The "Repugnance" Lens of *Gonzales v. Carhart* and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies

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I am grateful to Naomi Cahn, Tom Colby, Julie Stieff, Ronald Suter, Bob Tuttle, and the participants of this symposium for their invaluable comments and insights. Many thanks also to Kasia Solon, my library liaison, who is always efficient, thorough, and resourceful. Finally, I want to thank Dean Fred Lawrence and the George Washington University Law School for research and faculty support.

Introduction

Reproductive decisionmaking has always raised ethical and legal issues. With scientific advances, reproductive decisions are even more complex and the legal and moral issues even more complicated. Some advanced technologies, such as in vitro fertilization ("IVF")[1] *assist* procreation. Other technologies, such as amniocentesis and chorionic villus sampling ("CVS"), help future parents gather information about the fetus to make decisions about whether to continue a pregnancy.[2] A technique called preimplantation genetic diagnosis ("PIGD") involves genetic testing of embryos created through IVF, which allows people to get information about the embryo to decide whether or not to implant it.[3] Finally, gene transfer, a technology of the future, may allow us to make reproductive decisions of an altogether different nature—decisions about whether to alter the fetus or embryo genetically, either to eliminate disease or to "enhance" certain traits.[4]

As long as technology has been able to alter the reproductive process, the state has intervened to regulate or sometimes even ban particular reproductive procedures. Before the Supreme Court recog-

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1 This technology allows the egg to be fertilized outside the womb and then implanted in a woman's uterus. JUDITH DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 35–37 (2006). IVF first succeeded in 1978 when Louise Joy Brown was born through IVF. *Id.* at 36.

2 *See* Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J. 897, 928 (2007).

3 *See id.* at 929.

4 *See id.* at 932–33. Gene transfer research has primarily focused on its use in adults. For the treatment of some diseases, it may only be effective if it is done in the embryo, before differentiation has occurred. *See id.* at 933 & n.189.

Throughout this Article I refer to all of these technologies as advanced reproductive technologies, even though some of them—such as amniocentesis, CVS, and even gene transfer—are not precisely reproductive technologies; that is, they do not result in the creation of a child. Nevertheless, they are closely associated with reproductive decisions, and therefore I refer to all of these technologies in shorthand form as "advanced reproductive technologies."

nized constitutional rights to contraception and abortion,[5] many states banned or limited access to these technologies.[6] More recently, states have set limits on what can be done with embryos created through IVF.[7] In a related vein, some state initiatives aim to amend state constitutions to bestow "personhood" status on the "pre-born from the moment of fertilization . . . so that they may enjoy equal protection under the law."[8] States have also banned abortion on the basis of sex.[9]

States have become increasingly active in regulating or banning reproductive technologies. Sometimes these efforts are especially aggressive, for example, directly challenging constitutionally protected rights by banning abortion outright.[10] Other efforts are more subtle: imposing requirements for an abortion such as waiting periods, parental or spousal notifications, mandating the receipt of particular information, or more recently, requiring that ultrasounds be offered or given to women seeking abortions.[11]

As advanced reproductive technologies move from ideas to viable techniques, states will likely intervene to regulate or even prohibit some of these technologies. Thus, as it becomes possible to test for

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5 Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception).

6 *See Roe*, 410 U.S. at 147 (describing, in 1973, "the enactment of criminal abortion laws in the 19th century and . . . their continued existence").

7 *See, e.g.*, LA. REV. STAT. ANN. § 9:129 (West 2000) ("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.").

8 Life Counts! Colorado for Equal Rights—Personhood Initiative 2008, http://coloradoforequalrights.com (last visited June 9, 2008) (defining "'Person' or 'Persons'" as "any human from the time of fertilization"); *see also* David Harsanyi, *Abortion Debate Is Changing*, DENVER POST, Jan. 22, 2008, at B-07; Stephanie Simon, *The New Abortion Warriors*, L.A. TIMES, Jan. 22, 2008, at A1 (describing how Colorado's campaign was initiated by a Colorado teenager); Ben Smith, *Fetus "Personhood" Sought: Calls Seek Support for Proposed Anti-Abortion Legislation*, ATLANTA J.-CONSTITUTION, Feb. 16, 2008, at B6 (describing "House Resolution 536, the 'Human Life Amendment,' which would grant 'personhood' status to fetuses in an amendment to the Georgia Constitution" and noting that "[a]nti-abortion activists are lobbying legislatures in Georgia, Colorado, Michigan, Mississippi and other states").

9 *See, e.g.*, 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.").

10 *See, e.g.*, S.D. CODIFIED LAWS § 22-17-5 (West 2006). *But see S.D. Abortion Ban Went Too Far*, STAR TRIBUNE (Minneapolis-St. Paul, Minn.), Nov. 10, 2006, at 18A ("By a sound 55–45 percent margin, South Dakota voters said the Legislature went too far, and repealed the ban.").

11 *See* William Saletan, *Window to the Womb*, WASH. POST, Apr. 29, 2007, at B02 (describing how "ultrasound bills are all the rage. . . . [often requiring] clinics to offer each woman an ultrasound view of her fetus"); Stephanie Simon, *Abortion Foes Work to Expand Informed-Consent Laws*, L.A. TIMES, Apr. 12, 2007, at 9.

traits other than just sex, states may ban abortions on the basis of this information or perhaps even restrict the ability to get information about fetal traits.[12] States might protect excess embryos created through IVF by prohibiting PIGD or the discard of embryos with unwanted characteristics.[13] If genetic modification becomes possible at the fetal or embryonic level, states may impose limits on this technology as well.

Although the Supreme Court has developed a substantial body of law that defines reproductive rights, this jurisprudence has focused principally on decisions regarding contraception and abortion.[14] As a result, it is uncertain whether decisions concerning advanced reproductive technologies, such as IVF, prenatal testing, PIGD, and genetic modification, are encompassed within the cluster of constitutionally protected reproductive interests. A few lower courts have addressed the constitutionality of a limited number of these technologies, but often without full analysis.[15] Other courts have touched upon issues related to these questions without resolving them directly.[16]

Determining whether and when the state may interfere with decisions to use advanced reproductive technologies depends both on how we characterize the reproductive interests protected in the contraception and abortion cases and how those interests compare to our interests in the new reproductive technologies. Although contraception, abortion, IVF, PIGD, prenatal testing, and genetic modification of the fetus or embryo all concern reproduction, the interests at stake in each instance are quite different. Contraception and abortion allow people to prevent procreation. IVF allows people to procreate noncoitally, raising the question whether we have an affirmative right *to* procreate and whether such a right includes the right to do so

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12 Testing for traits may prove especially complex given that most traits are the result of complex interactions between multiple genes and environmental factors. *See* John A. Robertson, *Procreative Liberty in the Area of Genomics*, 29 AM. J.L. & MED. 439, 460–61 (2003).

13 *See, e.g.*, *supra* note 7; *see also infra* Part I.A.4.

14 Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (abortion); Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) (abortion); Stenberg v. Carhart, 530 U.S. 914 (2000) (abortion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (abortion); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception).

15 *See, e.g.*, Forbes v. Napolitano, 236 F.3d 1009, 1014 (9th Cir. 2000) (Sneed, J., concurring) (finding that a statute prohibiting research on aborted fetal tissue "could burden the rights of women and couples to make both present and future reproductive choices," because it could "prevent the advancement of important diagnostic techniques, the creation of safer abortion techniques, and the discovery of medical defects that would influence a woman's decision regarding future pregnancies"); Lifchez v. Hartigan, 735 F. Supp. 1361, 1376–77 (N.D. Ill. 1990).

16 *See infra* note 59.

noncoitally. Prenatal testing helps people make decisions about whether to continue a pregnancy based on information about the health, or possibly even traits, of the fetus. It raises the question whether reproductive rights encompass the right to any method of obtaining information that influences such decisions, and if so, whether it encompasses the right to any and all information, including information about fetal traits. Finally, genetic modification would allow parents to alter fetal or embryonic genes, either to improve health or to alter traits. This raises the question whether we have a right to manipulate the fetus or embryo genetically.

To determine whether the state may limit the ability to use advanced reproductive technologies, we must be attentive not only to the different kinds of interests with respect to each technology, but also to the lens through which we interpret Supreme Court cases dealing with reproduction. Since 1925, the Court has explored the constitutionality of state efforts to control reproduction, including laws mandating involuntary sterilization,[17] laws banning contraception,[18] and laws prohibiting or regulating abortion.[19] How we should interpret these cases and the reproductive interests they protect is a source of debate.[20] One might read these cases to establish a right to procreative liberty, grounded in a libertarian conception of autonomy and self-definition.[21] Alternatively, one might interpret these cases more circumspectly as protecting rights that are rooted in our nation's history and tradition.[22] These cases are also consistent with a right of privacy that primarily encompasses an interest in bodily integrity—the right to privacy of person.[23] One might also interpret these cases as creating a relational right to privacy, in particular, a right of parental or familial privacy.[24] Finally, the cases might be read to prevent state intervention when reproductive choices promote equality, generally

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17 Skinner v. Oklahoma, 316 U.S. 535 (1942); Buck v. Bell, 274 U.S. 200 (1927).

18 Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 485 (1965); Poe v. Ullman, 367 U.S. 497 (1961).

19 Gonzales v. Carhart, 127 S. Ct. 1610 (2007); Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006); Stenberg v. Carhart, 530 U.S. 914 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

20 *See infra* Part I.

21 *See infra* Part I.A.

22 *See infra* Part I.B. This approach does not, however, satisfactorily explain the constitutionally protected right to contraception or abortion given that these technologies were historically banned in many states. Instead this approach may be used to reign in the potential expansion of substantive due process rights. *See infra* text accompanying notes 158–67.

23 *See infra* Part I.C.

24 *See infra* Part I.D.

or between the sexes.[25] And, of course, one might use more than one of these lenses when interpreting these cases.[26]

Each of these interpretations results in a different conclusion as to whether the various advanced reproductive technologies should be granted constitutional protection. The first Part of this piece explores how the different understandings of reproductive rights play out with respect to IVF, prenatal testing, PIGD, and genetic modification. Because this body of law is subject to so many different interpretations, and because the interests at stake with respect to these newer technologies are not precisely the same as those of contraception, abortion, and the avoidance of mandatory sterilization, it remains largely unclear whether and when the state can regulate or ban some of these technologies.

Gonzales v. Carhart,[27] the Court's latest word on abortion, presents yet another approach to evaluating reproductive rights, which challenges the various interpretations of Supreme Court jurisprudence I explore in Part I. As I argue in Part II, although claiming to preserve the fundamental holdings of *Casey* and *Roe*, *Gonzales* undercuts them in important ways. By justifying and upholding an abortion ban with no health exception, even before viability,[28] the Court directly challenges *Casey*'s notion of self-defining liberty. In addition, *Gonzales* broadens the range of state interests that can justify limiting reproductive decisions to include the state interest in protecting society and the medical profession against moral "coarsen[ing]"[29]—an approach I call the "repugnance" approach. As I argue in Part II.B, the Court's willingness to draw sharp lines between different abortion procedures based on their effect on the sensibility of the community suggests it might easily distinguish between many forms of advanced reproductive technologies and "ordinary" reproductive decisions, particularly where moral concerns exist.

Finally, I argue in Part II.C that *Casey* and *Gonzales* reflect two extremes of constitutional analysis, a heightened individualism and a heightened focus on community concerns, respectively. I end by briefly suggesting that neither extreme gets it right; each oversimpli-

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25 *See infra* Part I.E.

26 *See, e.g.*, Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO WASH. L. REV. 1457, 1462–74 (2008) (relying on equality and bodily integrity approaches of constitutional analysis to evaluate assisted reproductive technologies).

27 Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

28 *Id.* at 1619, 1638; *see infra* notes 303–05 and accompanying text.

29 *Id.* at 1633 (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(N), 117 Stat. 1201).

fies the issue, and each leaves out important considerations. Instead, we need a more balanced approach that understands autonomy in terms of the relationships that define us, balancing social as well as individual concerns.

I. Constitutional Theories of Reproductive Rights

A. Procreative Liberty and Personal Autonomy

Roe v. Wade[30] has come to symbolize the polarizing rhetoric about abortion in this country: the right to choose versus the right to life. This way of framing the conflict reflects a common understanding of *Roe* as granting reproductive rights under a highly individualistic, libertarian theory of autonomy and privacy. Reproductive rights, under this theory, protect against state interference with important and intimate decisions central to one's personal identity and self-definition. This notion was not present in earlier Supreme Court cases, but evolved over the years and was finally explicitly articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[31]

In 1942, for example, the Supreme Court struck down a law that allowed involuntary sterilization of certain categories of criminals in *Skinner v. Oklahoma*.[32] The Court described marriage and procreation as "fundamental to the very existence and survival of the race,"[33] expressing more concern with preservation of the human species than individual self-definition.[34] Twenty-three years later, in *Griswold v. Connecticut*,[35] the Court focused on the importance of reproduction in the domestic realm when protecting a married couple's procreative interest in contraception under a right to privacy.[36] The Court viewed this fundamental right as intricately connected to the intimacy of mar-

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

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

32 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

33 *Id.* The Court actually found the statute unconstitutional on equal protection grounds because it allowed the sterilization of chicken thieves but not embezzlers. *Id.* at 538–39. "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." *Id.* at 541.

34 *See id.* at 541.

35 Griswold v. Connecticut, 381 U.S. 479 (1965).

36 The Court described this right of privacy as originating from the penumbras of the Bill of Rights. *Id.* at 484–85. Glen Cohen argues that the Court's concern was less the State's "interference with procreative decisions per se" and more its "invasion of the marital 'space.'" I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1150 (2008).

riage, which it described as "intimate to the degree of being sacred."[37] It was not until the Court's decision in *Eisenstadt v. Baird*,[38] seven years later, when the Court began to think of reproduction in terms of its centrality to individual self-definition. In this case, the Court made clear that this constitutional right of privacy protected the right of individuals, married or not, to use contraception.[39] As the Court stated, "if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[40] In *Carey v. Population Services International*,[41] the Court again emphasized the *individual's* "interest in independence in making certain kinds of important [and personal] decisions."[42] The culmination of this trend toward protecting the autonomy of personal reproductive decisionmaking was, of course, *Roe v. Wade*,[43] which interpreted the right of privacy to be "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[44]

For nearly two decades, numerous legal assaults were directed at the basic holding of *Roe*.[45] But in 1992, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[46] affirmed *Roe*'s "essential holding."[47] In so doing, *Casey*, even more than *Roe*,[48] emphasized the individualistic and self-defining aspects of reproductive autonomy, stating:

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37 *Griswold*, 381 U.S. at 486.

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

39 *Id.* at 453.

40 *Id.* Cohen argues that this language "was dictum, since the decision (unlike *Griswold*) was premised on an equal protection and not a due process violation." Cohen, *supra* note 36, at 1151. Nevertheless, "the Court has obscured both these points in its later decisions and has frequently relied on this language." *Id.*

41 Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

42 *Id*. at 684.

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

44 *Id.* at 153.

45 *See, e.g.*, *infra* notes 148–49 and accompanying text.

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

47 *Id.* at 846, 853 (justifying this ruling based on the Court's "explication of individual liberty" and the "force of *stare decisis*"). Many aspects of *Roe* that were not central to the holding, however, were altered. For example, the Court described the interest at stake as a liberty, rather than a privacy, interest. *Id.* at 851–52. The Court also rejected the much-criticized trimester approach of *Roe* and used fetal viability instead as the marker in defining the limits of state control over abortion. *Id.* at 872–73. Finally, throughout the opinion, the Court focused on the woman's—not the physician's—liberty interest in making abortion decisions. *See, e.g.*, *id.* at 853.

48 There is some irony in interpreting *Roe* as being principally about individual choice and autonomy in reproductive decisionmaking. In fact, Justice Blackmun's opinion treats the abor-

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[49]

Finally, in *Stenberg v. Carhart*,[50] the Court affirmed the basic principles of *Roe* and *Casey* when it found unconstitutional a Nebraska statute prohibiting the so-called partial-birth abortion, a late-term abortion procedure that involves partially delivering the fetus and then puncturing the skull and removing its contents.[51] The Court summed up its case law over the "course of a generation" as having "determined and then redetermined that the Constitution offers basic protection to the woman's right to *choose*,"[52] thus reflecting the common understanding of *Roe* and its progeny as protecting choice in matters of reproduction.

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tion decision more as a medical matter to be decided by the woman *and* her physician, rather than as a purely autonomous and self-defining decision. *See Roe*, 410 U.S. at 163–66. The woman's autonomy seemed at best secondary to the physician's ability to exercise his or her technical expertise. *See id.* at 163 ("[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."); *id.* at 164 ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the *medical judgment of the pregnant woman's attending physician*." (emphasis added)); *id.* at 165–66 (The abortion "decision vindicates the right of the *physician* to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention." (emphasis added)); *id.* at 166 (Up until viability, "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.").

49 *Casey*, 505 U.S. at 851.

50 Stenberg v. Carhart, 530 U.S. 914 (2000).

51 *Id.* at 921–22. "Partial-birth abortion" is not actually a medical term. AMA, H-5.982 Late-Term Pregnancy Termination Techniques, http://www0.ama-assn.org/apps/pf_new/pf_online (search "Enter search term(s)" for "Late-Term Pregnancy Termination Techniques"; then follow "H-5.982 Late-Term Pregnancy Termination Techniques" hyperlink under "Policy Finder Results List") (last visited Oct. 8, 2008). The use of this term "highlights the ability of language to alter public perception and change public policy. This ambiguous and misleading term, which has been used to describe a number of distinct procedures . . . has significantly shaped public debate, federal legislation and media coverage." T. A. Weitz et al., *"Medical" and "Surgical" Abortion: Rethinking the Modifiers*, 69 CONTRACEPTION 77, 78 (2004).

52 *Stenberg*, 530 U.S. at 921 (emphasis added) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973)).

Although *Gonzales*, as Part II suggests, calls into question this interpretation of reproductive rights, some commentators and lower courts understand the cases before *Gonzales* to protect broad reproductive choice, which potentially encompasses decisions regarding many forms of advanced reproductive technologies.[53] Even assuming that the reproductive cases protect procreative liberty or the right to choose reproductive options, many questions remain as to the reach of such a right. Most of the reproductive cases have dealt with state efforts to limit contraception or abortion. At a minimum, this suggests the Court has recognized a right *not* to procreate.[54] But does such a right encompass the right *to* procreate? And if it does, what constitutes procreation under this theory? Does it encompass any action that brings about a child, whether "naturally" or through technological means like IVF? Does it include actions that influence the health or traits of the child, such as prenatal testing, PIGD, or genetic modification? I now turn to these questions as played out with respect to each technology.

1. IVF

Although less controversial than many of the advanced reproductive technologies I examine in this Article, IVF pushes us to consider the reach of procreative liberty or reproductive autonomy. IVF has become fairly commonplace, but nevertheless some criticize it for altering the natural process of reproduction and separating sex from procreation.[55] IVF, they claim, makes reproduction more like manufacture and lessens the special significance of sexual reproduction.[56] In addition, some studies have suggested it might pose health risks to children born of the procedure.[57] Given these concerns, legislatures

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53 *See infra* notes 58–62 and accompanying text.

54 At least in the sense of gestational procreation, one commentator rightly points out that commentators and courts "are not at all clear on what exactly this right means." Cohen, *supra* note 36, at 1139. He argues that many understand it as a "monolithic" right, rather than as "a bundle of rights having multiple possible sticks" including "a right not to be a gestational parent, a right not to be a genetic parent, and a right not to be a legal parent." *Id.* at 1139–40. As I suggest below, whether there is in fact a right not to procreate in the genetic sense is more tenuous than the right not to procreate gestationally. *See infra* text accompanying notes 83–84, 97–99; *see also* Cohen, *supra* note 36, at 1138 ("[W]hile the Fourteenth Amendment's Due Process Clause and the Supreme Court jurisprudence interpreting it unquestionably protect a fundamental right not to be a *gestational* parent, they do not compel recognizing a fundamental right not to be a *genetic* parent.").

55 *See* Carl H. Coleman, *Assisted Reproductive Technologies and the Constitution*, 30 FORDHAM URB. L.J. 57, 58 (2003).

56 *See id.*

57 *See, e.g.*, Jacob Farhi & Benjamin Fisch, *Risk of Major Congenital Malformations Asso-*

might ban IVF, proclaiming their interests in protecting potential life as well the sanctity of sexual reproduction. Because IVF allows individuals to procreate with technological assistance, constitutional challenges to such state action force us to consider whether there is an affirmative right *to* procreate and to do so noncoitally.

John Robertson, well known for his theory of procreative liberty, has argued that such liberty includes both the right *not* to procreate and the right *to* procreate in most circumstances since such decisions are central to "matters so fundamentally affecting a person as the decision whether to bear or beget a child."[58] The only federal court to address this issue directly[59] interprets *Roe* similarly, declaring that "within the cluster of constitutionally protected choices . . . must be . . . the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy . . . ."[60] Under this theory, the state cannot interfere directly with efforts to prevent procreation or to as-

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ciated with Infertility and Its Treatment by Extent of Iatrogenic Intervention, 4 PEDIATRIC ENDOCRINOLOGY REVIEWS 352, 355–56 (2007); Ian Sample, *IVF Embryos Found to Carry Higher Than Expected Genetic Defects*, GUARDIAN, Oct. 19, 2005, *available at* http://www.mindfully.org/Health/2005/IVF-Embryos-Defects19oct05.htm; *see also* Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1642–45 (2008) (describing the risks associated with IVF).

