 (contextualizing rights related the human body as falling under a constitutional guarantee of privacy). Privacy interests protect on two fronts. *Id.* at 388. The first is a right to personal privacy, which encompasses bodily integrity. *Id.* The second is relational privacy which protects against governmental interference into intimate relationships. *Id.* at 389. Legal questions surrounding the treatment of human bodies reaches both personal and relational privacy concerns. *Id.* at 388. Personal privacy safeguards an individual's body against invasive forces. *Id.* at 389. It is lacking, nevertheless, in that it does not provide for an affirmative right to exact control over the body. *Id.* Relational privacy shields individuals' consensual relationships from state interference but does not protect economic exchanges between strangers. *Id.* Both of these methods of privacy protection seek to curtail government authority but fail to actually empower, that is, to affirmatively confer

property's bundle of rights metaphor such as possession and exclusion, but does not account for a right to use or a right to transfer.²⁵⁴ The inability to affirmatively use one's body in a manner of one's choosing, although useful in some contexts, may no longer comport with a modern understanding of autonomy.²⁵⁵ The notion of commercially using one's body immediately draws to mind the role of sex work in society.²⁵⁶ Although once previously taboo, and in fact used as a comparison point to disparage surrogacy arrangements, several jurisdictions have begun to decriminalize sex work and to grant individuals the freedom to use their bodies in this manner.²⁵⁷ Property, which provides for a right to use and which is intimately intertwined in other service arrangements, better comports with the shifting attitudes surrounding the legitimacy of sex work.²⁵⁸ Contrary to

power upon individuals. *Id.* The Supreme Court's abortion jurisprudence also gave significant weight to the importance of relational and personal privacy. *Id.* at 392. Specifically, in 1992, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* painted a picture of the abortion right as drawing on the relational privacy articulated in its previous 1965 case, *Griswold v. Connecticut*—the contraceptives jurisprudence—and the importance of bodily autonomy articulated in *Roe v. Wade*. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992), *overruled by Dobbs*, 142 S. Ct. 2228 (2022).

²⁵⁴ Rao, *supra* note 13, at 389.

²⁵⁵ *See id.* (describing how, although privacy protects matters such as contraception, resisting sterilization, and, historically, abortion, it did not extend to affirmatively granting a right to use one's body in a manner of one's choosing). Privacy is not a sufficient basis to legitimize sex work, nor can it serve as a touchstone for enforcing surrogacy agreements. *Id.* at 390.

²⁵⁶ Linda S. Anderson, *Ending the War Against Sex Work: Why It's Time to Decriminalize Prostitution*, 21 U. MD. L.J. RACE RELIGION GENDER & CLASS 72, 73–74 (2021) (describing the multitude of legal ways women are permitted to use their bodies as similar to sex work, despite its criminalization).

²⁵⁷ *See* PATEMAN, *supra* note 177, at 212 (analogizing surrogacy contracts and sex work arrangements). Pateman uses this comparison to clarify that individuals engaged in sex work are not selling their bodies, they are selling a service. *Id.* Similarly in surrogacy arrangements, women serving as surrogates are not selling a baby, they are selling the service of carrying a baby to term. *Id.* Pateman describes the surrogacy arrangement as a contract “for use of the property a woman owns in her uterus.” *Id.*

²⁵⁸ *See* Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019), <https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc> [<https://perma.cc/KDS4-LQ6H>] (recounting the successful removal of criminal penalties for selling sex in New Zealand and Amnesty International's 2016 call for all other countries to similarly remove criminal penalties). Efforts to decriminalize sex work in the United States have not been quite as successful although there is a long history of advocating for sex workers' rights. *Id.* For example, sex workers were part of the landmark Stonewall riots of 1969 and in 1917 over two hundred sex workers gathered in San Francisco to oppose an anti-prostitution campaign. *Id.* Although there is no federal law prohibiting sex work, buying and selling sex is outlawed in almost all parts of the country, with a small handful of exceptions in certain counties in Nevada. *Id.* Despite this, both Cory Booker and Kamala Harris expressed a willingness to support some form of decriminalization during their 2020 presidential campaigns. *Id.* Additionally, D.C. and New York legislatures have introduced measures to decriminalize sex work in recent years. *Id.* Even the linguistic shift from prostitution to sex work implies that the sex is a form of labor and that people who engage in sex work are not defined by their profession. Carol Leigh, *Inventing Sex Work*, in *WHORES AND OTHER FEMINISTS* 223, 230 (Jill Nagle ed., 1997).

