

Equal Liberty: Assisted Reproductive Technology and Reproductive Equality

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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.¹ However, the regulatory vacuum surrounding assisted reproductive technologies (“ARTs”) may not last for much longer.² 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.³ Already, some states such as California have en-

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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”).

² The state of Georgia recently created a commission—the Senate Study Committee on Rights Relating to Reproductive and Genetic Technology—in order to study issues involving ARTs and propose legislation. *See* S. Res. 280, 2007 Leg. Reg. Sess. (Ga. 2007). The Committee is contemplating recommending limits on the number of eggs that can be fertilized in IVF and requiring certain legal documents regarding embryo ownership in order to prevent disputes over frozen embryos. *See* Sonji Jacobs, *Ethical Boundaries of Baby-Making*, ATLANTA J.-CONST., Sept. 17, 2007, at A1.

³ *See* THE PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 208–09 (2004) (recommending federally funded studies on the impact of ARTs upon the health and well-being of women and of children born with their aid).

acted laws that limit the production and use of embryos for the purpose of human embryonic stem cell research (“hESCR”).⁴ 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 abortion⁵ may also pave the way for more regulation of embryos and fetuses.⁶ 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,⁷ which restricts the creation, implantation, and destruction of external embryos.⁸ 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.⁹ It also mandates implantation of all embryos and bans their destruction, effectively preventing genetic selection as well.¹⁰ In addition, although the Embryo Protection Act permits sperm donation, it proscribes even unpaid egg donation and gestational surrogacy.¹¹ More recently, in 2004, Italy enacted Law 40¹²—one of the most restrictive laws regu-

4 California law prohibits any compensation to women who donate their eggs for the purpose of human embryonic stem cell research, yet the state continues to permit unlimited payments to those who provide eggs for in vitro fertilization. See CAL. HEALTH & SAFETY CODE § 125350 (West 2006). For a critique of this distinction, see Radhika Rao, *Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055 (2006).

5 *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007).

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.

7 GESETZ ZUM SCHUTZ VON EMBRYONEN [Embryo Protection Act], Dec. 13, 1990, BGBI. I at 2746 (F.R.G.).

8 See John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. TRANSNAT’L L. 189, 203, 205 (2004).

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.

12 Law 40/2004 of Feb. 19, 2004, 2004 Gazz. Uff. No. 45 (Feb. 24, 2004).

lating ARTs in the world.¹³ Law 40 limits ARTs to married or “stable” heterosexual couples of childbearing age who are infertile.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.¹⁵ It also prohibits genetic selection of embryos and gametes, as well as the use of donor sperm, eggs, and surrogacy.¹⁶ Would similar laws be constitutional in the United States?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.¹⁸ Under this expansive interpretation of reproductive liberty, almost every technology necessary to procreate would receive constitutional protection.¹⁹ Others contend that there is no such constitutional right at all, leaving the government completely free to regulate the field of fertility treatments.²⁰

¹³ See Rachel Anne Fenton, *Catholic Doctrine Versus Women’s Rights: The New Italian Law on Assisted Reproduction*, 14 MED. L. REV. 73, 74 (2006).

¹⁴ See Giuseppe Benagiano & Luca Gianaroli, Editorial, *The New Italian IVF Legislation*, 9 REPROD. BIOMEDICINE ONLINE 117, 122 (2004); Fenton, *supra* note 13, at 73.

¹⁵ Benagiano & Gianaroli, *supra* note 14, at 124; see also Fenton, *supra* note 13, at 73, 99.

¹⁶ Benagiano & Gianaroli, *supra* note 14, at 122; see also Fenton, *supra* note 13, at 73, 84, 99.

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.

¹⁸ See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994) [hereinafter ROBERTSON, CHILDREN OF CHOICE]; John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421 (1996) [hereinafter Robertson, *Genetic Selection*]; John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371 (1998) [hereinafter, Robertson, *Liberty, Identity*]; see also Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 950 (2007) (summarizing Robertson’s views).

¹⁹ See ROBERTSON, CHILDREN OF CHOICE, *supra* note 18, at 16; Suter, *supra* note 18, at 250.

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.²¹ 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

²¹ See Sonia M. Suter, *Advanced Reproductive Technologies Seen Through the "Repugnance" Lens of Carhart v. Gonzales and Other Theories of Reproductive Rights*, 76 GEO. WASH. L. REV. 1514, 1538 (2008) (noting that "[o]ne could argue that procreative liberty protects autonomous decisionmaking about any matters involving reproduction—a virtually unbounded conception").

