THE SPERM-DONOR DILEMMA: CAN COLORADO LIMIT HOW MUCH SPERM ONE CAN DONATE?

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This Note examines the constitutionality of Colorado's groundbreaking Act limiting the number of families a single sperm donor can assist—the first law of its kind in the United States. While the statute potentially aims to reduce accidental consanguinity and prevent unregulated commodification of sperm, it raises complex constitutional questions under the Due Process Clause of the Fourteenth Amendment. Specifically, this Note explores whether sperm donation is protected as a fundamental right within the broader right to procreate. While it is unlikely that the current Supreme Court would extend the broader right to procreate to sperm donors, even if such a right were recognized, Colorado's proposed limitations would likely withstand constitutional scrutiny. The state's compelling interests and the Act's narrow tailoring support its validity. The Note concludes by proposing alternative regulatory measures that could achieve similar goals with fewer burdens on reproductive autonomy.

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INTRODUCTION

What could be so terrible about helping families conceive children they otherwise could not have without the assistance of a sperm donor? The answer is more complicated than it seems.

In the United States, the fertility industry operates within a complex web of regulations that vary significantly from state to state.[1] Yet as reproductive

1. *See, e.g.*, Henry Michaelson, *Demystifying the Donor: A Call for Transparency in Reproductive Technology*, COLUM. POL. REV., Spring 2024, at 27, 28, https://www.cpreview.org/articles/2024/4/demystifying-the-donor-a-call-for-transparency-in-reproductive-technology#:~:text=That%E2%80%99s%20why%2C%20as%20DNA%20testing,had%20conducted%20DNA%20tests [https://perma.cc/4A94-ASSH] ("[T]he highly consequential and ethically complex terrain of gamete donation is being navigated by a disjointed array of guidelines and statewide half-measures rather than a cohesive body of federal law."); Bryn Nelson, *A Shifting Ethical and Legal Landscape for Sperm Donation*, 130 CANCER CYTOPATHOL. 572, 573 (2022) ("Most testing and disclosure requirements are left to state medical boards and legislatures . . . ."); Lisa Luetkemeyer & Kimela West, *Paternity Law: Sperm Donors, Surrogate Mothers and Child Custody*, 112 MO. MED. 162, 163 (2015)

technology becomes more accessible and donor-conceived children grow up in an increasingly connected world, the unregulated proliferation of donor-conceived offspring poses novel risks to individual identity, relationships, and public health.

In 2023, a court in the Netherlands banned a man named Jonathan Meijer from making further sperm donations after finding out that he sired at least 550 children over the span of 16 years.[2] Meijer had donated to at least 11 fertility clinics, despite signing an agreement with each that he would not donate elsewhere—one of these being a clinic that mails donations across the globe.[3] Meijer did not stop there—he also offered his sperm to women on various social media platforms.[4] Despite Meijer's seemingly selfless motivations,[5] the Dutch court ultimately held that such a ban is in Meijer's children's best interests, allowing them to better cultivate relationships with those around them and limit the risk of accidental consanguinity[6] in the community.[7]

In response to similar concerns about donor anonymity, accidental consanguinity, and fertility fraud,[8] Colorado recently enacted[9] the Donor-Conceived Persons and Families of Donor-Conceived Persons Protection Act (the "Act"), aimed at regulating many aspects of the fertility industry.[10] This Act marks a significant shift in the U.S. sperm-donation landscape.[11] Among its provisions, the

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("[T]he laws governing paternity of sperm donors vary widely across the country and in many states are untested by the judicial system.").

2. Claire Moses, *Man Who Has Fathered Hundreds Is Barred from Donating Sperm*, N.Y. TIMES (Apr. 28, 2023), https://www.nytimes.com/2023/04/28/world/europe/dutch-sperm-donor-ban.html [https://perma.cc/DZH7-U3TY].

3. *Id.*

4. *Id.*

5. Jessica Sager, *Who Is 'The Man With 1,000 Kids'? All About Serial Sperm Donor Jonathan Meijer at Center of New Netflix Series*, PEOPLE (July 3, 2024, at 12:00 EDT), https://people.com/who-is-jonathan-meijer-the-man-with-1000-kids-8672729 [https://perma.cc/VD9E-Z684] ("Meijer has maintained for years that his prolific sperm donation is merely a means of altruism for him.").

6. "In clinical genetics, a consanguineous marriage is defined as a union between two individuals who are related as second cousins or closer . . . ." Hanan Hamamy, *Consanguineous Marriages*, 3 J. CMTY. GENET. 185, 185 (2012).

7. *Id.*

8. *See infra* Section II.A (discussing various influences of the Act).

9. The Act was passed in 2022. COLO. REV. STAT. § 25-57-101.

10. The Act regulates a broad range of practices within the fertility industry, including licensing requirements for clinics and agencies, limits on the number of families per donor, and mandatory disclosure of identifying information to donor-conceived individuals upon request. It also requires providers to maintain permanent records; make good faith efforts to update donor contact and medical information every three years; and furnish written materials to both donors and recipients outlining rights, responsibilities, and long-term implications. *See id.* §§ 25-57-101 to -112.

11. *See* Sam Tabachnik, *Colorado Becomes First State to Ban Anonymous Sperm and Egg Donations*, DENV. POST (June 1, 2022, at 3:58 PM), https://www.denverpost.com/2022/06/01/colorado-donor-conceived-persons-protection-act/ [https://perma.cc/LAM9-BSXM] ("'This is groundbreaking,' said Jody Madeira, an Indiana University law professor and expert on fertility law. 'We're really not sure what these bills should look like ideally, but we have one now.'"); *see also* Ellen Trachman, *Colorado Donor-*

Act limits the number of families that can use a single donor's sperm—the first law of its kind in the country.[12] This unprecedented cap raises a critical constitutional question: does limiting the number of families a sperm donor can assist infringe upon fundamental rights protected by the Due Process Clause of the Fourteenth Amendment? More specifically, is the right to donate sperm part of the fundamental right to procreate, or is it a modern extension courts are unlikely to protect? This Note explores that question by examining the intersection of reproductive technology, individual liberty, and the evolving boundaries of state power in regulating procreation.

This Note argues that even if sperm donation is treated as implicating fundamental rights, Colorado's statute would likely survive strict scrutiny: the state's compelling interests in minimizing accidental consanguinity and regulating the commodification of human genetic material outweigh the targeted and limited burden on individual autonomy. However, the Act also foreshadows a deeper tension between reproductive liberty and public health regulation that courts will increasingly face as biotechnology continues to outpace existing legal frameworks.

Part I examines the current sperm donation landscape in the United States, focusing on supply, demand, cost, and transparency concerns. Part II outlines Colorado's Act and narrows in on the pertinent issue discussed here—the cap on the number of families a sperm donor can assist. Part III traces the historical development of procreative rights and the strict scrutiny framework. Part IV analyzes whether Colorado's cap infringes a fundamental right and whether it can withstand constitutional scrutiny. Finally, Part V explores alternative regulatory approaches that could address similar concerns while minimizing burdens on reproductive freedom.

I. THE CURRENT LANDSCAPE OF SPERM DONATION IN THE UNITED STATES

This Part explores the evolving landscape of sperm donation in the United States, focusing on the rising demand and decreasing supply of sperm donors, compounded by COVID-related factors like travel restrictions and reduced in-person recruitment. It also examines the high costs of sperm from sperm banks, prompting many individuals to seek alternative and unregulated donation sources. Additionally, this Part discusses public calls for greater transparency in the industry, including the impact of DNA tests and online registries, the effect of emerging legislation on fertility fraud, and the influence of large international sperm banks.

Conceived Person Protection Law Opens Public Comments On Proposed Rules, ABOVE L. (Oct. 31, 2023, at 12:15 MST), https://abovethelaw.com/2023/10/colorado-donor-conceived-person-protection-law-opens-public-comments-on-proposed-rules/ [https://perma.cc/SZG9-3ZPK] ("This law makes Colorado the first state in the country to place firm requirements on identity disclosure in egg and sperm donations, and moreover, limits the number of families that can receive donations from a single donor . . . .").

12. COLO. REV. STAT. § 25-57-109(1)(a).

As the demand for donor sperm continues to grow,[13] addressing these challenges and opportunities will be crucial for the future of reproductive technology.

A. Supply, Demand, and Cost of Sperm Donation

The demand for sperm in the United States has surged since the COVID-19 pandemic.[14] Despite the rising demand, the number of men registering as sperm donors seems to have decreased.[15] Several pandemic-related factors may have contributed to this trend, including clinics closing,[16] existing donors being afraid of or unable to travel to open banks,[17] and the decline of in-person recruitment of potential donors.[18]

Additionally, the cost for prospective parents to purchase sperm from a bank is considerable.[19] A single vial of sperm can cost up to $1,100.[20] Given the recommendation to purchase four or five vials per desired child, the total expense for sperm alone can range between $4,000 and $5,000.[21]

In response to the high costs and limited availability of sperm from banks, many individuals and couples are turning to alternative sources for sperm

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13. SPHERICAL INSIGHTS LLP, *Global Sperm Bank Market Size to Worth USD 6.58 Billion By 2032 | CAGR of 3.2%*, YAHOO! FINANCE, (Nov. 7, 2023), https://finance.yahoo.com/news/global-sperm-bank-market-size-120000041.html [https://perma.cc/2X2M-6VZG] ("The Global Sperm Bank Market Size is to Grow from USD 4.80 Billion in 2022 to USD 6.58 Billion by 2032, at a Compound Annual Growth Rate (CAGR) of 3.2% during the forecast period.").

14. *See* Nellie Bowles, *The Sperm Kings Have a Problem: Too Much Demand*, N.Y. TIMES (June 25, 2023), https://www.nytimes.com/2021/01/08/business/sperm-donors-facebook-groups.html [https://perma.cc/5Y6N-DGF3] ("'We've been breaking records for sales since June worldwide not just in the U.S.—we've broken our records for England, Australia and Canada,' said Angelo Allard, the compliance supervisor of Seattle Sperm Bank, one of the country's biggest sperm banks. He said his company was selling 20 percent more sperm now than a year earlier, even as supplies dwindled."); *see also* Georgia Witkin, *Sperm Shortage: Sperm Bank vs. Private Donor*, PSYCH. TODAY (Apr. 9, 2021), https://www.psychologytoday.com/us/blog/the-chronicles-infertility/202104/sperm-shortage-sperm-bank-vs-private-donor [https://perma.cc/8LRR-KBPS] ("Now, the demand is so high that many sperm banks say they can't fill all the requests.").