the historic understanding of both sex work and surrogacy as exploitative and reinforcing sexism and gender stereotypes, women may choose to assume these roles because they enjoy the work and/or because they can profit from it.²⁵⁹ Laws that criminalize sex work deny sex workers, the majority of whom are women, control over their bodies and deprive them of a valuable source of enrichment.²⁶⁰ A full treatment of the ways in which decriminalizing sex work furthers bodily autonomy is outside the scope of this Note.²⁶¹ Nevertheless, the potential for empowerment and risks of commodification offer important parallels between a legally recognized property interest in one's uterus and the movement toward decriminalization.²⁶²

B. Post-Dobbs Abortion Landscape and the Need for Creative Alternate Legal Challenges

Property rights are creatures of law and reflect the values of the society that promulgates them.²⁶³ There is a significant divide between societal values and the law governing abortion access.²⁶⁴ In the wake of the U.S. Supreme

²⁵⁹ See Holmstrom-Smith, *supra* note 108, at 452 (describing the varied motivations people may have for entering the sex work industry and rejecting the notion that women who chose to occupy the roles of surrogate or sex worker are somehow boxed into positions driven by sexism and gender discrimination).

²⁶⁰ See Kelly J. Bell, *A Feminist's Argument on How Sex Work Can Benefit Women*, 1 INQUIRIES J. 1, 1 (2009), <http://www.inquiriesjournal.com/articles/28/a-feminists-argument-on-how-sex-work-can-benefit-women> [<https://perma.cc/6UTU-TST6>] (describing how it is beneficial to women to treat sex work like other forms of paid labor and protect workers who engage in the profession).

²⁶¹ See *supra* notes 1–24.

²⁶² See Bell, *supra* note 260, at 2. Additionally, criminalizing sex work doesn't actually stop the practice altogether, rather it leads to unsafe working conditions for those involved. Anderson, *supra* note 256, at 109. This parallels the predictions made regarding illegal abortion procedures in states with abortion bans. See Michael Nedelman, *Abortion Restrictions Don't Lower Rates, Report Says*, CNN HEALTH (Mar. 21, 2018), <https://www.cnn.com/2018/03/21/health/abortion-restriction-laws/index.html> [<https://perma.cc/VA29-6C7T>] (describing how abortion restrictions do not lower the rate of abortions but do make the procedure more dangerous).

²⁶³ See Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 357 (1954) (writing how laws reflect the interests of those who craft it). Property rights are judged on more than their ability to reflect the interests of the legislature and their constituents. Bjorkman & Hansson, *supra* note 156, at 210. Property rights must also be evaluated based on their ability to secure a good life for individuals impacted by the law. *Id.* Therefore, property rights ought to promote a marriage of social and economic well-being. *Id.*

²⁶⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overturning a constitutional right to abortion). According to the Pew Research Center, roughly six out of every ten Americans believe abortion should be legal in at least most circumstances. Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022), <https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/> [<https://perma.cc/6R7P-SK2K>]. Despite this, lawmakers across the United States are enacting ever more restrictive abortion laws. See McCann et al., *supra* note 6 (tracking the fourteen states that now ban most abortions, the two states that have a six-week abortion ban, and the four states where state judges have blocked abortion bans at the time of publication).