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.²² Instead, it permits legislators to limit ARTs so long as they are willing to impose the same restrictions upon everyone, including themselves.²³ 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.²⁴ Yet equal liberty extends this theory beyond the arena of discrimination against protected classes to the realm of fundamental rights.²⁵ 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*²⁶ and *Pierce v. Society of Sisters*,²⁷ and including *Skinner v. Oklahoma*,²⁸ *Roe v. Wade*,²⁹ 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.”).

²³ Equality preserves fundamental liberties by requiring that legislators deprive themselves of the same liberties they would deny to others. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *Ry. Express Agency, Inc.*, 336 U.S. at 112–13 (Jackson, J., concurring).

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

²⁵ See Rebecca L. Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1498 (2002) (arguing that the same principles underlying Ely's theory of representation-reinforcement apply not only to discrimination against protected classes, but also to the deprivation of fundamental liberties).

²⁶ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²⁷ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

²⁸ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

²⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

v. *Casey*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 Constitution confers 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.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.³²

Although this is a plausible interpretation of the case law, the “liberty” protected under the Due Process Clause of the Fourteenth Amendment³³ doesn’t appear to include a fundamental right to use ARTs. Looking to history and tradition, framed fairly narrowly,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.³⁵ IVF itself has been around for only thirty years,³⁶ while PGD has been practiced for less than two decades,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

³⁰ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

³¹ See *supra* note 18 and accompanying text.

³² See *supra* note 19 and accompanying text.

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.

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.”).

³⁵ Suter, *supra* note 21, at 1541–42.

³⁶ See JUDITH DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 36 (2006) (noting that IVF was first successfully used in 1978).

³⁷ See John A. Robertson, *Extending Preimplantation Genetic Diagnosis: Medical and Non-Medical Uses*, 29 J. MED. ETHICS 213, 214 (2003) (noting that PGD was first introduced in 1990).

across the Internet,³⁸ and the Fourth Amendment prohibition against unreasonable searches extends to the use of infrared thermal sensors to scan a private home,³⁹ so, too, the right to reproductive autonomy—if there is such a right—should encompass new reproductive technologies.⁴⁰ If fertile persons possess a right to reproduce, shouldn't infertile persons be extended the same rights through the vehicle of ARTs?⁴¹

If history and tradition are read more broadly,⁴² 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,⁴³ abortion,⁴⁴ and sterilization cases⁴⁵ represent a fundamental right “to bear or beget a child”⁴⁶ that arguably encompasses not just the right to *avoid* reproduction, but also the right to *reproduce* with the assistance of technology.⁴⁷ And another line of precedent protects child-rearing: shielding parents' right to choose whether their child learns a foreign language,⁴⁸ attends private school,⁴⁹ or stops education after the eighth grade.⁵⁰ One could argue

³⁸ See *Reno v. ACLU*, 521 U.S. 844, 867–68 (1997) (applying First Amendment protections to communications on the Internet).

³⁹ See *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

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.

⁴² Occasionally, the Supreme Court looks to history and tradition at a broader level of generality. See *Roe v. Wade*, 410 U.S. 113, 129 (1973); *Loving v. Virginia*, 388 U.S. 1, 6–10 (1967); see also *Washington v. Glucksberg*, 521 U.S. 702, 765–66 (1997) (Souter, J., concurring) (suggesting a more fluid analysis of history and tradition).

⁴³ *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (protecting distribution of contraception to single persons); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (protecting a married couple's right to use contraceptives).

⁴⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion) (reaffirming right to abortion); *Roe*, 410 U.S. at 164 (1973) (protecting right to abortion).

⁴⁵ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down a law authorizing compulsory sterilization).

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).

⁴⁹ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (protecting parents' right to send their child to private school).

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.⁵¹ They do not confer a broader constitutional right not to have children,⁵² 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.⁵³ 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.⁵⁴ 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,

[C]ompelled 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.

See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 927 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

trol over their bodies, commandeering them for use as incubators in the service of the state.⁵⁵ Compulsory sterilization laws similarly interfere with bodily integrity by forcing individuals to submit to a significant medical procedure.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.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.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.⁵⁹ It also provides a principle to reconcile the diverging results in *Cruzan v. Director, Missouri Department of Health*,⁶⁰ which assumed that there is a constitutional right to refuse invasive life-sustaining medical treatment,⁶¹ and *Washington v. Glucksberg*,⁶² which rejected a constitutional right to commit physician-assisted suicide.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

⁵⁵ See *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”).