15. *See* Bowles, *supra* note 14.

16. *See* Valerie Bauman, *How the Unregulated Sperm Market Is Creating an Online Baby Boom*, NEWSWEEK (Aug. 13, 2024, 15:21 EDT), https://www.newsweek.com/2024/04/05/how-unregulated-sperm-market-creating-online-baby-boom-1880310.html#:~:text=Nearly%20171%2C000%20American%20women%20used,for%20donor%20sperm%20has%20grown [https://perma.cc/G6FL-KGHJ] ("[M]any fertility clinics closed their doors as 'nonessential' medical procedures were put on the back burner during the pandemic . . . .").

17. *See* Bowles, *supra* note 14 ("Existing donors were scared to go in.").

18. *See id.* (noting that much of the in-person donor recruitment went on at college campuses and gyms, but since these places closed during the pandemic, recruitment of new donors suffered).

19. *See id.*

20. *Id.*

21. *Id.*

donations.[22] Facebook groups have become popular venues for private sperm donation arrangements, with groups having thousands of members.[23] Many individuals also turn to the Known Donor Registry, a free online platform that facilitates unregulated sperm donation by allowing donors and recipients to create profiles and connect directly.[24] Private, unregulated donations offer several advantages: they are typically much cheaper than purchasing sperm from a bank; they bypass the stringent regulations and screening processes imposed by sperm banks; and readily available consumer DNA tests now offer genetic screening capabilities that approach the level of those conducted by sperm banks, providing prospective parents with the peace of mind they desire.[25] Another advantage of using a freelance sperm donor is access to fresh sperm, which can survive in a woman's body for up to five days and may allow for multiple donations per ovulation cycle.[26] In contrast, frozen sperm from clinics is typically provided only once per cycle and remains viable for just 24 hours, making precise timing around ovulation much more crucial.[27]

B. Nationwide Calls for More Transparency

In addition to rising costs and many people turning to private donations,[28] there has also been a rise in public calls for more transparency within the industry. The advent of consumer DNA tests and the growth of online donor sibling registries have also revolutionized the sperm donation landscape while simultaneously highlighting the need for transparency regarding the identity of donor children and the number of half-siblings they may have.[29] These tools have allowed donor-

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22. *See id.*; *see also* T. Freeman et al., *Online Sperm Donation: A Survey of the Demographic Characteristics, Motivations, Preferences and Experiences of Sperm Donors on a Connection Website*, 31 HUM. REPROD. 2082, 2083 (2016) ("[Other] [p]ossible reasons for this trend include the rise of online social networking, the high expense of fertility treatment, growing numbers of single women and lesbian couples seeking donor sperm and the introduction of open-identity donation in several countries.").

23. *See* Bauman, *supra* note 16 (highlighting one Facebook group with almost 24,000 members); *see also* Bowles, *supra* note 14 (highlighting one Facebook group with almost 11,000 members). One woman, unable to afford the high costs of IVF and sperm banks, turned to alternative methods and now shares her journey of private sperm donation, ovulation tracking, and donor communication on her popular TikTok account, with over 91,000 followers. Bowles, *supra* note 14.

24. *See* Bauman, *supra* note 16.

25. *See id.*

26. *Id.*

27. *Id.*

28. *See supra* Section I.A.

29. *See* Susan Dominus, *Sperm Donors Can't Stay Secret Anymore. Here's What That Means*, N.Y. TIMES (June 26, 2019), https://www.nytimes.com/2019/06/26/magazine/sperm-donor-questions.html [https://perma.cc/9Q3H-4D63] ("The original sperm-bank contracts providing for anonymity were made by institutions serving parents and donors; the satisfaction of the children conceived with their product had no bearing on their profits. But what the banks once withheld, technology has now delivered. What looks like privacy to one person in a relationship may look like secrecy to another, unearned and undeserved. For sperm donors, their offspring, the half siblings, that distinction may become moot, in an era when both privacy and secrecy are aspirational rather than reasonable goals. Technology

children to discover tens, if not hundreds, of half-siblings.[30] The accessibility of such tests and databases has destroyed any hope of anonymity for donors and led to a growing awareness of just how many children any one donor has sired.[31]

Another indication of this call for transparency within the sperm donation industry is the emerging legislation targeting fertility fraud.[32] Instances when doctors have secretly used their own sperm in fertility treatments instead of an agreed-upon, anonymous donor have led to public outcries and legal action.[33] For example, several states are enacting laws criminalizing such fraudulent practices and also providing victims a cause of action in civil court.[34]

The influence of international sperm banks further complicates the transparency issue. The largest of these international banks, Cryos International,[35] distributes donor sperm to more than 100 countries, leading to situations where donor-conceived children have half-siblings all over the world.[36] This global reach amplifies the challenges of tracking and managing donor information,[37] making it even more crucial to implement standardized practices. For these reasons, families,

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belongs to the young, and what the young seem to want, as ever, is to know—and be known.").

30. *See id.*

31. *See id.*

32. *See* Jacqueline Mroz, *When an Ancestry Search Reveals Fertility Fraud*, N.Y. TIMES (Feb. 28, 2022) [hereinafter Mroz, *Ancestry Search*], https://www.nytimes.com/2022/02/28/health/fertility-doctors-fraud-rochester.html [https://perma.cc/YWY7-N7M5] ("Ms. Portugal and other activists have been pushing for legislation, both statewide and nationally, that would make fertility fraud a crime.").

33. *See id.*

34. *See id.* ("So far, there are laws in Indiana, Florida, Texas, Arizona, California, Colorado and Utah. Arkansas enacted legislation in April and bills have been introduced in seven other states, including New York.").

35. *About Cryos*, CRYOS INT'L SPERM & EGG BANK [hereinafter CRYOS], https://www.cryosinternational.com/en-us/us-shop/client/about-us/about-cryos/ [https://perma.cc/YWM2-UZZU] (last visited Dec. 23, 2024) ("Being an international company, Cryos supplies frozen donor sperm and donor eggs to more than 100 countries worldwide. We have the world's largest selection of ID Release and Non-ID Release donors. We are also proud to say that we boast the highest number of registered pregnancies in the world.").

36. *See* Jacqueline Mroz, *The Case of the Serial Sperm Donor*, N.Y. TIMES (Feb. 1, 2021) [hereinafter Mroz, *Serial Sperm Donor*], https://www.nytimes.com/2021/02/01/health/sperm-donor-fertility-meijer.html [https://perma.cc/7PYR-JY94].

37. *See, e.g.*, *Donor Conception in the United States Compared to Other Countries*, U.S. DONOR CONCEIVED COUNCIL (Apr. 6, 2022), https://www.usdcc.org/2022/04/06/donor-conception-in-the-united-states-compared-to-other-countries/ [https://perma.cc/QC4H-VLSA]; Jackson Kirkman-Brown et al., *Good Practice Recommendations for Information Provision for Those Involved in Reproductive Donation*, 2022 HUM. REPROD. OPEN 1, 5; Boon Chin Heng, *Legal and Ethical Issues in the International Transaction of Donor Sperm and Eggs*, 24 J. ASSIST. REPROD. & GENET. 107, 108 (2007).

lawyers, medical ethical committees, and other professionals are increasingly calling for more stringent regulations.[38]

The rising use of consumer DNA tests,[39] the establishment of donor sibling registries,[40] and the enactment of legislation targeting fertility fraud[41] reflect a broader movement towards transparency in the sperm donation industry. These developments highlight the need for more robust regulations and ethical guidelines to ensure that donors, recipients, and donor-conceived individuals have access to essential information, including the number and location of any half-siblings they may have.[42] As the industry continues to evolve, prioritizing transparency will be crucial in maintaining trust and addressing the complex issues arising from the growing demand for donor sperm and the increasingly global nature of sperm donation services.[43]

II. OVERVIEW OF COLORADO'S ACT

Colorado's revolutionary Act is intended to protect the rights and interests of donor-conceived individuals and their families.[44] The Act regulates many aspects of the sperm and egg donation industry, including the collection and disclosure of

38. *See* Mroz, *Serial Sperm Donor*, *supra* note 36 ("Judith Daar, who leads the ethics committee of the American Society for Reproductive Medicine, said that although there is often a reluctance to regulate assisted reproduction more strictly than natural conception, it might be appropriate in extreme cases . . . to impose limits on the number of offspring that any one donor may have.").

39. *See* Michaelson, *supra* note 1 ("[A]s DNA testing has become more widely accessible, an increasing number of donor-conceived people have used it as a method of uncovering the mysteries within their families."); *see also 2020 We Are Donor Conceived Survey Report*, WE ARE DONOR CONCEIVED (Sept. 17, 2020), https://www.wearedonorconceived.com/2020-survey-top/2020-we-are-donor-conceived-survey/ [https://perma.cc/TX4P-FSRJ] ("A third of respondents (34%) indicated they discovered the truth about their origins as the result of taking a commercial DNA test such as 23andMe or AncestryDNA.").

40. *See* Dominus, *supra* note 29; *see also* Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011) [hereinafter Mroz, *150 Offspring*], https://www.nytimes.com/2011/09/06/health/06donor.html [https://perma.cc/474W-8PQZ] ("Today there are 150 children, all conceived with sperm from one donor, in this group of half siblings, and more are on the way.").

41. *See* Mroz, *Ancestry Search*, *supra* note 32.

42. *See infra* Section V.B (discussing proposals for enhancing informed consent procedures in gamete donation).

43. *See* CRYOS, *supra* note 35.

44. COLO. REV. STAT. § 25-57-102(2) ("[T]he general assembly finds that to protect the health and welfare of donor-conceived persons and their families in Colorado, it is essential to enact the . . . [Act] to regulate the use of donated gametes provided from gamete agencies, gamete banks, or fertility clinics located inside or outside of Colorado to recipients in Colorado."); *see also id.* § 25-57-111 ("[T]he state board shall consider and protect the interests of donor-conceived persons and families of donor-conceived persons, including lesbian, gay, bisexual, and transgender parents and donor-conceived persons and single parents.").

identifying information, record-keeping requirements, age limits for donors, limits on number of donations, licensure requirements, and more.[45]

This Part is divided into two sections: the first examines a notable fertility fraud case in Colorado that coincided with the passage of the Act, and the second outlines the ongoing debate surrounding the Act's implementation and impact.