58 JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 35, 36–37 (1994) (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

59 Two lower courts addressed the constitutionality of laws restricting access to assisted reproductive technology, but because prison regulations were at issue, the rulings are not informative in establishing whether non-prisoners have constitutional rights to access such technologies. *See* Goodwin v. Turner, 908 F.2d 1395, 1400 (8th Cir. 1990) (ruling that a prison's policy prohibiting assisted reproductive technology was not unconstitutional because it was "reasonably related to furthering the legitimate penological interest of treating all inmates equally, to the extent possible"); Percy v. State, 651 A.2d 1044, 1047 (N.J. Super. Ct. App. Div. 1995) (assuming prisoners have a fundamental right to procreate, but upholding a prison regulation prohibiting assisted reproductive technology because of concerns about security, limited resources, and equal protection).

60 Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990). A concurring judge reasoned similarly in *Forbes v. Napolitano*, 236 F.3d 1009 (9th Cir. 2000) (Sneed, J., concurring). *Id.* at 1014 ("Experimentation on aborted fetal tissue may foster the development of reproductive technology that is related to reproductive decisions. Government restrictions on reproductive decisions are only justifiable given compelling state interests," and none of the state's asserted interests justified its prohibitions).

Similarly, Ann Massie notes that Justice Stewart, when ruling in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), that the school boards' requirements for maternity leave were impermissible burdens on "freedom of personal choice in matters affecting marriage and family life," linked the pregnancy choice of the teachers to the rights described in *Eisenstadt*. Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's* Children of Choice, 52 WASH. & LEE L. REV. 135, 151 (1995) (citing *LaFleur*, 414 U.S. at 639). "Justice Stewart's reference was arguably significant for the fact that he cited contraception cases (dealing with the right *not* to procreate) to imply support for an expansive *positive* constitutional concept of procreative liberty." *Id.*

sist procreation without a narrowly tailored state interest, and thus *Roe* and its progeny stand for the constitutional right to IVF.[61]

The claim that procreative liberty includes the right to IVF presumes that procreation includes any method of becoming pregnant, whether through "natural" coital means, or with technological assistance. As Robertson suggests, "if bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally."[62] Such a presumption, however, is not explicitly grounded in any Supreme Court jurisprudence.[63] For example, the *Skinner* Court, which described marriage and procreation as among "the basic civil rights of man" and "fundamental to the very existence and survival of the race,"[64] contemplated coital procreation in the context of marriage at a time when IVF was not only an impossibility, but barely even a concept.[65] Similarly, the highly individualistic language of *Eisenstadt* and *Casey* arose in the context of preventing a pregnancy through contraception and abortion, respectively, and thus cannot be assumed to apply to any and all reproductive decisions.

There are further reasons to be skeptical about such an expansive understanding of procreative liberty. As Professor Rao has suggested, although constitutional jurisprudence supports a negative right to avoid procreation, it may provide only "sketchy support" for the right *to* reproduce.[66] In her view, the lineage of reproductive cases are indeterminate and may be read in contrary ways to support a constitutional right to privacy of the person (protecting bodily integrity), privacy of parenting, and privacy of procreation.[67] Indeed, the Court

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61 A law that prohibited IVF "would no doubt be found unconstitutional because it [would] directly impede[ ] the efforts of infertile married couples to have offspring, thus interfering with their fundamental right to procreate." ROBERTSON, *supra* note 58, at 100.

62 *Id.* at 39.

63 *See* Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1475 (1995); *cf.* Cohen, *supra* note 36, at 1141 (challenging the tendency in "American constitutional jurisprudence . . . to treat the right to be and not to be a gestational parent . . . as conjoined").

64 Skinner v. Oklahoma, 361 U.S. 535, 541 (1942).

65 *See* DAAR, *supra* note 1, at 35–36.

66 Rao, *supra* note 63, at 1475; *see also* Coleman, *supra* note 55, at 61; Massie, *supra* note 60, at 148 (suggesting that the Court's "clearest jurisprudence in this area concerns the right *not* to procreate"); Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987, 989 (2002) (describing Supreme Court jurisprudence as leaving "a great deal of ambiguity" and lacking "much coherence" in the context of analyzing whether the right to clone constitutes a fundamental right).

67 Rao, *supra* note 63, at 1484–89, 1493; *see* Massie, *supra* note 60, at 159–60 (finding that the Court's privacy cases implicate values other than the "value of self-fulfillment or self-definition," and include values of "respect for an individual's bodily integrity or as social concerns

in *Casey*, conceded such indeterminacy, noting that "*Roe* stands at an intersection of two lines of decisions," those that recognize "the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child," and as "a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."[68] In short, the Court itself is not fully sure whether it carved out a liberty interest grounded principally in bodily integrity, procreative rights, or relational interests.

Moreover, although one might argue procreative decisions involve the "most intimate and personal choices a person may make in a lifetime,"[69] and are therefore protected under the Constitution, the "intimate" and "personal" nature of reproduction alone cannot be sufficient for finding such rights.[70] In numerous instances the Court has refused to recognize constitutional protection of decisions that seem intimate and personal, such as physician-assisted suicide,[71] decisions to live together,[72] and, for some time, homosexual sodomy.[73]

In addition, the Supreme Court has noted repeatedly that the interest in procreative autonomy is not unlimited.[74] Indeed, the Court

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related to the privacy of marital intimacy and the integrity of the family unit"); Sunstein, *supra* note 66, at 989 (asserting that the Court's fundamental rights jurisprudence could be read to establish "a presumptive right to noninterference with decisions that are highly personal and intimate"); *see also* Coleman, *supra* note 55, at 66 ("Yet, it is not unthinkable that the Court would extend the right to procreate to at least some forms of [assisted reproductive technologies], particularly those that enable married couples to reproduce using their own gametes. Language about procreation in the Court's prior decisions have emphasized the importance of decisions about having and raising children, not the relationship between reproduction and sexual intimacy."); Dana Ziker, *Appropriate Aims: Setting Boundaries for Reprogenetic Technology*, 2002 DUKE L. & TECH. REV. 0011, 3 ("The right to procreate does not extend limitlessly to cover any procreative activity. Instead, the right to procreate should be carefully limited in scope to protect procreative activities that further the most important interest at stake, the parental interest of child rearing.").

68 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (plurality opinion); *see also id.* at 915 (Stevens, J., concurring in part and dissenting in part) (describing one aspect of the "woman's constitutional interest in liberty" as "a right to bodily integrity, a right to control one's person"); *id.* at 926 (Blackmun, J., concurring in part and dissenting in part) ("The Court today reaffirms the long recognized rights of privacy and *bodily integrity*." (emphasis added)).

69 *Id.* at 851 (plurality opinion).

70 Sunstein, *supra* note 66, at 992–93.

71 Washington v. Glucksberg, 521 U.S. 702, 734–35 (1997).

72 Village of Belle Terre v. Boraas, 416 U.S. 1, 2, 7 (1974).

73 Bowers v. Hardwick, 478 U.S. 186, 191 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

74 *Roe* and *Casey*, for example, allow the state to prohibit abortions after viability based

infamously upheld involuntary sterilization laws in *Buck v. Bell*[75] during the eugenic era on the grounds that it furthered the well-being of the public and the very individuals (described as "imbeciles") targeted by the law.[76] Although most view this case as a dark moment in reproductive jurisprudence,[77] the Supreme Court has never actually overturned the decision. Indeed, *Roe v. Wade*, the case most associated with reproductive rights, cites to *Buck v. Bell* for the proposition that such rights are not unlimited.[78] It therefore remains uncertain whether one has a right *to* procreate, especially through technological means.

2. Disposition of Embryos

Even more likely than banning IVF outright is the possibility of state efforts to control the disposition of embryos. A state might assert its interest in the potentiality of life by prohibiting, as Louisiana has done, the destruction of surplus embryos[79] or by amending state constitutions, as some state initiatives aim to do, to bestow personhood status on "any human from the time of fertilization."[80] Or it might require that excess embryos be donated to (or, to use the inflammatory rhetoric, "adopted by") infertile couples.[81] This kind of state action tests the scope of one's right *not* to procreate. In other words, does the right to use contraception or have an abortion imply that one has the right to destroy unwanted embryos?

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on the state's interest in the potential life. *See Casey*, 505 U.S. at 869–70; Roe v. Wade, 410 U.S. 113, 163–64 (1973).

75 Buck v. Bell, 274 U.S. 200 (1927).

76 *Id.* at 207–08 ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . [S]o far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.").

77 *See, e.g.*, Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 862–64 (2004); *see also* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 30–32 (1985) (describing criticism of *Buck v. Bell*).

78 Roe v. Wade, 410 U.S. 113, 154 (1973). *But see infra* note 159.

79 LA. REV. STAT. ANN. § 9:129 (West 2000) ("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.").

80 *See supra* note 8.

81 For example, the Snowflakes Frozen Embryo Adoption Program, run by Nightlight Christian Adoptions, aims to help "some of the more than 400,000 frozen embryos realize their ultimate purpose—life—while sharing the hope of a child with an infertile couple." Snowflakes Embryo Adoption Program, http://www.nightlight.org/snowflakeadoption.htm (last visited June 9, 2008).

In this context, the technological distinction between coital and noncoital reproduction is particularly significant. Whereas coital reproduction results in an embryo that resides and will develop in the woman's body, IVF creates extra-corporeal embryos.[82] This literal disembodiment of reproduction has important theoretical consequences. The state's interest in the potential life of the embryo does not conflict with the woman's privacy of person in the way that the state's interest in the potential life of the fetus in a woman's womb does. Moreover, when the state prevents a woman from using contraception or having an abortion, the state impinges on the full spectrum of reproductive decisions: whether to be a genetic parent, whether to be pregnant, whether to bear a child, whether to rear a child, and whether to be a legal parent.[83] When the state prevents the destruction of embryos or requires their donation to other couples, it impinges only on the interests in avoiding genetic parentage.[84] Thus, these laws push us to examine whether procreative liberty includes the right to make decisions solely about genetic parentage.

The Supreme Court has never expressed a view on this issue.[85] Thus, any constitutional right to limit such state intervention depends upon a broad theory of procreative liberty and choice that includes the right to control genetic parentage. Under Robertson's conception of procreative liberty, this interest is protected because he understands procreative liberty as the "freedom to reproduce or not to reproduce in a genetic sense . . . ."[86]

Some state courts have reasoned along these lines in resolving disputes between divorcing spouses over the disposition of unused embryos they created for IVF. The Tennessee Supreme Court in *Davis v. Davis*,[87] one of the first courts to address such a dispute, rejected

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82 *See supra* note 1.

83 *See* Cohen, *supra* note 36, at 1139–43 (urging courts and commentators to unbundle the right not to procreate into its separate components: the right not to be a genetic parent, the right not to be a gestational parent, and the right not to be a legal parent).

84 Of course, if the state required a woman to implant embryos she wanted to discard, the state would interfere with decisions about pregnancy, bearing, and rearing a child.

85 Indeed, as John Robertson concedes, the "constitutionality of laws that prevent the discard or destruction of IVF embryos is independent of the right to abortion established in *Roe* . . . and upheld in . . . *Casey* . . . . Under *Roe-Casey* the state would be free to treat external embryos as persons or give as much protection to their potential life as it chooses, as long as it did not trench on a woman's bodily integrity or other procreative rights." ROBERTSON, *supra* note 58, at 108.

86 *Id*. at 22–23.

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

the view that embryos[88] are either people or property.[89] It found that embryos "occupy an interim category that entitles them to special respect because of their potential for human life."[90] Thus, the essential dispute between the ex-wife who wanted the embryos donated and the ex-husband who wanted them destroyed was "whether the parties will become parents."[91] In short, it turned on the right of "procreational autonomy," which the court contended was "composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[92]

Noting that issues of the woman's bodily integrity were not at stake,[93] the court concluded that the man's interest in avoiding procreation by discarding the embryos and the woman's interest in procreating by donating the embryos to another couple were equivalent.[94] As the court noted, the reproductive interests concerned only "genetic parenthood," not "child-bearing and child-rearing aspects of parenthood" or "gestational parenthood."[95] Nevertheless, the court concluded that "an interest in avoiding genetic parenthood can be significant enough to trigger the protections afforded to all other aspects of parenthood."[96]

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88 The Tennessee Supreme Court noted that there was "much dispute at trial about whether the four- to eight-cell entities in this case should properly be referred to as 'embryos' or as 'preembryos' with resulting differences in legal analysis." *Id.* at 593. The court concluded that the distinction "is not dispositive in the case before us," yet referred to the cells at issue as "preembryos." *Id.* at 594, 595. This distinction is beyond the scope of this Article, and I will continue to use the term "embryos" for consistency.

89 *Id.* at 597.

90 *Id.*

91 *Id.* at 598.

92 *Id.* at 601.

93 *Id.* The court did note, however, that the IVF procedure is more taxing to women. *Id.*

94 *Id.* The court noted that the state interest, in this pre-*Casey* era, was not compelling in the first trimester and therefore was not compelling with respect to embryos, which had not even been implanted. *See id.* at 602.

95 *Id.* at 603.

96 *Id.* In trying to balance the equivalent procreative interests, the court ultimately came down on the side of the man's interest in not procreating. *Id.* at 604. To decide otherwise would "impose unwanted parenthood" on the man, whereas the woman still had other options to fulfill her interests in procreating. *Id.* at 603–04. The specifics of this case thus made the balance tip more clearly toward the ex-husband. *Id.* at 604. Whereas he argued he would be deeply burdened if he were forced to become a father genetically, the ex-wife did not want to use the embryos for herself, but instead to help another couple. *Id.* The court noted that the "case would be closer" if she wanted to use the embryos for herself and "if she could not achieve parenthood by any other reasonable means." *Id.* The court noted, however, that even if the woman could not undergo another round of IVF, "she could still achieve the child-rearing aspects of parenthood through adoption." *Id.* The court thus reasoned that "[o]rdinarily, the

Some commentators, however, are skeptical that the reproductive rights cases protect an interest in controlling just genetic parentage. Glenn Cohen, for example, interprets the contraception cases as simply protecting against "state interference with the *collective* decision of both parties to prevent procreation."[97] Under this view, they offer no guidance as to whether an individual has a constitutionally protected right to prevent genetic parentage through destruction of embryos. Further, in all of the abortion cases, Cohen notes, the Court emphasizes the gestational burdens on a woman in prohibiting abortion,[98] suggesting that this was crucial to the Court's protection of abortion rights. Because the reproductive rights cases deal with the full bundle of reproductive interests—gestational, genetic, and legal parentage—they offer at best limited support for the view that one has a constitutionally protected right to prevent genetic parentage through the destruction of embryos.[99]

3. Prenatal Testing

In contrast to IVF, prenatal testing raises a different set of reproductive interests. Whether we have a right to prenatal testing depends on whether procreative liberty encompasses the right to glean information about the fetus, which could influence decisions about whether to continue the pregnancy. In other words, do we have a right to end

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party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the [ ]embryos in question." *Id.*

97 Cohen, *supra* note 36, at 1152. He offers an alternative interpretation that the cases protect "a right to have sexual intercourse without the state conditioning that right on the individual having to risk becoming pregnant." *Id.* In isolation, this may be a plausible read. But in light of the jurisprudence in this area it seems less plausible than the other interpretation given that the Court has seemed more concerned with protecting reproductive decisionmaking than protecting the ability of individuals, particularly unmarried individuals, to engage in sexual intercourse. *Cf.* Carey v. Population Servs. Int'l, 431 U.S. 678, 703 (Powell, J., concurring in part and concurring in the judgment) ("[T]he extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions."). *But see* Cohen, *supra* note 36, at 1152 n.61 (providing support to the contrary).

98 Cohen, *supra* note 36, at 1158–59; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976) (holding a spousal consent provision unconstitutional and resolving a couple's conflict over an abortion decision in the woman's favor because "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two . . . .").

99 Cohen, *supra* note 36, at 1155 ("[N]othing in the *holdings* of the Supreme Court's abortion decisions themselves establish a right not to be a genetic parent."); *id.* at 1161 (concluding that "the holdings and language of the Court's abortion jurisprudence do not *compel* recognition of a right not to be a genetic parent"); *id.* at 1153 (We cannot necessarily conclude from these cases that they protect "a fundamental right when only genetic parenthood is at stake.").

a pregnancy or avoid procreation based on information regarding the fetus or embryo, and if so, does it encompass the right to obtain any information technologically possible about fetal or embryonic health or traits?

Again our answer depends on the way we understand the rights described in *Roe* and *Casey*. The only federal court to address this issue found that these interests could be protected by *Roe*.[100] It reasoned that "within the cluster of constitutionally protected choices . . . must be . . . the right to submit to a medical procedure to [obtain information about the fetus through prenatal testing,] which can then lead to a decision to abort."[101]

As a practical matter, as long as abortion is legal, states are unlikely to interfere with prenatal testing for disease, particularly given how entrenched it has become in prenatal care. Indeed, of the technologies that I have discussed, prenatal testing has one of the longest histories and has become a "routinized" part of prenatal care.[102] But as this technology evolves from testing for disease to testing for traits that are irrelevant to health,[103] legislatures may worry that this kind of "quality control"[104] commodifies reproduction and shifts our attitudes "from seeing a child as an unconditionally welcome gift to seeing him as a conditionally acceptable product."[105] A state might, therefore,

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100 *See* Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990).

101 *Id.*; *see also* Forbes v. Napolitano, 236 F.3d 1009, 1014 (9th Cir. 2000) (Sneed, J., concurring).

102 *See* Sonia M. Suter, *The Routinization of Prenatal Testing*, 28 AM. J.L. & MED. 233, 270 (2002) (arguing that "prenatal testing has become routinized as a result of the actions and attitudes of the legal community, the medical community and society at large").

103 Not only will it be technologically difficult to test for many traits, it is also conceptually difficult to make distinctions at the margins between trait and disease. *See id.* For example, testing for height could be deemed medical because certain genetic conditions such as achondroplasia (a bone growth disorder resulting in "disproportionate short stature . . . . caused by a gene alteration," National Genome Research Institute, Learning About Achondroplasia, http://www.genome.gov/19517823 (last visited June 9, 2008)) affect height, but it could also be deemed cosmetic, when parents hope to have taller children for social or aesthetic reasons. For my purposes, I am assuming that legislatures could draft legislation that distinguishes between medical and non-medical prenatal testing.

104 *See* BARBARA KATZ ROTHMAN, THE TENTATIVE PREGNANCY: HOW AMNIOCENTESIS CHANGES THE EXPERIENCE OF MOTHERHOOD 13 (2d ed. 1993).

105 THE PRESIDENT'S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS 37 (2003), *available at* http://bioethicsprint.bioethics.gov/reports/beyondtherapy/chapter2.html [hereinafter BEYOND THERAPY] (suggesting that such attitudes might feed the desire for better—and *still* better—children); *see also* GENETICS & PUB. POLICY CTR., PREIMPLANTATION GENETIC DIAGNOSIS: A DISCUSSION OF CHALLENGES, CONCERNS, AND PRELIMINARY POLICY OPTIONS RELATED TO THE GENETIC TESTING OF HUMAN EMBRYOS 6 (2006) (suggesting that PIGD may alter the "currently prevailing view of reproduction as a

assert its interest in preventing the commodification and quality control of reproduction by banning prenatal testing for non-medically relevant traits. This is not purely hypothetical. A statute in Illinois[106] and the Pennsylvania statute at issue in *Casey*[107] prohibit sex selective abortions. That aspect of the Pennsylvania statute was not challenged in *Casey*,[108] leaving open the question of its constitutional validity. Alternatively, legislatures might prevent individuals from obtaining certain prenatal information until after viability.[109]

Under a theory of procreative liberty, one might argue that selective abortions are subsumed within the general right to abortion. If individuals pursue prenatal testing with the goal of terminating pregnancies when the test results are unfavorable, then the interest in prenatal testing is linked to the right to abortion. John Robertson has suggested that as long as abortion is legal:

> [T]he reason or indication for the abortion is irrelevant—abortions may occur for strong or weak reasons, for major or for trivial genetic defects. Thus laws that banned abortion for sex selection purposes or for genetic reasons perceived as trivial would most likely be struck down if ever challenged. The woman is the final judge of the importance of the pregnancy to her.[110]

That a woman can terminate a pregnancy before viability for virtually any reason, however, does not necessarily bar the state from intervening to prevent her from *accessing* any information desired through any means.[111] Nevertheless, given that the *raison d'être* of

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mysterious process that results in the miraculous gift of a child" to a view of reproduction "more as the province of technology and children the end result of a series of meticulous, technology-driven choices").

106 720 ILL. COMP. STAT. ANN. 510/6-6(8) (West 2003).

107 18 PA. CONS. STAT. ANN. § 3204(c) (West 2000).

108 ROBERTSON, *supra* note 58, at 262 n.23.

109 In Canada, the Royal Commission on New Reproductive Technologies ("RCNRT") "affirmed the Society of Obstetricians and Gynaecologists of Canada's practice guideline against [prenatal diagnosis] for determination of sex. It further recommended that . . . information about fetal sex not be made available to patients prior to the third trimester." Angela M. Long, *Why Criminalizing Sex Selection Techniques Is Unjust: An Argument Challenging Conventional Wisdom*, 14 HEALTH L.J. 69, 79 (2006) (noting that the RCNRT "focused solely" on the prenatal diagnosis aspect of sex selection and not on the abortion aspect, probably "due to the strong abortion rights that women possess in Canada").

