Equal Liberty: Assisted Reproductive Technology and Reproductive Equality

Radhika Rao*

Introduction

Regulating reproductive technologies—the subject of this symposium—is a theoretical issue right now because there is virtually no such regulation in the United States. However, the regulatory vacuum surrounding assisted reproductive technologies (“ARTs”) may not last for much longer. The outcry over human cloning and embryonic stem cell research have enhanced public scrutiny of parallel technologies and led to calls for more oversight of ARTs. After issuing reports on cloning and embryonic stem cell research, President Bush’s Council on Bioethics took on the related topic of assisted reproduction and recommended studies of the effects of ARTs as a preliminary to such regulation. Already, some states such as California have en-

* Professor of Law, University of California, Hastings College of the Law, and Fulbright Distinguished Professor at the University of Trento, Italy, from March to July 2008. The author was a member of the California Advisory Committee on Human Cloning, and is currently a member of the California Human Embryonic Stem Cell Research Advisory Committee. Thanks are due to the participants in the regulating reproductive technologies symposium for their helpful comments and criticism, to the Hastings 1066 Foundation for its generous support, and to Navjot Mahal, Hastings Class of 2009, for her excellent research assistance. This Article also benefited from discussions with the students in the author’s Biolaw class at the University of Trento and from her stay in Italy.

1 One federal law simply creates a system for the accurate reporting of information regarding the efficacy of fertility treatments, see Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. §§ 263a-1 to -7 (2000), while most states have no laws regulating ARTs at all. A notable exception is Louisiana, which prohibits the destruction of spare embryos and requires them to be made available to others for “adoptive implantation.” See LA. REV. STAT. ANN. §§ 9:129–:130 (2000) (providing that “[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person”).


acted laws that limit the production and use of embryos for the purpose of human embryonic stem cell research (“hESCR”). The disparity between the extensive restrictions imposed upon research embryos and the near absence of regulation of embryos in the context of fertility treatments is too obvious to ignore. Moreover, the Supreme Court’s recent decision upholding a federal ban on partial-birth abortion may also pave the way for more regulation of embryos and fetuses. All of these developments put pressure upon the government to act.

To predict how the United States or various state governments might respond to such pressures to regulate ARTs, we should look abroad. Germany and Italy, in particular, offer instructive examples. In 1990, Germany enacted the Embryo Protection Act, which restricts the creation, implantation, and destruction of external embryos. The Embryo Protection Act makes it a crime to create more embryos than can be transferred to a woman in one cycle and allows no more than three embryos to be implanted in the uterus. It also mandates implantation of all embryos and bans their destruction, effectively preventing genetic selection as well. In addition, although the Embryo Protection Act permits sperm donation, it proscribes even unpaid egg donation and gestational surrogacy. More recently, in 2004, Italy enacted Law 40—one of the most restrictive laws regu-

---


6 For example, anti-abortion activists are attempting to place constitutional amendments on the ballot in a number of states in 2008 that would grant “personhood” to the embryo from the moment of conception. Such measures would not only outlaw all abortions, but they could also forbid embryo discard, limiting or even precluding some methods of assisted reproduction. See Judith Graham & Judy Peres, Rights for Embryos Proposed: Abortion Foes Push State Initiatives to Bestow “Personhood,” Chi. Trib., Dec. 3, 2007, at C7; Nicholas Riccardi, Foes of Abortion Shift to States, L.A. Times, Nov. 23, 2007, at A1.


9 Embryo Protection Act § 1(1), nos. 2–4; see also Robertson, supra note 8, at 205.

10 Embryo Protection Act § 1(1), nos. 2–4; see also Robertson, supra note 8, at 205.

11 Embryo Protection Act § 1(1), nos. 6–7; see also Robertson, supra note 8, at 209.

lating ARTs in the world.\textsuperscript{13} Law 40 limits ARTs to married or “stable” heterosexual couples of childbearing age who are infertile.\textsuperscript{14} Law 40 permits no more than three embryos to be created at any one time, requires implantation of all extracorporeal embryos, and forbids embryo destruction or even freezing except under very limited circumstances.\textsuperscript{15} It also prohibits genetic selection of embryos and gametes, as well as the use of donor sperm, eggs, and surrogacy.\textsuperscript{16} Would similar laws be constitutional in the United States?\textsuperscript{17}

Some scholars suggest that the U.S. Constitution confers a right to reproduce with the assistance of a wide variety of technologies, including in vitro fertilization (“IVF”), preimplantation genetic diagnosis of embryos (“PGD”), and even somatic cell nuclear transfer (“SCNT”), otherwise known as cloning.\textsuperscript{18} Under this expansive interpretation of reproductive liberty, almost every technology necessary to procreate would receive constitutional protection.\textsuperscript{19} Others contend that there is no such constitutional right at all, leaving the government completely free to regulate the field of fertility treatments.\textsuperscript{20}


\textsuperscript{15} Benagiano & Gianaroli, supra note 14, at 124; see also Fenton, supra note 13, at 73, 99.

\textsuperscript{16} Benagiano & Gianaroli, supra note 14, at 122; see also Fenton, supra note 13, at 73, 84, 99.

\textsuperscript{17} Perhaps inspired by the Italian example, the Georgia Legislature is currently considering whether to set limits on the number of eggs that can be fertilized in IVF and prohibit embryo discard. See supra note 2. Other states may follow suit. See supra note 6.


\textsuperscript{19} See Robertson, Children of Choice, supra note 18, at 16; Suter, supra note 18, at 250.

\textsuperscript{20} In the context of disputes over frozen embryos, Glenn Cohen reasons that there is no “naked” right not to be a genetic parent, unbundled from the obligations of gestational and legal parenthood. See I. Glenn Cohen, The Constitution and the Rights Not to Procreate, 60 Stan. L. Rev. 1135, 1165–67 (2008). Accordingly, he concludes that the U.S. Constitution does not compel any single answer to embryo disputes, so states have the legal discretion to select whatever approach they prefer. See id. at 1196. More broadly, Professor Cass Sunstein suggests that the “due process traditionalism” approach (which he himself disclaims) applied by the Supreme Court in cases like Washington v. Glucksberg, 521 U.S. 702 (1997), and Michael H. v. Gerald D., 491 U.S. 110 (1989), might even permit the government to ban all use of reproductive technologies because of the complete absence of any tradition of constitutional protection. See Cass R. Sunstein, Is There a Constitutional Right to Clone?, 53 Hastings L.J. 987, 989–92 (2002).
This Essay offers a novel approach that rejects both extremes. I argue that there is no general right to use ARTs as a matter of reproductive autonomy, but there may be a limited right to use ARTs as a matter of reproductive equality. Accordingly, the government could prohibit use of a particular reproductive technology across the board for everyone; however, once the state permits use in some contexts, it should not be able to forbid use of the same technology in other contexts. Hence, all persons must possess an equal right, even if no one retains an absolute right, to use ARTs.

This theory does not bar the government from drawing any lines with respect to ARTs; instead, it simply circumscribes the state’s regulatory power when the lines between what is permitted and what is proscribed are unconstitutional. Lines drawn based upon the status of the persons involved would likely be unconstitutional, whereas lines drawn to differentiate between different acts would likely be constitutional. Thus, a law that permits ARTs to be used by married persons but not single persons, or by heterosexuals but not homosexuals, should be deemed unconstitutional. However, a law that simply distinguishes between different categories of ARTs probably should be judged constitutional.

Applying this theory, courts need ensure only that restrictions upon reproductive liberty are meted out with a measure of equality. Why provide equal but not absolute rights in the realm of assisted reproduction? The principle of reproductive liberty has no logical stopping point; it confers constitutional protection upon almost every technology that is necessary to procreation. Such an expansive reading of the right fails to distinguish between different categories of regulation and the reasons underlying them. It subjects all laws that restrict reproductive autonomy to strict judicial scrutiny and requires them to be struck down unless necessary to advance compelling governmental objectives. Under this theory, almost every regulation of assisted reproduction would be unconstitutional. Laws that limit the creation, implantation, and destruction of embryos, laws that prohibit gamete donation and surrogacy, and even laws that prevent genetic selection and cloning would all be invalid because they all inhibit reproductive autonomy. Only ARTs that inflict serious harm upon the

---

parties involved or the resulting child could be constrained under this vision of the Constitution.