A. The Act's Influences

Colorado passed the Act in the same year that a jury awarded $8.75 million in a civil lawsuit against a former fertility doctor who had secretly used his own sperm to impregnate patients without their consent.[46] The doctor, who worked at Women's Health Care of Western Colorado, fathered at least 17 children with 12 women between 1975 and 1997.[47] The lawsuit, filed in 2019, alleged medical negligence, lack of informed consent, fraud, and other claims.[48] While Colorado was quick to criminalize fertility fraud in 2020, the case also brought renewed attention to other aspects of the sperm donation industry—including donor anonymity, informed consent, and the potential consequences of unregulated sperm donation.[49]

B. Ongoing Debate Around the Act

Since its passing in 2022, this Act has been the subject of considerable debate, despite initially passing with broad bipartisan support.[50] In fact, less than three months after the Act went into effect, the Colorado legislature began considering scaling back some of its protections.[51] While House Bill 1259 (the "Bill")[52] does not alter the cap on the number of families a sperm donor can assist, it introduced changes that could weaken the Act's overall effectiveness.[53] For example, the Bill reverted to the pre-Act norm of allowing banks to limit an adult donor-conceived person's ability to discuss their genetic origins with others.[54] It also softened reporting requirements, changing the obligation for donor recipients to inform banks of live births using donated gametes into a mere recommendation.[55] Additionally, the Bill shifted the responsibility for creating informational materials from the state's public health department to donor banks, potentially altering the

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45. *See id.* §§ 25-57-104 to -110.

46. *See* Alyssa Lukpat, *Fertility Doctor Accused of Using His Own Sperm Is Ordered to Pay Millions*, N.Y. TIMES (Apr. 28, 2022), https://www.nytimes.com/2022/04/28/us/paul-jones-fertility-settlement-colorado.html [https://perma.cc/JS64-YUM4].

47. *Id.*

48. *Id.*

49. *See id.*

50. *See* Jesse Paul, *Colorado Lawmakers Consider Rollback of Sperm Donor Disclosure Requirements Adopted in Wake of Scandals*, COLO. SUN (Mar. 10, 2025, at 03:55 MDT), https://coloradosun.com/2025/03/10/colorado-sperm-donor-laws/ [https://perma.cc/GD3M-93JT].

51. *See id.*

52. Passed in May of 2025. H.B. 1259, 75th Gen. Assemb., Reg. Sess. (Colo. 2025).

53. *See* Paul, *supra* note 50.

54. *Id.*

55. *Id.*

consistency and oversight of the educational resources provided to donors and recipients.[56]

Supporters of the Bill argued that unrestricted access to sperm donors, fertility clinics, and reproductive technology is essential for individuals and couples trying to conceive.[57] Advocates, including members of the LGBTQ+ community who rely on sperm donation to build their families, contended that imposing stricter regulations could limit options for families, forcing them to seek expensive out-of-state procedures or, in some cases, preventing them from having children altogether.[58] To bolster their position, supporters of the Bill argued that sperm donations are dwindling as a result of the Act's stringent requirements.[59]

On the other hand, opponents of the Bill argued that the existing regulations were put in place to protect the well-being of donor-conceived individuals.[60] They pointed to the psychological challenges that can arise when someone learns the identity of their biological father or discovers they have an unexpectedly large number of half-siblings.[61] Critics also challenged the notion that the Act is responsible for the decline in sperm donors, noting that the law has only been in effect for a few months—too short a time to draw meaningful conclusions.[62] Additionally, Former Senate President Steve Fenberg, a key sponsor of the Act and an opponent of the Bill, dismissed claims that the 2022 Act caused this drop in donors, calling the new Bill a "hot mess."[63] Moreover, he criticized the effort to frame the Bill as a pro-IVF measure, arguing that the framing was a strategic move to ensure Democratic support from legislators who could be politically harmed by opposing it.[64] Most importantly, Fenberg emphasized that the Bill overlooks the very individuals the Act was designed to protect—those conceived through sperm donation.[65]

III. HISTORICAL DEVELOPMENT OF THE FUNDAMENTAL RIGHTS AT ISSUE

While the policy debates surrounding the Act are ongoing, the ultimate question for courts is whether such regulations infringe on any constitutional rights.

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* For example, year-to-date sperm donor applications at a local sperm bank are down by half. *Id.*

60. *Id.*

61. *Id.* ("'I have discovered over 40 half-siblings so far,' Sarah Jeffers, a Boulder woman who was conceived through donor sperm, told lawmakers . . . . 'I will never know how many siblings I truly have.'").

62. *Id.* Instead, they argue that the rise of DNA testing services like 23andMe, which makes anonymity nearly impossible, is a more likely factor. *Id.*

63. *Id.*

64. *Id.* ("This bill has nothing to do with IVF. I believe—and I'm not questioning motives here—it's put into this bill because no Democrat in America today would vote against a bill that is pro-IVF. That would be political suicide.").

65. *Id.* ("'[T]he most impacted community that the underlying law passed in 2022 was meant to protect was shut out,' he said, referencing people conceived through sperm donation.").

This Part condenses centuries of Due Process case law into just a few pages, focusing on how courts determine which rights qualify as fundamental and how the strict scrutiny test applies when the government attempts to infringe upon those rights. To assess whether Colorado's cap is constitutional, we must first ask whether the affected rights—particularly the right to donate sperm—are fundamental. That analysis begins with how courts have historically defined and recognized such rights. Accordingly, this Part outlines the relevant history of the fundamental right to procreate and the contours of the public health justification as a compelling government interest.

A. How Courts Determine Which Rights Are Fundamental

The Fourteenth Amendment of the United States Constitution states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[66] Fundamental liberty interests protected by the Due Process Clause of the Constitution are those that are "deeply rooted in [our] history and tradition" and are essential to this Nation's "scheme of ordered liberty."[67] Determining whether a right is deeply rooted in our history and tradition requires a "careful description" of the asserted interest.[68] This test has been widely criticized, as much of what is considered "deeply rooted" in our history is up to the federal courts' discretion and largely relies on the level of generality used to define the right and outline the relevant history, making decisions like these extremely unpredictable.[69]

1. Evolution of Procreative and Privacy Rights in Case Law

Despite the unpredictability of the fundamental rights framework, the Supreme Court in *Skinner v. Oklahoma* offered a rare moment of clarity by firmly recognizing procreation as a fundamental right.[70] The Court struck down an Oklahoma law permitting the sterilization of individuals convicted of certain crimes, emphasizing the essential role of procreation in the survival of the human race.[71] *Skinner* established a doctrinal foundation for future reproductive rights jurisprudence, anchoring the right to procreate within the broader liberty to make

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66. U.S. CONST. amend. XIV, § 1.

67. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 216 (2022) (quoting Timbs v. Indiana, 586 U.S. 146, 149 (2019)).

68. Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

69. *See* Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J. F. 946, 949 (2024) ("Ratcheting levels of generality up and down enables courts in history-and-tradition cases to achieve preferred outcomes while claiming they are simply deferring to the past."); *see also* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 358 (1992) ("Movements in the level of constitutional generality may be used to justify almost any outcome."); Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J. F. 65, 66 (2024) ("*Dobbs* is not the first time the Supreme Court has relied on dubious history to reject a constitutional right of profound importance.").

70. *See* Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

71. *See id.* ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.").

personal decisions regarding one's own marriage and family life.[72] These rights—encompassing the right to marry, form families, and raise children—have evolved throughout the 20th century.[73] More recently, in *Lawrence v. Texas*, the Court reaffirmed that intimate personal decisions between consenting adults fall within a protected sphere of liberty.[74] Together, these precedents establish the framework for assessing whether modern reproductive practices, such as sperm donation, are encompassed by the constitutionally protected right to procreate. But the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization* signals a shift away from expansive interpretations of substantive due process,[75] which could impact this analysis.

B. Applying Strict Scrutiny to Fundamental Rights

Government interference with a fundamental right is subject to strict scrutiny, meaning the regulation (1) must serve a compelling government interest and (2) must be narrowly tailored to achieve that interest.[76]

1. Compelling Government Interest Prong

To survive strict scrutiny, the regulation must first advance a compelling state interest. In *Jacobson v. Massachusetts*, the Supreme Court held that a state's police power extends to reasonable regulations protecting public health and safety,[77]

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72. *See id.*

73. These rights also fall within the broader framework of the "right to privacy," a doctrine first articulated in *Griswold v. Connecticut*. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) ("The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

74. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (affirming that the Due Process Clause safeguards the right of consenting adults to engage in private sexual activity, even when it is not intended for procreation).

75. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 216 (2022) (holding that the right to abortion is not "deeply rooted in this Nation's history and tradition" and thus not protected by the Due Process Clause).

76. State v. Oakley, 245 Wis. 2d 447, 465 (2001).

77. 197 U.S. 11, 29 (1905) ("There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-

so long as those regulations bear a "real and substantial relation" to those objectives.[78] In that case, a Massachusetts law mandating vaccination and revaccination for smallpox met this standard because the law protected the community from a dangerous and contagious disease.[79] Determining whether a regulation has a "real and substantial relation" does not require precise scientific certainty; courts generally defer to the legislature's judgment on what best promotes public welfare.[80] Although *Jacobson* predates the modern strict scrutiny framework, it remains a valuable precedent for balancing individual liberties with the general welfare and supports the argument that protecting public health constitutes a compelling government interest.[81]

2. Narrowly Tailored Prong

To survive the "narrowly tailored" prong of the test, the regulation must promote a "substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen [must] not [be] substantially broader than necessary to achieve that interest."[82] Put differently, the regulation must use the least restrictive means to achieve its goal.[83] For example, while *Jacobson* justified government regulation in the name of public health,[84] *Moore v. East Cleveland*[85] illustrates how even well-intentioned local laws can fail constitutional scrutiny when

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ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.").

78. *Id.* at 31 ("[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.").

79. *Id.*

80. *See id.* at 35 ("A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts . . . . The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.").

81. *See id.* at 38 ("We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state."). *But see* R. George Wright, *The Scope of Compelling Government Interests*, 98 NOTRE DAME L. REV. REFLECTION 146, 146 (2023) ("The narrowness or breadth of how courts choose to formulate a government interest may well affect that interest's overall weight or legal significance. For example, a public interest in safety and security, broadly conceived, may seem compelling. But the public interest in merely some modest upgrading of a safety and security regulation may seem less than compelling.").

82. Ward v. Rock Against Racism, 491 U.S. 781, 782–83 (1989).

83. *See id.*

84. *Jacobson*, 197 U.S. at 31.