110 ROBERTSON, *supra* note 58, at 159. He argues similarly that "[n]o strong ethical argument exists for denying couples access to embryo biopsy as a diagnostic technique. . . . If discard of unwanted embryos is accepted, discard on the basis of genetic traits should also be acceptable." *Id.* at 156.

111 *See* Rao, *supra* note 26, at 1487 (suggesting that it would be constitutional to prohibit

prenatal testing is to obtain information, if the state banned prenatal testing for non-medically relevant traits,[112] such state action would raise First Amendment concerns. Although a series of Supreme Court cases has recognized a First Amendment right to receive information,[113] none has addressed precisely whether such a restriction of access to information would be infirm under the First Amendment.[114] In *Bigelow v. Virginia*,[115] the Supreme Court found that a newspaper

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prenatal testing to obtain information regarding the sex of the fetus, but arguing that "[t]he 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.").

112 *See supra* text accompanying notes 103–09.

113 *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'") (citation omitted); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *see also* C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW § 1.03, at 10 (3d ed. 2005); John R. Schaibley III, Note, *Sex Selection Abortion: A Constitutional Analysis of the Abortion Liberty and a Person's Right to Know*, 56 IND. L.J. 281, 283 (1981) (describing "[a] series of Supreme Court cases [recognizing] a First Amendment interest in the 'free flow of information'").

114 A few Supreme Court cases have addressed First Amendment issues in the context of abortion, but primarily in terms of the physician's First Amendment interests. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion) (rejecting the view that a state requirement that physicians provide patients with "information about the risks of abortion, and childbirth, in a manner mandated by the State" violates a physician's First Amendment rights because even though "the physician's First Amendment rights not to speak are implicated, . . . [it is] only as part of the practice of medicine, subject to reasonable licensing and regulation by the State" (citations omitted)); *id.* at 882 (overruling City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), and Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), "[t]o the extent [that they] find a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus . . ."); Rust v. Sullivan, 500 U.S. 173, 193 (1991) (concluding that federal regulations that prohibited projects receiving Title X funds from "providing counseling, referral, [or] . . . information regarding abortion as a method of family planning" did not "discriminate[ ] on the basis of viewpoint"; instead, the government had "merely chosen to fund one activity to the exclusion of the other"); Planned Parenthood of Minn. v. Rounds, 375 F. Supp. 2d 881, 887 (D.S.D. 2005) (issuing a preliminary injunction to prevent South Dakota's mandatory abortion disclosure law from going into effect because the requirement that physicians "enunciate the State's viewpoint on an unsettled medical, philosophical, theological, and scientific issue, that is, whether the fetus is a human being" is "unconstitutional compelled speech, rather than reasonable regulations of the medical profession"), *vacated*, No. 05–3043, 2008 U.S. App. LEXIS 13564 (8th Cir. June 27, 2008).

115 Bigelow v. Virginia, 421 U.S. 809 (1975).

editor's conviction for publishing an advertisement in Virginia about the availability of abortions in New York violated his First Amendment rights.[116] Although the publication was commercial, the Court noted that it "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"[117] Ultimately, however, the Court's primary concern was that the Commonwealth of Virginia was trying, "under the guise of exercising internal police powers, [to] bar a citizen of another State from disseminating information about an activity that is legal in that State."[118] Thus it did not address whether the women to whom the advertisement was directed had a First Amendment right to access information relevant to an abortion decision.[119]

Other cases have focused more specifically on individuals' First Amendment interests in receiving critically important information. In *Linmark Associates, Inc. v. Township of Willingboro*,[120] for example, the Court found unconstitutional a local ordinance that banned "For Sale" signs in front of residential homes.[121] The Court reasoned that the ban prevented "residents from obtaining . . . information . . . . of vital interest to [them] . . . bear[ing] on one of the most important decisions they have a right to make: where to live and raise their families."[122] One commentator reads this case as supporting the notion that "a sex selection abortion statute would [similarly] prevent women from obtaining information of interest to them, bearing on a most important decision they have a recognized right to make: whether to have an abortion."[123]

Of course, simply declaring that information is of vital interest to someone is not sufficient to assert successfully a "right to receive information" since such a right is not absolute.[124] In some states, for

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116 *Id.* at 811–13, 829.

117 *Id.* at 822.

118 *Id.* at 824–25.

119 Although "the advertisement related to activity [abortions] with which, at least in some respects, the State could not interfere. . . . [the Court did] 'not decide . . . the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.'" Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1976) (quoting *Bigelow*, 421 U.S. at 825).

120 Linmark Assocs., Inc. v. Twp. of Willingboro, 431 U.S. 85 (1977).

121 *Id.* at 86–87.

122 *Id.* at 96.

123 Schaibley, *supra* note 113, at 315.

124 DIENES ET AL., *supra* note 113, § 1.03, at 12 ("[T]he right to speak and publish does not carry with it the unrestrained right to gather information . . . . There are few restrictions on action which could not be elevated by ingenious argument in the garb of decreased data flow." (citation omitted)).

example, adoptees are generally prohibited from learning the identity of their biological parents.[125] First Amendment challenges of such bans have not succeeded, in spite of assertions that such information is of vital interest to those seeking the information.[126]

Moreover, the state may sometimes limit the flow of information it deems illegitimate.[127] In *Pittsburgh Press Co. v. Pittsburgh Commission of Human Relations*,[128] for example, the Court found that construing a city ordinance to prohibit newspapers from printing separate classified advertisements for men and women searching for jobs did not violate the press's First Amendment rights.[129] The illegality of sex discrimination in employment rendered "absent" any First Amendment interest the paper may have had in publishing advertisements.[130] Although this case dealt with commercial speech versus speech in the context of the doctor-patient relationship, it suggests that First Amendment challenges to restrictions on access to certain information about the fetus would turn, in part, on whether the disclosure or sharing of this information is illegitimate in some way. As I discuss in Part I.E, some forms of ART may be discriminatory. As a result, bans on access to information through those techniques might be legitimate under the First Amendment.

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125 *See* Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 250, 259–66 (1994) (describing state statutes sealing adoption records).

126 "Although recognizing that adoptees have a general right to privacy and to receive information, the courts have rejected the argument that adoptees have a fundamental right to learn the identities of their biological parents. The courts maintain that no constitutional or personal right is unconditional and absolute to the exclusion of the rights of all other individuals. The right to privacy and to information asserted by adoptees directly conflicts with the right to privacy of birth parents to be left alone. Due to these conflicting interests, the sealed records statutes are upheld because they bear a rational relationship to the permissible state objective of protecting the integrity of the adoption process." *Id.* at 268–69; *see In re* Roger B., 418 N.E.2d 751, 757 (Ill. 1981) ("Although the Constitution protects the right to receive information and ideas . . . , the [F]irst [A]mendment does not guarantee a constitutional right of special access to information not available to the public generally. . . . Just as we held that plaintiff's right to know his identity is not absolute, plaintiffs [sic] right to receive information cannot be considered at the exclusion of the right of the other concerned parties." (citations omitted)); *In re* Adoption of S.J.D., 641 N.W.2d 794, 803 (Iowa 2002) (holding that the right to information of adoptees is superseded by the right to privacy of the birth parents and hence the "sealing of adoption records [does not] violate free speech under the Federal or Iowa Constitutions").

127 *See* Schaibley, *supra* note 113, at 316 ("When the Court refers to the flow of truthful and *legitimate* information, it implies that there are limits on the right to listen and that the state has the authority to restrict the flow of some kinds of information.").

128 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

129 *Id.* at 377–78, 391.

130 *Id.* at 389.

If the state's goal in banning prenatal testing for non-medical traits is instead to protect the safety of the fetus from risks associated with the procedure,[131] such state action may seem theoretically legitimate under the First Amendment. Ultimately, however, such a defense is suspect if the state bans prenatal testing for only certain kinds of information since any risk to the fetus from prenatal testing does not depend on the nature of the information sought. In other words, the risk to the fetus is based on the procedure used to obtain the genetic samples, not the nature of the analysis of such samples. Consequently, one would have to conclude that the state was driven not by a desire to protect the fetus, but to prevent certain kinds of abortions.

If the state prohibits prenatal tests for non-medical traits with the goal of preventing trait-selective abortions, then the legitimacy of such state action depends on the strength of one's procreative liberty interest in being able to undergo such abortions.[132] *Lifchez v. Hartigan* may be right that prenatal testing to prevent disease is intimately connected to the kinds of concerns that might influence decisions about whether to have a child[133]—the demands of time, energy, and money that parenting entails can be intensified when a child has a serious illness.[134] As a result, state bans of prenatal tests to identify disease or state limits on a woman's access to medical information about the fetus would unlikely survive First Amendment challenges. But an interest in obtaining information about non-health related traits in the fetus is easily distinguishable from the interests in learning about the health of the fetus and thus may seem to go beyond the kinds of interests protected under *Roe* and *Casey*.[135] As a result, a state's concern about commodification and quality control of reproduction, or other social ramifications of trait selection, may seem legitimate to limit access to information about non-medical traits in the fetus. Ultimately, only the broadest interpretation of procreative liberty would protect the individual against state bans of trait-selective abortions and of prenatal tests for traits.

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131 Amniocentesis and CVS pose some real, albeit small, risks to the fetus. *See* Suter, *supra* note 102, at 235–36.

132 *See* Schaibley, *supra* note 113, at 317 ("By analogy, the government may prevent a woman from finding out the sex of her fetus if it has a similar legitimate state purpose.").

133 *See* Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990).

134 *See* Suter, *supra* note 2, at 925. *But see* Elizabeth Weil, *A Wrongful Birth*, N.Y. TIMES MAG., Mar. 12, 2006, at 52–53 (describing studies suggesting that raising children with disabilities is not significantly more difficult or different from raising children without disabilities).

135 *See* Schaibley, *supra* note 113, at 317 (describing the state interests in limiting access to sex selection).

4. PIGD

Even more likely than banning prenatal testing is state regulation or prohibition of PIGD to prevent the commodification of reproduction and to express the state's interest in potential life. The state could prohibit PIGD altogether, restrict the kind of information that an individual could obtain from PIGD, or prohibit the destruction of embryos on the basis of particular traits. Such state action would cut against the individual's interest in bringing about a life noncoitally and gathering information about the embryo to help decide whether or not to implant, destroy, or donate it. Just as with prenatal testing, one might have an interest in this information to select embryos based on the health of the future child or preferred traits.

Because the interests here combine the interests in IVF and prenatal testing, whether we have reproductive rights in decisions regarding PIGD turns largely on our interests in those technologies. If one has a constitutional right to destroy unwanted or excess embryos,[136] then one should have the corresponding right to destroy embryos for whatever reason, whether based on evidence of disease or undesired traits. But, again, we must distinguish the right to destroy embryos from the right to gather any information we seek about those embryos.[137] If procreative liberty does not include the right to obtain certain information about the fetus through prenatal testing,[138] then obtaining such information through PIGD cannot be included within that liberty interest either. Because PIGD does not implicate bodily integrity, it is even less likely we would have a fundamental procreative liberty interest in this technology. State action to regulate PIGD is thus even more likely to be constitutional than similar efforts to control the ability to test the fetus in utero because it need not be narrowly tailored to a compelling state interest.

5. Fetal or Embryonic Genetic Modification

Finally, we turn to genetic engineering, a technology that may one day allow us to make reproductive decisions of an altogether different nature—decisions about whether to modify the fetus or embryo genetically to eliminate disease, or to "enhance" or otherwise control certain traits.[139] Of all of the reproductive technologies examined, this

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136 *See supra* text accompanying notes 86–96.

137 *See supra* text accompanying note 111.

138 *See supra* text accompanying notes 111–35.

139 *See* Suter, *supra* note 2, at 932–34. It is worth noting, however, that parents might not necessarily always want to enhance traits. For example, some individuals with achondroplasia,

one—especially if used to alter traits—is most likely to be regulated or prohibited by the state. Whatever concerns we may have that the previous technologies commodify reproduction, genetic engineering only intensifies those worries. Moreover, although genetic modification may ultimately prove valuable in treating disease, the potential physical risks of this technology[140] in its early stages may motivate legislatures either to prohibit its use or to regulate it heavily, especially when used to manipulate traits irrelevant to health. The individual's interest in genetic modifications pushes the boundaries of procreative autonomy even further. Here, the interest is not in being able to decide whether to reproduce because the fetus or embryo already exists. Instead, it is an interest in being able to control the *process* and *product* of reproduction.[141]

Only the most liberal conception of procreative autonomy would constitutionally protect fetal or embryonic genetic modification. One could argue that procreative liberty protects autonomous decision-making about any matters involving reproduction—a virtually unbounded conception. Professor John Robertson reads the reproductive rights cases as protecting "the freedom to decide whether or not to have offspring and to control the use of one's reproductive capacity."[142] Under his theory, procreative liberty would protect against state interference with many advanced reproductive technologies, such as IVF, "selection of offspring characteristics," and some forms of reproductive cloning.[143] Professor Jack Balkin has suggested that a libertarian interpretation of *Roe* may create a "generalized right to reproductive autonomy," which would protect one's

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see supra note 103, have expressed an interest in prenatal testing for achondroplasia with the goal of terminating pregnancies if the fetus does *not* have the gene for achondroplasia. *See* Ronald M. Green, *Parental Autonomy and the Obligation Not to Harm One's Child Genetically*, 25 J.L. MED. & ETHICS 5, 6 (1997).

140 *See* Thomas H. Maugh II, *Gene Therapy Experiments Put On Hold*, L.A. TIMES, Mar. 4, 2005, at A16 (describing three children who developed leukemia after participating in gene therapy trials to treat their genetic immunodeficiency disorder); Sheryl Gay Stolberg, *The Biotech Death of Jesse Gelsinger*, N.Y. TIMES MAG., Nov. 28, 1999, at 136 (describing the tragic death of a teenager who participated in a gene therapy trial).

141 There is a difference between decisions about whether to have a child and decisions as to how to have a child. *See* Lindsey A. Vacco, *Preimplantation Genetic Diagnosis: From Preventing Genetic Disease to Customizing Children: Can the Technology Be Regulated Based on the Parents' Intent?*, 49 ST. LOUIS U. L.J. 1181, 1220 (2005); *see also* Garrison, *supra* note 57, at 1627; Sunstein, *supra* note 66, at 993–94.

142 ROBERTSON, *supra* note 58, at 16.

143 *See* Suter, *supra* note 2, at 950 (summarizing Robertson's views).

right "to choose when and how to have offspring."[144] Ultimately, such a right would allow one to engage in a number of advanced reproductive technologies, including genetic engineering and cloning.[145]

But procreative liberty might be understood to encompass a narrower range of goals. Even someone with a robust vision of liberal procreative autonomy, like John Robertson, wants to set "outer limits" for procreative liberty so that it does not include "everything material to a decision to reproduce."[146] For example, he suggests that procreative liberty should:

> protect only actions designed to enable a couple to have normal, healthy offspring, whom they intend to rear. Actions that aim to produce offspring that are more than normal (enhancement), less than normal (Bladerunner), or replicas of other human genomes (cloning) would not fall within procreative liberty because they deviate too far from the experiences that make reproduction a valued experience.[147]

In short, procreative liberty need not be unlimited. Although we may not choose the same lines Roberston has chosen, lines can be drawn and distinctions made among the various reproductive interests. Each of the technologies we have addressed pushes our understanding of procreative interests a step further from those originally protected by Supreme Court jurisprudence. We can draw coherent lines between decisions concerning contraception and abortion, which implicate our interest in preventing procreation in its fullest sense—genetic parentage, gestation, childbearing, and child-rearing—and decisions that disaggregate reproduction, which implicate an interest in being able *to* procreate or to control genetic parentage. Further distinctions can be made as we move toward decisions about the kind of child we want to have, through prenatal selection, PIGD, or genetic modifications. And, of course, within this category, we might draw further lines to distinguish between reproductive decisions based on health concerns or those based on trait preferences. It is entirely possible, and even likely, for the reasons I discuss next, to imagine that

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144 Jack M. Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 856, 858 (2007).

145 *Id.*

146 *See* ROBERTSON, *supra* note 58, at 166–67.

147 *Id.* at 167. Robertson observes that this characterization might exclude noncoital reproduction, but dismisses that view because the goal of IVF and similar procedures is to "produce healthy, normal children for rearing, which is not the situation with enhancement, cloning, or diminishment interventions. It is this interest which gives the freedom to reproduce its value." *Id.*

the Court would find some or all of these distinctions material in limiting procreative liberty, *if* the Court would even interpret its decisions as actually protecting procreative liberty.

B. Nation's History and Tradition—An Assault on Autonomy-Based Reproductive Rights

Even if one reads the Supreme Court jurisprudence as supporting a theory of procreative liberty, recent decisions suggest the Court would be highly reluctant to interpret that liberty interest too broadly, particularly with respect to some new and advanced reproductive technologies. When *Roe* was decided, it upset the constitutional apple cart in many ways. Not only did it divide our nation over the issue of abortion, it also divided the legal community over the methodology for establishing fundamental rights. *Roe* has been roundly criticized for establishing a right to privacy—a term the Constitution never mentions—on the basis of substantive due process.[148] To many, this approach is boundless, opening the door to countless, undefined fundamental rights.[149] In *Washington v. Glucksberg*,[150] the Court revisited substantive due process analysis and pointedly limited its reach when it unanimously upheld state bans on physician-assisted suicide.[151]

Writing for the Court in *Glucksberg*, Chief Justice Rehnquist did not hide his frustration with the precedent that *Roe* had set. Indeed, his opinion is as much an admonition to the Court to be extremely circumspect in expanding the concept of substantive due process as it is an analysis of the problem of physician-assisted suicide.[152] Rehnquist quickly put to rest the view that substantive due process rights are grounded in autonomy and choice. The right to withdraw life-sustaining treatment that was inferred in *Cruzan v. Director, Missouri Department of Health*,[153] he explained, "was not simply deduced from

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148 *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935–36 (1973) (arguing that "[w]hat is frightening about *Roe* is that this super-protected right [of a woman's freedom to choose an abortion] is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure . . . .").

149 *See id.* at 937–39.

150 Washington v. Glucksberg, 521 U.S. 702 (1997).

151 *Id.* at 706; *see* Cohen, *supra* note 36, at 1165 (noting that "the days of expansively adding to what is protected by substantive due process rights, if not over, are substantially reigned in").

152 *See Glucksberg*, 521 U.S. at 720 (noting that the Court has "'always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended'" and urging the Court to "'exercise the utmost care whenever . . . asked to break new ground in this field . . . .'" (citation omitted)).

153 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

abstract concepts of personal autonomy."[154] Even *Casey*'s highly individualistic description of liberty interests involving the "most intimate and personal choices a person may make in a lifetime"[155] does not support expansive substantive due process.[156] As he stated, "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . and *Casey* did not suggest otherwise."[157] Instead, Rehnquist argued, the Court must look to this "Nation's history and tradition" to establish fundamental rights.[158]

If physician-assisted suicide is not part of our "Nation's history and tradition," it raises a question as to whether advanced reproductive technologies—such as IVF, prenatal testing, PIGD, or reproductive genetic modification—would be. Under Rehnquist's analysis, we could find a constitutional right *to* procreate that prohibits the state from involuntarily sterilizing its citizens because coital procreation, particularly in the context of marriage, is so clearly part of our well-established traditions.[159] One might argue, however, that it is more difficult to discern a right *to* procreate with advanced technologies like

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154 *Glucksberg*, 521 U.S. at 725.

155 *Id.* at 726 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

156 *Id.* at 726–28.

157 *Id.* at 727.

158 *Id.* at 720–21 (observing that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . ."). This approach is consistent with that of earlier rulings. *See* Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (plurality opinion) (insisting that substantive due process requires "not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (citations omitted)); Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (upholding a Georgia statute criminalizing sodomy because the prohibited behavior was not "'deeply rooted in this Nation's history and tradition'" (citation omitted)), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003); *see also* Cohen, *supra* note 36, at 1160 & n.92 (observing that "the Court has treated decisions that seem equally 'intimate' as not meriting heightened scrutiny").

Sunstein suggests that one could read these Supreme Court cases as having "issued a firm 'this far, and no more'" and as being "unwilling to recognize additional fundamental rights unless they find specific and extremely strong recognition in Anglo-American traditions." Sunstein, *supra* note 66, at 989.

159 Although *Buck v. Bell*, 274 U.S. 200 (1927), which upheld an involuntary sterilization law, has never been explicitly overruled and is even cited with approval in *Roe v. Wade*, 410 U.S. 113, 154, for the claim that the one does not have "an unlimited right to do with one's body as one pleases," *see supra* text accompanying notes 74–78, *Buck*'s holding is in direct opposition to a strong body of case law that expressly prevents the state from interfering with coital procreation.

IVF or a right to influence the outcome of procreation with technologies like prenatal testing, PIGD, and genetic modification because these technologies are so new and, in some cases, only experimental.[160] Given how recent many of these technologies are, they would seem to be outside our nation's history and tradition. As a result, a narrow historical approach to constitutional analysis would inevitably insulate bans of new technologies against constitutional challenges.