⁵⁶ See Rao, *supra* note 53, at 1111–12.

⁵⁷ See *id.* at 1112–13.

⁵⁸ See *id.*

⁵⁹ See Susan M. Wolf, *Physician-Assisted Suicide, Abortion, and Treatment Refusal: Using Gender to Analyze the Difference*, in *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”).

⁶⁰ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

⁶¹ *Id.* at 278.

⁶² *Washington v. Glucksberg*, 521 U.S. 707 (1997).

⁶³ *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 *Vacco v. Quill*, the Supreme Court reasoned that the constitutional protection afforded to the right to refuse life-sustaining medical treatment in *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 . . .” *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (citations omitted).

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. Oklahoma*⁶⁸ 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

⁶⁴ See Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 364 (2000).

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”).

⁶⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁶⁷ *Id.* at 856 (majority opinion).

⁶⁸ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

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*⁷³ and *Pierce v. Society of Sisters*⁷⁴—that protected fundamental liberties in order to redress inequalities.⁷⁵ 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.⁷⁶ Likewise, *Loving v. Virginia*⁷⁷ and *Zablocki v. Redhail*⁷⁸ found unconstitutional state laws that denied the right to marry in ways that also perpetuated race and class-based inequalities.⁷⁹ More recently, *Lawrence v. Texas*⁸⁰ 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.⁸¹

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.⁸² 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.⁸³ 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-

73 *Meyer v. Nebraska*, 262 U.S. 390 (1923).

74 *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

75 *Brown*, *supra* note 25, at 1508 & n.84.

76 *See id.*

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

78 *Zablocki v. Redhail*, 434 U.S. 374 (1978).

79 *See id.* at 387, 390–91; *Loving*, 388 U.S. at 12.

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

81 *Id.* at 575, 578.

82 *See Balkin, supra* note 40, at 858; *Suter, supra* note 18, at 959.

83 *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).

accompanied by—and may even reinforce—racist,⁸⁴ sexist, or other invidious stereotypes.⁸⁵ 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.⁸⁶ In addition, unequal access to genetic technologies such as PGD could result in a DNA divide—a society of genetic haves and have-nots.⁸⁷ 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.⁸⁸

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.⁸⁹ 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.⁹⁰ 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-

⁸⁴ See, e.g., Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 937–44 (1996); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 209–14 (1995); see also PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991).

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).

⁸⁶ See Carey Goldberg, *On Web, Models Auction Their Eggs to Bidders for Beautiful Children*, N.Y. TIMES, Oct. 23, 1999, at A11; Harold M. Schmeck, Jr., *Nobel Winner Says He Gave Sperm for Women to Bear Gifted Babies*, N.Y. TIMES, Mar. 1, 1980, at A6.

⁸⁷ See *supra* note 82 and accompanying text.

⁸⁸ See, e.g., Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA. ST. U. L. REV. 315, 332–41 (2003); cf. Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*, 62 OHIO ST. L.J. 391 (2001).

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).

⁹⁰ See Radhika Rao, *Property, Privacy, and Other Legal Constructions of the Embryo 1* (Aug. 10, 2008) (unpublished manuscript, on file with author).

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).

⁹² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe*, 410 U.S. at 164–65.

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*.

LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 98–99 (1992).

⁹⁴ *Roe*, 410 U.S. at 160, 164–65.

fetus gains the capacity for consciousness.⁹⁵ Consciousness may be deemed critical to the moral status of the fetus,⁹⁶ and medical evidence regarding brain development and electrical activity suggests that this occurs around the time of viability.⁹⁷

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.⁹⁸ 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 murder⁹⁹

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.¹⁰⁰ Congress enacted a law that pro-

⁹⁵ See Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 620–23 (1991) (discussing the strengths and weaknesses of the proposition that life begins at viability).

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.

⁹⁹ Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 27–28 (1973).