85. 431 U.S. 494 (1977).

they intrude upon family autonomy. In *Moore*, the Supreme Court struck down a Cleveland law making it illegal for a home to be occupied by people from more than one family by defining "family" strictly as a traditional nuclear family.[86] The City cited goals such as preventing overcrowding, reducing traffic and parking issues, and avoiding excessive financial strain on the school system;[87] however, the Supreme Court ultimately stated that "[t]he ordinance at best has but a tenuous relationship to the objectives cited by the city."[88]

IV. CONSTITUTIONALITY OF COLORADO'S ACT

The constitutionality of gamete disclosure and reporting requirements has been thoroughly debated by scholars for decades.[89] Additionally, most current debate regarding the Act centers around such requirements.[90] This Part, however, will examine a less explored but equally significant issue: the constitutionality of limiting the number of families a donor can assist. The pertinent section of the Act is as follows:

> [A] gamete agency, gamete bank, or fertility clinic shall not match or provide gametes from a donor to additional families once the gamete agency, gamete bank, or fertility clinic has record of or should reasonably know that twenty-five families have been established using a single donor's gametes in or outside of Colorado, with no limit on the number of children conceived by each of the families, unless the donor requests, and the gamete agency, gamete bank, or fertility clinic agrees to, a lower limit on the number of families.[91]

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86. *Id.* at 495–96.

87. *Id.* at 500 ("For example, the ordinance permits any family consisting only of husband, wife, and unmarried children to live together, even if the family contains a half dozen licensed drivers, each with his or her own car. At the same time it forbids an adult brother and sister to share a household, even if both faithfully use public transportation. The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household.").

88. *See id.* at 494.

89. *See generally* Mary Patricia Byrn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23 COLUM. J. GENDER & L. 1 (2012) (arguing that banning anonymous sperm donation and mandating parental disclosure would unconstitutionally burden procreative and parental rights); Naomi Cahn, *Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?*, GEO. J. GENDER & L. (2001) [hereinafter Cahn, *Children's Interests and Information Disclosure*] (arguing that while adoption and gamete provision terminate parental rights, laws upholding gamete donor anonymity raise constitutional concerns because adult children have a paramount interest in accessing information about their biological origins); Madeline Ash, *The Rights of Donor-Conceived Persons in Colorado: America's First Foray into Abolishing Anonymous Gamete Donation*, 99 IND. L.J. 1015 (2024) (examining Colorado's ban on anonymous gamete donation in light of constitutional concerns, industry regulation gaps, and international models, and recommending reforms to strengthen its enforceability).

90. *See* Paul, *supra* note 50 (discussing the current debate around the Act).

91. COLO. REV. STAT. § 25-57-109(1)(a).

Generally speaking, legislation regulating sperm donation impacts not only the donor's ability to choose whether, when, and how to procreate, but also that of the prospective parents.[92] Thus, if the broader fundamental right to procreate extends to sperm donation, such a cap would be constitutional only if it survives strict scrutiny.[93] To evaluate whether this provision withstands constitutional scrutiny, this Part proceeds in three steps: first, whether sperm donation implicates a fundamental right; second, whether the state's interest is compelling; and third, whether the cap is narrowly tailored.

A. Fundamental Right: Is Donating Sperm a Fundamental Right?

How the right at issue is framed—whether broadly or narrowly—plays a crucial role in determining whether the court considers it fundamental, thereby necessitating strict scrutiny for any government infringement.[94] While the Act as a whole may impact other rights, this Part will only discuss the right to procreate, or more specifically, the right to donate sperm.

1. Broad Framing: Donation Within the Right to Procreate

If the right to donate sperm is nestled under the broader "right to procreate," courts are more likely to consider it fundamental and require the government to satisfy strict scrutiny.[95] The right to procreate is deeply rooted in the nation's history and traditions and is essential to individual autonomy and liberty interests protected under the Due Process Clause of the Fourteenth Amendment.[96] Given its fundamental status, any legislation infringing upon this right would trigger strict scrutiny, requiring the state to demonstrate a compelling interest and show that the law is narrowly tailored to achieve that interest.[97]

If framed broadly, courts may also consider how the cap affects parties other than the sperm donor. For example, regulations limiting the right to donate sperm not only affect donors but also directly impact the reproductive autonomy of prospective parents.[98] Specifically, restrictions that limit the availability of donor sperm may disproportionately affect individuals and couples relying on donor insemination.[99] By constraining their options to build families, such regulations also risk infringing upon the fundamental liberty interest of families to bear and beget a child.[100] Therefore, courts evaluating these limitations must balance the state's

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92. *See* Naomi Cahn, *The New "Art" of Family: Connecting Assisted Reproductive Technologies & Identity Rights*, 2018 U. ILL. L. REV. 1443, 1446–70 [hereinafter Cahn, *The New "Art" of Family*].

93. *See* State v. Oakley, 245 Wis. 2d 447, 465 (2001).

94. *See* sources cited *supra* note 69.

95. *See* Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

96. *Id.* ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.").

97. *See Oakley*, 245 Wis. 2d at 465.

98. *See infra* Subsection IV.C.2 (discussing the supply constraints that such regulation could cause).

99. *See id.*

100. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted

interests in public health and genetic diversity against the deeply personal and constitutionally significant rights to procreation, family formation, and control[101]—both from the sperm donor's perspective and the future family's perspective.

However, in *Dobbs v. Jackson Women's Health Organization*, the current Supreme Court indicated its reluctance to continue recognizing broad substantive due process rights, beginning by separating the right to an abortion from the more general right to privacy.[102]

2. Narrow Framing: Sperm Donation as a Non-Fundamental Right

If the right is framed narrowly as the "right to donate sperm," the courts may be less inclined to deem it fundamental.[103] Courts are increasingly hesitant to recognize new fundamental rights unless such rights are firmly rooted in legal and social tradition.[104] Frozen sperm donation, as a relatively modern form of reproductive technology,[105] may not fit neatly within the historical understanding of procreation rights.[106]

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governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

101. *See* cases cited *supra*, note 73.

102. In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Roe v. Wade* by framing the issue narrowly as a "right to an abortion" rather than viewing it within the broader "right to privacy." The Court determined that abortion rights are not deeply rooted in the nation's history or traditions and, therefore, do not constitute a fundamental right. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022) ("[P]rocuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."). In his concurrence, Justice Thomas suggested that the Court should reconsider its approach to other substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*, potentially advocating for a narrower approach to substantive due process in future cases. *See id.* at 332 (Thomas, J., concurring).

103. *But see* Leigh-Anne St. Charles, *Regulating Relationships: A Challenge to the Constitutional Authority of the FDA Regulation of Private Sperm Donation*, 47 COLUM. J.L. & SOC. PROBS. 141, 154 (2013) (arguing that even if a court narrowly frames the issue as a fundamental right to donate sperm, that right may still be constitutionally protected).

104. *See Dobbs*, 597 U.S. at 300.

105. While the first recorded instance of fresh sperm donation occurred in the 1880s, the first generation of frozen sperm banks did not pop up in the United States until the second half of the twentieth century. *Compare* Rachel Arocho et al., *Estimates of Donated Sperm Use in the United States: National Survey of Family Growth 1995-2017*, 112 FERTILITY & STERILITY 718, 718–19 ("Sperm donation, specifically as used in artificial insemination . . . is the oldest form of reproductive donation and donor conception, with the first recorded instance in the United States performed in the 1880s."), *with* Nam Cheol Park, *Sperm Bank: From Laboratory to Patient*, 36 WORLD J. MENS HEALTH 89, 89 (noting that the first sperm bank established for therapeutic purposes in the United States opened in 1964), *and* MORNING EDITION, *Planet Money Investigates The Origins Of The Sperm Bank*, at 02:00 (NPR, Nov. 22, 2019, at 05:04 ET), https://www.npr.org/2019/11/22/781916137/planet-money-investigates-the-origins-of-the-sperm-bank [https://perma.cc/H6YV-PA2N] ("[T]he first generation of frozen sperm banks started in the early '70s when they were marketed as a kind of insurance for men undergoing vasectomies or cancer treatment who might want to have children later on. But it remained a niche industry.").

106. *See* Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

Historically, procreative and familial rights have focused on an individual's right to bear and beget a child[107] and subsequently direct the care, custody, and control of that child.[108] As a result, courts have generally distinguished between biological procreation and legal parenthood when it comes to defining "family" and the rights that follow.[109] This is because legal parentage comes with an abundance of other rights and responsibilities, including the responsibility for the child's well-being; the entitlement to the child's services and income; the authority to oversee the child's actions; the right to make choices concerning the child's upbringing, education, and healthcare; and the obligation to equip the child for future duties by instilling moral values, religious teachings, and principles of responsible citizenship.[110] Contrastingly, a sperm donor's role is purely biological without an inherent legal or social parenting component, as sperm donors typically relinquish their parental rights and the subsequent obligations that follow,[111] which complicates the argument that their "right to procreate" is implicated.

As a result, if framed narrowly, the right to donate sperm is unlikely to be deemed fundamental, and courts may subject Colorado's Act to only rational basis review, where the state merely needs to show that the law is rationally related to a legitimate government interest.[112] However, as the role of reproductive technology continues to grow in our society,[113] even framed narrowly, the right to conceive or assist in conception via donor insemination, assisted reproductive technology, in vitro fertilization, etc. could potentially rise to fundamental status later down the line. Here, while it is unlikely that the current Supreme Court would extend the

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107. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[I]t 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.").

108. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

109. Biological relation has never been the only determinative factor in deciding legal parentage of children born out of wedlock. *See* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) ("We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."). This is similar in assisted reproductive contexts. *See* Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541, 552 (2012) ("[L]aws directly addressing use of today's assisted reproduction technology do not make biological parentage a universally determinative criterion.").

110. *See Michael H.*, 491 U.S. at 118–19.

111. In most states, laws typically transfer parental rights from anonymous sperm donors to the intended parents; however, these laws are typically limited to married women who are inseminated under the supervision of a licensed physician. Luetkemeyer & West, *supra* note 1, at 163.

112. *See* James D. Thomas, *Burden of Proof in Equal Protection Discriminatory Impact Cases: An Emerging Standard*, 26 CATH. U. L. REV. 815, 815–16 (1977).