It is not clear, however, whether a majority of the Supreme Court would necessarily adhere to Rehnquist's historical understanding of substantive due process.[161] Moreover, as Cass Sunstein has argued, it is problematic to use traditions, "narrowly and specifically conceived, as the sole source of rights under the [D]ue [P]rocess [C]lause."[162] Although such an approach might theoretically cabin judicial activism, "there is no reason to think that traditions, understood at a level of great specificity, are systematically reliable . . . as to exclude a somewhat more reflective and critical judicial role."[163]

This is not to say, however, that it is not worth considering whether a putative constitutional right resembles, in kind, the rights "that have been sanctified by tradition."[164] Rather, a circumspect judge should consider how the alleged right fits into our traditions, as they have evolved over time.[165] All of this raises a question of our conception of tradition and whether we should adhere to a static notion of tradition or whether we should focus on a more fluid notion of tradition. As Justice Souter noted in his concurring opinion in *Glucksberg*:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that . . . it has represented the balance

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160 *Cf.* Cohen, *supra* note 36, at 1166 ("It seems unlikely that the right not to be a genetic parent, standing alone, can satisfy the historical prong analysis, since reproductive technologies, and the ability to make someone a genetic parent without imposing unwanted gestation, is a very recent development.").

161 First, the composition of the Court has changed; Chief Justice Rehnquist and Justice O'Connor, who signed on to his opinion in *Glucksberg*, are no longer on the Court. Moreover, it is not clear whether a majority of the Court in *Glucksberg* adhered to this "due process traditionalism." Sunstein, *supra* note 66, at 989–90 (noting that "Justice O'Connor's separate and narrower opinion places [the] status [of due process traditionalism] into doubt"). In addition, in the earlier opinion, *Michael H. v. Gerald D.*, 491 U.S. 110, 132 (1989), Justice O'Connor, writing a separate opinion, concurring in part, took issue with the Court's "imposition of a single mode of historical analysis." *Id.* at 132 (O'Connor, J., concurring in part).

162 Sunstein, *supra* note 66, at 991.

163 *Id.*

164 *Id.* at 991–92.

165 *See id.*

> which our [n]ation . . . has struck between . . . liberty and the demands of organized society. If the supplying of content to this [c]onstitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[166]

Souter's approach suggests a break with a rigid adherence to tradition defined statically and even a break with some traditions over time. Rather than focus narrowly on whether our traditions specifically include the use of advanced reproductive technologies (which they clearly do not), we might ask instead whether these technologies are consistent with efforts over time to control or influence reproduction. In other words, we could look for a continuity in our approaches toward reproduction, rather than limit our constitutional protections specifically to practices that were literally part of our history. This approach would cast a wider net of constitutional protection to at least some forms of advanced reproductive technologies given that, since time immemorial, humans have developed a range of imaginative approaches to influence reproduction, most notably to control the sex of the child.[167]

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166 Washington v. Glucksberg, 521 U.S. 702, 765–66 (1997) (Souter, J., concurring) (citation omitted).

167 The fascinating history of sex selection techniques and theories goes as far back as ancient times. Techniques for controlling the gender of the child included adjusting "the vigor with which one copulated" (of course greater vigor was thought to increase the chances of a male), controlling the timing of the male and female orgasm (if the man's was first, the child would be female; if the woman's was first, the child would be male; and if they were simultaneous, the child would be a hemaphrodite), dietary choices (for example, drinking wine and lion's blood and then copulating under a full moon were thought to yield a male child). *See* Owen D. Jones, *Sex Selection: Regulating Technology Enabling the Predetermination of a Child's Gender*, 6 HARV. J.L. & TECH. 1, 4–5 (1993). Many approaches over the years and across cultures were grounded in the theory that one side of the body was correlated with one gender and the other side with the other gender. *Id.* Consequently, sex selection techniques included having the woman lie on a particular side during intercourse, tying off one testicle just before intercourse, and breathing through a particular nostril at the point of orgasm. *Id.*

One might also emphasize historical efforts to protect the well-being of future children and argue that prenatal testing, or even PIGD—that aims to eliminate disease—reflects goals consis-

This history (often grounded more in folklore than science) is similar in spirit and intent to the use of IVF, prenatal testing, and even genetic modification since both ancient and modern techniques stem from a desire to control reproduction. Of course, fine distinctions could be made. Influencing the sex of an embryo at the moment of conception is not precisely the same as altering the genetic make-up of a created embryo or selecting for or against particular fetuses or embryos based on traits. Whether the use of these various advanced reproductive technologies could be constitutionally protected under the historical approach would therefore depend on how broadly the Court understood our history of trying to influence reproduction. If the Court should decide to treat our traditions, understood narrowly and statically, as the sole basis for establishing substantive due process rights, it would significantly limit efforts to expand procreative liberty rights to include most advanced reproductive technologies.

C. Privacy of Person and Bodily Integrity

Whereas procreative liberty writ large is harder to square with our nation's history and tradition, the privacy of person, i.e., the interest in bodily integrity, is deeply ensconced in our history and common law traditions.[168] The fact that the reproductive decisions that have occupied the Court—sterilization, abortion, and contraception—all directly implicate bodily integrity only reinforces this idea. Indeed, in these cases, the Court has expressed concern that prohibitions of contraception and abortion can impose unwanted physical burdens on individuals.[169] However, if we understand reproductive rights in terms

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tent with our history and tradition. But this kind of argument seems a stretch, particularly since the elimination of disease requires the elimination of the future child.

168 *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269–70 (1990) (inferring that a competent person has a constitutionally protected right to refuse lifesaving hydration and nutrition after demonstrating the long common law tradition of protecting bodily integrity through battery actions and the informed consent doctrine, now "firmly entrenched in American tort law"); Winston v. Lee, 470 U.S. 753, 753, 766 (1985) (holding that surgical removal of a bullet from a defendant's body was an unreasonable search violating the Fourth Amendment); Rochin v. California, 342 U.S. 165, 172–73 (1952) (holding that evidence obtained through the forceful use of a stomach pump violated the Due Process Clause); *see also* Cohen, *supra* note 36, at 1155–56; Massie, *supra* note 60, at 159–60.

169 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion) (The woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."); *see also* Massie, *supra* note 60, at 159 & nn.111–12 ("Both *Eisenstadt* and *Casey* struck down contraception restrictions partly on the basis that the state had no right to punish concededly illicit sexual conduct by imposing on the miscreant the

of bodily integrity interests, it limits the constitutional protections of many decisions regarding advanced reproductive technologies.

Because IVF and PIGD disembody reproduction, it is difficult to protect these technologies under such a theory of reproductive rights. This suggests that the state's power to prohibit IVF, control the disposition of embryos, or regulate PIGD may be great.[170] Under this theory, we have a right to procreate, but only in the sense of preventing state action from invading personal space. Thus, the right to procreate protects us from mandatory sterilization laws, but does not protect us from laws prohibiting IVF because they do not threaten bodily integrity.[171] Similarly, the right to contraception or an abortion, which can be premised on our interest in bodily integrity,[172] does not imply a right to control the disposition of extra-corporeal embryos because it does not implicate bodily integrity. Under this theory, then, the state interest in potential life could easily justify state action that prevents people from discarding unwanted embryos or, even possibly, that requires them to donate embryos to infertile couples. In the latter instance, as we saw in the Tennessee Supreme Court's decision in *Davis v. Davis*, the interests in preventing such state interventions are linked to an interest in avoiding forced genetic parentage, which is not tied to bodily integrity.[173] Without some broader notion of autonomy or procreative rights, one cannot find such state actions constitutionally problematic under the privacy of person approach.

One might say that prohibiting IVF implicates bodily integrity in one sense because the state is interfering with decisions regarding the use of one's body. But in order to reach that conclusion one must show that the right to be free of unwanted bodily intrusions implies a right to *access* bodily intrusions (the IVF procedure). In addressing end-of-life decisionmaking in *Glucksberg*, the Court, however, suggested there are important differences between preventing bodily intrusions and seeking them out.[174] The *Glucksberg* Court noted that its

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physical burdens of pregnancy and the birth of an unwanted child. *Roe v. Wade* and other abortion cases expressed similar concerns.").

170 If there is no fundamental right to access this technology, the state action need not be narrowly tailored to a compelling state interest. *Cf.* Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (holding that no fundamental right was at issue and therefore applying rational basis review).

171 Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. Rev. 1077, 1112 & n.204 (1998).

172 *See supra* text accompanying note 169.

173 *See supra* text accompanying notes 87–96.

174 *Glucksberg*, 521 U.S. at 722–23.

earlier decision in *Cruzan* assumed that the constitutional right to terminate life support was grounded in the common law interest in bodily integrity.[175] But the *Glucksberg* Court found no corresponding right to seek out assistance to bring about death through physician-assisted suicide.[176] In the former instance, the asserted interest is in preventing unwanted medical treatment—preventing a bodily intrusion—whereas, in the latter instance, the individual seeks to bring about death with a physician's assistance—requesting a bodily intrusion. Given the state's interest (among others) in protecting life, *Glucksberg* therefore ruled that the state could prohibit physician-assisted suicide.[177]

Under this view, the interest in IVF is more like the interest in physician-assisted suicide than the interest in terminating life support. With IVF and physician-assisted suicide, the individual seeks the assistance of another to achieve the end goal via medical procedures that constitute a kind of bodily intrusion.[178] In addition, the interest in both IVF and physician-assisted suicide is in being able to control processes that are deeply personal and self-defining, such as bringing a life into existence or "controlling the manner and timing of [one's] death,"[179] deciding "how, rather than whether" to die,[180] and "determining the character of the memories that will survive long after [one's] death."[181] In other words, these interests are linked almost entirely to the kinds of autonomy and self-defining concerns consistent with the broad theory of procreative liberty, but not bodily integrity. If reproductive rights are grounded primarily in bodily integrity concerns, it is difficult to see how these rights protect an interest in IVF.[182]

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175 *Id.* (explaining that "although *Cruzan* is often described as a 'right to die' case . . . we were, in fact, more precise: We assumed that the Constitution granted competent persons a 'constitutionally protected right to refuse life-saving hydration and nutrition.'" (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990))).

176 *Id.* at 728.

177 *Id.* at 728–35.

178 *See* Rao, *supra* note 171, at 1112 n.204 (IVF "does not involve the removal of anything from the body. On the contrary, techniques such as in vitro fertilization often entail affirmative invasions of the body in order to initiate conception, pregnancy, and childbirth.").

179 *Glucksberg*, 521 U.S. at 742 (Stevens, J., concurring).

180 *Id.* at 745.

181 *Id.* at 743.

182 One might argue that abortion is like physician-assisted suicide because it involves a medical procedure (a bodily intrusion) to achieve the end goal. But it is quite different from physician-assisted suicide in one important respect: like the withdrawal of life support, abortion involves the removal of something (the fetus) from one's body.

The parallel is not perfect. In refusing life-sustaining treatment, one is exercising an extension of the underlying right to refuse treatment, the right to decide that another does not invade

IVF, of course, is distinguishable from physician-assisted suicide in important ways. Whereas the state interest in preventing physician-assisted suicide is tied to its well-established interest in protecting life (moreover, an existing, not merely potential, life), no such state interest can justify the prohibition of IVF, which creates life. Instead, the state interest would have to be grounded in other concerns, such as the manner in which life is brought into existence and the effects IVF has on the reproductive process. This state interest is less weighty, less well established, and therefore less persuasive as a basis for state action. *Gonzales*, as we shall see later, however, suggests that this interest may have more traction today.[183]

Prenatal testing is also unlikely to be protected under a theory of bodily integrity because it involves seeking out bodily intrusions (amniocentesis or CVS), as opposed to trying to remove something that is a bodily intrusion. To the extent that prenatal testing implicates decisions to terminate a pregnancy selectively, however, bodily integrity issues are raised.[184] But again, we must distinguish between decisions to terminate a pregnancy, which are protected under this theory, from decisions to test the fetus to obtain information about it, which is not protected under this theory.[185] One might argue that because the information obtained from prenatal testing is so central to decisions to terminate a pregnancy, it indirectly implicates bodily integrity.[186] But that view stretches the idea of what is at stake under this theory. Privacy of person protects against the state's interference with our ability to prevent unwanted bodily intrusions, not our ability to gather information to decide what kinds of bodily intrusions we want to prevent.[187]

Fetal or embryonic gene transfer is even less likely to be protected by the bodily integrity theory of reproductive rights because it does not involve the removal of a bodily intrusion, nor does it provide information to make decisions about removing a bodily intrusion. Instead, it involves an affirmative decision to undergo bodily intrusive

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one's personal space. In the case of abortion, one is responding not to the imposition of another person but the imposition of a life created within. Nevertheless, the fetus is a presence that one can feel as intrusive as unwanted medical treatment.

183 *See infra* Part II.

184 *See* Rao, *supra* note 26, at 1485.

185 *See id.* at 1486–87.

186 *See id.* at 1486.

187 The First Amendment, however, might protect those interests. *See supra* text accompanying notes 113–32.

procedures to manipulate the fetus or embryo genetically,[188] i.e., genetic alteration of the fetus while in the womb or IVF procedures to create embryos that will be genetically modified. As a result, the interest in genetic modification, whether to cure disease or alter traits, would not be protected under the bodily integrity approach to reproductive rights.

D. Familial and Parental Privacy

A fourth way to understand the lineage of reproductive cases is in terms of familial and parental privacy rights.[189] Indeed, some of the earliest cases to articulate the right to privacy did so in the context of parental decisionmaking.[190] As the *Meyer* Court noted in recognizing the right of parents to control the education of their children, the liberty interest guaranteed under the Due Process Clause:

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[191]

Moreover, both *Roe* and *Casey* link the right to abortion to other "intimate and personal choices," such as those surrounding parenting.[192]

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188 There are many technological hurdles to overcome before these technologies would become feasible. *See* Suter, *supra* note 2, at 934 n.195.

189 *See* Massie, *supra* note 60, at 160; Rao, *supra* note 63, at 1493; Ziker, *supra* note 67, at 2 (noting that the interest in procreation is tied to the interest in parenthood).

190 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (reaffirming that substantive due process protects "the liberty of parents and guardians to direct the upbringing and education of children under their control" because "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the liberty interest protected by the Due Process Clause of the Fourteenth Amendment includes "not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children"); *see also* Wisconsin v. Yoder, 406 U.S 205 (1972) (relying, in part, on the liberty right of parents to direct the upbringing of their children when holding that Amish parents were not required to send their children to public school after eighth grade).

191 *Meyer*, 262 U.S. at 399.

192 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 926–27 (1992) (plurality opinion) (describing the right of privacy as protecting "against governmental intrusion in such intimate family matters as procreation, child-rearing, marriage, and contraceptive choice"); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (describing the right of privacy as having "some extension to activities relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education" (citations omitted)).

One could understand the right to prevent procreation through contraception and abortion as related to parental decisionmaking because these activities determine whether and when one will become a parent.

Whether a theory of family privacy protects advanced reproductive decisions from interference by the state depends on how these rights are understood. Family privacy is often expressed as a variant of liberal autonomy in the context of decisionmaking regarding the family. It sees the family as a locus of expression for the individual and thus protects an individual's decisions with respect to familial relations against state interference. Under this conception, parental privacy protects the right to determine one's experience of parenting and thus is an expansion of individual autonomy expressed in the context of intimate relationships.[193] As Radhika Rao states, it protects "the freedom to create and maintain intimate associations apart from the state."[194] This conception of privacy is individualistic in the sense that it gives the individual the power to enter or exit from these relationships, protecting individual choice as opposed to protecting the integrity of the relationships per se.

But family privacy can also be understood as a form of relational privacy, which protects the sanctity of the family by working to support the relationships that are constitutive of the family and by recognizing "a private realm of family life which the state cannot enter."[195] Relational family privacy is grounded in the notion that the family unit has integrity in and of itself, independent of the integrity of each of the members. It is also a form of "corporate governance" much

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193 Radhika Rao argues that "there is no general constitutional right to marry, to form a family, to procreate or not to procreate, to rear children, and to engage in sexual activity. Instead, the right to privacy secures the freedom to conduct intimate and consensual associations, while the rights of bodily integrity and equal protection work together to afford constitutional protection to particular acts involved in procreation." Rao, *supra* note 171, at 1113–14.

194 *Id.* at 1079. Rao would not describe her conception of privacy as individualistic since she sees it as tied to protecting intimate relationships from state interference. But it is nevertheless more individualistic than the alternative conception of family privacy described below, *infra* text accompanying note 195, because the focus is on individual decisions to exit or enter relationships, rather than on the relationships themselves. *See infra* note 202.

195 *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (invalidating as unconstitutional a zoning ordinance that prevented a woman from living with her grandchildren because "[a] host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter'"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." (citation omitted)).

like the state might grant to smaller forms of government. Decisions concerning, respectively, small government and family matters are shielded from state interference because the small government and family are presumed to have better access to local knowledge and a greater investment in the well-being of the entity vis-à-vis the state. A relational account of family privacy would not only generally shield family decisionmaking from state interference, but would also evaluate state action in terms of its effect on the integrity of the family, tending to uphold state actions that cultivate family relationships and to prohibit those that do not.[196]

Under either conception of family privacy, decisions to engage in IVF would likely receive constitutional protection. IVF may be considered a form of "creation and sustenance of a family," which the Court has recognized as entitled to constitutional protection from "unjustified interference by the State."[197] The more individualistic conception of family privacy would protect IVF decisions because such privacy:

> encompasses the right of consenting adults entwined in an intimate relationship to engage in discrete acts involved in procreation. Specifically, it allows parties who are entirely in agreement to conceive by means of sexual intercourse or with the assistance of technology, to carry the pregnancy to term, and to rear the resulting child, all free from government interference.[198]

A relational notion of family privacy would also protect such decisions because the family (in this case, the couple) is presumed to have better access to relevant knowledge about the propriety of such decisions and to be more invested than the state in the well-being of the family and its members. In other words, the state would grant the couple corporate governance over such matters of procreation.[199] A relational conception of family privacy would also consider whether

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196 One concern with this approach is the risk that family privacy can "insulate from scrutiny, and thereby ensure the continuation of, violence and oppression within families." Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 231 (2003). *See infra* text accompanying notes 219–20. A full response to this important critique is beyond the scope of this Article.

197 *See* Roberts v. United States Jaycees, 468 U.S. 609, 618–19 (1984).

198 Rao, *supra* note 171, at 1115.

199 This approach raises questions as to which relationships should be granted such constitutional protections. Clearly, the decisions by a married couple would be. One could also argue that other committed relationships may also warrant such protection even if not formally recognized by the state, though the development of such arguments is beyond the scope of this Article.

the state action would enhance or hinder the integrity of the family. Given that IVF results in the creation of family relationships, state prohibitions of IVF would seem in conflict with this view of family privacy.[200]

Less clear is whether familial privacy would prevent the state from requiring that unused embryos be donated or from prohibiting their destruction. Such state action would indirectly interfere with decisions about the creation of the family because it would discourage individuals from creating multiple embryos so they could implant more than one fertilized egg, thereby decreasing the chances of achieving a successful pregnancy.[201] Such prohibitions could thus be seen as interfering in "the privacy realm of the family,"[202] though only indirectly. As a result, it might violate family privacy understood individualistically by prohibiting individual choice within the family. Under an individualistic conception of privacy, such state action also seems problematic because it would prevent people from controlling genetic parentage and could force individuals to become genetic parents against their will. Nevertheless, this is not the same as forcing people to become parents in the full sense of the word, where they are not only genetically connected to someone, but also engaged in the process of rearing a child. This distinction raises questions about what parental decisions fall within the constitutionally protected realm of familial privacy,[203] or to put it differently, which parental decisions are central to the constitutionally recognized right to use contraception or to have an abortion. Are they interests in controlling genetic parentage, avoiding pregnancy, or deciding to become a parent in the sense of raising a child? Some have argued that the last interest—"the com-

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200 I want to be very careful, however, to emphasize that I am not suggesting that relational family privacy automatically supports state action that promotes life. In arguing that family privacy protects the integrity of relationships, I want to emphasize the need to privilege the relationships between existing members over relationships that *may* form. *See infra* text accompanying note 465.

201 *See* Carson Strong, *Too Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities*, 31 J.L. MED. & ETHICS 272, 279 (2003).

202 Rao suggests that the familial privacy interest only applies when there is agreement between the parties: "the right of relational privacy ends at the point when individuals within a protected relationship assert contradictory interests." Rao, *supra* note 171, at 1115. Thus, when the family is split over how to dispose of embryos, familial or parenting privacy interests no longer apply.

203 Such a family would not be of the sort that Rao believes the Constitution protects, since it would not be an "intimate and consensual relationship[ ]." *Id.* at 1078. Nevertheless, it would seem odd to understand family privacy to allow this sort of state imposition given the importance that many attach to genetic connectedness. *See supra* note 96; *infra* note 206 and accompanying text.

mitment to raise a child[—]embodies the most important interest at stake in the decision to procreate."[204] If that is so, then the interest in controlling just genetic parentage is on much less solid ground than decisions about parenting that also implicate bodily integrity and child rearing concerns, such as contraception or abortion.[205]

Using the lens of relational family privacy to evaluate state laws that require unused embryos to be donated or that prohibit their destruction also raises complicated issues. On first glance, such laws might seem consistent with this conception of family privacy because they would enable some infertile couples to create family relationships. But such laws also have the potential to disrupt the integrity of *existing* family units by creating genetic ties with children who will be raised by others. Of course, the effect is likely to vary considerably from family to family. But one can easily imagine how painful and difficult it might be for some families to know that a child genetically related to mom and dad is being raised by another family—a child that is and is not a family member.[206] Such state laws also prevent the family from making decisions about matters that seem particularly suited to familial determinations. As compared to the state, the family would have far greater understanding of and care more deeply about the implications to the family of creating biological connections outside the family. For this reason, such state interference with regard to the disposition of embryos is problematic.