The principle of equal liberty, on the other hand, offers only a limited right to reproductive equality. Hence, it possesses the following virtues. First, it adopts a more modest approach to the counter-majoritarian nature of judicial review because it does not deprive the legislature of the power to regulate ARTs altogether. Instead, it permits legislators to limit ARTs so long as they are willing to impose the same restrictions upon everyone, including themselves. Second, protection of equal rather than absolute rights seems less value-laden because it does not call upon courts to make controversial choices as to which acts are worthy of constitutional protection; they need only look to the liberties that legislators already deem important and guarantee them equally to everyone. Third, it is grounded in a process-based perspective reminiscent of John Hart Ely’s theory that courts should play the important role of representation-reinforcement and intervene only when the political process fails to represent citizens adequately. Yet equal liberty extends this theory beyond the arena of discrimination against protected classes to the realm of fundamental rights. Finally, the principle of equal liberty is consistent with a long line of cases in which the Supreme Court has protected fundamental rights. Almost all of these cases—starting with *Meyer v. Nebraska* and *Pierce v. Society of Sisters* and including *Skinner v. Oklahoma*, *Roe v. Wade*, and *Planned Parenthood of Southeastern Pennsylvania*

---

22 See Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand.”).


24 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73, 105 (1980).


v. Casey\textsuperscript{30}—may be reconsidered from the perspective of equality, as all of them involved selective or unequal deprivations of fundamental liberties.

I. No Right to ARTs Under the Rubric of Reproductive Autonomy

Some scholars contend that the Constitutionconfers a fundamental right to reproductive autonomy that encompasses not only the right to avoid reproduction, but also the right to reproduce with the assistance of technology.\textsuperscript{31} Accordingly, almost every restriction upon assisted reproduction would need to withstand strict scrutiny, and laws limiting ARTs would need to be struck down unless narrowly tailored to serve a compelling government interest.\textsuperscript{32}

Although this is a plausible interpretation of the case law, the “liberty” protected under the Due Process Clause of the Fourteenth Amendment\textsuperscript{33} doesn’t appear to include a fundamental right to use ARTs. Looking to history and tradition, framed fairly narrowly,\textsuperscript{34} it is doubtful that there is a fundamental right to use technologies such as IVF, PGD, or SCNT because the technologies themselves have been in existence for too short a time for there to have developed any tradition of legal protection.\textsuperscript{35} IVF itself has been around for only thirty years,\textsuperscript{36} while PGD has been practiced for less than two decades,\textsuperscript{37} and SCNT has not yet been performed in humans.

Standing alone, however, this argument is not conclusive, because the Constitution should afford protection to technologies that simply supply new methods for exercising existing rights. Just as the First Amendment protection of free speech includes communications


\textsuperscript{31} See supra note 18 and accompanying text.

\textsuperscript{32} See supra note 19 and accompanying text.

\textsuperscript{33} The Fourteenth Amendment’s Due Process Clause provides: No State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

\textsuperscript{34} In general, the Supreme Court has adopted the practice of reading history and tradition quite narrowly. See Washington v. Glucksberg, 521 U.S. 702, 710–22 (1997); Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (plurality opinion); cf. Cohen, supra note 20, at 1165 (“[T]he days of expansively adding to what is protected by substantive due process rights, if not over, are substantially reigned in.”).

\textsuperscript{35} Suter, supra note 21, at 1541–42.

\textsuperscript{36} See Judith Daar, Reproductive Technologies and the Law 36 (2006) (noting that IVF was first successfully used in 1978).

across the Internet, and the Fourth Amendment prohibition against unreasonable searches extends to the use of infrared thermal sensors to scan a private home, so, too, the right to reproductive autonomy—if there is such a right—should encompass new reproductive technologies. If fertile persons possess a right to reproduce, shouldn’t infertile persons be extended the same rights through the vehicle of ARTs?

If history and tradition are read more broadly, assisted reproduction could qualify as a fundamental right because it subsumes several aspects of liberty that have a long history of constitutional protection. The contraception, abortion, and sterilization cases represent a fundamental right “to bear or beget a child” that arguably encompasses not just the right to avoid reproduction, but also the right to reproduce with the assistance of technology. And another line of precedent protects child-rearing: shielding parents’ right to choose whether their child learns a foreign language, attends private school, or stops education after the eighth grade. One could argue

---

40 See Jack M. Balkin, How New Genetic Technologies Will Transform Roe v. Wade, 56 Emory L.J. 843, 856 (2007) (observing that “[t]he question will be whether the privacy principle applies in the new technological context, just as courts have asked whether free speech principles apply to the Internet”).
41 See Robertson, Children of Choice, supra note 18, at 99–100.
46 Eisenstadt, 405 U.S. at 453.
47 Indeed, at least one court has concluded that there is a constitutional right to have children, and that this right encompasses the use of reproductive technologies such as IVF. Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990) (“It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.”).
48 Meyer v. Nebraska, 262 U.S. 390, 393 (1923) (protecting parents’ right to teach their child a foreign language).
that this fundamental right to rear one's child as one sees fit includes the right to shape the child, not only through education, but also at the cellular level by means of technologies that enable genetic selection.

Yet such an expansive reading of the privacy cases is unwarranted. If we separate the various strands of the constitutional right to “bear or beget a child,” it is clear that the Constitution does not guarantee reproductive autonomy all by itself, disentangled from concerns about bodily integrity and inequality. The contraception and abortion cases provide only a limited right to prevent conception or to interrupt pregnancy. They do not confer a broader constitutional right not to have children, let alone a right to create a child or even to genetically select a particular child with the assistance of technology.

Several important distinctions may be drawn between the activities that currently receive constitutional protection and assisted reproduction. First, a law banning contraception or abortion violates bodily autonomy by effectively coercing women to become pregnant or to carry their pregnancies to term. Pregnancy itself may be viewed as a profound invasion of the body that imposes heavy physical burdens and subjects women to serious medical risks to their health. Accordingly, a law that compels conception or gestation robs women of con-

50 Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (protecting Amish parents’ right to take their children out of public schools after the eighth grade).

51 See Suter, supra note 21, at 1526 (explaining that “the Supreme Court has noted repeatedly that the interest in procreative autonomy is not unlimited”).

52 Glenn Cohen makes a similar point when he argues that “the Supreme Court’s jurisprudence unquestionably protects a right not to be a gestational parent as a fundamental right, but it does not compel recognizing a right not to be a genetic parent, when genetic parenthood is unbundled from the obligations of legal and gestational parenthood.” Cohen, supra note 20, at 1135.

53 See Christyne L. Neff, Woman, Womb, and Bodily Integrity, 3 Yale J.L. & Feminism 327, 329 (1991) (arguing that the right of bodily integrity provides at once a narrower and stronger protection for abortion rights than the right of privacy); Radhika Rao, Reconceiving Privacy: Relationships and Reproductive Technology, 45 UCLA L. Rev. 1077, 1112 (1998) (“The right of bodily integrity protects a woman’s sole right to bar the fetus from entering her body by means of contraception and to rid her body of the fetus by means of abortion.”).

54 According to Justice Blackmun,

[Strikelight]Compelled continuation of a pregnancy infringes upon a woman’s right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts.

trol over their bodies, commandeering them for use as incubators in the service of the state.\textsuperscript{55} Compulsory sterilization laws similarly interfere with bodily integrity by forcing individuals to submit to a significant medical procedure.\textsuperscript{56}

The principle of bodily integrity does not, however, guarantee infertile persons the right to conceive with the assistance of reproductive technologies and reproductive collaborators. Unlike contraception and abortion, assisted reproduction does not involve the removal of anything from the body.\textsuperscript{57} To the contrary, ARTs may actually require the ingestion of drugs and affirmative invasions of the bodies of some participants in the process in order to initiate conception, pregnancy, and childbirth.\textsuperscript{58} Hence a law regulating or even proscribing the use of ARTs would not necessitate government intervention into a person’s body, but would simply bar access to certain types of technology. This distinction draws a sharp line between freedom from unwanted bodily invasions and freedom to obtain bodily invasions or otherwise exercise control over one’s body.\textsuperscript{59} It also provides a principle to reconcile the diverging results in \textit{Cruzan v. Director, Missouri Department of Health},\textsuperscript{60} which assumed that there is a constitutional right to refuse invasive life-sustaining medical treatment,\textsuperscript{61} and \textit{Washington v. Glucksberg},\textsuperscript{62} which rejected a constitutional right to commit physician-assisted suicide.\textsuperscript{63} Privacy protects freedom from bodily invasions, but the freedom to exert affirmative control over one’s body—to detach, manipulate, or even sell parts of

\textsuperscript{55} See \textit{id.} at 928 (declaring that “[b]y restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care”).