113. *See generally* Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2017*, 69 MMWR SURVEILLANCE SUMMARIES 1 (2020), https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6909a1-H.pdf [https://perma.cc/4JN5-HAE6] ("Since the first U.S. infant conceived with assisted reproductive technology (ART) was born in 1981, both the use of ART and the number of fertility clinics providing ART services have increased steadily in the United States.").

broader right to procreate to sperm donors, even if such a right were recognized, Colorado's proposed limitations would likely withstand constitutional scrutiny.

B. Compelling Government Interest: Does the State Have a Strong Enough Justification?

Colorado has several potential justifications for imposing a cap on the number of families a sperm donor can assist, each grounded in public health and regulatory concerns. First, the potential for accidental consanguinity among donor-conceived individuals is heightened by the natural human tendency to be drawn to those with similar genetic traits. Second, the health risks to children born from consanguineous relationships—including a higher likelihood of genetic disorders and other medical complications—highlight the need for safeguards to protect future generations. Third, the need to prevent the unchecked commercialization of sperm donation remains a significant concern.

1. Traditional Arguments Against Incest and Why They Fall Short Here

The incest taboo permeates almost every human society.[114] Many of the traditional arguments against allowing incest are sociological, centering around the idea that the practice threatens the very fabric of our society.[115] However, in the context of Colorado's cap on the number of families a sperm donor can assist, the only relevant incest-related compelling interest is biological—specifically, reducing the potential for accidental consanguineous relationships among donor-conceived individuals and the health risks to children born to such relationships.

For instance, one traditional argument against incest is its potential to significantly alter family dynamics by creating inherently coercive relationships and hindering informed consent, especially in situations involving children.[116] However, this concern does not apply to relationships between half-siblings who are unaware

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114. Mary Noble et al., *Incest*, 4 J. MED. ETHICS 64, 64 (1978) ("One of the most interesting features about the prohibition of incest is its universality; there are rules prohibiting sexual congress between certain close relatives in every society in which we know.").

115. *See* Rita Astuti & Maurice Bloch, *The Causal Cognition of Wrong Doing: Incest, Intentionality, and Morality*, 6 FRONTIERS PSYCH. 1, 4 (2015) ("This is why incest leaves people dumbfounded: it is because incest is felt to attack the foundational principles of kinship and, by attacking kinship at its foundation, it is felt to threaten the transcendental in its entirety. In ethnographic terms, as we have seen, incest is said to cause *loza*: calamity and disaster. In more abstract and theoretical terms, we now propose, incest is perceived as a threat to the very fabric of human sociality. This is because the possibility of incest evokes a world where everything and anything is allowed; a world where there are no rules, no respect for elders or for ancestors, who are the source of one's own existence.").

116. *See, e.g.*, Rachel Sharaby, *An Anthropological View on the Taboo Incest as a Mean for Maintaining Social and Family Order*, 9 ADVANCES ANTHROPOLOGY 169, 171 (2019) ("[C]ontrary to rape by a stranger, the sexual abuse in incest is possible not only by the use of force, but rather also by the authority and trust found in the hands of the abuser, and due to the helplessness of the child.").

of their biological connection, as no inherent power imbalance exists in such cases.[117]

Another is an evolutionary biology argument commonly known as the Westermarck Effect.[118] This hypothesis suggests that individuals who grow up in close domestic proximity during early childhood develop a natural aversion to sexual attraction toward one another, thereby reducing the likelihood of incest.[119] However, this concern does not apply to donor-conceived individuals raised in separate families, as they do not share the early-life bonding necessary to trigger this natural kinship aversion.[120]

Another is an anthropological argument encouraging people to marry outside of their kin group.[121] Anthropological theories suggest that societies historically encouraged marrying out of one's kin group to forge alliances and create a broader social network.[122] However, donor-children, despite being half-siblings genetically, are raised in different kin groups and do not share the cultural and social upbringing that would typically define kinship bonds.[123]

Additionally, in American jurisprudence, the constitutionality of incest bans has been thoroughly criticized, especially in light of the Supreme Court's decision in *Lawrence v. Texas*.[124] In *Lawrence*, the Court strongly implies that moral

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117. The dynamics of a traditional family—characterized by legal and social obligations, close-knit environments, and defined hierarchies—differ significantly from the voluntary relationships that may arise between half-siblings connected through sperm donation. As a result, the risk of inherently coercive relationships is substantially lower in the latter context. *See* Mariam Alizade, *Incest: The Damaged Psychic Flesh*, *in* ON INCEST: PSYCHOANALYTIC PERSPECTIVES 101, 106–09 (Giovanna Ambrosio ed., 2005) (arguing that in incestuous relationships, the traditional role of parenting—which fosters education, maturity, and a sense of responsibility—is starkly undermined by dysfunctional dynamics, distorted relationships, and harmful emotional bonds).

118. Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 88 (2009) [hereinafter Cahn, *Accidental Incest*].

119. *Id.*

120. *Id.* at 107.

121. *Id.*

122. *Id.*

123. *Id.*

124. *See, e.g.*, William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1057 (2005) ("In large part because the social and normative stakes of adult incest among cousins or siblings by affinity are so low, *Lawrence* and its (or my) jurisprudence of tolerance do not clearly require that even these statutes violate the Fourteenth Amendment."); Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 351 (2004) ("It seems hard to distinguish an adult brother and sister having sex in the privacy of their own home from two unrelated adult men having sex in the privacy of their own home, in terms of their own interests being at stake."); Y. Carson Zhou, *The Incest Horrible: Delimiting the* Lawrence v. Texas *Right to Sexual Autonomy*, 23 MICH. J. GENDER & L. 187, 241 (2016) (arguing that "neither genetic health nor anti-coercion may be compelling enough as stand-alone government interests under a strict scrutiny regime" for the prohibition of incest); Gabriel Ernesto Andrade, *A Libertanian Critique of Incest Laws: Philosophical and Anthropological Perspectives*, 31 HUM. AFFS. 139, 146 (2021) ("[A]s philosopher Martha Nussbaum has argued, disgust has also been

repugnance, absent any other bases, is not a compelling government interest for criminalizing intimate personal relations between consenting adults.[125] Therefore, if outright criminalization of incest is unconstitutional, then preventing incest alone is unlikely to be a sufficient justification for regulating sperm donation.

Because these traditional arguments against incest do not apply to accidental consanguineous relationships among donor-conceived individuals, this Note will put forth other potential compelling government interests.

2. Potential for Accidental Consanguinity Among Donor Siblings

The potential for accidental consanguinity among donor siblings is a pressing concern, particularly considering the increasing number of individuals using sperm donation to conceive.[126] As studies suggest, people often choose romantic partners who resemble themselves physically.[127] This tendency therefore raises the potential for unintended consanguineous relationships among donor siblings who may meet and form romantic bonds without knowledge of their shared genetic background.

The concern of accidental consanguinity is further supported by research suggesting that physical resemblance enhances trust between individuals.[128] This psychological tendency can further complicate the dynamics between donor siblings. When they encounter each other, this increased perception of trust may lead to increased comfort and attraction, reinforcing the likelihood of forming potentially romantic relationships that could have serious biological implications.[129]

Opponents may argue that the actual probability of accidental consanguinity in the United States is so low that the government's interest in

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traditionally used in defense of very harmful prejudices and racist attitudes . . . . [and] cannot be a reliable guide for morality, let alone the law.").

125. Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.").

126. *See* Bauman, *supra* note 16 ("Nearly 171,000 American women used sperm from a bank to get pregnant in 1995. By 2016 that number had risen to more than 440,000. As more U.S. women wait longer to marry and have a child, the demand for donor sperm has grown.").

127. *See, e.g.*, Liliana Alvarez & Klaus Jaffe, *Narcissism Guides Mate Selection: Humans Mate Assortatively, as Revealed by Facial Resemblance, Following an Algorithm of "Self Seeking Like*,*"* 2 EVOLUTIONARY PSYCH. 177, 190 (2004) ("The results of this study are compatible with the notion that humans develop a sense of beauty through imprinting-like mechanisms.").

128. *See* Lisa M. DeBruine, *Facial Resemblance Enhances Trust*, 269 ROYAL SOC'Y LOND. 1307, 1311 (2002) ("Experimental subjects, who believed that they were playing against pictured opponents while unaware that information from their own faces had been incorporated into the 'morphed' faces of some of those supposed opponents, trusted opponents who resembled themselves significantly more than they trusted other opponents . . . .").

129. *See infra* Subsections IV.B.2–3 (discussing the potential for accidental consanguinity amongst donor-siblings and the health risks to children born to such unions).

preventing such relationships is not compelling. Research from 1980 concluded that only one child is born in the United States every six years to half-siblings who are unaware of their relation.[130] However, this research was conducted at a point in time where only approximately 10,000 children were sired by a sperm donor every year.[131] Today, while the exact amount is unknown, it most likely exceeds[132] the 30,000 to 60,000 "guesstimate"[133] employed throughout modern literature. The reason for this drastic increase is unknown; however, it is possibly due to more parents willing to be open with their children about using reproductive technology.[134] Moreover, the legalization of gay marriage and the rise of single motherhood by choice may have also contributed to this surge.[135] As a result, it is reasonable to argue that the risk of accidental consanguinity is only increasing, especially given the current lack of enforceable and uniform regulations.[136]

In fact, stories of American donors siring up to hundreds of children are not uncommon.[137] Parents of donor-conceived children have responded to such

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130. Martin Curie-Cohen, *The Frequency of Consanguineous Matings Due to Multiple Use of Donors in Artificial Insemination*, 32 AM. J. HUM. GENET. 589, 596 (1980).

131. *See id.* at 589.

132. *See* Arocho, *supra* note 105, at 721 (estimating with a 95% confidence interval that 108,458 to 773,513 women of reproductive age in the United States used donated sperm from 2015–2017).

133. Wendy Kramer, *30k-60k US Sperm and Egg Donor Births Per Year?*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/a-call-to-to-stop-using-t_b_8126736 [https://perma.cc/AR7P-NM4Z].