One might argue that decisions concerning prenatal testing, PIGD, and genetic modification, whether for health or cosmetic reasons, are within the realm of familial privacy under both theories of

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204 *See* Ziker, *supra* note 67, at 2.

205 *See supra* note 99.

206 While the concept of family depends on far more than pure genetic connection and sometimes exists even without it (in the case of adoption), genetic relatedness is nevertheless relationally significant. Genetic ties are among those that define us relationally and thus such ties are relevant to the family unit. Sonia M. Suter, Giving In to Baby Markets: Regulation Without Prohibition 6–8 (2008) (unpublished manuscript, on file with author). In a battle over the disposition of frozen embryos in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), the ex-husband wanted the embryos destroyed because he did not want a child to grow up without both parents. *Id.* at 604. He also opposed the donation of the embryos to another couple. *Id.* Although he did not want any more children, he also did not want a child genetically related to him to grow up without living with him. *Id.* If the embryos were donated, he believed he "would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it. He testified quite clearly that if these [ ]embryos were brought to term he would fight for custody of his child or children." *Id.* One could imagine as well that children may be bothered to know a genetic sibling exists but is not a part of their family. The concerns here, however, are not simply the effects on each of the individuals. These sources of distress could create problematic familial dynamics.

family privacy. They affect the autonomy of parents to determine who the family's members will be and what they will be like. But they are also decisions that depend on knowledge about what is best for the family unit—knowledge we would presume the family has much better access to than the state. When these technologies are used to prevent disease, the force of this argument is particularly great. Many parents pursue these technologies to prevent the suffering of their future child according to their vision of the child's best interest.[207] Of course, parents may also be motivated by concerns about the emotional, financial, and sheer physical difficulties of rearing a child with a handicap, not just for the parents, but also for the entire family—concerns that fall within the realm of familial privacy.[208] More controversial decisions to test for or manipulate particular traits may also be based on parental concerns for the well-being of the future child.[209] Parents may believe that certain traits give their child an advantage in their society or culture.[210] If we understand these decisions as parental efforts to influence their children's opportunities, they fall within the kinds of parenting decisions that the Court has protected from state interference.[211]

Although the "creation and sustenance" of the family includes the traditional methods of creating and sustaining a family, some believe that it should not include advanced technological means to determine the qualities and traits of our children. One commentator has suggested that we can distinguish "pre- and post-natal molding of offspring" based on "the distinction between nature and nurture."[212] She argues that because of "the powerful way genes impact identity," the former leaves a "much more permanent mark on offspring."[213] Given

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207 Ziker argues that because the "parental interest of child rearing should be at the forefront of any procreative liberty discussion," *see* Ziker, *supra* note 67, at 2, only a decision to screen "for traits that substantially alter the responsibilities associated with child rearing is most consistent with the interests protected by the right to procreate." *Id*. at 6. Under this framework, prenatal testing for Tay Sachs, a terribly debilitating and ultimately lethal disease, would be protected under procreative liberty whereas testing for late-onset genetic diseases, susceptibility traits, gender and other non-medical traits, and intentional diminishment of traits would not. *Id.* at 6–9.

208 *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

209 *See Suter*, *supra* note 2, at 934.

210 *See id.* at 934–37 (describing the cultural norms that push toward acceptance of nontherapeutic technologies and noting that nearly half of Americans polled in 1986 and 1992 approved of genetic enhancement to improve physical and intellectual traits).

211 *See supra* notes 190–92 and accompanying text.

212 Ziker, *supra* note 67, at 5.

213 *Id.*

how popular and compelling this notion is to many,[214] some judges might find it persuasive. Consequently, as our capacity to influence the traits of our children increases, it would not be surprising if the Court were to prevent the scope of familial privacy from encompassing these new realms of parenting decisions,[215] particularly if the Court wants to limit the expansion of substantive due process rights.

Such an approach, however, may not be consistent with the Court's prior rulings on family privacy. Many of the parental decisions that are constitutionally protected under family privacy—such as decisions about education—can have enduring influences on a child's development just as genetic alterations might.[216] Some worry that there is something particularly troubling about parental motivations to enhance traits genetically, presuming that parents will view the child solely in terms of her capacity to fulfill the underlying expectations and hopes that drove the parents to pursue such genetic engineering.[217] But, as I have argued before, parental motivations are complex and we cannot presume any one parental motivation based solely on the choice to engage in genetic engineering.[218] Moreover, the very same problematic parental motivations that people worry will be present with genetic enhancement can exist with respect to "postnatal molding." Parents may push their children in education, sports, the arts, or other activities to such an extreme that they damage their child's self-esteem.[219]

A necessary presumption underlying family privacy is that parents will make parental and familial decisions based on the well-being of the children and the family as a whole and that they are better situated than the state to do so. Of course, the family unit sometimes breaks down and the parents cannot or will not act in the best interests of the child or the family, in which case, the state must intervene. But to the extent that concerns about genetic molding are grounded in worries about sinister parenting, the issue has less to do with prenatal

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214 *See infra* note 216.

215 This argument is different from the argument I make below, *see infra* Part II.A.2., about state interests. Here I am suggesting that the Court might not even treat these interests as within the privacy interests of parents and family, whereas below I argue that even if they are privacy interests, they are not absolute and can be impinged by powerful enough state interests.

216 As I have argued previously, many people too readily and erroneously believe genes are more powerful influences on identity than other factors. *See* Sonia M. Suter, *The Allure and Peril of Genetics Exceptionalism: Do We Need Special Genetics Legislation?*, 79 WASH. U. L.Q. 669, 674 (2001).

217 *See supra* note 105 and accompanying text.

218 Suter, *supra* note 2, at 964–65.

219 *See id.* at 963–65.

decisions than with the breakdown of the family. Thus, deciding whether parents or the state should make parental decisions depends less on whether the decisions concern prenatal or postnatal molding and more on whether we have sufficient faith that parents will generally act in the best interests of the child and family.

Nevertheless, even if decisions to use many of these reproductive technologies fall within family privacy, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[220] As a result, states might ban certain reproductive technologies to protect the child's interests. This justification is least likely to succeed with respect to prenatal testing for disease, given the widespread view that this technology protects the well-being of the future child. Of course, this claim depends on the belief that nonexistence would be better than existence with the disease selected against. Determining whether prenatal testing and selection actually promotes the best interests of the future children is extremely difficult.[221]

Efforts to ban IVF, PIGD or genetic alterations on these grounds may be more successful if there is justifiable concern for the health risks to future children.[222] At this point, gene transfer in adults and children has proven not only difficult, but also risky.[223] Thus, the state would have a powerful justification for prohibiting genetic modification of the fetus or embryo.[224] The risks of genetically manipulating the fetus or embryo are likely to be substantial enough to allow the

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220 Prince v. Massachusetts, 321 U.S. 158, 166, 167 (1944) (affirming a parent's conviction under child labor laws for engaging her child in state preaching and recognizing that "to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control" in various ways such as controlling school attendance, regulating child labor, etc.).

221 *See* Suter, *supra* note 2, at 967 & n.321. As a general matter, Robertson is not persuaded that concerns about the children who result from assisted reproductive technologies are sufficient to overcome procreative liberty. *See, e.g.*, ROBERTSON, *supra* note 58, at 153 ("The risk of harmful effects does not undercut the presumptive importance of [trait] selection as part of reproductive choice, even if analysis of particular cases shows sufficient harm to justify limiting the right to select."). Massie takes issue with the claim that *all* children born with conditions or traits we could test for are necessarily better off than not having been born. *See* Massie, *supra* note 60, at 167. And she quotes approvingly Bonnie Steinbock, who argues that it "seems simply false" to say that "every life . . . no matter how filled with physical suffering, is necessarily a good to the individual who lives it." Bonnie Steinbock, *The Logical Case for "Wrongful Life,"* HASTINGS CENTER REP., Apr. 1986, at 17.

222 *See supra* text accompanying note 57.

223 *See supra* note 140 and accompanying text.

224 *Cf.* REPORT AND RECOMMENDATIONS OF THE NAT'L BIOETHICS ADVISORY COMM'N, CLONING HUMAN BEINGS 107–08 (1997) (recommending a ban on cloning primarily because of concerns regarding the safety of the procedure).

state to ban this procedure, even if intended to treat serious medical conditions.

Less clear is whether state concerns for the psychological well-being of children born to parents who selected for or against certain traits or who had a trait genetically altered in their child would justify limiting parental privacy rights in this area. A common critique of such technologies is that they can harm the child psychologically or damage the parent-child relationship. Parents may have unrealistic expectations for children selected for certain traits. Even more, the desire to use these reproductive technologies might suggest a kind of perfectionistic, harmful attitude toward parenting, which views the child as a product or commodity, as something to be controlled, rather than as an individual to be cherished and valued in her own right.[225] These claims presume too much, however, and often caricature parental motivations as monolithic, instead of complicated and multivalanced.[226]

Even assuming parental motivations are potentially damaging to the future child, we must ask whether the harm of being born with these psychological risks is greater than the harm of not being born at all. As I noted earlier, making this determination is extremely difficult.[227] This conundrum makes the state interest less compelling with respect to regulating prenatal or PIGD trait selection. With fetal or embryonic gene transfer, however, these concerns take on more force because the state would be protecting the future child, not by preventing its existence, but by preventing a procedure it viewed as harmful to the child.

When one also considers the physical risks of such procedures, it seems that the state interest in protecting the welfare of the child could be sufficiently compelling to allow the state to prohibit genetic modifications intended to influence traits. Thus, although familial and parental privacy suggests there may be a right to IVF, to control the disposition of embryos, and arguably even prenatal testing and PIGD for disease, the constitutional basis for a right to trait selection or genetic alteration seems more suspect.

E. Equality Theory

Finally, I turn to an equality theory of reproductive rights, which covers different notions of equality: sex equality, equality among dif-

225 *See supra* note 105 and accompanying text.

226 *See* Suter, *supra* note 2, at 964–65.

227 *See supra* note 221 and accompanying text.

ferent races and socioeconomic groups, and equality between those with disabilities and those without. I shall explore all three notions of equality, with greatest attention to sex equality since this is the focus of most commentators. Balkin argues, for example, that the "best argument for the right to abortion is not that it follows from a more general right to privacy," but that "women's equality demands it."[228] Reva Siegel similarly advocates a sex equality approach to reproductive rights, which "views control over the timing of motherhood as crucial to the status and welfare of women, individually and as a class."[229] Cass Sunstein suggests that reproductive decisions should be singled out from the many other decisions central to individual autonomy (such as physician-assisted suicide) because issues of sexual equality are at stake.[230]

But an equality theory of reproductive rights can also address socioeconomic and racial inequality. *Skinner v. Oklahoma*,[231] one of the earliest reproductive rights cases, is consistent with such a theory of equality. As Rao claims, sterilization laws of the sort that were at issue in *Skinner* "are unconstitutional not simply because they invade the integrity of intimate relationships. Rather, such laws are unconstitutional because they violate the individual's right of bodily autonomy and endanger the equal protection rights of minorities by raising the threat of eugenics."[232]

Nevertheless, an equality theory—sexual or otherwise—did not emerge immediately in the context of abortion. It is difficult, for example, to read *Roe* in those terms. Even though an amicus brief challenged the abortion statute on sex equality grounds, the Supreme Court "never mention[ed] equal protection or . . . sex equality."[233] Instead, the Supreme Court decided *Roe* in terms of substantive due

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228 Balkin, *supra* note 144, at 851.

229 Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 818 (2007).

230 Sunstein, *supra* note 66, at 993–94.

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

232 Rao, *supra* note 171, at 1111 (not only advocating an equality approach, but reading equality concerns as driving the Court's protection of reproductive rights). Balkin similarly argues that *Skinner* can be read under the equality theory because it "limits . . . the state's control over reproduction or genetic technologies that single out groups for special disabilities or attempt to reduce them to a subordinate status." Balkin, *supra* note 144, at 862. *But see* LORI B. ANDREWS ET AL., GENETICS, ETHICS, LAW, AND POLICY 76 (2d ed. 2006) (observing how Justices Douglas and Stone "incorporate eugenic language and rationale" in their opinions).

233 *See* Siegel, *supra* note 229, at 825–26. Siegel suggests that political moves, such as rhetoric challenging the Equal Rights Amendment as "anti-family, anti-children, and pro-abortion," also worked to undermine an equality interpretation of *Roe*. *Id.* at 827 (citation omitted).

process.[234] Equality-based theories failed similarly in *Geduldig v. Aiello*,[235] where the Court ruled that a state disability insurance program that excluded benefits due to disability from pregnancy was not invidious discrimination under the Equal Protection Clause.[236] In short, although only women can become pregnant, pregnancy discrimination was not considered sex discrimination.[237]

But in spite of case law and political efforts to prevent sex equality theory from taking hold, commentators began to reintroduce the theory in debates about reproductive rights in the 1980s.[238] By the time the Court revisited the question of abortion in *Casey*, the theory had gained some traction.[239] In *Casey*, a majority of the Court emphasized the equality dimension of abortion rights. The joint opinion, written by Justices O'Connor, Kennedy, and Souter, with concurring and dissenting opinions by Justices Stevens and Blackmun, observed that the State is not "entitled to proscribe [abortion] in all instances . . . because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."[240] It reflected an awareness of the special impact that reproduction has on women:

> [A woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[241]

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234 *Id.* at 826. The Court severed "the connection between substantive rights and equal citizenship" and "obscured the relationship between women's reproductive liberty and their equality with men" by failing to address the substantive right of abortion in its social context. Balkin, *supra* note 144, at 850–51; *see also* Siegel, *supra* note 229, at 826 (observing that the "Fourteenth Amendment case law effaced equality as a basis for reproductive rights"). Balkin suggests that the Court's primary concern regarding equality was the effect that abortion restrictions might have on the poor. Balkin, *supra* note 144, at 854.

235 Geduldig v. Aiello, 417 U.S. 484 (1974).

236 *Id.* at 488–89, 497. The Court reasoned that discrimination on the basis of pregnancy did not discriminate against any definable group, including women. *Id.* at 496–97 ("There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.").

237 Siegel, *supra* note 229, at 826.

238 *Id.* at 828–29 (noting that among these commentators was Ruth Bader Ginsburg, who argued in favor of such a theory).

239 *Id.* at 828–31.

240 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (plurality opinion).

241 *Id.*

The majority further observed that the "ability of women to participate equally in the economic and social life of the [n]ation has been facilitated by their ability to control their reproductive lives."[242]

Although the *Casey* Court upheld a number of regulations regarding abortion—including an informed consent requirement,[243] a 24-hour waiting period,[244] a parental notification requirement,[245] and record keeping and reporting requirements[246]—the one regulation the Court did not uphold was the spousal notification requirement.[247] This requirement, it concluded, would impose a "substantial obstacle"[248] for women who fear physical and emotional abuse.[249] As Professor Siegel observes, the Court's undue burden analysis on this point was shaped by equality theory.[250] The Court voided the spousal notification requirement because it reflected "a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."[251]

Although the recently decided *Gonzales v. Carhart* does not adopt this equality approach, a vehement dissent by Justice Ginsburg, joined by Justices Breyer, Souter, and Stevens, and quoting heavily from *Casey*, explicitly relies on equality arguments.[252] As Ginsburg writes, women's "ability to realize their full potential . . . is intimately connected to 'their ability to control their reproductive lives.'"[253] Moreover, citing to the works of Reva Siegel and Sylvia Law, Ginsburg specifically equates the woman's autonomy rights with equal pro-

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242 *Id.* at 856; *see also id.* at 912 (Stevens, J., concurring in part and dissenting in part) (observing that the "societal costs of overruling *Roe* . . . would be enormous" because "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women"); *id.* at 928 (Blackmun, J., concurring in part and dissenting in part) ("Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life.").

243 *Id.* at 883 (plurality opinion).

244 *Id.* at 886–87.

245 *Id.* at 889–90.

246 *Id.* at 900–01.

247 *Id.* at 898.

248 *Id.* at 895.

249 *Id.* at 892–98. Although this group of women may comprise only one percent of women seeking abortions, the Court emphasized that of the women whom the statute targeted—married women who do not want to inform their spouses—the fraction affected would in fact be large. *Id.* at 894–95.

250 Siegel, *supra* note 229, at 831.

251 *Id.* (quoting *Casey*, 505 U.S. at 898).

252 *See infra* notes 417–21 and accompanying text.

253 Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 856)

tection, stating "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[254]

Professor Balkin argues that the equality interpretation of reproductive rights is not only the right way to approach these issues generally,[255] but it takes on increasing importance as we face new reproductive technologies.[256] Whereas an autonomy-based, libertarian theory of reproductive rights would "insulate new reproductive technologies from regulation on the grounds that individuals should be free to have children by any means that science permits,"[257] an equality theory would free the state to regulate these technologies.[258] This is so, he reasons, because reproductive technologies like genetic enhancement or trait selection "do not necessarily promote equal status and equal citizenship."[259] Indeed, they may lead to many forms of inequity.[260]

Although Balkin is persuasive about the general distinctions between an individualistic, libertarian perspective of reproductive rights and an equality-based understanding, these distinctions are too roughly drawn. First, he overstates the power of the individualistic interpretation to protect all decisions regarding advanced reproductive technologies. As I suggested above, relevant lines can be drawn and distinctions made among the kinds of procreative liberties the Court has recognized.[261] Nevertheless, these lines are vulnerable to the pull of broad claims about intimate personal choices. It may thus be harder for the state to limit reproductive decisions under a theory of procreative autonomy than if we understand reproductive rights as protecting other interests such as bodily integrity or equality.

On the flip side, Balkin is too ready to conclude that equality theory cannot support constitutional protections of many advanced

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254 *Id.* (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1002–28 (1984)).

255 *See* Balkin, *supra* note 144, at 851.

256 *Id.* at 855.

257 *Id.* at 856.

258 *Id.* at 859.

259 *Id.*

260 *Id.* at 858–59. In fact, because many new technologies—such as stem cell research or cloning—may require the harvesting of eggs from women, Balkin argues that they may actually undermine women's equality by creating pressure on women, especially the most disadvantaged, to provide those eggs. *Id.* at 859.

261 *See supra* Part I.A.

reproductive technologies. As I will discuss below, an equality theory can justify the constitutional protection of some advanced reproductive decisions such as the use of IVF and some forms of prenatal testing and PIGD, in particular, those aimed at testing for disease. Moreover, even some forms of trait selection might be defended under an equality theory.

1. IVF

Let us begin first with the equality theory of reproductive rights as applied to IVF. The sex equality theory emphasizes that the social effects of reproduction are as important as its physical aspects.[262] It is thus concerned with women's ability to control whether and when to become parents because this ability affects all aspects of women's lives: health, sex, relationships, education, job opportunities, parenting roles, societal roles, and roles in the workplace.[263] As women have delayed childbearing, infertility has increased.[264] Although IVF is less successful as women age, for many women it may be one of their only options for having a biologically related child. To prevent women from accessing this technology would undercut an important element of control over the timing of reproduction that is central to sexual equality.

The ability to control the disposition of embryos created through IVF is also connected to the ability to control one's reproductive life, but less directly, making the equality analysis more uncertain. Because laws prohibiting the discard of embryos or requiring them to be donated to other couples do not impose pregnancy or child-rearing obligations upon women, such state action does not have the same physical, social, and economic effects on women as laws prohibiting contraception or abortion. Although these laws do limit women's ability to control genetic parenthood, this limitation does not affect women unequally vis-à-vis men; such laws limit both men's and women's ability to control genetic parenthood.

On the other hand, the process of IVF is far more burdensome for women than men.[265] They must endure the physical discomfort or perhaps even long-term risks associated with intensive hormonal treatment, whereas men experience no discomfort or long-term effects

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262 Siegel, *supra* note 229, at 817.

263 *See id.* at 817–22.

264 *See* DAAR, *supra* note 1, at 13, 16 (citing NAT'L CTR. FOR HEALTH STATISTICS, NATIONAL SURVEY OF FAMILY GROWTH (1995), www.cdc.gov/nchs/data/series/sr_23).

265 *See* Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

from participating in IVF.[266] As a result, one could argue that the greater physical hardships for women give them a stronger interest than men in making decisions surrounding IVF, including those concerning the disposition of embryos and controlling genetic parentage.[267] Such an argument, however, is not as strongly grounded in the kinds of concerns that drive the equality analysis and may therefore be difficult to sustain against a state's asserted interest in protecting life by banning the destruction of embryos or requiring their donation. One can buttress this argument, however, by pointing out that preventing individuals from controlling the disposition of extra embryos would dissuade many women and couples from fertilizing more than one embryo at a time, greatly reducing their chances of success.[268] To the extent that this prevents women, albeit indirectly, from being able to control the timing of reproduction, the equality argument is more powerful.