\textsuperscript{56} See \textit{Rao, supra} note 53, at 1111–12.

\textsuperscript{57} See \textit{id.} at 1112–13.

\textsuperscript{58} See \textit{id.}

\textsuperscript{59} See Susan M. Wolf, \textit{Physician-Assisted Suicide, Abortion, and Treatment Refusal: Using Gender to Analyze the Difference}, in \textit{PHYSICIAN ASSISTED SUICIDE} 167, 170, 173 (Robert F. Weir ed., 1997) (declaring that the Constitution “clearly embraces the right to be free of unwanted bodily invasion” but that “it is not at all clear that it covers a right to be free to obtain bodily invasions for the purpose of ending your own life”).


\textsuperscript{61} \textit{Id.} at 278.


\textsuperscript{63} \textit{Id.} at 735. Other cases confirm that the Constitution does not confer an expansive right to die, but only a limited right to disconnect the body from the invasive medical apparatus keeping it alive. In \textit{Vacco v. Quill}, the Supreme Court reasoned that the constitutional protection afforded to the right to refuse life-sustaining medical treatment in \textit{Cruzan “was grounded not . . . on the proposition that patients have a general and abstract ‘right to hasten death,’ . . . but on well established, traditional rights to bodily integrity and freedom from unwanted touching . . . .”}

the body—more closely resembles the dominion we possess over objects of property.64

The second and even more important distinction between ARTs and the other activities currently protected under the constitutional rubric of privacy is their close connection to equality. Almost all of the privacy cases may be reconsidered from the perspective of equality because they all involved selective or unequal deprivations of fundamental liberties. For example, Justice Ruth Bader Ginsburg has linked a woman’s ability to control her reproductive life with her ability to participate equally in the economic, political, and social life of the nation.65 Justice Harry A. Blackmun has argued that abortion restrictions violate the principle of sex equality by singling out women as a class and conscripting their bodies into the service of the state.66 And in Casey, a majority of the Supreme Court recognized for the first time that the constitutional right to abortion is essential to guarantee equality for women.67

In addition, Skinner v. Oklahoma68 protected a constitutional right to be free from forced sterilization in large part because of fears regarding race and class-based inequalities.69 In Skinner, the Supreme Court invalidated an Oklahoma law that authorized the sterilization of chicken thieves but not embezzlers because this distinction raised an inference of race and class discrimination.70 Although the Court ostensibly rested its holding upon the Equal Protection Clause,71 many scholars read Skinner as a precursor to the privacy cases.72 Indeed, the origins of the constitutional right to privacy actually lie in two


65 See Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting); see also Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. Rev. 375, 386 (1985) (observing that Roe is “weakened . . . by the opinion’s concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective”).


67 Id. at 856 (majority opinion).


69 Id. at 539, 541.

70 Id.

71 Id. at 541.

72 See, e.g., John Robertson, Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom, 76 Geo. Wash. L. Rev. 1490, 1493 (2008) (“Although [Skinner] couched its decision in the language of equality . . . the rhetoric of a liberty right to reproduce . . . explains the frequency with which the case is now cited.”); Suter, supra note 21, at 1520; see also Ira C. Lupu, Untangling the Strands of the Fourteenth Amendment, 77 Mich. L. Rev. 981, 1019 (1979).
Lochner-era cases—Meyer v. Nebraska\footnote{Meyer v. Nebraska, 262 U.S. 390 (1923).} and Pierce v. Society of Sisters\footnote{Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925).}—that protected fundamental liberties in order to redress inequalities.\footnote{Brown, supra note 25, at 1508 & n.84.} Thus, Meyer struck down a statute banning foreign language instruction in public schools because it was the product of anti-German prejudice, while Pierce invalidated a compulsory public school program that was born of anti-Catholic bias.\footnote{See id.} Likewise, Loving v. Virginia\footnote{Loving v. Virginia, 388 U.S. 1 (1967).} and Zablocki v. Redhail\footnote{Zablocki v. Redhail, 434 U.S. 374 (1978).} found unconstitutional state laws that denied the right to marry in ways that also perpetuated race and class-based inequalities.\footnote{See id. at 387, 390–91; Loving, 388 U.S. at 12.} More recently, Lawrence v. Texas\footnote{Lawrence v. Texas, 539 U.S. 558 (2003).} explicitly tied the protection of fundamental liberties to equality. In Lawrence, the Court grounded its invalidation of a law proscribing same-sex sodomy in the prevention of discrimination against gays and lesbians, reasoning that constitutional protection for their private sexual activity is necessary in order to ensure the equal status of homosexuals in society.\footnote{Id. at 575, 578.}

Unlike all of these examples, a law banning or limiting ARTs would not necessarily infringe the constitutional guarantee of equality. To the contrary, many of the justifications for regulating reproductive technologies are rooted in precisely the opposite concern—that the use of ARTs could create and exacerbate inequality in our society.\footnote{See Balkin, supra note 40, at 858; Suter, supra note 18, at 959.} Indeed, some feminists contend that ARTs actually aggravate rather than alleviate inequality by reinforcing woman’s primary role as that of child-bearer, reducing women to their wombs and perpetuating patriarchy.\footnote{See, e.g., Janice G. Raymond, Women as Wombs (1993) (arguing that technological and contractual reproduction result in the reproductive exploitation of women); Barbara Katz Rothman, Recreating Motherhood: Ideology and Technology in a Patriarchal Society (1989); Susan Sherwin, No Longer Patient: Feminist Ethics and Health Care (1992); see also Reproduction, Ethics, and the Law: Feminist Perspectives (Joan C. Callahan ed., 1995).} Although ARTs benefit some women by permitting them to postpone childbearing, they may harm other women by commodifying their bodies and exploiting their reproductive capacity. Other scholars argue that ARTs unduly emphasize biology and genetics; this emphasis poses an insidious threat to equality because it is often ac-
companied by—and may even reinforce—racist, sexist, or other invidious stereotypes. For instance, sperm banks that advertise the sale of sperm taken from Nobel prize winners and Web sites that market the eggs of supermodels clearly cater to sex-based stereotypes that associate women with beauty and men with intelligence. In addition, unequal access to genetic technologies such as PGD could result in a DNA divide—a society of genetic haves and have-nots. Moreover, disability-rights theorists maintain that PGD and other technologies that enable genetic selection of offspring traits fundamentally alter our concept of “normal” and disadvantage those who deviate from society’s ideal, raising the specter of new genetic hierarchies.

II. Privacy, Property, or Person?

Whether individuals possess a constitutional right to reproductive autonomy would seem to turn upon the legal status of the embryo or fetus. However, I propose that it is the other way around. The legal status of the embryo or fetus rests upon the constitutional rights of others. Thus, the very same entity may be deemed the subject of a woman’s constitutional privacy rights, the object of property law, or even a full-fledged person with rights of its own under the rubric of tort and criminal law. The choice between these different frameworks all depends upon the context in which the question is posed and the consequences of the embryo’s or fetus’s status for others. When the embryo or fetus is within a woman’s body, the attri-

85 See Lisa C. Ikemoto, The In/Fertile, the Too Fertile, and the Dysfertile, 47 Hastings L.J. 1007, 1009, 1058–61 (1996) (exploring ways in which infertility discourse constructs boundaries that divide women into different categories and oppress women of color, poor women, and lesbians in different ways).
87 See supra note 82 and accompanying text.
89 In Roe, for example, the Supreme Court found that a fetus is not a constitutional person before granting women the right to terminate their pregnancies. Roe v. Wade, 410 U.S. 113, 157–58 (1973).
bution of legal rights would deprive the woman of her own constitutional rights to bodily autonomy and sex equality. Thus, the embryo or fetus must be subsumed within the woman’s privacy as long as it remains inside her body. Once the embryo or fetus emerges from the womb, however, the woman’s rights are no longer uniquely at stake. At that point, her privacy ends and the government may intervene. The government is free to protect the embryo or fetus as a person, to characterize it as the property of its progenitors, or to address it as an intermediate entity that merits “special respect because of [its] potential for human life.”91 The government may freely choose between these legal frameworks as long as it does not impinge upon the rights of others.