134. Arocho, *supra* note 105, at 721.

135. Bowles, *supra* note 14.

136. *See* Dan Gong et al., *An Overview on Ethical Issues About Sperm Donation*, 11 ASIAN J. ANDROL. 645, 646 (2009) ("In the United States, there is no federal . . . law limiting sperm donation."); *see also* April Schweitzer & Alexandra Busto, *Increasing Regulation of Reproductive Tissue Banks*, NIXON PEABODY 5 (May 18, 2023), https://www.nixonpeabody.com/-/media/files/alerts/2023/05/increasing-regulation-of-reproductive-tissue-banks.pdf [https://perma.cc/UQM3-ASZU] ("Many clinics also self-regulate based on American Society for Reproductive Medicine (ASRM) guidelines that recommend a cap of six egg retrievals for egg donors, and limit the number of families that can use a particular sperm donor to 25. However, there is no registry of listed donors, so tissue banks and providers do not have a comprehensive way to verify how many donations have been made and how many children are conceived from one donor."); Rene Almeling, *The Unregulated Sperm Industry*, N.Y. TIMES (Nov. 30, 2013), https://www.nytimes.com/2013/12/01/opinion/sunday/the-unregulated-sperm-industry.html# [https://perma.cc/YY2N-H982] ("Sperm banks say they cap the number of offspring per donor, but have no way of compelling customers to report when they get pregnant or give birth.").

137. *See, e.g.*, Mroz, *Serial Sperm Donor*, *supra* note 36 (highlighting one donor with 76 children); Mroz, *150 Offspring*, *supra* note 40 (highlighting one donor with 150 children); Eli Baden-Lasar as told to Susan Dominus, *A Family Portrait: Brothers, Sisters, Strangers*, N.Y. TIMES MAG. (June 26, 2019), https://www.nytimes.com/interactive/2019/06/26/magazine/sperm-donor-siblings.html [https://perma.cc/26PW-YQV7] (highlighting one donor with 33 children); Ben Cost, *I'm the World's Most Famous Sperm Donor—I'm Close to Having Fathered 100 Children*, N.Y. POST (Jan. 7, 2025, at 1:57 ET), https://nypost.com/2025/01/07/lifestyle/worlds-most-famous-sperm-donor-will-have-100-children-soon/ [https://perma.cc/5SKF-9VJ8] (highlighting one donor with nearly 100 children).

occurrences by creating online registries and social media groups to track half-siblings.[138] One such website, donorsiblingregistry.com, allows parents to register their child and find half-siblings by looking up a number assigned to their specific sperm donor.[139] As the number of children in these groups grows, parents are increasingly concerned about the possibility that their children will meet and potentially form sexual relationships with half-siblings.[140] One donor conceived woman recounts being "traumatized" after finding out that her high school boyfriend—one she says she "easily could have married"—was her half-sibling.[141]

3. Health Risks to Children Born to Consanguineous Relationships

Additionally, the potential health risks to children born to these consanguineous relationships are significant. Studies indicate that such consanguineous unions can lead to adverse reproductive outcomes, such as birth defects arising from the shared genetic material between closely related individuals.[142] Research shows that offspring from consanguineous relationships face a higher incidence of birth defects—up to three times the rate seen in the general population.[143] Specifically, elevated rates of childhood deafness, blindness, and congenital heart defects are often linked to autosomal recessive inheritance patterns, where harmful genes inherited from a common ancestor are more likely to be expressed.[144]

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138. Mroz, *150 Offspring*, *supra* note 40 ("Ms. Daily searched a Web-based registry for other children fathered by the same donor and helped to create an online group to track them. Over the years, she watched the number of children in her son's group grow.").

139. *Id.*

140. A California mother of a teenager conceived via sperm donation explained that her daughter knows her donor's number to avoid inadvertently forming relationships with half-siblings, as many of her schoolmates are also donor-conceived, including boys she has had crushes on. This has become an essential part of her teenager's sex education. Mroz, *150 Offspring*, *supra* note 40; *see also* Mroz, *Serial Sperm Donor*, *supra* note 36 ("Some of his half siblings have encountered each other multiple times on Tinder, the dating app. One half brother . . . matched online with four half sisters.").

141. This woman's story "illustrates how the huge groups of siblings made possible in part by a lack of regulation can lead to a worst-case scenario coming to pass: accidental incest." Rob Kuznia et al., *A DNA Test Turned Her Life Upside Down. She's Not Alone*, CNN (Feb. 14, 2024, at 10:00 EST), https://www.cnn.com/2024/02/14/us/fertility-fraud-accidental-incest-invs/index.html [https://perma.cc/9X6G-JVRW]. It may also be traumatizing for donor-conceived children to learn they have tens or hundreds of half-siblings, even without the fear of accidental incest. *See* Farah Otero-Amad, *A Modern Family: 20-plus Sperm Donor Siblings Find Each Other*, NBC NEWS (Nov. 2, 2019, at 03:10 MST), https://www.nbcnews.com/news/us-news/modern-family-20-plus-sperm-donor-siblings-find-each-other-n1071656 [https://perma.cc/2L7J-2BV6] ("'It's understandably overwhelming to learn that they have 10 or 20 or 30 or more half siblings with whom they are at least genetically related,' said Fox. 'Some people find comfort in communities like that, but others don't.'").

142. Hamamy, *supra* note 6, at 187–89.

143. *Id.* at 189.

144. Alan H. Bittles & Michael L. Black, *The Impact of Consanguinity on Neonatal and Infant Health*, 86 EARLY HUM. DEV. 737, 739 (2010).

Apart from birth defects, the long-term effects of consanguineous relationships must also be considered. While studies evaluating the long-term effects of these risks across numerous generations of humans are essentially nonexistent, animal studies may provide a clearer picture. For example, when sibling birds mate across several generations, the family line dies out fairly quickly.[145] This is due to the expression of harmful recessive genes that may have otherwise remained suppressed in a more genetically diverse population.[146]

History offers a striking human parallel. Genetic analysis of the Spanish Habsburg dynasty shows how repeated marriages between close relatives, such as uncles and nieces, led to a sharp increase in genetic risks.[147] Over two centuries, the dynasty's inbreeding coefficient[148] rose from 0.025 at its founding to 0.254 by the time of King Charles II.[149] This level of genetic similarity is comparable to what would be expected from an incestuous union between parent and child or brother and sister.[150] Scientists believe that this extreme inbreeding played a major role in Charles II's severe physical disabilities, cognitive impairments, and infertility,[151] traits that ultimately led to the extinction of the royal line.[152] The Habsburg case illustrates that when harmful recessive genes are repeatedly combined over generations, the resulting health effects can be devastating—not just for individuals, but for entire families.

The cumulative effects of these genetic risks highlight the critical need for legal frameworks to prevent consanguineous unions. Such measures are essential to safeguard public health and the well-being of individuals born from these relationships.

4. Unregulated Commodification of Sperm in the Open Market

Colorado may also have a compelling interest in preventing completely unregulated commodification of sperm in the open market. Generally, American jurisprudence has limited which human body parts can be bought and sold.[153] Regarding reproductive processes specifically, providers have been careful to characterize their contributions as "services" rather than "sales" to avoid running

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145. PATRICK BATESON, INBREEDING AVOIDANCE AND INCEST TABOOS, IN INBREEDING, INCEST, AND THE INCEST TABOO: THE STATE OF KNOWLEDGE AT THE TURN OF THE CENTURY 24, 25 (Arthur P. Wolf & William H. Durham eds., 2005).

146. These recessive genes are more likely to be paired together in a consanguineous relationship than a non-consanguineous relationship. *Id.*

147. *See* Gonzalo Alvarez, Francisco C. Ceballos & Celsa Quinteiro, *The Role of Inbreeding in the Extinction of a European Royal Dynasty*, 4 PLOS ONE 1, 1–2 (2009).

148. The inbreeding coefficient is the "probability that an individual receives at a given locus two genes identical by descent due to the common ancestry between his parents," or, more simply, the chance that a person has inherited two copies of the same gene from a shared ancestor. *See id.* at 2.

149. *Id.* at 3.

150. *Id.*

151. *See id.* at 1, 6–7.

152. *Id.* at 1.

153. *See, e.g.*, 42 U.S.C. § 274e(a) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.").

afoul of this rule.[154] However, as opposed to surrogacy services, it is harder to argue that sperm donation is a mere "service" as opposed to a "sale."[155] While the sale of sperm is not illegal,[156] some scholars have argued that allowing such unregulated sperm donation may be a slippery slope for placing monetary value on those with the "best" biology.[157] In essence, some attributes may become more "valuable" than others.[158] Placing such a preconceived value on genetic material and unconceived children is antithetical to the American value that all people are created equal.[159] Though few scholars call for banning sperm donation outright,[160] some argue that allowing completely unregulated sperm donation in the open market is incompatible with the long-standing American value of not selling or buying human body parts—or at least the "important" ones.[161]

In summary, the government has multiple potential justifications for asserting a compelling interest in capping the number of families a sperm donor can assist. First, the risk of accidental consanguinity among donor-conceived individuals

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154. *See* David B. Resnik, *The Commodification of Human Reproductive Materials*, 24 J. MED. ETHICS 388, 391 (1998) ("In the debate about surrogate mothering, some authors have argued that contracts with gestational surrogates are not baby-selling because these women are only selling the use of their wombs.").

155. *See id.* ("Carrying a child in a womb is clearly a valuable service, but how is ejaculation a service? A donor who does not provide sperm will not be paid."); *see also* Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 258 ("This practice is usually called gamete 'donation,' a term that suggests that a gift is being made. Only rarely, however, do people transfer gametes without receiving money for them.").

156. The National Organ Transplant Act of 1984 prohibits the sale of human organs for transplantation but does not extend this prohibition to reproductive tissues such as sperm, eggs, or blood. *See* NAT'L ACADS. SCI. ENG'G & MED., OPPORTUNITIES FOR ORGAN DONOR INTERVENTION RESEARCH: SAVING LIVES BY IMPROVING THE QUALITY AND QUANTITY OF ORGANS FOR TRANSPLANTATION 76 (James F. Childress et al. eds., 2017). Consequently, sperm donation for compensation is legal in the United States. *Id.*

157. Resnik, *supra* note 154, at 391.

158. Shanley, *supra* note 155, at 272 ("Differential pricing of gametes based on characteristics like the provider's height, skin and hair color, athletic or academic achievement, and musical ability seems to validate the assumption that persons with such attributes—both providers and as-yet-unborn (indeed, as-yet-unconceived) children—are 'worth more' than others.").

159. *Id.* ("When people know that the genetic material that made a particular child's existence possible was bought for a higher (or lower) price than that of some other child, such knowledge may undermine the proposition that all persons are of equal dignity regardless of their wealth or social status.").

160. *See id.* at 279 ("Reimagining gamete transfer as something other than a market activity will be an uphill struggle, but is not inevitably doomed to failure.").