Court's decision in *Dobbs v. Jackson Women's Health Organization* in 2022, abortion advocates have called for greater creativity in strategies for challenging abortion bans.²⁶⁵

Empowering women with a legally recognized property interest in their uterus serves as a useful basis for challenging abortion bans.²⁶⁶ The Constitution explicitly protects property rights.²⁶⁷ Although the Court in *Dobbs* declined to interpret the Constitutional right to privacy to extend to abortion, and the rest of the privacy jurisprudence now rests on shaky ground, the importance of property rights in the Constitution is undeniable.²⁶⁸

²⁶⁵ See Cohen et al., *supra* note 19, at 1 (calling for new strategies to defend the right to an abortion in the absence of a constitutional protection). Shifting and flexible strategies are essential for a rapid response to this urgent issue. See *id.* (warning that longer battles will result in greater consequences for people who can become pregnant). New and creative legal strategies put abortion rights advocates on the offensive and anti-abortion advocates will be forced to defend the Supreme Court's holding in *Dobbs*. *Id.* at 10. Abortion rights advocates have criticized privacy as the legal basis for protecting abortion access long before the Supreme Court overruled *Roe v. Wade* and *Casey*. *Id.* at 3. Other legal scholars have proffered alternative mechanisms for grounding the abortion right, but prior to June 2022, privacy prevailed as the main tool. *Id.* Some of these suggestions included arguments that abortion bans ran afoul of the Equal Protection Clause, the First Amendment, and the Thirteenth Amendment. *Id.* Some scholars have even argued that abortion restrictions, such as ultrasound requirements, may violate the Fourth Amendment's prohibition on search and seizure. See U.S. CONST. amend. IV (prohibiting unlawful search and seizure). See generally Note, *Physically Intrusive Abortion Restrictions as Fourth Amendment Searches and Seizures*, 128 HARV. L. REV. 951 (2015) (describing the possibility that physically intrusive abortion regulations could be considered physical intrusions in violation of the Fourth Amendment). Prior to her appointment to the Supreme Court, Ruth Bader Ginsburg argued that inability to access abortion curtailed women's ability to participate equally in society and therefore ought to be considered a matter of sex equality under the Equal Protection Clause. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. REP. 143, 143–44 (1978). Abortion has also been characterized as involuntary servitude in violation of the Thirteenth Amendment. See Michele Goodwin, Opinion, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> [<https://perma.cc/7Z7F-JTMA>] (describing how the Thirteenth Amendment and Fourteenth Amendment were enacted to cure, among other societal evils, forced reproduction for Black women). Even if these creative legal strategies do not enjoy immediate success, they can serve as foundational steps for future challenges and generate new social narratives and judicial dissents. Cohen et al., *supra* note 19, at 12. Prior to their victory in *Dobbs*, the anti-abortion movement was willing to adopt creative strategies to restrict abortion access. *Id.* at 4–5 (pointing to the passage of the Hyde Amendment banning federal funding for abortion care, laws such as waiting periods and parental consent that delay the ability to access care, targeted regulation of abortion providers laws, and, most recently, Texas's S.B.8 Bill creating a civil bounty enforcement mechanism).

²⁶⁶ See generally Rausch, *supra* note 38 (outlining the positives and drawbacks generated by recognizing uterine property).

²⁶⁷ U.S. CONST. amend. V; *id.* amend. XIV. The Fifth Amendment's Due Process Clause and Takings Clause each restrict the government's ability to interfere with an individual's property. *Id.* amend. V. The Fourteenth Amendment's discussion of property guarantees similar rights and applies to the states. *Id.* amend. XIV.

²⁶⁸ See *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (suggesting that the Court review other substantive due process cases including ones protecting the right to contraception, consensual sodomy, and gay marriage).