¹⁰⁰ See *Stenberg v. Carhart*, 530 U.S. 914, 921–22 (2000) (describing partial-birth abortion).

hibits this method of abortion,¹⁰¹ 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*.¹⁰² Whereas *Roe* drew a temporal line at viability,¹⁰³ *Gonzales* draws a spatial line between the destruction of a fetus inside and outside the woman’s body.¹⁰⁴ *Gonzales* suggests that it is this spatial line that separates the constitutionally protected right to abortion from the criminal act of infanticide.¹⁰⁵ 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.”¹⁰⁶ 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.”¹⁰⁷ 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.”¹⁰⁸

If there is a principle underlying *Gonzales*—and there may not be¹⁰⁹—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

¹⁰¹ Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. IV 2004)).

¹⁰² *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007).

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).

¹⁰⁶ Transcript of Oral Argument at 14–15, *Gonzales*, 127 S. Ct. 1610 (No. 05-380).

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.¹¹⁰ Senator Hatch proposed a constitutional amendment to outlaw abortion,¹¹¹ yet he sponsored a bill that would permit experimentation upon extracorporeal embryos.¹¹² According to Hatch, "life begins in a woman's womb, 'not in a petri dish.'"¹¹³ 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.'"¹¹⁴ 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*

¹¹⁰ See Sheryl Gay Stolberg, *Key Republican Backs Cloning in Research*, N.Y. TIMES, May 1, 2002, at A20.

¹¹¹ David Corn, *Leave No Embryo Behind! Dissecting the Messy Politics of Stem-Cell Research*, SEATTLE WKLY., July 18, 2001, at 26.

¹¹² See Human Cloning Ban and Stem Cell Research Protection Act of 2005, S. 876, 109th Cong. (2005); see also Stolberg, *supra* note 110.

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,¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰

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.¹²¹ 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 embryos¹²²—are constitutional even if they infringe reproductive autonomy by im-

115 See *supra* text accompanying notes 108–09.

116 See Stolberg, *supra* note 110.

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.

¹²⁵ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

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.

¹²⁹ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹³⁰ *Id.* at 443, 453.

¹³¹ *Lawrence v. Texas*, 538 U.S. 560 (2003).

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.¹³³ 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.¹³⁴ 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.¹³⁵ Such provisions may be designed to protect gamete donors, surrogate mothers, and other parties from entering into agreements that they might later regret.¹³⁶ 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.¹³⁷

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.¹³⁸ 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.¹³⁹ More-

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).

¹³⁸ See FLA. STAT. § 63.042 (2008); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 827 (2004) (upholding the constitutionality of § 63.042).

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;¹⁴⁰ otherwise, it would be able to terminate their parental rights and take away their biological children.¹⁴¹ 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,¹⁴² 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?¹⁴³ 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—infertility.¹⁴⁴ 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

California and Massachusetts. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 950 (Mass. 2003).

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).

¹⁴¹ See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (requiring clear and convincing evidence of abuse or neglect before state can constitutionally terminate parental rights).

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.

¹⁴⁴ See *Bragdon v. Abbott*, 524 U.S. 624, 639–41 (1998) (holding that reproduction is a major life activity for the purposes of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12182(a) (2000)). *Bragdon* has thus "opened the proverbial door to asserting infertility as a disability." Peter K. Rydel, *Defining the Right to Reproduce: Asserting Infertility as a Disability Under the Americans with Disabilities Act*, 63 ALB. L. REV. 593, 635 (1999).

for a law is that it replicates nature by allowing infertile men to procreate 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).

¹⁴⁷ See Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1716–20 (2008) (observing that infertility afflicts persons of all races).

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.

Carl H. Coleman, *Assisted Reproductive Technologies and the Constitution*, 30 FORDHAM URB. L.J. 57, 68–69 (2002).

¹⁴⁹ See DEBORA 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 repugnance¹⁵⁵ 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.

¹⁵⁵ See *Lawrence v. Texas*, 539 U.S. 558, 571, 578–79 (2003); *Romer v. Evans*, 517 U.S. 620, 623, 633–36 (1996).

¹⁵⁶ Human Cloning Prohibition Act of 2003, H.R. 534, 108th Cong. (2003); Human Cloning Prohibition Act of 2001, H.R. 2505, 107th Cong. (2001).

¹⁵⁷ See ARK. CODE ANN. § 20-16-1002 (2008); IND. CODE § 16-34.5-1-2 (2008); MICH. COMP. LAWS §§ 333.16274–.16275 (2008); N.D. CENT. CODE § 12.1-39-02 (2008); S.D. CODIFIED LAWS §§ 34-14-26 to -28 (2008).