2. Testing for and Treating Disease

Sex equality theory, however, might more successfully protect the right to undergo prenatal testing and PIGD, at least when done with the purpose of preventing disease.[269] One might even argue for a right to fetal or embryonic genetic modification under this theory.[270] The job of parenting, historically and even today, has not been shared equally by men and women. There is thus good reason to think that the birth of a child with a serious illness would impact the day-to-day life of women more than men, with all of the attendant effects on education, employment, social roles, etc. that those factors imply. If equality theory supports women's rights to decide whether and when to become a parent based on the impact parenting has on all aspects of a woman's life, then it should also support the right to determine whether a fetus or embryo is likely to suffer from an illness that could make parenting especially challenging.

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266 *See id.*

267 *But see id.* (concluding, after explaining that IVF is far more burdensome for women than men, that the genetic procreative interests of the man and woman are equal).

268 *See supra* text accompanying note 201.

269 Of course, in the context of prenatal testing and PIGD, the prevention of disease occurs by preventing the birth of someone who has a disease. Gene transfer would involve true treatment of disease, if it could be done successfully. *See* Suter, *supra* note 2, at 933 ("Gene transfer may also open the door to positive eugenics, where the focus would be on *improving* births rather than preventing undesirable births.").

270 Even if one establishes a right to genetic modification, the state interest in protecting the well-being of the future child might be sufficiently compelling if evidence suggests that gene transfer is too risky. *See supra* note 140 and accompanying text.

If both IVF and the ability to determine the health of a fetus through prenatal testing can be protected under an equality theory, then it would follow that PIGD should also be protected under this theory, including the decision not to implant embryos shown to be at an increased risk of disease or disability. It is less certain, however, as discussed above, whether one would have the constitutional right to destroy such embryos or prevent their donation to other couples, since this does not directly impose the kinds of burdens that equality analysis addresses.[271]

Although prenatal testing and PIGD might protect the equality of women vis-à-vis men, the disability critique offers a different kind of equality argument *against* constitutional protections of these technologies, especially prenatal testing and PIGD. This critique argues that the availability and use of such technologies promotes an attitude that the "normal" or appropriate response to identifying a defect in the fetus or embryo is to prevent the existence of the future child through abortion or embryo discard.[272] For many, this expresses the view that "[i]t is better not to exist than to have a disability"; that the birth of someone with a disability was a "mistake."[273] In short, it may suggest that people with disabilities are less valuable than, or unequal to, the rest of society. Whether or not prenatal testing actually or clearly expresses such attitudes is a source of debate.[274] Nevertheless, we should worry that this technology focuses more on preventing the birth of people with disabilities, than on working to address the social factors that make disabilities true disabilities.[275] In this sense, prenatal testing and PIGD undermine equality between those with disabilities and those without.

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271 *See supra* text accompanying notes 264–65.

272 *See, e.g.*, Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, *in* PRENATAL TESTING AND DISABILITY RIGHTS 147–48 (Erik Parens & Adrienne Asch eds., 2000).

273 *Id.* at 160 (citation omitted); *see also* Adrienne Asch, *Why I Haven't Changed My Mind About Prenatal Diagnosis: Reflections and Refinements*, *in* PRENATAL TESTING AND DISABILITY RIGHTS, *supra* note 272, at 240 ("People with just the disabilities that can now be diagnosed have struggled against an inhospitable, often unwelcoming, discriminatory, and cruel society to fashion lives of richness, of social relationships, or economic productivity. . . . [Prenatal testing and abortion] invalidate[ ] the effort to lead a life in an inhospitable world.").

274 *See* Deborah Hellman, *What Makes Genetic Discrimination Exceptional?*, 29 AM. J.L. & MED. 77, 110–11 (2003) (describing the different views on this point).

275 *See* Tom Shakespeare, *Choices and Rights: Eugenics, Genetics and Disability Equality*, 13 DISABILITY & SOC'Y 665, 669 (1998) (noting the argument that "social barriers . . . create disability, and that the difficulties of living as a disabled person are due to discrimination and prejudice, rather than impairment").

Prenatal testing and PIGD therefore present a dilemma if we want to understand reproductive rights in terms of equality. If this theory focuses narrowly on *sexual* equality, then it supports protecting the ability to access these technologies, at least for the purpose of identifying disease and disability.[276] But if we are concerned about broader equality implications, the disability critique raises some important issues that undermine constitutional protections of these technologies.

3. Trait Selection and Genetic Modification

Balkin is probably right that an equality-based theory of reproductive rights would not generally encompass decisions to select against fetuses or embryos based on traits that do not affect health, or decisions to modify traits genetically. If a woman chooses to have a child and accepts all that motherhood brings with it, then it is difficult to argue that she or other women similarly situated are disadvantaged economically, educationally, socially, or physically by the inability to have a child with the chosen traits. The social impact surrounding pregnancy, childbirth, and child rearing is not based on particular non-health related traits, but on the physical and social demands of parenting generally. Disability in a child may increase such demands,[277] but it is hard to see how mere traits would do so as well.[278]

Sex selection against females, however, demonstrates the complexity of the equality analysis. In one sense, this reproductive decision clearly threatens equality between the sexes, demonstrating an attitude about the relative value of males and females.[279] But if one considers the social context in which some people choose to select against female children, the problem becomes more complicated. In communities that devalue women and pressure families to have sons,

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276 For the purposes of this Article, I do not explore precisely how this line should be drawn or how severe the disease must be in order for the equality theory to apply. These are not simple issues and would have to be developed much more fully under this approach.

277 *See supra* note 133–34 and accompanying text; *see also* text accompanying notes 269–70.

278 *See* Ziker, *supra* note 67, at 8 ("In general, no non-medical trait presents a convincing argument for substantially affecting child rearing responsibilities. . . . Avoiding severe diseases constitutes a compelling objective for reprogenetics. Pursuit of the perfect baby through non-therapeutic genetic enhancement does not.").

279 Of course, the degree of inequality depends on the motivations for sex selection. In some cases, the decisions may be motivated by a strong sense of the inferiority of females. *See* Long, *supra* note 109, at 72–73. In other cases, the decisions may be based on beliefs that special bonds can be formed between mother and daughter or between father and son. *See* Vacco, *supra* note 141, at 1197. Although these ideas might be grounded in stereotypes about the sexes, they are not degrading in the way that beliefs about females' inferiority to males are.

women can be at risk for ostracization or even abuse if they bear a daughter.[280] In such cases, women clearly bear a much greater burden than men if they are unable to prevent the birth of a daughter.[281] These potential effects on women bring to mind some of the concerns that influenced the *Casey* Court's determination that the spousal notification law posed an undue burden on women.[282] Just as the risks of spousal abuse from spousal notification requirements were an undue burden to many women so might laws preventing sex selection be.[283]

A common response to this argument is that the solution to these underlying discriminatory views is not to allow sex selective abortions or the discard of embryos with two X chromosomes, but rather to work toward changing the social norms and attitudes that pressure people to undergo sex selection.[284] The same argument, however, could be made with respect to the defense of contraception and abortion. The reason that pregnancy, childbirth, and child-rearing pose unequal burdens on women is largely because of social attitudes about the role of women in society and in the family. We might try to change these attitudes, but they are entrenched in our world in subtle and complex ways. Accordingly, reproductive rights afford women the opportunity to deal with these inequities in part but clearly cannot solve all inequity.[285] Thus, if social context matters in defending rights to abortion, it should also matter in assessing whether similar rights should exist for reproductive decisions like sex selection.

This argument is unlikely, however, to apply to all manner of trait selection or genetic enhancement. Having a child with unwanted traits would not generally impose the same imbalance of hardship on women that sex selection might. Selecting against homosexuality might be more analogous to the sex selection scenario, given the still

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280 *See* Long, *supra* note 109, at 74; Sonia M. Suter, *Sex Selection, Nondirectiveness, and Equality*, 3 U. CHI. L. ROUNDTABLE 473, 477 (1996).

281 *See* Long, *supra* note 109, at 74; Suter, *supra* note 280, at 477.

282 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 892–98 (1992); *see also supra* notes 247–51 and accompanying text.

283 Probably, however, the fraction of women affected would not be as great. The *Casey* Court suggested that of the women who did not want to notify their husbands, a large fraction would not want to do so for fear of physical or psychological abuse. *Casey*, 505 U.S. at 894–95. Although it is an empirical question whether the number of women who seek out sex selection for fear of abuse or social ostracization is similarly large, it is likely to be a smaller percentage than that of women fearing psychological abuse in *Casey*, given that many individuals use sex selection to balance gender within a family. *See* Rob Stein, *A Boy for You, a Girl for Me: Technology Allows Choice*, WASH. POST, Dec. 14, 2004, at A01. In other words, for many, the motivation may not be due to fears of ostracization but rather stereotypes about gender.

284 *See* Long, *supra* note 109, at 75–76; Suter, *supra* note 280, at 486.

285 Balkin, *supra* note 144, at 853.

prevalent and unfortunate discriminatory views against homosexuality. Even here, however, women are unlikely to be more burdened by such social discrimination than men.

Finally, if the equality-based theory of reproductive rights focuses not just on sexual equality but takes a broader view of equality, this approach supports arguments against a constitutional right to prenatal genetic alterations because of the ways in which it would further social inequities. Such technologies may be available only to the most privileged, allowing them to select or enhance offspring according to traits that enhance social and economic opportunities.[286] As these technologies become more widespread, presumably the prevalence of undesirable traits would decline, particularly among the more advantaged, "further exacerbat[ing] negative associations with such traits and . . . inequities"[287] and promoting prejudicial attitudes that cut against equality.[288] The state could thus regulate trait selection or enhancement under either a sexual equality or more broad equality theory.

II. Gonzales v. Carhart

Having explored a range of approaches to understanding reproductive rights, I now turn to *Gonzales v. Carhart*,[289] the latest word from the Supreme Court on this issue. In *Gonzales*, the Court revisited the question raised in *Stenberg v. Carhart*[290]: whether the government may prohibit a form of late-term abortion, called partial-birth abortion,[291] especially when the law provides no health exception.[292]

In 2000, in an opinion written by Justice Breyer, and joined by Justices Stevens, O'Connor, Souter, and Ginsburg, the *Stenberg* Court overturned a Nebraska statute that banned partial-birth abortion on two grounds.[293] First, the statute lacked any health exception.[294] Sec-

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286 *See* Balkin, *supra* note 144, at 858; Suter, *supra* note 2, at 959 ("Those with the greatest advantages in society (and often with the traits most widely favored) will often have greater resources and therefore greater access to technologies that allow them to select against certain traits or disease or to enhance certain traits.").

287 Suter, *supra* note 2, at 959.

288 *Id.* at 958–59.

289 *See* Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

290 Stenberg v. Carhart, 530 U.S. 914 (2000). The challenged statute was one of roughly thirty state bans, reflecting the widespread public support for such bans. *See, e.g.*, Melinda Henneberger, *Why Pro-Choice Is a Bad Choice for Democrats*, N.Y. TIMES, June 22, 2007, at A21 (Polls show that "an overwhelming majority of Americans . . . support a ban.").

291 *See supra* text accompanying note 51 (describing the partial-birth abortion procedure).

292 *See Gonzales*, 127 S. Ct. at 1619, 1637–38.

293 *Stenberg*, 530 U.S. at 930. Justices Kennedy, *id.* at 956 (Kennedy, J., dissenting), Scalia, *id.* at 953 (Scalia, J., dissenting), Thomas, *id.* at 980 (Thomas, J., dissenting), and Chief Justice

ond, because the statute could be read as also banning another more common late-term abortion called D&E,[295] physicians might fear "prosecution, conviction and imprisonment" if they performed D&Es, which unduly burdened the right to choose a D&E and abortion itself.[296]

Three years later, the United States Congress virtually thumbed its nose at the *Stenberg* decision by drafting a statute virtually identical to the Nebraska partial-birth abortion ban.[297] Most notably, Congress left out a health exception.[298] Although the *Stenberg* Court found "substantial medical authority" to support the view that a ban of partial-birth abortion would endanger women's health,[299] Congress found, based on "substantial record evidence," that the partial-birth abortion procedure "is *never necessary* to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care."[300] Congress thus found no need for a health exception.[301] This finding was remarkable given that numerous and

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Rehnquist, *id.* at 952 (Rehnquist, C.J., dissenting), each wrote dissenting opinions, some of which foreshadowed the opinion in *Gonzales*.

294 *Stenberg*, 530 U.S. at 930.

295 This second-trimester abortion procedure, known as "dilation and evacuation" involves dilating the woman's cervix and then removing the fetus in parts. *See id.* at 924–25; *see also Gonzales*, 127 S. Ct. at 1620.

296 *Stenberg*, 530 U.S. at 945–46 (describing the statute as "an undue burden upon a woman's right to make an abortion decision").

297 The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. IV 2000) ("Partial-Birth Abortion Ban Act"). The only notable difference between the Partial-Birth Abortion Ban Act and the Nebraska statute was the definition of a partial-birth abortion. *See Gonzales*, 127 S. Ct. at 1629–30. To address the *Stenberg* Court's concerns that the Nebraska statute was too vague and could be read to apply to the more common D&E procedure, Congress tightened the definition of a partial-birth abortion. *See id.* (describing the difference in definitions between the Nebraska statute and the Partial-Birth Abortion Ban Act).

298 *See Gonzales*, 127 S. Ct. at 1637.

299 *Stenberg*, 530 U.S. at 937–38. Although the Court recognized a division of opinion among medical experts as to whether the partial-birth abortion procedure is ever necessary or safer than the more common D&E procedure, it reasoned that the presumption should be in favor of those who argue that the procedure is medically necessary, and thus ruled that a medical exception was required. *Id.* at 937 ("Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that D&X ["dilation and extraction"] is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.")

300 Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(13), 117 Stat. 1201 (emphasis added).

301 *Id.* § 2(1) (noting that a "moral, medical, and ethical consensus exists that the practice

highly respected medical groups have continually asserted otherwise.[302]

With a change in the composition of the court since *Stenberg*—most significantly, the departure of Justice O'Connor—the Supreme Court upheld the congressional Partial-Birth Abortion Ban Act in *Gonzales*.[303] In Section A, I argue that in spite of claims that it preserved the fundamental holdings of *Casey* and *Roe*, *Gonzales* actually undercuts their fundamental holdings in important ways and all but overturns *Stenberg*.[304] By justifying on a weak basis the ban of one abortion procedure—even before viability and with no health exception—the Court seriously weakens the undue burden test. As a result, it limits the scope of constitutionally protected reproductive decision-making in general and challenges the kind of self-defining procreative liberty that some find in *Casey* and *Roe*. Moreover, despite a dissent grounded almost entirely on sexual equality theory,[305] the majority's paternalistic efforts to protect women against uninformed abortion decisions undermines an equality-based conception of reproductive rights as well.

In addition, *Gonzales* broadens the range of state interests that can justify limiting reproductive choices to include protecting community sensibilities. The Court's willingness to draw sharp lines between procedures on the grounds of vague and unbounded concerns about "coarsen[ing] society"[306] represents a novel lens through which to analyze reproductive rights—what I call the lens of "repugnance." In Section B, I suggest that this lens allows for fairly comprehensive limitation of reproductive rights. As a result, it provides the state with ammunition to prohibit or regulate many advanced reproductive tech-

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of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is *never medically necessary* and should be prohibited" (emphasis added)). These findings not only conflicted with those of the *Stenberg* Court, *Stenberg*, 530 U.S. at 937–38, but they were also quite different from those of the lower courts that addressed the issue, *see, e.g.*, Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1122–25 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914 (2000).

Congress made a point of noting that it was "not bound to accept the same factual findings that the Supreme Court was bound to accept in *Stenberg* under the 'clearly erroneous' standard. Rather, the United States Congress is entitled to reach its own factual findings—findings that the Supreme Court accords great deference—and to enact legislation based upon these findings . . . ." Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(8), 117 Stat. 1201.

302 *See infra* notes 329–30 and accompanying text.

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

304 *See id.* at 1641 (Ginsburg, J., dissenting) (describing the Court's decision as "alarming" and asserting that it "refuses to take *Casey* and *Stenberg* seriously").

305 *See, e.g.*, *id.* at 1648–49.

306 *Id.* at 1633 (majority opinion).

nologies, many of which could, under this theory, be distinguished from "ordinary" reproductive technologies, particularly where moral or religious concerns exist. Finally in Section C, I offer some brief words about the ways in which both *Casey* and *Gonzales* go too far in opposite directions. *Casey* emphasizes procreative autonomy at the expense of relational concerns, and *Gonzales* emphasizes certain relational and community interests at the expense of individual concerns and some intimate relationships. Together, they demonstrate just how difficult it is to find a language of constitutional rights that adequately considers both interests.

A. Interpreting Reproductive Rights Through the Lens of "Repugnance"

Let me begin with the ways in which *Gonzales* undermines the liberty interests articulated in *Casey*. Although Justice Kennedy notes the three main holdings of *Casey*—(1) a woman has the right to choose an abortion without undue interference before viability; (2) the State has the power to restrict abortions after viability, provided there is a health exception; and (3) "the State has legitimate interests from the outset of pregnancy in protecting the health of the woman and the life of the fetus . . . ."[307]—the opinion never actually reaffirms the first two principles. Instead, Justice Kennedy merely states that those "holdings are implicated" in *Gonzales* and "*assume[s]* . . . for the purposes of th[e] opinion" that the State may not prohibit abortions or impose an undue burden on the right to an abortion before fetal viability.[308] Kennedy notes that "[w]hatever one's views concerning . . . *Casey*," finding the Partial-Birth Abortion Ban Act unconstitutional would repudiate "a premise central" to *Casey*—the government's "legitimate and substantial interest in preserving and promoting fetal life."[309] At best, the opinion reluctantly accepts *Casey*. At worst, it is an attempt to strengthen the Court's weighting of the state's interest in potential human life, which may one day uphold a ban of previable abortions.

1. Lack of Health Exception

More significant than these hedging words are Kennedy's ultimately unpersuasive attempts to justify the Court's conclusion that the

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307 *Id.* at 1626 (citation and quotation omitted).

308 *Id.* (emphasis added).

309 *Id.*

lack of a health exception is not an undue burden,[310] i.e., that "its purpose or effect" does not place a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[311] First, Kennedy finds support for Congress's decision not to have a health exception, even though he questions the accuracy of Congress's finding that there is medical consensus that the procedure is never necessary.[312] Kennedy recognizes that two district courts concluded that partial-birth abortion is sometimes the safest procedure,[313] and that even the most skeptical lower court found that a "significant body of medical opinion" believes it is sometimes safest.[314] Yet he rejects the *Stenberg* Court's interpretation of this division of medical opinion.[315] The *Stenberg* Court suggested that "the division of medical opinion . . . at most means uncertainty, a factor that signals the presence of risk, not its absence," and that there is "a significant likelihood that those who believe that D&X is a safer abortion method in certain circumstances may turn out to be right."[316] Kennedy, in contrast, asserts that the medical uncertainty "provides a sufficient basis to conclude" that, facially, "the Act does not impose an undue burden."[317]

What is most notable about Kennedy's opinion is the dramatic shift the Court makes in its deference (or in this case, lack thereof) to the medical profession. Although Kennedy does not "place dispositive weight on Congress's findings,"[318] he "gives short shrift to the records before" the Court,[319] and leaves the final determination to

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310 For the purposes of this Article, I leave aside the stronger of Kennedy's arguments, that the new and more explicit definition of partial-birth abortion is not unduly vague. *See id.* at 1627–29. Whether he is ultimately right that the statute survives the vagueness test is beyond the scope of this Article.

311 *Id.* at 1632 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)).

312 *Id.* at 1636–38.

313 *Id.* at 1636 (noting that the District Courts for the District of Nebraska and the Northern District of California so concluded). In fact, the District Court for the Northern District of California found that "the majority of highly-qualified experts on the subject believe intact D&E [partial-birth abortion] to be the safest, most appropriate procedure under certain circumstances." Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1034 (N.D. Cal. 2004), *aff'd*, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 127 S. Ct. 1610 (2007); *see also Gonzales*, 127 S. Ct. at 1646 (Ginsburg, J., dissenting) (quoting *Planned Parenthood Fed'n of Am.*, 320 F. Supp. 2d at 1034).

314 *Gonzales*, 127 S. Ct. at 1636 (quoting Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 480 (S.D.N.Y. 2004) (noting that the District Court for the Southern District of New York was "more skeptical of the purported health benefits of" the partial-birth abortion)).

315 *Gonzales*, 127 S. Ct. at 1638.

316 Stenberg v. Carhart, 530 U.S. 914, 937 (2000).

317 *Gonzales*, 127 S. Ct. at 1637.

318 *Id.*

319 *Id.* at 1646 (Ginsburg, J., dissenting).