In the United States, women possess a fundamental constitutional right to terminate their pregnancies under Roe and Casey.92 However, close reading of the abortion cases reveals that they guarantee only the right of a woman to free her body from the burdens of pregnancy, not the additional right to take the life of the fetus.93 That is why Roe drew a sharp temporal line at viability—the earliest point at which the fetus is capable of survival outside of the womb.94 Roe’s viability line is confusing because it contains multiple meanings. Some scholars suggest that viability matters because it marks a stage of fetal development that corresponds roughly with sentience—the point at which the

---

91 Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).


93 I have previously argued:
[There is a] right to prevent intrusions into the body by means of contraception and a right to free the body of intruders by means of abortion[, but if] it ultimately becomes possible to expel the fetus intact from a woman’s body, without injuring it in the process, nothing in the case law suggests that there also exists a right to destroy the fetus, at least so long as the new procedure poses no threat to the life or health of the mother.

Radhika Rao, supra note 53, at 1114 (1998). Laurence Tribe has similarly argued:
[T]he liberty that is most plainly vindicated by the right to end one’s pregnancy is the woman’s liberty not to be made unwillingly into a mother, the freedom to say no to the unique sacrifice inherent in the processes of pregnancy and childbirth. A ‘right’ not to have a biological child in existence—the right during pregnancy, for example, to destroy one’s fetus rather than simply being unburdened of it—is analytically distinct, and seems harder to support. . . . While there may be arguments in favor of recognizing a woman’s right, early in pregnancy, to destroy the fetus growing within her for the very purpose of preventing a living child of hers from coming into being, this is not the liberty the Court undertook to protect in Roe.


fetus gains the capacity for consciousness. Consciousness may be deemed critical to the moral status of the fetus, and medical evidence regarding brain development and electrical activity suggests that this occurs around the time of viability.

But I believe that viability is important not simply because it correlates with sentience, but because it marks the moment of independence, of an autonomous existence. At viability, it is reasonable to regard the fetus as a separate entity rather than an appendage that is part of the woman’s body because it no longer needs her in order to survive. At this point, it may be treated as an autonomous entity, a distinct being with interests in its own right. Accordingly, viability connects the legal status of the fetus with its dependence upon the woman’s body, confirming the importance of bodily integrity and sex equality to the abortion right. Professor Laurence Tribe has advanced a similar argument, stating:

Once the fetus can be severed from the woman by a process which enables it to survive, leaving the abortion decision to private choice would confer not only a right to remove an unwanted fetus from one’s body, but also an entirely separate right to ensure its death. . . . [R]ecognition and enforcement [of the latter right] would be indistinguishable from recognizing and enforcing a right to commit infanticide . . . . Viability thus marks a point after which a secular state could properly conclude that permitting abortion would be tantamount to permitting murder . . . .

Professor Laurence Tribe’s hypothetical arguably came to life with the practice of “partial-birth abortion,” which involves not just the right to remove an unwanted fetus, but also the right to ensure its death outside the woman’s body. Congress enacted a law that pro-


96 Professor Jed Rubenfeld emphasizes this element, observing that “[v]iability occurs not only at the time when the fetus’s pulmonary capability begins, but also when its brain begins to take on the cortical structure capable of higher mental functioning,” and arguing that “[t]hese two important developments provide indicia both of independent beingness and of distinctly human beingness.” Id. at 622–23.

97 See id. at 622–23 & n.108 (citations omitted).

98 See supra text accompanying notes 53–81.


hibits this method of abortion, which physicians term “D & X” (dilation and extraction) because the fetus is partly or wholly withdrawn from the uterus before it is killed, and the Supreme Court recently upheld the law in *Gonzales v. Carhart*. Whereas *Roe* drew a temporal line at viability, *Gonzales* draws a spatial line between the destruction of a fetus inside and outside the woman’s body. *Gonzales* suggests that it is this spatial line that separates the constitutionally protected right to abortion from the criminal act of infanticide. This position was articulated most forcefully by Solicitor General Paul D. Clement at oral argument, when he observed that “the basic point of this statute is to draw a bright line between a procedure that induces fetal demise in utero and one where the lethal act occurs when the child or the fetus, whichever you want to call it, is more than halfway outside of the mother’s womb.” According to Clement, “I don’t think that anybody thinks that law is or should be indifferent to whether . . . fetal demise takes place in utero or outside the mother’s womb. The one is abortion, the other is murder.” Clement argued that, even if the federal ban on partial-birth abortions fails to preserve the life of a single fetus, “Congress has an interest in maintaining the spatial line between infanticide and abortion.”

If there is a principle underlying *Gonzales*—and there may not be—it is this idea that the constitutional right to privacy ends at the outer limits of the woman’s body. When the fetus is dangling partly or mostly outside the woman’s womb, her bodily autonomy and equality are no longer uniquely at stake. At this point, the woman forfeits her right to privacy, and the government may dictate the precise method by which the fetus will die, even if the choice of method poses some

---

103 See supra note 94 and accompanying text.
104 *Gonzales*, 127 S. Ct. at 1628, 1634–35; see also id. at 1650 (Ginsburg, J., dissenting) (“Instead of drawing the line at viability, the Court refers to Congress’ purpose to differentiate ‘abortion and infanticide’ based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed.”).
105 *Id.* at 1628, 1634–35 (majority opinion).
107 *Id.* at 16.
108 *Id.* at 17.
109 The case may simply be unprincipled in its departure from recent precedent, see *Stenberg v. Carhart*, 530 U.S. 914 (2000), or its sole justification may be Dr. Leon Kass’ “repugnance” principle—that it is permissible to outlaw practices at which we recoil—which is not much of a principle at all. See Suter, supra note 21, at 1582–83 (citing Leon R. Kass, *The Wisdom of Repugnance*, NEW REPUBLIC, June 2, 1997, at 17).
risk to her health. Once the fetus emerges from the woman’s body, the government is free to regulate in order to protect it from pain, to promote the symbolic interest in potential life, or even to prevent harm to the moral fabric of society.

If the abortion cases represent a right to reproductive autonomy, the right should attach regardless of whether the fetus is inside or outside the woman’s body. From the perspective of those who claim a right to reproductive autonomy—a right to choose whether or not to reproduce—the location of the embryo or fetus is irrelevant. But if reproductive autonomy receives constitutional shelter only when there is also a threat to bodily integrity or sex equality, however, location is critical. This is because laws that regulate embryos and fetuses within the womb obviously have an immediate impact upon women’s bodies and their status in society. Accordingly, the principle of reproductive equality is bounded by the contours of the woman’s body. It limits regulation of embryos or fetuses only within the womb, but gives government great latitude to enact laws that regulate extracorporeal embryos and fetuses, so long as such regulation operates in an evenhanded fashion.

Members of Congress as well as the Justices of the Supreme Court attach significance to the location of the embryo or fetus. For example, Senator Orrin Hatch reconciles his support for human embryonic stem cell research and cloning with his opposition to abortion by emphasizing the distinction between embryos in a dish and those that remain inside a woman’s womb. Senator Hatch proposed a constitutional amendment to outlaw abortion, yet he sponsored a bill that would permit experimentation upon extracorporeal embryos. According to Hatch, “life begins in a woman’s womb, ‘not in a petri dish.’” He believes that “there is a huge difference between ‘a frozen embryo stored in a refrigerator’ and ‘an embryo or fetus developing in a mother’s womb’ . . . . [because] the former ‘will never complete the journey toward birth.’” Ironically, this position is completely at odds with Gonzales and the other abortion cases because it would protect embryos and fetuses only when they are inside

---

113 Stolberg, supra note 110.
114 Corn, supra note 111, at 26–27.
a woman’s body. *Gonzales* permitted Congress to personify the fetus by protecting it from pain when it is outside the woman’s womb, whereas Senator Hatch seeks to propertize external embryos by treating them as mere clumps of cells that may be fragmented, manipulated, and ultimately destroyed in the process of transforming them into medical treatments that could save the lives of others.