161. *See id.* at 271–72 ("The law allows people to sell hair, and sometimes blood, but prohibits the sale of body organs. Even someone willing and able to live with only one kidney or eye may not sell the other, nor may the kidney, eye, heart, or liver from a deceased person be sold. The distinction here is not simply that between renewable and nonrenewable material, or between material necessary and unnecessary to sustain life. It also involves a judgment that some parts of the body should not be for sale . . . because of the significance of reserving aspects of the human body from commodification . . . .").

is heightened by the natural human tendency to be drawn to those with similar physical and genetic traits.[162] Second, the increased likelihood of health risks to children born from consanguineous relationships[163] highlights the need for regulatory safeguards to protect the health and well-being of future generations. Third, even if the outright criminalization of incest is deemed unconstitutional,[164] the government may still have a compelling interest in preventing the unrestricted commodification of sperm in the open market.[165] As the number of donor-conceived children grows,[166] so does the urgency of addressing these risks.

C. Narrow Tailoring: Is the Cap the Least Restrictive Means?

A key consideration in evaluating the constitutionality of Colorado's cap on the number of families a sperm donor can assist is whether the statute is narrowly tailored to effectively address the compelling interests discussed above.[167]

1. Arguments in Favor: Why the Act's Approach Is Not Overly Restrictive

The statute limits the number of families a donor can assist to 25 but does not impose any restriction on the number of children born within each of those families.[168] By not imposing an outright ban on sperm donation or capping the number of children born to a single family, the statute avoids being overly restrictive.

Additionally, Colorado's Act only seeks to regulate anonymous donations made to established sperm banks, not the donor's own children or private arrangements made on a social media group or between friends.[169] Additionally, civil penalties are only directed toward gamete banks, gamete agencies, and fertility clinics, not donors.[170] Therefore, if donors or recipients are not satisfied with the level of government interference, they are still free to make private arrangements where the donor's identity is known.[171] And compared to *Skinner*, which dealt with

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162. *See supra* Subsection IV.B.2.

163. *See supra* Subsection IV.B.3.

164. *See* sources cited *supra* note 124.

165. *See supra* Subsection IV.B.4.

166. *See* sources cited *supra* notes 13–14, 126.

167. *See supra* Subsections IV.B.2–4 (discussing the heightened risk of accidental consanguinity due to natural human attraction to genetically similar individuals, the increased likelihood of health risks for children born from consanguineous relationships, and the need to prevent the unrestricted commodification of sperm in the open market).

168. COLO. REV. STAT. § 25-57-109(1)(a).

169. *See id.* ("This limit does not include any children conceived by the donor as a parent or children conceived with the donor's gametes when the donor is known to the recipient parent or parents at the time of the donation. This limit does not include donations of embryos from one family to another family.").

170. *Id.* § 25-57-110(6).

171. However, this may have other unintended consequences. *See Risk Factors to Consider for Home Insemination*, COMPLETE FERTILITY CTR. (Apr. 9, 2019), https://www.completefertility.co.uk/blog-resources/blog-news/risk-factors-to-consider-for-home-insemination [https://perma.cc/4NDR-VBC2] (explaining that at-home insemination with donor sperm carries several risks, including the possibility that the female patient has undiagnosed fertility issues or irregular ovulation, reducing the chances of conception; the lack of medical screening for the donor, which could pose health risks to both the patient and

complete sterilization,[172] sperm donors are still allowed to procreate within traditional family structures.[173]

Further, the government is better equipped than individual couples to research and address concerns of consanguinity. With access to extensive resources, expertise, and regulatory authority,[174] government agencies can better analyze sperm donation patterns, genetic risks, and the potential for accidental consanguinity within a given population. By centralizing this research and regulation, the government can implement policies that more effectively mitigate these risks on a larger scale, ensuring greater public health and safety nationwide.[175]

In summary, Colorado's Act adopts a targeted, carefully calibrated approach: it caps only anonymous donations, preserves donors' ability to build families privately, penalizes banks rather than individuals, and entrusts public health protection to the entities best equipped to manage genetic risks. Therefore, Colorado's Act likely satisfies the "narrowly tailored" requirement of strict scrutiny.

2. Arguments Against: Concerns About Overbreadth and Underinclusiveness

Some may argue that there exist less intrusive means to serve Colorado's compelling interests, as seen by the trend in favor of better disclosure and tracking requirements.[176] Families would essentially self-regulate. They would gain access

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baby due to untested sperm quality and potential disease transmission; the absence of regulatory safeguards such as recommended sperm testing and quarantine procedures; the risk of infection or physical injury from non-sterile insemination methods; and potential legal complications regarding parental rights and responsibilities).

172. Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (holding that Oklahoma's forced sterilization law fails strict scrutiny and noting that such sterilization could have irreversible, far-reaching, and devastating effects).

173. *See* COLO. REV. STAT. § 25-57-109(1)(a).

174. *See* MAEVE P. CAREY, CONG. RSCH. SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS 1 (2021) ("Congress delegates rulemaking authority to agencies for a number of reasons. Perhaps most importantly, agencies have a significant amount of expertise and can 'fill in' technical details of programs that Congress created in statute.").

175. *See* Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 218 (2009) [hereinafter Cahn, *Necessary Subjects*] ("A federal-level structure could more efficiently and effectively implement any large-scale collection of information and oversight of the process."). The federal government is already involved in regulating gamete handling and curbing deceptive clinic practices regarding procedural success. *Id.* at 206. Additionally, the FDA has implemented comprehensive regulations on gamete testing and safety. *Id.* at 218.

176. *See e.g.*, Ethics Comm. Am. Soc'y for Reprod. Med., *Informing Offspring of Their Conception by Gamete or Embryo Donation: an Ethics Committee Opinion*, 109 FERTILITY & STERILITY 601, 601 (2018) ("[M]ore recently a strong trend in favor of encouraging disclosure has emerged."); Cahn, *Necessary Subjects*, *supra* note 175, at 212–13 ("[T]he donor movement is beginning to place pressure on the gamete industry for more disclosure."); Kirstin Mac Dougall et al., *Strategies for Disclosure: How Parents Approach Telling Their Children That They Were Conceived With Donor Gametes*, 87 FERTILITY & STERILITY 524, 524 (2007) (footnotes omitted) ("[S]ome authors maintain that there may be an increasing trend for parents to favor disclosure, a stance recently supported in guidelines

to comprehensive information about a donor's donation history that would aid them in avoiding donors with high donation counts, and thereby eliminate the need for a cap. However, given the documented instances[177] of some sperm banks exceeding the ASRM-recommended limit of 25 families[178] or failing to implement other screening recommendations,[179] the effectiveness of disclosure requirements would still depend on robust enforcement mechanisms.

Others may argue that the Act may actually be underinclusive given its goals. For example, the proposed penalties are designed to target individual gamete banks, gamete agencies, and fertility clinics rather than the donors themselves.[180] This creates a significant loophole, as sperm donors can bypass the formal sperm bank system entirely and potentially donate over the recommended limit.[181] Donors might use online platforms and social media to directly connect with recipients.[182] Without regulation of private donations, the risk of accidental consanguinity is still prevalent.[183]

Moreover, Colorado's Act cannot effectively account for donations occurring outside its jurisdiction.[184] Donors could easily travel to neighboring states to donate, exceeding the 25-family limit imposed by Colorado[185] without detection. As it stands, a large percentage of donors donate to more than one clinic.[186] The absence of a nationwide database or reporting system means there is no way to

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encouraging disclosure published by the American Society for Reproductive Medicine's Ethics Committee.").

177. *See* U.S. Donor Conceived Council, *2022 Sperm Bank Data Survey* 14, 20–22 (Apr. 25, 2023), https://www.usdcc.org/wp-content/uploads/2023/04/Sperm-Bank-Survey_2022.pdf [https://perma.cc/N2ML-3SPB] (showing that at least 5 U.S. sperm banks allow donors to donate to more than 25 families).

178. Prac. Comm. Am. Soc'y for Reprod. Med. & Prac. Comm. Soc'y for Assisted Reprod. Tech., *Gamete and Embryo Donation Guidance*, 122 FERTILITY & STERILITY 799, 804 (2024) (footnote omitted) ("It has been suggested that in a population of 800,000, limiting a single donor to no more than 25 births would avoid any significant increased risk of inadvertent consanguineous conception.").

179. In addition to FDA requirements, the ASRM also recommends psychological, genetic, and infectious-disease screening. *Id.* at 800.

180. *See* COLO. REV. STAT. § 25-57-110(6)(a).

181. *See* Witkin, *supra* note 14 ("While most banks limit the number of families to which a donor can give, there are no limits on private sperm donors.").

182. *See* Bauman, *supra* note 16.

183. *See supra* Subsection IV.B.2.

184. Yes, while Colorado's statute explicitly applies to donations made both within and outside the state, COLO. REV. STAT. § 25-57-109(1)(a) ("a gamete agency . . . shall not match or provide gametes from a donor to additional families once the gamete agency . . . has record of or should reasonably know that twenty-five families have been established using a single donor's gametes in or outside of Colorado . . . ."), the lack of uniform reporting and disclosure requirements in other states makes it difficult for Colorado to effectively monitor and enforce the limitation outside its borders. *See id.*; *see also* sources cited *supra* note 1.

185. COLO. REV. STAT. § 25-57-109(1)(a).

186. According to Wendy Kramer, co-founder and director of the Donor Sibling Registry, "27% of donors donate to more than one clinic." Kramer, *supra* note 133.

monitor or regulate donors who cross state lines.[187] States may have differing regulations, or none at all, allowing donors to exploit these discrepancies.[188]

Courts may also be inclined to consider the supply constraints that such regulation could cause. By limiting the number of families a donor can help, the regulation could unintentionally reduce the overall availability of donor sperm, and thereby increase the cost of regulated donations[189] and potentially increase demand for private donations as well.[190] For example, one sperm bank advertises sperm that will only be distributed to 2–10 families for a whopping $35,000.[191] Additionally, sperm banks that do not wish to comply with these regulations may choose to leave Colorado, further congesting the demand for sperm in that state.[192] While private donations are not currently regulated under the Act,[193] the rise in private donations[194]—and the resulting lack of oversight[195]—negates many of the other benefits of the Colorado Act such as medical screening and donor tracking.[196]

Taken together, these concerns suggest that Colorado's Act may not be as narrowly tailored as strict scrutiny demands. By imposing a rigid cap without first exhausting less intrusive alternatives, such as enhanced disclosure and centralized tracking, the Act risks unnecessarily burdening reproductive autonomy. At the same time, by failing to regulate private donations or account for interstate fertility practices, the law leaves critical gaps in its coverage that undermine its stated goals. As a result, courts might find that the Act is both overinclusive and underinclusive—sweeping too broadly in restricting clinical donations while failing to meaningfully address the broader risks of accidental consanguinity in an increasingly interconnected fertility market.