Congress, emphasizing its "wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[320] Kennedy's easy acceptance of Congress's actions here is all the more striking when one considers that this was the first ever congressional ban on an abortion procedure.[321]

Kennedy's opinion highlights the fact that the debate over the lack of a health exception is as much about deciding who should have authority to limit or restrict abortions—the legislature or the medical community—as it is about the propriety of certain abortion techniques. In other words, in resolving the facial challenge to the lack of a health exception, the Court had to determine whether Congress or the medical profession had the decisionmaking authority to prevent or allow abortions. By requiring a health exception in earlier opinions, the Court essentially gave physicians the authority to determine, based on their medical judgment, when abortions could occur after the point of viability. As evidenced in *Stenberg*, this delegation of authority was premised on deference to the medical profession and faith that its determinations would be purely medical, as opposed to political.[322]

Kennedy's opinion reflects deep disappointment in the medical profession. He seems to believe physicians have abused their delegated decisionmaking authority, using it more for political ends than based on medical expertise. He writes with unmasked contempt of "abortion doctors,"[323] who want "unfettered choice in the course of their medical practice"[324] and who promote the procedure for its "mere convenience"[325] or because they simply "prefer" it,[326] rather than because they primarily want to protect women's health.[327] One senses that he believes physicians have not kept up their end of the

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320 *Id.* at 1636 (majority opinion); *see also id.* ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.").

321 Communications with Eve C. Gartner, Deputy Director, Public Policy Litigation and Law Department of Planned Parenthood (Nov. 7, 2007).

322 *See* Stenberg v. Carhart, 530 U.S. 914, 937 (2000); *see also* George J. Annas, *The Supreme Court and Abortion Rights*, 356 NEW ENG. J. MED. 2201, 2201–02, 2206 (2007) (describing the Court's deference to medical judgment with respect to abortions).

323 *See Gonzales*, 127 S. Ct. at 1650 (Ginsburg, J., dissenting) (noting that "[t]hroughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label 'abortion doctor'" and "the reasoned medical judgments of highly trained doctors are dismissed as 'preferences' motivated by 'mere convenience'").

324 *See id.* at 1636 (majority opinion).

325 *See id.* at 1638.

326 *See id.* at 1633.

327 *See id.* at 1637.

bargain reached in *Casey*, which was to allow previable abortions as long as the medical profession worked hard to protect fetal life after the point of viability by only allowing abortions in the face of truly grave medical risks.

In part because of his frustration with the presumed politicization of the health exception, Kennedy fails to engage with the considerable evidence that, at a minimum, a *substantial* portion of the medical community believes the partial-birth procedure is sometimes medically necessary.[328] As Justice Ginsburg points out, he is unmoved by the fact that some of the most widely influential and respected professional groups, such as the American College of Obstetrics and Gynecologists ("ACOG"), find the procedure "necessary and proper in certain cases";[329] that "[n]o comparable medical groups supported the ban";[330] or indeed, that the experts who testified that the partial-birth abortion is never medically necessary had "slim authority for their opinions"—they had not performed the procedure, were not trained in performing it, and had only rarely performed any abortions.[331]

For Kennedy, the issue is less who got it right, but what scope of review to bring to the facial challenge.[332] Deeply skeptical that the medical profession has used the health exception in good faith, Justice Kennedy seems to believe instead that physicians have used the health exception as a proxy for promoting women's autonomy at the expense of fetal life. In contrast, the *Stenberg* Court worried more about the serious possibility that some women might suffer serious medical consequences—a concern of a substantial portion of the medical community.[333] Consequently, Justice Kennedy defers considerably to Congress with a scope of review substantially more limited than that of *Stenberg*.[334] Kennedy seems concerned that the *Stenberg* approach

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328 *See id.* at 1644–46 (Ginsburg, J., dissenting).

329 *Id.* at 1641; *see also id.* at 1644 ("[T]he congressional record includes . . . statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D&E [partial-birth abortion] carries meaningful safety advantages over other methods.").

330 *Id.* at 1644.

331 *Id.* at 1646.

332 *See id.* at 1650–51.

333 Stenberg v. Carhart, 530 U.S. 914, 937 (2000). *Gonzales*, by contrast, almost gleefully departs from the Court's historic deference to the judgment of the medical community and sanctions the government's involvement in medical decisionmaking between individual patient and doctor. *See Gonzales*, 127 S. Ct. at 1641–46 (Ginsburg, J., dissenting).

334 *Id.*; *see also* Naomi Cahn & June Carbone, *Sex, Politics, and the Judicial Role* (forthcoming 2009) (manuscript at 32, on file with author) (observing that the *Gonzales* Court "reaffirmed its deference to legislative judgment," in part because, "[a]s partisanship has intensified around the issue of abortion, the Court has signaled that the issue is better left to the political branches

would invalidate any abortion regulation as long as "some part of the medical community" did not want to follow it,[335] leaving the ultimate judgment as to whether abortions would occur to the individual physician, who acts as proxy for the woman. Justice Kennedy may state that he does not place "*dispositive* weight on Congress's findings."[336] Nevertheless, in the face of his great disappointment in the medical profession and the medical uncertainty as to whether partial-birth abortions are ever medically necessary, Kennedy's scope of review is far from strict.[337]

Moreover, from Kennedy's perspective, all of the claims that partial-birth abortions may sometimes be necessary to protect a woman's health are not pertinent given the procedural posture of the case: a facial challenge to the general ban on partial-birth abortions.[338] The closest that Kennedy comes to recognizing that the ban may present real risks to some women is his suggestion that any exceptions should be sought through as-applied challenges, where "the nature of the medical risk can be better quantified and balanced than in a facial attack."[339] Kennedy suggests an as-applied challenge might succeed by showing "that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used."[340] But, in fact, as Justice Ginsburg points out, the petitioners made such a showing through "hundreds and hundreds of pages of testimony identifying 'discrete and well-defined instances' in which recourse to [partial-birth abortion] would better protect the health of women with particular conditions."[341]

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of government"); Annas, *supra* note 322, at 2206 ("For the first time, the Court permits congressional judgment to replace medical judgment.").

335 *See Gonzales*, 127 S. Ct. at 1638.

336 *Id.* at 1637 (emphasis added). Instead, Kennedy emphasizes alternative methods for late-term abortion, including D&E, or a lethal injection before delivering the fetus intact (a partial-birth abortion of a deceased fetus), which, however, simply does not respond to the opposing view that, for some women, these are not viable medical options. *Id.* As Ginsburg argues, the law ultimately prohibits a woman from a partial-birth abortion even if her physician "'reasonably believes [that procedure] will best protect [her].'" *Id.* at 1647 (Ginsburg, J., dissenting) (quoting *Stenberg*, 530 U.S. at 946 (Stevens, J., concurring)).

337 *See id.* at 1650–51; *cf.* Cohen, *supra* note 36, at 1168 (observing that the Court's application of the "undue burden" test generally "is a good deal more deferential than traditional strict scrutiny.").

338 *Gonzales*, 127 S. Ct. at 1638–39.

339 *Id.* at 1639.

340 *Id.* at 1638.

341 *Id.* at 1652 (Ginsburg, J., dissenting). Ginsburg also notes that the Court does not explain why it did not allow the injunctions from the lower courts to stand, except where other procedures would protect the woman's health as well as the banned procedure. *Id.* at 1651–52.

Ultimately, Kennedy found such evidence insufficient for a facial attack because the respondents did not show that the statute was unconstitutional in a "large fraction of relevant cases."[342] Instead, he notes the statute applies in all cases, not just those where "the woman suffers from medical complications."[343] Thus, had the case been litigated with respect to certain women facing particular medical conditions, Kennedy might have ruled differently. As Ginsburg points out, however, part of the difficulty is that *Casey* suggested that the relevant cases (or denominator to establish the fraction) are not "'all women'" seeking an abortion, but rather those women for whom the ban "'is an actual rather than an irrelevant restriction.'"[344] In this context, the relevant cases would be all women for whom the partial-birth abortion was medically necessary. In other words, the lack of a health exception would "burden *all* women for whom it is relevant."[345]

Such an approach would have been consistent with *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 331 (2006), which "counsels against reversal." *Gonzales*, 127 S. Ct. at 1652 (Ginsburg, J., dissenting) (citing *Ayotte*, 546 U.S. at 331).

342 *Gonzales*, 127 S. Ct. at 1639.

343 *Id.*

344 *Id.* at 1651 (Ginsburg, J., dissenting) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992)).

345 *Id.* at 1651 (pointing out that that may ultimately be a small number of women). Underlying this discussion is a much larger debate about the standard for facial challenges in the abortion context. In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court ruled that facial challenges outside the First Amendment can only succeed when the challenger can "establish that no set of circumstances exists under which the Act would be valid." In the abortion context, however, where facial challenges are the norm, John Christopher Ford, *The* Casey *Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443, 1444 (1997), many commentators believe that the Court has not followed *Salerno*, but instead applied an "overbreadth" rule that allows abortion statutes to be found facially invalid even if the statutes are constitutional in some circumstances. Indeed, "the widely held view [is] that the Court's abortion jurisprudence represents a tacit extension of overbreadth doctrine outside of the First Amendment." Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 414 (1998); *see also* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1322–23 (2000) (noting that in "[c]hampioning the *Salerno* approach as he understands it, Justice Scalia has protested bitterly when . . . courts have held anti-abortion statutes facially invalid.").

Justice Kennedy largely avoids this debate, only dipping his foot into it by hinting that the overbreadth rule should not apply in the abortion context. As he stated, "[t]he latitude given facial challenges in the First Amendment context is inapplicable here" since "[b]road challenges of this type impose 'a heavy burden' upon the parties maintaining the suit." *Gonzales*, 127 S. Ct. at 1639. Rather than resolve whether the burden for facial challenges in the abortion context is in conflict with *Salerno*'s "no-set-of-circumstances" approach, Justice Kennedy simply noted that "what [the standard for facial challenges] consists of in the specific context of abortion statutes has been a subject of some question." *Id.* (comparing cases that follow the *Salerno* "no-set-of circumstances" approach with those that follow the *Casey* "large-fraction-of-the-cases"-that-are-relevant approach). Kennedy does cite to *Casey* in concluding that the respondents had "not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases," but

An additional problem in Kennedy's insistence that the matter be addressed through as-applied challenges is the time constraints that would arise if a woman faced grave medical risks without a partial-birth abortion.[346] In such instances, litigating an as-applied challenge to resolution would likely take far longer than is medically safe.[347] The physician would thus be forced either to risk prosecution by performing a partial-birth abortion or to jeopardize the health of the patient by failing to perform a partial-birth abortion. As Ginsburg queries, "[s]urely the Court cannot mean that no suit may be brought until a woman's health is immediately jeopardized by the ban on [partial-birth abortion]."[348]

Ultimately, Kennedy's willingness to uphold the lack of a health exception, even with respect to previable partial-birth abortions, must be understood as an expression of his deep distrust in the medical profession's prior role as gatekeepers of late-term abortions. Having struggled to compromise in *Casey* by finding previable abortions constitutional as long as the state and medical profession were careful to protect potential life postviability, Kennedy seems disenchanted by the deal. One senses that he feels burned and is no longer willing to compromise. "If the vaguely defined health exception is merely going to be politicized and used as a proxy for women's free choice at any point in pregnancy, no matter how minimal her health concerns are," Kennedy seems to say, "then I am no longer willing to support the right to previable abortions." Having repeatedly emphasized in *Casey*, *Stenberg*, and now *Gonzales*, that the state has a "legitimate and *substantial* interest in preserving and promoting fetal life,"[349] Kennedy seems determined to give this state interest a potency not yet seen, even with respect to previable fetuses. This interpretation helps explain his discussion of state interests, as we shall see below.

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opaquely observes that it is not the Court's role "to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzales*, 127 S. Ct. at 1639. In addition, he cites to a commentator, *id.* (citing Fallon, *supra*, at 1328) who believes that much of the "debate rag[ing]" over facial and applied challenges is grounded in misassumptions and a mistaken belief that there is a "single distinctive category of facial, as opposed to as-applied, litigation." Fallon, *supra*, at 1321. In short, Justice Kennedy does not attempt to resolve the uncertainty about facial challenges in the abortion context.

346 *Gonzales*, 127 S. Ct. at 1651 (Ginsburg, J., dissenting).

347 *See id.*

348 *Id.*

349 *Id.* at 1636 (majority opinion) (emphasis added).

2. State Interests

As troubling as Kennedy's conclusion that the lack of a health exception does not pose an undue burden on abortion rights is Kennedy's discussion of the relevant state interests. His analysis is both descriptive—discerning the purpose and intent of the statute—and normative—establishing the legitimacy of the state interests underlying these purposes and using them to justify the ban. Kennedy identifies many objectives underlying this statute, many of which he connects to state interests emphasized in *Casey*, including protecting fetal life and the health of the mother. Contrary to his claims, however, the ban serves neither of these interests. Instead, *Gonzales* introduces a new state interest to justify the Act—the "wisdom of repugnance."[350]

a. Protecting the Mother's Health

Having accepted the view that the lack of a health exception puts few if any women at physical risk, Kennedy's opinion provides some "puzzling attempts to show that the statute might reflect the second interest *Casey* recognized: protecting pregnant women."[351] Quite taken with the polemically powerful but unsubstantiated post-abortion syndrome,[352] Kennedy worries about the emotional risks associated with the procedure. He describes the "bond of love the mother has for her child" and the possible regret, even "[s]evere depression and loss of esteem," that women may experience if they "come to regret their choice to abort the infant life they once created and sus-

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350 I borrowed this phrase from Leon Kass, who uses this concept to describe, in part, what is wrong with human cloning. *See infra* notes 389–92 and accompanying text.

351 Ronald Dworkin, *The Court & Abortion: Worse Than You Think*, N.Y. REV. BOOKS, May 31, 2007, at 21.

352 Many opponents of abortion assert that women can suffer from depression and other serious psychological ailments after having an abortion. *See, e.g.*, Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES MAG., Jan. 21, 2007, at 41, 44–47 (noting that "[a] growing number of anti-abortion activists, despite social-science research, claim that women are traumatized by their abortions"). In fact, the affidavits of over 1000 women claiming to suffer from this syndrome were submitted in *Gonzales v. Carhart*. *See id.* at 62. The scientific evidence, however, strongly suggests that the syndrome does not exist. *Id.* at 44–46 (describing studies along these lines and the methodological flaws in studies that claim to demonstrate the existence of the syndrome); *see also Gonzales*, 127 S. Ct. at 1648 n.7 (Ginsburg, J., dissenting) (noting that "'neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion . . . comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have . . . .'" (quoting Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, 9 GUTTMACHER POL'Y REV. 8, 8 (2006))).

tained."[353] Describing the abortion decision as "a difficult and painful moral decision,"[354] "fraught with emotional consequence,"[355] Kennedy fears that some physicians will avoid disclosing the graphic details of the late-term abortion procedures.[356]

A woman who later regrets her choice to undergo a partial-birth abortion, he surmises, "must struggle with grief more anguished and sorrow more profound when she learns, only after the event," of the details of how the abortion was performed.[357] Thus, because the intact D&E procedure is uniquely "brutal"[358] and because the failure of physicians to disclose these "brutal" elements is so detrimental to informed decisionmaking,[359] the procedure must be banned.[360] After all, he reminds us, the state has a strong interest in protecting the woman's well-being by "ensuring so grave a choice is well informed."[361]

Even assuming that the emotional risks are as dire as Kennedy suggests, Kennedy's reasoning does not show how the statute protects the well-being of pregnant women. He neither emphasizes the legal and moral obligation of the medical profession to educate women fully about their reproductive choices, nor focuses on the appropriate legal remedy when physicians fail to disclose material information about the procedure. Nor does he address why the informed consent requirements are different in this context, that is, why physicians should disclose the "precise details" of the partial-birth abortion procedure, as opposed to "the required statement of risks the procedure entails."[362] After all, as he concedes, physicians may be equally likely to leave out all of the graphic details surrounding other medical procedures since "patients facing imminent surgical procedures [may] prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense."[363]

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353 *Gonzales*, 127 S. Ct. at 1634.

354 *Id.*

355 *Id.*

356 *See id.*

357 *Id.*

358 *See id.* at 1634–35.

359 *See id.* at 1634.

360 *See id.* at 1635.

361 *Id.* at 1634.

362 *Id.*

363 *Id.*; *see* Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1616–20 (2008) (observing that "the informed consent doctrine does not require graphic language and vivid pictures designed to discourage patients from choosing a medical intervention.").

Instead, Justice Kennedy supports Congress's decision to promote "the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences" of late-term abortions by banning the partial-birth abortion.[364] In other words, he condones state efforts to prevent *uninformed* choice by prohibiting choice altogether. Ronald Dworkin highlights the irony of this analysis: if the goal is to protect women "from possible 'severe depression and loss of self-esteem,' . . . by not permitting her to choose how her fetus will be killed, why may it not protect her more securely by not permitting her an abortion at all?"[365]

Kennedy's highly paternalistic response to concerns about informed consent is astounding. Given the well-established legal doctrine of informed consent, firmly acknowledged by the Supreme Court,[366] it is striking that Kennedy would address this issue so glibly and inadequately. As Professor Rebecca Dresser points out, *Gonzales* represents the pinnacle in the evolution of the Court's special treatment of informed consent in the abortion context. The Court has shifted from requiring abortion disclosure laws to "conform to the general requirements of the common law informed consent doctrine"; to the "double standard" of *Casey*, where "states could emphasize risks of and alternatives to abortion as a means of encouraging women to refuse abortion"; to the "double-bind" of *Gonzales*, in which "neither the traditional disclosure standard nor a heightened one offer[s] an adequate means of protecting women's interests."[367]

Ultimately, Justice Kennedy's concern for real dialogue between the woman and her physician cannot be taken seriously, at least not to

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364 *See Gonzales*, 127 S. Ct. at 1634.

365 Dworkin, *supra* note 351, at 21. Although Kennedy's support of the ban based on informed-consent grounds is unpersuasive, his language almost encourages legislatures to draft statutes requiring doctors to describe the procedure in its most gory detail. This fact highlights the fine line between adequately informing women of this (or any other medical procedure) so that they can make informed choices, and providing information with the intent of discouraging women from undergoing the procedure. *See* Dresser, *supra* note 363.

366 *See* Washington v. Glucksberg, 521 U.S. 702, 791 (1997) (noting the "the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment"); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990) (recognizing that "[a]t common law, even the touching of one person by another without consent and without legal justification was a battery" and the related doctrine that "informed consent is generally required for medical treatment").

367 Dresser, *supra* note 363, at 34–38 (describing the various ways in which requirements in state abortion disclosure laws—such as requiring "graphic language and vivid pictures," requiring physicians to warn of "health risks that the expert medical community fails to recognize," requiring "physicians to give patients selective information about the moral dimensions of a medical choice"—deviate from the informed consent doctrine).

justify the ban of this procedure. Clearly, a statute cannot promote informed consent by eliminating any possibility of consent. Nor can the ban be justified as a means to protect the physical well-being of women when it removes the possibility of a procedure that many respectable medical groups believe is medically necessary for some women[368] (except perhaps for those women who bring an as-applied challenge—*if* they succeed, and *if* there is time for such litigation). In short, Kennedy offers no persuasive reason to believe that the ban promotes the state interest in protecting the well-being of the pregnant woman. Moreover, as Ginsburg demonstrates, this approach, in conjunction with a willingness to accept the lack of a health exception, virtually undercuts the possibility that this Court understands abortion rights in terms of sexual equality.

b. Protecting Potential Life

Kennedy also tries to tie many of the objectives of the statute to the state interest in potential fetal life, an interest he believes "the Court's precedents after *Roe* had 'undervalued.'"[369] Kennedy describes numerous congressional goals that he believes express respect for the dignity of potential life.[370] First, Congress was concerned that allowing partial-birth abortions would "'further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.'"[371] Second, Congress wanted to draw a sharp line between infanticide and abortion by prohibiting partial-birth abortion, which it found "'disturbing[ly] similar[ ] to the killing of a newborn infant.'"[372] Finally, Congress suggested that the ban protects the "'integrity and ethics of the medical profession'"[373] by prohibiting a procedure that "'confuses the medical, legal, and ethical duties of physicians to preserve and

368 *See supra* notes 329–30 and accompanying text.

369 *Gonzales*, 127 S. Ct. at 1633 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992)).

370 *Id.*

371 *Id.* (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(N), 117 Stat. 1201).

372 *Id.* (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(L), 117 Stat. 1201). Kennedy reasoned that many would find D&E to be a procedure that could "devalue human life," *id.* at 1633, and argued that the Court had previously drawn "boundaries to prevent certain practices that extinguish life and are close to actions that are condemned," *id.* at 1634, when it approved a ban on physician-assisted suicide because allowing the practice might "'start it down the path to voluntary and perhaps even involuntary euthanasia.'" *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 732–35 & n.23 (1997)).

373 *Id.* at 1633 (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life.'"[374]

Kennedy's attempts to connect these concerns to the state interest in promoting fetal life is unconvincing. Protecting the integrity of the medical profession may be a state interest,[375] but not one linked to protecting fetal life. Nor is it an interest that has previously been used to limit abortion rights. Moreover, although the ban expresses Congress's views that partial-birth abortion is worse than other late-term procedures, in fact, fetal life is not protected by the Partial-Birth Abortion Ban Act at all.[376] Assuming that the partial-birth abortion is more brutal than other late-term abortions,[377] it is hard to see how the ban expresses respect for life simply because it regulates the means by which fetal life can be ended.

c. The State Interest in Preventing Moral Coarsening—"The Wisdom of Repugnance"

Ultimately, all of the concerns that Kennedy tries to tie to the state interest in protecting life reflect a different kind of interest altogether, one that no prior case dealing with reproductive rights has described. What Kennedy wants to legitimate as a justification for abortion regulations has more to do with "moral concerns" and pro-

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374 *Id.* (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(J), 117 Stat. 1201). Kennedy points out that this was one of the rationales for upholding a state law banning physician-assisted suicide in *Glucksberg*. *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

375 *See* Washington v. Glucksberg, 521 U.S. 702, 731 (1997).