Read together, *Roe* and *Gonzales* demonstrate that the constitutional right to privacy is framed by a temporal line that is drawn at viability and a spatial line that separates the inside and outside of a woman’s body. The woman’s constitutional right to terminate her pregnancy extends only to an embryo or fetus that is not viable and remains within her body. Once the embryo or fetus emerges from the woman’s womb or becomes capable of survival outside her body, her privacy right ends and the government may limit or even proscribe abortion. At that point, the embryo or fetus is no longer subsumed within the woman’s privacy and may be treated as an object of property or even a full-fledged person with rights and interests of its own.

What does this reading of constitutional rights portend for ARTs? Applying the constitutional right to privacy, the government may regulate ARTs so long as they involve embryos or fetuses that are viable or outside a woman’s body. ARTs such as IVF involve the creation of embryos completely outside a woman’s body, in a laboratory. These embryos may be deemed “viable” from the moment of conception because they are capable of survival outside the womb indefinitely, so long as they remain cryogenically preserved in a freezer. Under the theory of reproductive equality, the government is free to safeguard such extracorporeal embryos as long as it does so in an evenhanded fashion. Accordingly, regulations that are modeled upon Italy’s Law 40 and Germany’s Embryo Protection Act—which restrict the number of embryos that can be created through IVF, limit the number of embryos that may be implanted in the womb at any one time, prohibit destruction, and even prevent freezing of embryos—are constitutional even if they infringe reproductive autonomy by im-

---

115 See *supra* text accompanying notes 108–09.
117 See *supra* text accompanying notes 103–05.
118 See *supra* text accompanying notes 103–09.
119 See id.
120 See id.
121 *DAAR*, *supra* note 36, at 35–37.
122 See *supra* notes 7–16 and accompanying text.
pairing the efficiency of fertility treatments. Such laws may also burden the health of women involved in IVF by forcing them to undergo repeated egg retrieval procedures, yet Gonzales permits the government to make similar trade-offs between a woman’s health and fetal life as long as the fetus is outside the woman’s body.123 Only regulations that compel a woman to implant embryos in her womb against her will would violate the woman’s right to privacy by authorizing invasion of her body.

III. A Limited Right to ARTs as a Matter of Reproductive Equality

Although the government is free to ban ARTs across the board for everyone, it appears unlikely that any government would actually elect this option. Even Italy’s Law 40 only confines the use of ARTs to married or “stable” heterosexual couples who are of childbearing age and infertile, rather than forbidding them altogether.124 Thus the more relevant and difficult question is not whether a law prohibiting ARTs under all circumstances would violate the principle of reproductive autonomy, but rather whether a law that permits ARTs to be used in some situations but not others would violate the principle of reproductive equality.

A. The Art of Line-Drawing

Although there is no constitutional right to engage in assisted reproduction as a matter of reproductive autonomy, this does not mean that the government has free rein to permit ARTs in some situations but proscribe their use in others as a matter of reproductive equality. The government’s decision to permit ARTs to be used by some persons may confer a relative right upon others. Hence, all persons must possess an equal right, even if no one retains an absolute right, to use ARTs.

This analysis finds support in Skinner v. Oklahoma,125 which perfectly exemplifies the principle of reproductive equality. In Skinner, the Supreme Court struck down a compulsory sterilization law on the grounds that it discriminated between chicken thieves and embezzlers in violation of the Equal Protection Clause.126 The Court feared granting the government indiscriminate power to draw lines between

123 See Gonzales v. Carhart, 127 S. Ct. 1610, 1638 (2007) (upholding the partial-birth abortion ban without a health exception); see also supra text accompanying note 109.
124 See supra note 14 and accompanying text.
126 Id. at 539, 541.
those who could and could not be sterilized because of the potential for discrimination, stating:

[S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. . . . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.127

Similarly, close scrutiny of the classifications which a state makes in regulating assisted reproduction is essential in order to prevent invidious discrimination. Some scholars suggest that Skinner’s equal protection holding is a mistake and that the case actually embodies a fundamental right to reproductive autonomy.128 I agree with those who believe that the Constitution prohibits compulsory sterilization even if the sterilization law is not enacted or applied in a discriminatory fashion. But in my view, Skinner’s equal protection language is no accident; to the contrary, it reveals the Supreme Court’s longstanding concern for reproductive equality.

B. Unconstitutional Lines

A law that prohibits ARTs under some circumstances, but not others, must at the very least be based upon a legitimate governmental interest in order to be constitutional. Lines that are drawn based upon the status of the persons who seek to use ARTs are particularly troubling and likely unconstitutional under the reasoning of Eisenstadt v. Baird,129 which struck down a law that regulated the distribution of contraceptives because it discriminated between married and single persons,130 and Lawrence v. Texas,131 which invalidated a law that criminalized homosexual but not heterosexual sodomy.132 Hence, a law limiting ARTs to married persons or to heterosexual persons should fail because it would treat the very same act—the use of a particular technology—differently based upon the marital status or sexual

127 Id. at 541.
128 See, e.g., Lupu, supra note 72, at 1019; Robertson, supra note 72, at 1492–93.
130 Id. at 443, 453.
132 Id. at 578–79.
preference of the persons involved, with no real basis for the distinction other than societal disapproval or prejudice.

Italy’s Law 40 falls into this category because it confines ARTs to married and “stable” heterosexual couples, denying their use to single persons and homosexuals. Such a status-based prohibition upon the use of ARTs is even more problematic because it is completely unnecessary in light of the substantive provisions of the law, which preclude reproduction by anyone who requires the assistance of sperm donors, egg donors, and surrogates. The discrimination against single persons and homosexuals appears particularly blatant because it is utterly gratuitous, as Law 40 already forecloses their use of ARTs. Moreover, unlike the status-based prohibition, the substantive provision forbidding gamete donation and surrogacy affects homosexuals and heterosexuals alike—it equally restricts all persons who require such resources in order to reproduce. Such provisions may be designed to protect gamete donors, surrogate mothers, and other parties from entering into agreements that they might later regret. These kinds of laws should be deemed constitutional—even if their effect is to prevent reproduction by single persons and homosexuals—because they are not just the product of prejudice, but also appear to fulfill important government interests. But if the sole justification for a law is to display society’s disapproval of a particular group, such a law should be deemed unconstitutional.

What if a state enacts a law limiting ARTs to married persons based upon the justification that it is protecting the best interests of the children who may be born as a result of such technologies in being reared in the setting of a stable two-parent family? Some states restrict adoption to married persons, denying single persons and homosexuals the opportunity to become adoptive parents based upon precisely the same rationale. Yet such a justification appears to be unwarranted, at least as applied to married homosexuals, who exhibit as much stability and commitment as married heterosexuals.

133 See supra note 14 and accompanying text.
134 See infra Part III.B.
135 See id.
136 See id.
137 See Romer v. Evans, 517 U.S. 620, 623, 633–36 (1996) (striking down a law that discriminated against homosexuals based solely upon their status and that was inexplicable by anything other than animus against the group).
139 Homosexuals have recently gained the right to marry in a number of states, including
over, many gay, lesbian, and single parents are currently raising their biological children. The state cannot simply presume that all of these parents are unfit; otherwise, it would be able to terminate their parental rights and take away their biological children. If a state seeks to restrict ARTs solely to those who prove themselves to be suitable parents and satisfy additional requirements, as in the adoption context, then these requirements must apply equally to all. Accordingly, if a state enacts a statute modeled upon Italy’s Law 40, such a law should be deemed unconstitutional insofar as it confines the use of ARTs to married and “stable” heterosexual couples, denying use of such technologies to single persons and homosexuals.

What about Law 40’s restriction upon the use of ARTs to infertile persons who are of the childbearing age? These provisions also limit ARTs based upon the status of the persons involved. Are they likewise unconstitutional? The distinction between fertile and infertile persons does not deny reproductive equality; instead, it provides special accommodations to those who possess a disability—inertility. Indeed, such provisions actually enhance equal liberty by leveling the field and affording everyone an equivalent opportunity to reproduce. Similarly, a line that separates those who are of childbearing age from those who are not does not contravene the right to reproductive equality if it is grounded in good reasons and applied equally to men as well as women. Age limits should be considered constitutional as long as they prevent both men and women above a certain age from using ARTs in order to promote a valid objective, such as ensuring that the children born of such technologies will have parents who are alive and able to care for them. But if the only justification


140 See Stanley v. Illinois, 405 U.S. 645, 647, 649, 656–57 (1972) (invalidating statute that presumed unwed biological fathers are unfit and automatically deprived them of their children upon the mother’s death).