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187. *See* Otero-Amad, *supra* note 141 ("With no national registry among fertility clinics, even if various sperm banks were to keep accurate records for each donor, they would not be able to tell if that person donated to another bank elsewhere in the country.").

188. *See* sources cited *supra* note 1.

189. COLO. DEP'T OF PUB. HEALTH & ENV'T, 2024 BOARD OF HEALTH REQUEST FOR RULEMAKING FOR GAMETE BANK AND FERTILITY CLINIC PROGRAM 5 CCR 1005-6, at 12 (2024), https://www.coloradosos.gov/CCR/Upload/NoticeOfRulemaking/ProposedRuleAttach2024-00365.pdf [https://perma.cc/ND97-H4V4] ("By limiting how many families can be established with a single donor and increasing the regulation around the process, this could lead to increased costs for consumers.").

190. *See* Bauman, *supra* note 16 ("[P]eople who couldn't afford to spend thousands of dollars on sperm from a bank, or costly fertility procedures, increasingly went online to find free or cheap sperm.").

191. COLO. DEP'T OF PUB. HEALTH & ENV'T, *supra* note 189, at 12 ("These price estimates were retrieved from the [sperm bank] website before Colorado regulations went into effect and are intended only to provide a sense of potential price increases.").

192. *Id.*

193. COLO. REV. STAT. § 25-57-109(1)(a) ("This limit does not include any children conceived by the donor as a parent or children conceived with the donor's gametes when the donor is known to the recipient parent or parents at the time of the donation.").

194. *See* Bauman, *supra* note 16.

195. *See* Otero-Amad, *supra* note 141.

196. *See* COMPLETE FERTILITY CTR., *supra* note 171.

V. BEYOND THE CAP: ALTERNATIVE PATHS FORWARD

Given the ongoing conversation about the Act, there may be additional avenues for regulation that Colorado—and other states—could consider moving forward. Beyond legislative limits on the number of families a donor can assist, other proposals focus on enhancing transparency, accountability, and informed decision-making within the reproductive technology industry. This Part explores two possible regulatory alternatives: (1) creating a centralized database for sperm donations and (2) enhancing informed consent procedures for recipients. Together, these measures aim to mitigate risks associated with donor anonymity, inadvertent consanguinity, and the ethical complexities of donor-conceived sibling dynamics without running afoul of the Constitution.[197]

A. Creating a Central Database for Tracking Sperm Donation

Implementing a centralized database for sperm donors could significantly enhance the regulation of the sperm donation industry.[198] Currently, because the sperm donation industry essentially self-regulates, donors are given different identification numbers across different banks.[199] This proposal involves fertility clinics and sperm banks submitting genetic samples and detailed donor information to a central repository.[200] These samples would be used to assign a consistent identification number across all donations, regardless of the bank.[201] The central repository would verify that donors are not circumventing limits by donating to multiple clinics under different identities[202] and would thereby prevent the overproduction of offspring from a single donor and reducing the risk of inadvertent consanguinity.

B. Enhancing Informed Consent Procedures

Enhanced informed consent procedures would ensure that recipients fully understand the implications of sperm donation, including the health risks, donor privacy and anonymity, consent withdrawal and its consequences, access to counseling, financial considerations, and so on.[203] Recipients should be informed about the legal regulations regarding donor anonymity and identifiability in the United States.[204] This includes understanding the current laws and any potential

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197. Constitutional interpretation of these regulations is beyond the scope of this Note.

198. *See* Cahn, *Accidental Incest*, *supra* note 118, at 105.

199. *Id.*

200. *Id.* at 105–06. Another possible way to identify donors would be for banks to collect their social security numbers. *See* Otero-Amad, *supra* note 141.

201. Cahn, *Accidental Incest*, *supra* note 118, at 105–06.

202. *Id.*

203. Kirkman-Brown et al., *supra* note 37, at 12; *see also* Cahn, *Accidental Incest*, *supra* note 118, at 103 ("The informed consent process should begin at the earliest possible point, prior to when the donor actually provides the gametes, to ensure that both the donor and the recipients understand the implications of the treatment.").

204. Kirkman-Brown et al., *supra* note 37, at 12.

changes that could affect their situation, including legislation that may affect donor anonymity.[205]

Additionally, recipients should be informed about the recommended limits on the number of offspring or families per donor.[206] They should also know whether donors are allowed to set a personal limit on the number of offspring or families they wish to assist by including specific restrictions in their informed consent or if individual banks set their own limits.[207] It is crucial for recipients to understand that such limits can only be adhered to if they report the birth of their child.[208] This discussion should also address the absence of nationwide laws for the maximum number of offspring or families per donor.[209] Recipients should also understand the possible consequences of this lack of federal regulation, including the increased likelihood of multiple genetic half-siblings and the potential for inadvertent consanguinity.[210]

Furthermore, recipients should be informed if and at what age their children can access identifiable information about the donor.[211] They should also be provided with details on how any medically relevant updates and information about the number of donor-siblings will be communicated.[212] This discussion should also address the implications of direct-to-consumer genetic testing in combination with social media and online information.[213] They need to understand how these technologies can affect their ability to keep donor-conception confidential and the possibility that the donor, offspring, and extended family may discover each other through these routes.[214] This ensures that recipients are prepared for the potential future implications for their child's identity and medical history.[215]

By incorporating these elements into the informed consent process, the sperm donation industry can better protect the rights and interests of both donors and recipients. Comprehensive informed consent promotes transparency, respects autonomy, and enhances the ethical integrity of the sperm donation process.

CONCLUSION

The framework for determining which rights qualify as fundamental under the Constitution remains inherently unclear and inconsistent,[216] especially after the Supreme Court's recent divergence in *Dobbs*.[217] The Supreme Court has

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205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 13.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *See id.*
216. *See* sources cited *supra* note 69.
217. Originalism is not a new judicial philosophy. *See generally* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013) (explaining the evolution of the originalist theory). However, after *Dobbs*, the Court signaled

traditionally recognized fundamental rights based on their deep roots in the nation's history and tradition.[218] However, whether a right is deemed fundamental often depends on how broadly or narrowly that right is defined and how the historical analysis is framed.[219] Here, for instance, framing the right at issue as "the right to procreate" might garner strong historical support, while framing it more narrowly as "the right to donate sperm" would likely lack historical recognition, considering the first sperm bank did not open in the United States until 1964.[220] This definitional flexibility[221] profoundly affects how courts will approach reproductive rights amid emerging technologies. For example, this creates uncertainty about whether practices like sperm donation should be constitutionally protected under the "the right to procreate," which is itself inextricably intertwined with evolving "right to privacy."[222] *Dobbs* may mark the beginning of a judicial shift toward defining substantive due process rights more narrowly.[223] By anchoring its abortion analysis in a stringent historical framework,[224] the Court's decision hints at a retreat from expansive interpretations of rights not explicitly enumerated in the Constitution.[225]

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that some societal reliance interests may no longer be a strong enough justification for preserving precedent under *stare decisis*. *See* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1863 (2023). This shift raises doubts about whether reliance interests alone—such as the increasing number of women who depend on donor sperm—can justify extending related rights, like the right to donate sperm, under the broader right to procreate. *See supra* notes 13–14, 126 and accompanying text. Given that the right to procreate is itself derived from the right to privacy, which the Court has shown increasing reluctance to expand, grounding sperm donation rights in this framework may prove tenuous.

218. *See supra* Section III.A.

219. *See* sources cited *supra* note 69.

220. *See supra* Subsections IV.A.1–2.

221. *See* sources cited *supra* note 69.

222. *See supra* Subsection IV.A.1.

223. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239–40 (2022) (explaining how, to uphold the separation of powers, it is essential to impose meaningful limits on how courts interpret "liberty," preventing them from inserting their own policy views and overstepping the constitutional authority granted to the people's elected representatives).

224. *See id.* at 41.

225. Unenumerated rights are no longer guaranteed fundamental status. *See* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 190–91 (2022) (footnote omitted) ("Overruling Roe, explicitly or effectively, will put in jeopardy many of the other rights the Supreme Court has protected under the word 'liberty' in the Due Process Clause. For example, it has interpreted the word to protect the right to marry, the right to procreate, the right to custody of one's children, the right to keep one's family together, the right to control the upbringing of one's children, the right to purchase and use contraceptives, the right to engage in private adult consensual same-sex sexual activity, and the right of competent adults to refuse medical treatment. Some of these liberties, like the right of parents to control their children's upbringing, have been recognized by the Court for almost a century. Yet none of them are enumerated in the Constitution's text or can be said to be part of its original meaning. From an originalist perspective, all of them are unjustifiable."); *see also* Sonia M. Suter & Naomi Cahn, *More Than Abortion Rides on SCOTUS in* Dobbs, BLOOMBERG L. (May 10, 2022, at 01:00 MST), https://news.bloomberglaw.com/us-law-week/more-than-abortion-rides-on-scotus-in-dobbs

In conclusion, while it is unlikely that the current Supreme Court would extend the broader right to procreate to sperm donors, even if such a right were recognized, Colorado's proposed limitations would likely withstand constitutional scrutiny. The state's compelling interests in mitigating the risks of accidental consanguinity and unregulated commodification of sperm in the open market provide strong justification for the regulation. By capping only the number of families a donor can assist—without limiting the number of children born within each family, regulating private donations, or restricting the donor's procreation within traditional family structures—the statute takes a narrowly tailored approach that directly addresses these concerns without imposing overly broad or unnecessary restrictions on reproductive choices. Therefore, even under the highest level of constitutional review, the statute would likely be upheld as a valid and necessary exercise of the state's regulatory authority.

As reproductive technologies advance and nontraditional family structures become increasingly common, the legal frameworks governing them will face growing pressure to adapt. Courts will have to grapple not only with novel scientific realities but also with the enduring question of which reproductive liberties deserve constitutional protection. Whether the right to donate sperm will one day be viewed as fundamental or remain outside the scope of judicial recognition will likely depend on how future courts balance history, individual autonomy, and the state's evolving public health concerns.

[https://perma.cc/APR9-GDB5] ("The concern about the vulnerability of these rights is not hypothetical.").