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.¹⁵⁹

This line of reasoning conforms to the logic of *Vacco v. Quill*,¹⁶⁰ 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.¹⁶¹ 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.¹⁶² *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.¹⁶³ 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.¹⁶⁴ 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,¹⁶⁵ 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,

¹⁵⁹ See, e.g., CLONING HUMAN BEINGS, REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION 107, 108 (1997) (describing concerns about the safety of cloning procedures).

¹⁶⁰ *Vacco v. Quill*, 521 U.S. 793 (1997).

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.

¹⁶⁴ See, e.g., *In re Baby M.*, 537 A.2d 1227, 1234–35 (N.J. 1988).

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?¹⁶⁶ 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."¹⁶⁷ "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."¹⁶⁸ 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,¹⁶⁹ such as the notion that biological connections should be optional for men but mandatory for women.¹⁷⁰ 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,¹⁷¹ 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.¹⁷² Moreover, such conduct is now a federal crime. In 2004, Congress passed the Unborn Victims of Violence Act,¹⁷³ 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.¹⁷⁴ 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”?¹⁷⁵ 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?

¹⁷² See, e.g., ARIZ. REV. STAT. § 13-1103(A)(5), (B) (LexisNexis 2007) (manslaughter); 720 ILL. COMP. STAT. 5/9-1.2, -2.1, -3.2 (2006) (murder, manslaughter); IND. CODE § 35-42-1-6 (1998) (feticide); LA. REV. STAT. ANN. §§ 14:2(7), :32.5-.8 (2007) (feticide); MINN. STAT. §§ 609.266, .2661-.2665, .268(1) (2003) (murder, manslaughter); N.D. CENT. CODE § 12.1-17.1-01 to -04 (1997) (murder, manslaughter, negligent homicide); UTAH CODE ANN. §§ 76-5-201-03, -205-09 (2003 & Supp. 2007) (any form of homicide).

¹⁷³ 18 U.S.C. § 1841 (Supp. 2005).

¹⁷⁴ *Id.* § 1841(a)(1)-(2)(A).

¹⁷⁵ See Suter, *supra* note 21, at 1531 n.103 (noting difficulties in distinguishing between traits and diseases).

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,¹⁷⁶ society does not generally regard the decision to screen for such a trait as the product of prejudice against a particular group.¹⁷⁷

¹⁷⁶ See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 615 n.147 (2004).

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 group¹⁷⁸ 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,¹⁷⁹ 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.¹⁸⁰

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

African American airline stewardesses were fired. Insurance rates went up for carriers. 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.’

Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain’t Always Easy! An African American Perspective on Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191, 201 (1996) (citation omitted).

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”)?¹⁸¹ 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.¹⁸² 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.¹⁸³ 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.

¹⁸³ *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976) (striking down a law requiring spousal consent to abortion).

need not be made by the woman alone, but may be vetoed by her husband,¹⁸⁴ and perhaps even mandated by the state.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—Pennsylvania¹⁸⁶ and Illinois¹⁸⁷—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 unbearably 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 *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,¹⁸⁸ such a law would likely be constitutional.¹⁸⁹ Yet

¹⁸⁴ 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).

¹⁸⁵ See LA. REV. STAT. ANN. §§ 9:129–130 (2000) (prohibiting destruction of extra embryos and requiring them to be made available to others for “adoptive implantation”).

¹⁸⁶ 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.”).

¹⁸⁷ 720 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.”).

¹⁸⁸ 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, “*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, 459–60 (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).

¹⁸⁹ 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, *Genetic Selection*, *supra* note 18, at 434.

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.¹⁹⁰ In addition, government regulation may present less risk than the exercise of private power over ARTs. In *Skinner v. Oklahoma*,¹⁹¹ 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.”¹⁹² 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.

¹⁹¹ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

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*¹⁹³:

[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.¹⁹⁴

The same intuition underlies Justice Scalia's concurring opinion in *Cruzan*,¹⁹⁵ 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."¹⁹⁶

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,¹⁹⁷ or when discrimination is difficult to prove¹⁹⁸ or even to measure because the very concept of equality is confused and contested.¹⁹⁹ 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.

¹⁹³ *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1948) (Jackson, J., concurring).

¹⁹⁴ *Id.* at 112–13.

¹⁹⁵ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292 (1989) (Scalia, J., concurring).

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).

¹⁹⁸ See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 939–46 (1989) (describing the differing interpretations of what constitutes a violation of the Equal Protection Clause).

¹⁹⁹ See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982).

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.