142 Individuals who seek to become parents by adoption must often meet additional requirements that go far beyond proving minimal fitness to be a parent, such as providing evidence of financial stability or undergoing a home study. See, e.g., Ariz. Rev. Stat. Ann. § 8-105 (2008); Miss. Code Ann. § 93-17-11 (2008).

143 See Benagiano & Gianaroli, supra note 14, at 122.

for a law is that it replicates nature by allowing infertile men to pro-create with the assistance of technology well into their eighties while denying infertile women the same opportunities, it should be judged unconstitutional.

C. Constitutional Lines

Yet if infertility is a disability, why wouldn’t it infringe reproductive equality to deny ARTs across the board to everyone? Although a prohibition upon the use of ARTs provides formal equality, its practical effect is to single out and prevent reproduction by only one particular class of persons—those who are infertile. If fertile persons possess a right to reproduce, shouldn’t infertile persons be afforded equal liberty through the vehicle of ARTs?145

The answer is no, because assisted reproduction does not involve the interests of a group that lacks political power.146 Although infertile persons cross racial and class lines, permeating all aspects of society,147 those who seek to use ARTs tend to be disproportionately white and wealthy.148 Moreover, fertility treatments have become a booming business;149 thus, all of those who profit from the infertility industry possess a vested interest in advocating access to ARTs on behalf of the infertile.150 For all these reasons, legislators are likely to be sufficiently sensitive to the concerns of the infertile.151

---

145 See Robertson, Children of Choice, supra note 18, at 100.
146 Indeed, organizations such as RESOLVE exist solely to promote the interests of the infertile through advocacy, lobbying, and public education. RESOLVE: The National Infertility Association, http://www.resolve.org/site/PageServer (last visited July 16, 2008).
148 Carl Coleman has observed that:
There is no reason to believe that persons seeking to use ARTs lack the ability to pursue their interests effectively in the political process. Such individuals are not only disproportionately white and wealthy, but their interests also overlap with those of organized medicine and the pharmaceutical industry, two interest groups with considerable influence in the political process.
149 See Deborah L. Spar, The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception 33 (2006) (estimating that, in the United States alone, fertility treatments constitute a business worth nearly $3 billion a year, not including the costs of “consultants, lawyers, equipment suppliers, and various types of counselors”).
150 See Coleman, supra note 148, at 68–69.
151 Such legislative concern for the infertile is apparent in California, which recently enacted a law that prohibits any compensation for women who donate their eggs for the purpose of hESCR, even though the State continues to permit unlimited payments to those who provide eggs for the purpose of fertility treatments. See supra note 4.
Accordingly, a prohibition upon the use of ARTs is permissible as long as it is based upon a legitimate interest that goes beyond mere prejudice. The government could limit the use of ARTs in order to prevent physical, psychological, or social harms to the participants or the resulting children. Perhaps the government could prohibit IVF altogether if studies show that test-tube babies disproportionately suffer serious physical harms.\(^{152}\) Or the government could restrict the number of embryos that can be implanted at a single time in order to reduce the rate of multiple births, which typically result in premature babies who are born with dangerously low birth-weights.\(^{153}\) Such children are likely to suffer from a variety of health problems and could impose heavy costs upon all of society.\(^{154}\) Regulation of ARTs should be constitutional if it is grounded in good reasons such as these, but unconstitutional if it stems from nothing more than moral repugnance\(^{155}\) or prejudice against “unnatural” forms of reproduction.

Similarly, a prohibition against certain categories of ARTs should also be deemed constitutional. For example, the House of Representatives has twice passed a bill that would outlaw human cloning,\(^{156}\) while several states have already enacted such a prohibition.\(^{157}\) Do these laws violate the principle of reproductive equality by denying some infertile persons the right to create genetically related children?\(^{158}\) A law prohibiting cloning for everyone could be deemed constitutional for at least two reasons. First, such a law would prevent anyone—married or single, heterosexual or homosexual—from cloning. Accordingly, it would not treat the same act differently based upon the status of the persons involved. Second, the distinction between cloning and other ARTs is permissible as long as it is based upon some legitimate interest. A ban on cloning arguably furthers the state’s interest in advancing the welfare of children by preventing use

\(^{152}\) See Goodwin, supra note 147, at 1726–27 (citing such studies).

\(^{153}\) See Marsha Garrison, Regulating Reproduction, 76 Geo. Wash. L. Rev. 1623, 1643–46 (2008); Robertson, supra note 72, at 1501.

\(^{154}\) See Garrison, supra note 153, at 1643–46; Robertson, supra note 72, at 1501.


\(^{158}\) See Robertson, Liberty, Identity, supra note 18, at 1409 (proposing the argument that infertile persons may have a right to clone in order to create genetically related children).
of a technology that may result in physical, psychological, or social harms to children, where the risks might outweigh the benefits.  

This line of reasoning conforms to the logic of *Vacco v. Quill*, in which the Supreme Court upheld a New York law that allowed terminally ill persons on life support to withdraw life-sustaining medical treatment, but denied terminally ill persons not on life support the right to engage in physician-assisted suicide. Applying a similar analysis, the *Quill* Court concluded that the New York law did not violate the Equal Protection Clause because it applied equally to all persons and because it drew a distinction between different acts that was grounded in good reasons. *Quill* may thus stand for the proposition that lines drawn between different uses of ARTs are much less constitutionally problematic than lines drawn based upon the types of persons who seek to use ARTs.

Italy’s Law 40 prohibits gamete donation and surrogacy across the board for everyone. Unlike the provision of the Italian law denying ARTs to single persons and homosexuals, this prohibition affects homosexuals and heterosexuals alike, making it impossible for anyone who requires gametes or gestational capacity to reproduce using ARTs. By the same logic, such a law should be deemed constitutional if it is intended to protect either the participants in the process or the resulting children. For instance, some courts have refused to enforce surrogacy contracts on the grounds that they are coercive or exploitative of women and may harm children. The government could choose to ban sperm and egg donation for similar reasons. Indeed, given highly public disputes regarding surrogate mothers who change their mind and sperm donors who seek a parental role in the child’s life, such legislation could be deemed eminently justified in order to protect individuals from entering into agreements that they might later regret. Moreover, such conflicts between gamete donors,

---


161 Id. at 796–97.

162 Id. at 800–02.

163 Benagiano & Gianaroli, *supra* note 14, at 122; see also Fenton, *supra* note 13, at 73, 84, 99.


165 See id. at 1236–37 (involving surrogate mother who changed her mind); see also Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 531–33 (Cal. Ct. App. 1986) (upholding parental rights of a sperm donor who changed his mind because woman “failed to take advantage of . . . statutory basis for preclusion of paternity”).
surrogates, and those who intend to become parents could harm not only the participants in the process, but also the children who are born as a result of ARTs.

But what about Germany’s Embryo Protection Act, which permits sperm donation while outlawing even unpaid egg donation and gestational surrogacy? On the one hand, these are different acts with different consequences for the participants. Sperm donation may be viewed as less troubling than egg donation because of “the invasiveness of the egg retrieval procedure and the serious risks that it entails.” This difference is reflected in the huge disparity in price between sperm, which possesses a market value between $50 to $100, and eggs, which may sell for as much as $100,000. Thus, a rule that treats sperm and egg donors the same exhibits a superficial symmetry that may be flawed in substance. On the other hand, perhaps the line between sperm donation and egg donation or gestational surrogacy is actually the product of underlying assumptions regarding women and reproduction. Laws that appear to embody biological differences may actually stem from cultural stereotypes, such as the notion that biological connections should be optional for men but mandatory for women. Such sexist expectations should not justify a law that enables infertile men to procreate using donor sperm while denying infertile women equivalent opportunities.