The Fifth and the Fourteenth Amendments confer the right for an individual's property to be free from governmental interference.²⁶⁹ Under the Fifth Amendment's Takings Clause, litigants seeking to challenge abortion bans could argue that when the state forces a woman to carry a pregnancy in her uterus (her property) for nine months, they have effectuated a Fifth Amendment takings requiring just compensation.²⁷⁰ There are two categorical rules that constitute *per se* takings and are not subject to a balancing test, which may be applicable in the context of uterine property and abortion bans.²⁷¹ The U.S. Supreme Court has recently taken an expansive view of what constitutes a *per se* taking.²⁷² This expanded view may be broad enough to encompass the level of government invasion present when a state compels a woman to carry a pregnancy to term.²⁷³

²⁶⁹ U.S. CONST. amend. V; *id.* amend. XIV.

²⁷⁰ See Susan E. Looper-Friedman, "Keep Your Laws Off My Body": Abortion Regulation and the Takings Clause, 29 NEW ENG. L. REV. 253, 279–83 (1995) (examining whether abortion regulations could constitute a takings under the Fifth Amendment); Jeffrey D. Goldberg, *Involuntary Servitudes: A Property-Based Notion of Abortion-Choice*, 38 UCLA L. REV. 1597, 1641–48 (1991) (running a takings analysis on state regulation of women's bodies and envisioning the fetus as an unwanted licensee). Regulatory takings are generally assessed under the balancing test articulated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

²⁷¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992). The physical occupation at issue in the 1982 U.S. Supreme Court case, *Loretto v. Teleprompter Manhattan CATV Corp.*, was cable installations that the building owner could not remove pursuant to a New York law. 458 U.S. at 421. The Court described this level of occupation as minor, greatly beneficial to the public, and relatively harmless economically. *Id.* at 425. Nevertheless, the Court took great issue with the unique injury a property owner experiences when "a stranger directly invades and occupies the owner's property." See *id.* at 436 (pointing to the additional duties imposed by government-endorsed stranger occupation, given that the owner cannot control the duration or nature of the occupation). Although a fetus's residency in a uterus is not permanent, and it might not fairly be classified as a stranger given the genetic relationship to the woman, the language of the fetus as an unwilling physical invasion in an owner's property is an appealing comparison. See Rausch, *supra* note 38, at 46 (describing the possibility of challenging abortion restrictions under the Fifth Amendment's takings clause). Under the *per se* test in the U.S. Supreme Court's 1992 case, *Lucas v. South Carolina Coastal Council*, a takings occurs where the government strips an owner of all "economically viable use" of their property. 505 U.S. at 1016 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). In the context of abortion bans, where the government conscripts women's uteruses for nine months, depriving them of the ability to serve as surrogates or to sell their eggs, women have arguably been deprived of all economically beneficial use of their property. See *Become an Egg Donor*, *supra* note 193 (describing the requirement that women have regular, monthly menstrual periods to sell their eggs). Surrogacy also requires the surrogate to not already be pregnant. *Id.*

²⁷² See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2064 (2021) (holding that even a temporary restriction on the right to exclude constitutes a physical appropriation and a *per se* taking of property). The Court's 2021 opinion in *Cedar Point Nursery v. Hassid* expanded on the category of takings analyses established in *Loretto*. See *Loretto*, 458 U.S. at 421 (holding that "permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which compensation is due under the Fifth and Fourteenth Amendments of the Constitution").

²⁷³ See *Cedar Point*, 141 S. Ct. at 2064 (further expanding the physical appropriation category by elevating the right to exclude). In 1977, in *Moore v. City of East Cleveland*, Justice Stevens wrote a