D. The Special Case of Genetic Selection

Similarly, a law banning PGD under all circumstances would not violate the Constitution even if other forms of genetic selection—such as carrier testing and sperm and egg selection—are allowed. This is because PGD involves the selection of embryos, which raises quite different questions from the selection of sperm and eggs. Although embryos and fetuses are not constitutional persons for the purposes of the Fourteenth Amendment, the abortion cases make clear that the

166 See supra note 11 and accompanying text.
167 See Rao, supra note 4, at 1063.
168 See id. at 1063 & n.30.
169 See, e.g., Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 472–73 (1981) (upholding a California statutory rape law making it a crime to have sex with underage females but not underage males on grounds that females biologically bear the costs of pregnancy).
170 See, e.g., Nguyen v. INS, 533 U.S. 53, 56–59, 64 (2001) (upholding immigration law making it more difficult for child born abroad to become a citizen if the citizen parent is the father rather than the mother).
171 In Roe v. Wade, 410 U.S. 113, 158 (1973), the Supreme Court held that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”
state may choose to safeguard them in other contexts. Thus, many states have enacted laws punishing embryo and fetus killing as a crime when performed by a third party without the consent of the woman.\footnote{See, e.g., \textsc{Ariz. Rev. Stat.} § 13-1103(A)(5), (B) (LexisNexis 2007) (manslaughter); \textsc{Ill. Comp. Stat.} 5/9-1.2, -2.1, -3.2 (2006) (murder, manslaughter); \textsc{Ind. Code} § 35-42-1-6 (1998) (feticide); \textsc{La. Rev. Stat. Ann.} §§ 14:2(7), :32.5–:8 (2007) (feticide); \textsc{Minn. Stat.} §§ 609.266, .2661–.2665, .268(1) (2003) (murder, manslaughter); \textsc{N.D. Cent. Code} § 12.1-17.1-01 to -04 (1997) (murder, manslaughter, negligent homicide); \textsc{Utah Code Ann.} §§ 76-5-201-03, -205-09 (2003 & Supp. 2007) (any form of homicide).}

Moreover, such conduct is now a federal crime. In 2004, Congress passed the Unborn Victims of Violence Act,\footnote{18 U.S.C. § 1841 (Supp. 2005).} which creates a separate offense for any conduct that causes the death or bodily injury of “a child, who is in utero” and punishes such conduct to the same degree as if the death or injury had occurred to the mother.\footnote{Id. § 1841(a)(1)–(2)(A).} Therefore, a law distinguishing between the genetic selection of eggs or sperm and the genetic selection of embryos probably would be deemed constitutional.

What about a law allowing PGD to prevent birth of a child afflicted with a genetic disease but not to select “cosmetic” traits? Such a law could be deemed constitutional for at least two reasons. First, such a law would permit anyone—married or single, heterosexual or homosexual—to use PGD to prevent disease. Accordingly, it would not treat the same act differently based upon the status of the persons involved. Second, the use of PGD to prevent disease is a different, arguably more worthy, act than the use of PGD for “cosmetic” purposes. Moreover, the distinction between these different uses of PGD goes beyond mere prejudice; it furthers the state’s legitimate interest in advancing the welfare of children by allowing PGD to prevent serious harm but not for more speculative reasons, where the risks might outweigh the benefits. Of course, there are still difficulties in the interpretation and enforcement of such a line. If PGD is allowed only for the purpose of preventing disease, for example, what should count as a “disease”?\footnote{See Suter, \textit{supra} note 21, at 1531 n.103 (noting difficulties in distinguishing between traits and diseases).} Would this allow the use of PGD for the purpose of preventing obesity or even homosexuality? Moreover, how is the state to enforce this distinction and to ensure that PGD is being used only for disease prevention, and not for other rationales?
1. Sex-Selection

The issue of sex-selection raises even more difficult questions. A law prohibiting all PGD to select sex probably would be constitutional. However, a law permitting PGD to select sex for the purpose of “family balancing” (if a couple already has three girls and seeks to have a boy) but proscribing PGD to select sex in order to achieve a “cultural preference” for males (if a couple has no children and simply prefers a male child) might well be unconstitutional. This distinction comes perilously close to drawing lines based upon the status of the persons involved.

Some might argue that sex-selection for the purpose of “family balancing” is a qualitatively different act with different social consequences than sex-selection to achieve a “cultural preference” for males. Nevertheless, the fact that two families, both of whom seek to use PGD in precisely the same way, would receive different treatment based solely upon their personal circumstances or preferences appears to contradict this argument. In essence, such a law would grant the power to select sex to some persons (those who share the cultural preferences of the majority in the U.S.) while denying it to others (those who disproportionately come from certain minority groups). As a result, a law that permits sex-selection for the purpose of “family balancing,” but not to achieve a “cultural preference” for males, should be viewed as drawing an unconstitutional line that is based upon the status of the persons involved.

2. Disease vs. Other Traits

The preceding analysis exposes a problem underlying the line that was previously suggested to be constitutional, namely the line between genetic selection for disease and for other traits. If PGD to prevent disease is allowed, it is difficult to view the line drawn as depending upon the status of the persons involved. For example, even though Tay-Sachs disease disproportionately affects Ashkenazi Jews, society does not generally regard the decision to screen for such a trait as the product of prejudice against a particular group.177

---


177 However, this generalization may not hold true in all circumstances. In the 1970s, testing for the gene for sickle-cell anemia, which is disproportionately possessed by African Americans, see id., often served as the basis for racial discrimination in employment, insurance, and other contexts. As Vernellia Randall describes:

The military considered banning all African Americans from the armed services.
But the selection of some traits—such as homosexuality—is so likely to be linked to animus against an associated group as to render a law authorizing such forms of genetic selection unconstitutional. Where do traits like deafness and dwarfism fit on this spectrum?

If the Constitution guarantees equal liberty to use assisted reproductive technologies such as PGD, then the government must set forth some legitimate interest in order to justify any selective prohibition upon the use of PGD to select for or against certain traits but not others. On balance, it should be (a) relatively easy for the state to make the case for allowing PGD to select against a serious disease that would cause death, (b) more difficult but still possible to justify PGD to select against a “disability” that arguably decreases quality of life, such as deafness, but (c) much more difficult, and perhaps impossible, to defend PGD to select for traits such as sex, skin color, and sexual orientation that are disfavored solely because of negative societal attitudes and prejudice.

E. The Dangers of Discretion

The preceding analysis prompts the following questions: Should the United States adopt an approach similar to that of the United Kingdom, which places the decision whether or not to permit various ARTs in the hands of a regulatory agency—the Human Fertilisation and Embryology Authority. Some companies refused to insure carriers. During that period, many African Americans came to believe that the sickle-cell screening initiative was merely a disguised genocide attempt, since often the only advice given to African Americans with the trait was, ‘Don’t have kids.’


178 See Suter, supra note 21, at 1538.

179 Of course, some scholars would dispute the characterization of deafness and dwarfism as “disabilities,” arguing that these qualities are also disfavored because of negative societal attitudes and prejudice. Lois Shepherd, Protecting Parents’ Freedom to Have Children with Genetic Differences, 1995 U. Ill. L. Rev. 761, 761–63; see also Dena S. Davis, Genetic Dilemmas and the Child’s Right to an Open Future, 28 Rutgers L.J. 549, 570 (1997) (“Many Deaf people . . . have recently been claiming that Deafness is better understood as a cultural identity than as a disability.”).

180 Thus, in Palmore v. Sidoti, 466 U.S. 429 (1984), the Supreme Court reversed a trial court’s decision to award custody of a white child to her white father based upon the child’s “best interests” when the child’s mother remarried an African American man. Id. at 432–33. Although the Court acknowledged that racial prejudice is real and could harm the child, it stated that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” Id. at 433.
and Embryology Authority ("HFEA")? Or should the United States retain its current approach, in which such decisions are left to patients and the providers of services? Both options possess the virtue of allowing attention to context, and contextual decisions generally permit close consideration of all the facts. But both options also pose a risk to principles of reproductive equality. Important choices about whether or not to permit ARTs under various circumstances should not be left to the discretion of either a governmental licensing agency or the private providers of services, because discretion may be used to discriminate against minority groups or perspectives. Moreover, the lack of transparency would make these types of discretionary decisions very difficult to challenge as discriminatory, effectively insulating them from oversight.

F. PGD vs. Prenatal Testing and Abortion

But if there is no constitutional right to engage in PGD and the selective implantation of embryos, does that mean that there is also no constitutional right to engage in prenatal genetic testing and selective abortion? These are distinct acts, and it is possible to treat them differently based upon several theoretical and pragmatic distinctions. In theory, a woman’s decision whether or not to terminate her pregnancy can be distinguished from the choice whether or not to implant an embryo based upon the close connection between the right to abortion and principles of bodily autonomy and sex equality. Pregnancy is a profound invasion of the body that imposes physical, psychological, and social burdens upon a woman, threatening both her right to bodily autonomy and gender equality. For this reason, the choice whether or not to terminate her pregnancy must be left to the woman. A law regulating PGD and the selective implantation of embryos, on the other hand, would not implicate either of these values. Thus, decisions regarding the disposition of cryogenically preserved embryos

181 Human Fertilisation and Embryology Act of 1990, Ch. 37, §§ 5–11, sched. 1 & 2 (Eng.).

182 Thus, in one recent case, a lesbian domestic partner sued two physicians and her medical provider, alleging that they refused to perform artificial insemination on her in violation of the Unruh Civil Rights Act, which prohibits discrimination by public accommodations on the basis of sexual orientation. See N. Coast Women’s Care Med. Group, Inc. v. Superior Court, 40 Cal. Rptr. 3d 636, 638 (Cal. Ct. App. 2006). The California Court of Appeals, however, held that there was a genuine issue of fact as to whether her physicians refused to perform the procedure because of plaintiff’s unmarried status, which was legal at the time, or because of her sexual orientation, which was forbidden under California law. See id. at 642–43.

need not be made by the woman alone, but may be vetoed by her husband,\textsuperscript{184} and perhaps even mandated by the state.\textsuperscript{185}

However, suppose a state chooses to treat abortion and PGD in the same fashion and to prohibit sex-selection in either case, so that a woman could terminate her pregnancy for any reason except that the fetus is of the “wrong” sex. This is not just a hypothetical scenario. Laws proscribing sex-selective abortions already exist in at least two states—Pennsylvania\textsuperscript{186} and Illinois\textsuperscript{187}—but have not yet been subject to constitutional challenge. Any attempt to actually enforce such a law would raise serious constitutional questions. Enforcement under order of the state would require physicians to inquire into a woman’s motives for terminating her pregnancy in a manner that would be un-bearably intrusive of her privacy, and would pose substantial risks of discriminatory application that could further exacerbate inequalities in our society. These theoretical and practical differences between abortion and PGD warrant a different legal standard.

This does \textit{not} mean that there is a constitutional “right” to engage in sex-selective abortion. Indeed, if the government chose to enforce a policy against sex-selection not by banning certain abortions, but rather by prohibiting prenatal testing to obtain information regarding the sex of the fetus,\textsuperscript{188} such a law would likely be constitutional.\textsuperscript{189} Yet

\begin{footnotesize}
\begin{enumerate}
\item See Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992) (holding that a husband’s right not to procreate outweighed his ex-wife’s right to procreate by donating extra embryos to others).
\item 18 PA. CONS. STAT. ANN. § 3204(c) (West 2000) (“No abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion.”).
\item 720 ILL. COMP. STAT. ANN. 510/6(8) (West 2003) (“No person shall intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.”).
\item For example, in 1994, the Indian parliament passed the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (“PNDT”), which does not regulate abortion but instead bans only prenatal testing to determine the sex of the fetus. See Vineet Chander, “\textit{It’s (Still) a Boy . . . “}: Making the Pre-natal Diagnostic Techniques Act an Effective Weapon in India’s Struggle to Stamp Out Female Feticide, 36 Geo. Wash. Int’l L. Rev. 453, 453, 450–60 (2004). In 2003, this Act was amended, changing its title to the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act. See Kristi Lemoine & John Tanagho, Gender Discrimination Fuels Sex Selective Abortion: The Impact of the Indian Supreme Court on the Implementation and Enforcement of the PNDT Act, 15 U. Miami Int’l & Comp. L. Rev. 203, 203 n.1 (2007).
\item Of course, not all scholars agree with this distinction. Professor Robertson’s expansive principle of reproductive autonomy, for example, protects access to any information that would be determinative of the individual’s choice whether or not to reproduce, including prenatal tests that reveal the sex of the fetus. See Robertson, \textit{Genetic Selection}, supra note 18, at 434.
\end{enumerate}
\end{footnotesize}
there is a constitutional right for a woman to terminate her pregnancy. The difficulty in drawing lines between situations when the woman is warranted in making that decision and when she is not, coupled with the dangers of governmental power and the prospect of discrimination, require that the right to abortion be protected regardless of the woman’s reasons for terminating her pregnancy. To protect this right in some contexts, it must also be protected in other contexts as a matter of equality, not autonomy. It is not clear that the same holds true for assisted reproductive technologies in general, or for PGD in particular.

Unlike abortion, the task of drawing lines between the situations when PGD could be used and when it could not does not seem impossible, nor does the prospect of line-drawing necessarily grant the government a license to discriminate. But if the same fears prove justified in this context as well, then there should be a constitutional right to use PGD, not because individuals have the right to make these choices as a matter of reproductive autonomy, but rather because of the danger that governmental power would be used in a discriminatory fashion and the grave threat that would pose to reproductive equality.

This concern, however, does not appear to be as compelling in the context of assisted reproduction as it is in the context of abortion. Unlike abortion, assisted reproduction does not involve the interests of a group that lacks political power. In addition, government regulation may present less risk than the exercise of private power over ARTs. In *Skinner v. Oklahoma*, the Supreme Court declared that “[t]he power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.” It is a grave threat to grant the government the power to sterilize, but in the realm of assisted reproduction, unfettered free market forces may be equally dangerous and could lead to essentially the same result, causing races or types inimical to the dominant group to wither and disappear. Thus, the threat of governmental power in the realm of assisted reproduction may be necessary to counteract the even greater threat posed by private power.

---

190 See supra notes 146–51 and accompanying text.
192 Id. at 541.
Conclusion

The government rarely strips everyone of their liberty in a uniform fashion. Instead, society tends to single out certain individuals or groups, selectively depriving them of their liberty in a manner that also infringes equality. Equal liberty preserves fundamental freedoms by ensuring that legislators deprive themselves of the same rights they would deny to others. As Justice Jackson explained so eloquently in his famous concurrence in *Railway Express Agency*:

"[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."

The same intuition underlies Justice Scalia’s concurring opinion in *Cruzan*, which observed: “Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”

Just as equality may preserve fundamental liberties, the protection of liberty may promote social equality for groups in contexts when a group is not yet recognized, or when discrimination is difficult to prove or even to measure because the very concept of equality is confused and contested. The intimate relationship between liberty and equality suggests that courts should strive to ensure equal liberty: limits upon individual liberty and autonomy should be meted out with a measure of equality.

---

194 *Id.* at 112–13.
196 *Id.* at 300.
197 See William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1186 (2000) (arguing that due process protects individual liberty for minorities at the retail level, while equal protection potentially offers minority groups wholesale protection).
Unlike the libertarian image of reproductive autonomy, which would extend constitutional protection to every technology necessary to procreation, the egalitarian ideal of reproductive equality permits the legislature to regulate assisted reproduction as long as it does so in an evenhanded fashion. The egalitarian ideal of reproductive equality is attractive to those who are not enthralled with the individualistic, rights-oriented vision of reproductive autonomy because it focuses upon the relations among various groups in recognition of the fact that the powerful may not vigilantly safeguard the liberties of the powerless. Reproductive equality requires close attention to the reasons behind government regulation: it invalidates only those laws that stem from societal disapproval or prejudice as opposed to legitimate interests. The focus upon reproductive equality rather than reproductive liberty does not necessarily provide easy answers to difficult questions. But the shift from liberty to equality subtly changes the focus, emphasizing different issues. Instead of asking whether a law limits liberty, thereby requiring a compelling justification before the government may regulate ARTs, the inquiry turns to whether a law selectively denies individuals or groups the right to reproduce in a manner that offends equality. If lines are drawn between different acts or different classes without a reason that goes beyond moral revulsion or prejudice, such lines would be unconstitutional. Accordingly, regulations of ARTs that stem only from the dictates of religion or the desire to replicate nature would be unconstitutional. But if the regulations reflect legitimate governmental interests, even if not compelling ones, they would withstand constitutional scrutiny. Equal liberty recognizes the close connection between liberty and equality and promotes equality among individuals and groups by requiring courts to step in only when it is essential—namely, when the powerful fail to acknowledge and adequately protect the liberties of the powerless.