Although the implicit right to privacy under the Fourteenth Amendment no longer serves as a valid legal basis for challenging abortion bans, the Fourteenth Amendment's explicit protection of property may also provide a solid legal foundation.²⁷⁴ The absence of an express guarantee to privacy is a point of concern for the current textualist Supreme Court.²⁷⁵ It is much harder to ignore the protection of property given its dominance in the Constitution.²⁷⁶ Forcing a woman to carry a pregnancy to term because of a sweeping state ban on abortion may deprive her of her property without due process.²⁷⁷ Although neither of these legal bases for challenging abortion bans are perfect, neither was a right tethered in privacy, and the urgency of the modern day abortion access landscape calls for greater creativity in litigation strategies.²⁷⁸

concurring opinion that the ordinance at issue in the case violated a fundamental norm of property rights, which is the ability to decide who resides on one's property. 431 U.S. 494, 520 (1977) (Stevens, J., concurring). Depriving an individual of the ability to determine who occupies their property constitutes a takings. *Id.* at 521. This focus on the right to exclude fits into the abortion access legal landscape because abortions provide women with an opportunity to exclude fetuses from occupancy in their uteruses. *See Abortion*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/abortion> [<https://perma.cc/NDE5-4925>] (defining abortion as the expulsion of a fetus from the uterus). The perspective that pregnancy is burdensome regardless of whether women chose to keep the baby was notably absent from the majority's opinion in *Dobbs* who pointed to safe haven laws as a reason for removing a right to abortion. *See Dobbs*, 142 S. Ct. at 2259 (arguing that societal attitudes about unwed mothers have improved and that safe haven laws allow pregnant people to put their babies up for adoption without fear that their children will not find a good home). A potential drawback of bringing a takings claim to challenge an abortion ban is that takings are permissible if the government is willing to compensate the property owner. *See* U.S. CONST. amend. V. Therefore, were the government to be willing to pay for, at minimum, the medical costs associated with pregnancy, it would be free to ban abortions without offending the Fifth Amendment's takings clause. Rausch, *supra* note 38, at 47.

²⁷⁴ *See* U.S. CONST. amend. XIV (requiring due process of law before an individual can be deprived of their property); *see also Dobbs*, 142 S. Ct. at 2242 (holding that the right to privacy does not guarantee a right to obtain an abortion).

²⁷⁵ *See Dobbs*, 142 S. Ct. at 2254 (explaining that nowhere does the Constitution mention the asserted right to privacy).

²⁷⁶ *See* U.S. CONST. amend. V; *id.* amend XIV.

²⁷⁷ *See id.* amend. XIV. Although a woman's uterus is not physically removed from her possession, the Fourteenth Amendment's characterization of what counts as property, and what counts as a deprivation, is flexible enough to accommodate this new framework. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571 (1972) (asserting that what constitutes property is flexible and deprivations need not rise to the level of deprivation effectuated by criminal procedure). Indeed, what counts as property extends past "actual ownership of real estate, chattels, or money." *Id.* at 571–72. In 1991, in *Brotherton v. Cleveland*, the U.S. Court of Appeals for the Sixth Circuit held that the "aggregate of rights" conferred by Ohio's adoption of the UAGA and the quasi-property rights for decedents to make burial arrangements for a body were sufficient to warrant protection under the Fourteenth Amendment Due Process Clause. 923 F.2d 477, 482 (6th Cir. 1991).

²⁷⁸ *See* Cohen et al., *supra* note 19, at 2.

CONCLUSION

Society has already commercialized several facets of women's reproduction, from egg donation to surrogacy arrangements. Advocates of decriminalizing sex work have invoked bodily autonomy for the proposition that people ought to be empowered to use their bodies and their sexuality for their personal benefit without government interference. Women's bodies are treated as commercial objects but are not afforded any of the constitutional protections that accompany legally recognized property. Providing women with a property interest in their uteruses aligns the law with the reality of what women are free to do with their bodies. It also affords women greater protection from oppressive government regulation of reproductive health care by summoning the power of property rights. The onslaught of abortion bans following the overturning of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* puts abortion rights advocates on the offensive. Pro-abortion litigation strategies must be creative in their efforts to dismantle these archaic and draconian restrictions. A legally recognized property interest for women in their uteruses moves us closer toward true bodily autonomy and reproductive justice.

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