376 *See Gonzales*, 127 S. Ct. at 1647 (Ginsburg, J., dissenting) ("In short, the Court upholds a law that, while doing nothing to 'preserv[e] . . . fetal life,' . . . bars a woman from choosing intact D&E although her doctor 'reasonably believes [that procedure] will best protect [her].'" (quoting Stenberg v. Carhart, 530 U.S. 914, 946 (2000) (Stevens, J., concurring))).

377 Kennedy's (and Congress's) convictions that partial-birth abortion is in fact more brutal or horrific than other late-term abortions is unpersuasive. To quote Ginsburg, the standard D&E procedure—nonintact D&E—"could equally be characterized as 'brutal,' . . . involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs." *Gonzales*, 127 S. Ct. at 1647 (Ginsburg, J., dissenting).

The argument seems to be that because the partial-birth abortion looks more like infanticide, it is therefore more brutal. Whether it is in fact more like infanticide is debatable. What Kennedy seems to be saying is that if we can make visible what we are doing to the fetus then it looks more like infanticide. This raises interesting questions about what would happen if our technology develops so that we have a virtual "window to the womb." Would all abortions be so close to infanticide that this interest in fetal life could begin to justify the prohibition of more and more abortion procedures? *See* Saletan, *supra* note 11 (observing that "[u]ltrasound has exposed the life in the womb to those of us who didn't want to see what abortion kills. The fetus is squirming, and so are we").

tecting the sensibilities of the community.[378] His fears about "'further coarsen[ing] society to the humanity of . . . all vulnerable and innocent human life,'"[379] his interest in drawing the line between infanticide and abortion,[380] and his desire to protect the integrity of the medical community[381] speak more to a view of the appropriate moral attitudes than the goal of protecting fetal life or maternal health. To quote Ginsburg's dissent, "[u]ltimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion."[382]

Kennedy fails to acknowledge he has introduced an entirely new justification for prohibiting certain abortion procedures, one that *Casey* and *Roe* neither discussed nor legitimized. Indeed, this approach may be at odds with the Court's own prior declarations that certain moral arguments should not be the basis for limiting the liberty interests of others. In *Lawrence v. Texas*,[383] Justice Kennedy's majority opinion noted that, despite the fact that "[f]or many persons [objections to homosexual behavior] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles," the State could not enact legislation "to enforce these views on the whole society through operation of the criminal law."[384] Of course, the moral arguments directed against homosexual behavior are not precisely the same as those directed against the termination of potential life. Thus, it is not necessarily inconsistent to reject the arguments against homosexuality—which describe homosexual acts as "unnatural" behavior between consenting adults—and to accept the arguments against abortion—which describe abortion as taking an innocent life, unable to defend itself.

Even so, Kennedy's point in *Lawrence* seems to go further than rejecting a particular moral argument. Although sympathetic to the fact that some may genuinely morally oppose homosexuality, he nevertheless urges the state to avoid imposing the moral views of some on the whole of society through its legislation.[385] *Casey* similarly empha-

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378 *See Gonzales*, 127 S. Ct. at 1647 (Ginsburg, J., dissenting); *see also id.* at 1633–34 (majority opinion).

379 *Id.* at 1633 (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14)(N), 117 Stat. 1201).

380 *Id.* at 1633–34.

381 *Id.* at 1633.

382 *Id.* at 1647 (Ginsburg, J., dissenting).

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

384 *Id.* at 571, 578 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 850 (1992)).

385 *See id.*

sizes the need to separate moral views from the Court's articulation of liberty interests, stating:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.[386]

This circumspection is consistent with, and indeed necessary for, a well-ordered democratic society according to John Rawls,[387] who argues that Justices must resolve constitutional questions without relying on moral and religious arguments:

> The [J]ustices cannot . . . invoke their own personal morality, nor the ideals and virtues of morality generally. . . . Equally, they cannot invoke their or other people's religious or philosophical views. . . . Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason. These are values that they believe in good faith . . . that all citizens as reasonable and rational might reasonably be expected to endorse.[388]

But if Kennedy's approach finds no basis in prior Supreme Court jurisprudence or Rawls' conception of the well-ordered society, it is reminiscent of the argument from repugnance advocated by the former Chair of the President's Council on Bioethics, Leon Kass.[389] In

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386 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 850 (1992).

387 Rawls describes "a well-ordered society as a society effectively regulated by a political conception of justice," JOHN RAWLS, POLITICAL LIBERALISM 14 (1993), where "everyone accepts, and knows that everyone else accepts and publicly endorses, the very same principles of justice . . . . [I]ts basic structure . . . is publicly known, or with good reason believed, to satisfy those principles; and . . . [its] citizens have a normally effective sense of justice, that is, one that enables them to understand and to apply the principles of justice, and for the most part to act from them as their circumstances require." *Id.* at 201–02. For more on Rawls's notion of the well-ordered society and a public conception of justice, see *infra* notes 399–410 and accompanying text.

388 Rawls, *supra* note 387, at 236. Rawls does not insist "that judges agree with one another . . . in the details of their understanding of the constitution." He insists only that they are "and appear to be, interpreting the same constitution in view of what they see as the relevant parts of the political conception and in good faith believe it can be defended as such." *Id.* at 237.

389 Leon Kass "was chairman of the President's Council on Bioethics from 2002 to 2005." The President's Council of Bioethics: Leon R. Kass, M.D. Chair, http://www.bioethics.gov/about/kass.html (last visited June 9, 2008).

his article, *The Wisdom of Repugnance*,[390] Kass argued against reproductive human cloning, not for the familiar concerns about the safety of the future child or the threat to self-identity of the clone, but because of our repugnance to this procedure.[391] Repugnance, he argued, "is the emotional expression of deep wisdom, beyond reason's power to fully articulate it."[392] Kennedy's reliance on this kind of justification to uphold the statute taps into the widespread revulsion to this procedure. Indeed, given the ultimately unpersuasive grounds for upholding an abortion ban with no health exception, *Gonzales* suggests that such repugnance can be sufficient justification for limiting abortion rights.[393]

d. Critiquing the "Repugnance" Approach

Although paying attention to our repugnance may be a useful starting point when evaluating the moral propriety of something, the repugnance approach to ethical or constitutional analysis is deeply problematic.[394] This approach has been criticized as "intellectually lazy" and a form of "irrational fear mongering."[395] Worse, it offers no clear boundaries or analytical framework for assessing when something is morally problematic because it is like an argument from intuition. As Ludwig Wittgenstein warns, "If intuition is an inner voice—how do I know *how* I am to obey it? And how do I know that it

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390 Leon R. Kass, *The Wisdom of Repugnance*, NEW REPUBLIC, June 2, 1997, at 17.

391 *Id.* at 20 ("We are repelled by the prospect of cloning human beings not because of the strangeness or novelty of the undertaking, but because we intuit and feel, immediately and without argument, the violation of things that we rightfully hold dear.").

392 *Id.*

393 My colleague Professor Tom Colby interprets Kennedy's analysis slightly differently, arguing that he bases his ruling less on repugnance concerns and more on an effort to support the "culture of life." Communications with Tom Colby, Assoc. Professor of Law, The George Washington Univ. Law Sch.

394 *See* Sunstein, *supra* note 66, at 995 ("Perhaps repugnance, even of the visceral sort, reflects a kind of wisdom and rationality that are superior to readily accessible arguments. But is moral repugnance, felt by many people, enough to meet the government's burden?"); *see also id.* at 996 (Repugnance "sometimes captures a sound moral intuition. . . . Sometimes repugnance is fully rational. But standing by itself . . . moral repugnance seems to be a weak basis for intruding on a human choice . . . ."); Hank Greely, *Cloning and Government Regulation*, 53 HASTINGS L.J. 1085, 1091 (2002) ("I agree a reaction of repugnance to a proposal should serve as a warning flag. I disagree, however, that without logical arguments against the proposal, a reaction of repugnance has moral force in and of itself.").

395 Posting of Adam to Humanities Policy Blog, What's So Repugnant About Repugnance?, http://humanitiespolicy.unt.edu/blogs/index.php?title'whata_s_so_repugnant_about_repugnance&more'1&c'1&tb'1&pb'1 (Mar. 17, 2006, 11:56 EST) [hereinafter What's So Repugnant].

doesn't mislead me? For if it can guide me right, it can also guide me wrong. (Intuition an unnecessary shuffle.)"[396]

Moreover, it raises the problems of moral relativism of several types: cultural, personal, and temporal. What is repugnant to one culture may not be repugnant to another. What is repugnant to me may not be repugnant to you. And what is repugnant today may not be repugnant tomorrow. Whose repugnance, then, should drive our policymaking or our determination of constitutional rights?[397] Such an approach toward policy making, much less constitutional analysis, is problematic because it tends to "legitimize the moral absolutes of a particular tradition."[398] Although Leon Kass calls for serious efforts to articulate what underlies our repugnance, the "repugnance" approach easily undermines serious debate about the social meaning and effect of the "repugnant" activity. It makes it far easier to assert that we should ban something simply because it *feels* wrong.

Moreover, it undermines much of what is central to a functional democracy—the public availability of justifications and reasoning with respect to the resolution of constitutional matters. In *Political Liberalism*, John Rawls argues that "a well-ordered society" must resolve matters of fundamental justice through public reason,[399] that is, reason based on "the ideals and principles expressed by society's conception of political justice, and *conducted open to view on that basis*."[400] Public reason depends on "an effective public conception of justice" that "citizens accept and know that others likewise accept," and which "is publicly recognized."[401] But it also depends on "publicly shared methods of inquiry and forms of reasoning"[402] that support these shared beliefs.[403] Finally, and most relevant to the critique of the repugnance approach, public reason requires that a "full justification of the public

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396 LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 213 (G. E. M. Anscombe trans., 1973) (alteration in original); *see also id.* § 186.

397 *See* S. Philip Morgan et al., *Brave New Worlds: Philosophy, Politics, and Science in Human Biotechnology*, 31 POPULATION & DEV. REV. 127, 129 (2005); Sunstein, *supra* note 66, at 996 (pointing out how this theory could be applied to ban interracial marriage and that, if "we are speaking of strict scrutiny," *Loving v. Virginia*, 388 U.S. 1, 11 (1967), is enough to show that "moral repugnance by itself cannot be sufficient"); *see also id.* (explaining that "if rational basis review is at work . . . moral repugnance does not seem adequate under the authority of *Bowers v. Hardwick*").

398 What's So Repugnant, *supra* note 395.

399 RAWLS, *supra* note 387, at 14, 201–02.

400 *Id.* at 213 (emphasis added).

401 *Id.* at 66.

402 *Id.* at 67.

403 *Id.* at 66.

conception of justice" be, at a minimum, "publicly available" or transparent.[404]

Public reason, Rawls argues, is required when citizens in a democratic society collectively "exercise final political and coercive power over one another in enacting laws and in amending their constitution."[405] It gives legitimacy to the exercise of political power.[406] "[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[407] Equally important as shared principles of justice is a shared method for evaluating decisions, such that "the application of substantive principles be guided by judgment and inference, reasons and evidence that the [citizens] can reasonably be expected to endorse."[408]

The judiciary (especially the Supreme Court) particularly depends on public reason because it must "explain and justify . . . decisions as based on [its] understanding of the constitution and relevant statutes and precedents."[409] When the judiciary fails to "clearly and effectively interpret[ ] the constitution in a reasonable way . . . it stands at the center of a political controversy the terms of settlement of which are public values."[410] Kennedy's repugnance approach in upholding the Partial-Birth Abortion Ban Act is such a failure. Because

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404 *See id.* at 67. Public reason furthers the ideals of democracy by allowing citizens "to conduct their political affairs on terms supported by public values that we might reasonably expect others to endorse." *Id.* at 253. It is grounded in the notion that an ideal democracy requires a moral duty of civility, *id.*, that is, the ability "to explain to one another on . . . fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason." *Id.* at 217.

405 *Id.* at 214.

406 *Id.* at 225. "[O]n matters of constitutional essentials and basic justice, the basic structure and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires." *Id.* at 224. "In securing the interests of the persons they represent, the parties [in the original position must] insist that the application of substantive principles be guided by judgment and inference, reasons and evidence that the persons they represent can reasonably be expected to endorse." *Id.* at 225.

407 *Id.* at 217. Citizens in a democracy have "equal share in the coercive political power that citizens can exercise over one another by voting and in other ways." *Id.* at 217–18. In exercising such power, they "should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality." *Id.* at 218.

408 *Id.* at 225.

409 *See id.* at 216. Rawls says that "public reason is the reason of its supreme court" and that the supreme court is the "exemplar of public reason." *Id.* at 231.

410 *Id.* at 237. Rawls notes that "public reason often allows more than one reasonable answer to any particular question." *Id.* at 240. "[P]ublic reason does not ask us to accept the very

it is subjective, it is not "guided by judgment and inference, reasons and evidence that the [citizens] can reasonably be expected to endorse."[411] Lacking analytic transparency, it is at odds with public reason and thus loses political legitimacy.[412]

At best, Kennedy's "repugnance" approach goes beyond precedent; at worst, it "dishonors" precedent.[413] Given that the two *Casey* rationales—protecting the mother's health and potential fetal life—do not succeed in justifying the legislation, Kennedy's opinion ultimately rests on this new repugnance argument or alternatively on unarticulated goals. Two interpretations are therefore possible. We can take Kennedy's language at face value and conclude that he really means to argue from repugnance. Alternatively, we can explain his repugnance claim as a placeholder to uphold the partial-birth abortion ban today, while awaiting a future case in which he can develop the notion that the strengthened state interest in protecting life allows it to limit previable abortions.

If we understand Kennedy's opinion as grounded in claims of repugnance, *Gonzales* can be used in future cases to uphold or ban state regulations in a broad range of areas based on whether the Justices find the regulated behavior repugnant or not. As Dworkin has stated, this approach suggests that government can "outlaw sound medical procedures [and likely much more] for no better reason than that many people find those procedures disturbing or immoral."[414] Such an approach, as noted earlier, is untethered by reason or rationality.[415]

If we understand Kennedy's opinion as intended to bolster the strength of the state interest in previable life then the opinion is much more radical than he lets on. It begins to undo the well-established precedent that the state may not prohibit previable abortions and opens the door to future bans of previable abortion procedures based on visceral concerns about the sensibilities of the community and the medical profession. As Dworkin has pointed out, *Gonzales* offers "novel and dangerous justifications for regulating abortion, and these could provide the basis for much-further-reaching constraints in the

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same principles of justice, but rather to conduct our fundamental discussions in terms of what we regard as a political conception." *Id.* at 241.

411 *See id.* at 225.

412 *See id.* at 224 (Decisions must be "justifiable to all citizens, as the principle of political legitimacy requires."); *supra* note 406.

413 *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1647 (2007) (Ginsburg, J., dissenting).

414 Dworkin, *supra* note 351, at 21.

415 *See supra* notes 409–12 and accompanying text.

future."[416] But it does so without acknowledging that that is what is being done, which prevents transparency and undermines political legitimacy. As we will see, *Gonzales* offers the state ample opportunity to restrict advanced reproductive technologies broadly.

B. The "Repugnance" Approach Applied to Advanced Reproductive Technologies

As uncertain as it is that case law prior to *Gonzales* protects against state prohibitions or regulations of advanced reproductive technologies, *Gonzales* raises even more questions. As suggested above, it presents a very different vision of reproductive rights from most of those we examined in Part I. First, it directly challenges the notion of self-defining liberty of *Casey*. By upholding the ban of an abortion procedure—even before viability and with no health exception, on the basis of slim evidence contradicted by a notable group of medical experts—the Court suggests that the state may limit reproductive rights simply because it has concerns about the sensibilities of the community. Such an approach is in direct contrast to an expansive vision of procreative liberty.

Second, by limiting reproductive rights in this manner and by justifying the limits of reproductive choice on the paternalistic grounds of protecting women, it undermines the sex equality approach, as Ginsburg's dissent makes so clear.[417] The majority decision, she argues, "invokes an antiabortion shibboleth for which it concededly has no reliable evidence" about regrets and psychological distress surrounding abortion.[418] In upholding Congress's decision to ban the procedure, "the Court deprives women of the right to make an autonomous choice, even at the expense of their safety."[419] Rather than treating women as if they "have the talent, capacity, and right 'to participate equally in the economic and social life of the [n]ation,'" as Ginsburg believes the *Casey* Court did,[420] the *Gonzales* Court's analysis "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[421] Indeed,

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416 Dworkin, *supra* note 351, at 20.

417 *See Gonzales*, 127 S. Ct. at 1641 (Ginsburg, J., dissenting) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 856 (1992)); *see also supra* notes 252–54 and 305 and accompanying text.

418 *Gonzales*, 127 S. Ct. at 1648 (Ginsburg, J., dissenting).

419 *Id.* at 1649.

420 *Id.* at 1641 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 856 (1992)).

421 *Id.* at 1649; *see also id.* at 1641 ("'There was a time, not so long ago,' when women were 'regarded as the center of home and family life, with attendant special responsibilities that pre-

as Professor Rebecca Dresser states, the Court "imputes to women a psychological vulnerability that lacks evidentiary support."[422]

If equality concerns do not drive the opinion, neither do concerns about bodily integrity. The majority upholds a statute banning a partial-birth abortion procedure without a health exception, in spite of powerful arguments for the health exception and recent precedent requiring it.[423] Finally, although Kennedy speaks romantically of the bonds between mother and child,[424] the opinion speaks very little to the idea that abortion decisions fall within the realm of family privacy, as understood individualistically.[425] Indeed, it limits the very kind of parental decisionmaking that a liberal conception of family privacy protects.

Kennedy's novel repugnance approach, however, may be closest to a relational conception of privacy—although ultimately a flawed conception. His emphasis on the bond between mother and child hints at a desire to protect the integrity of that relationship by fostering the creation of life.[426] It also focuses on preserving other important relational interests, such as the well-being of the community generally and the integrity of the medical profession.

The effect of Kennedy's repugnance approach, coupled with his view of relational privacy, suggests that his constitutional vision of reproductive rights would allow the state to regulate or restrict a great many advanced reproductive technologies. Whether by intent[427] or effect, the opinion considerably strengthens the state interest in *previable* potential life. After all, it upholds the ban of an abortion procedure even previability, with no honest discussion as to what actually legitimizes the undoing of precedent that has heretofore prevented the state from banning previable abortions. *Gonzales*

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cluded full and independent legal status under the Constitution.' . . . Those views, this Court made clear in *Casey*, 'are no longer consistent with our understanding of the family, the individual, or the Constitution.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 896–97 (1992)).

422 Dresser, *supra* note 363, at 1599.

423 *See* Rao, *supra* note 26, at 1471–72, for a different and very interesting perspective that the opinion is in fact grounded in bodily integrity concerns.

424 I borrow my description of Kennedy's language as "romantic" from my colleague Jeffrey Rosen. Communications with Jeffrey Rosen, Professor of Law, The George Washington Univ. Law Sch.

425 *See supra* notes 192–95 and accompanying text (comparing relational and individualistic conceptions of family privacy).

426 Of course, the Partial-Birth Abortion Ban Act does nothing to actually protect fetal life. *See supra* note 376 and accompanying text.

427 *See supra* text accompanying notes 413–14.

therefore suggests the Court might be predisposed to uphold future state restrictions or maybe even bans of previable abortions—a significant contraction of reproductive rights indeed.

Moreover, by legitimating the state's ability to prohibit the *manner* of terminating fetal life on the grounds of moral concerns and worries about community sensibilities, the Court gives states the green light to rely on analogous arguments to distinguish many advanced reproductive technologies from "ordinary" reproductive decisionmaking. Thus, especially where there are moral or religious concerns regarding advanced reproductive technologies, the state may be able to regulate or restrict such technologies as it sees fit.

As seen in Part I, many of the objections to advanced reproductive technologies reflect concerns about the sensibilities of the community and the potential of these technologies to coarsen our understanding of the sacredness of natural reproduction. As we have seen, a frequent critique of these technologies is their commodification of reproduction and the resulting child.[428] Attempts to alter the genetic makeup of our children, particularly to satisfy predilections about their traits or abilities may challenge our ability to view our children and the reproductive process as a gift. Instead, we may begin to view our children as "objects of our design or products of our will or instruments of our ambition."[429] For example, prenatal testing and PIGD have been criticized for their capacity to shift "parental and societal attitudes toward prospective children from simple acceptance to judgment and control, and from seeing a child as an unconditionally welcome gift to seeing him as a conditionally acceptable product."[430] Even IVF has been criticized on similar grounds for its potential to "profoundly affect the character of human reproduction and our attitudes toward it, as well as the relationships between parents and children and across generations."[431] Among the concerns is "the

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428 *See supra* notes 104–05 and accompanying text.

429 *See* Michael J. Sandel, *The Case Against Perfection: What's Wrong with Designer Children, Bionic Athletes, and Genetic Engineering*, ATLANTIC MONTHLY, Apr. 2004, at 55; *see also* THE PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY xxix (2002) (describing similar risks of cloning).

430 BEYOND THERAPY, *supra* note 105, at 37; *see* GENETICS & PUB. POLICY CTR., *supra* note 105, at 6; *see also supra* note 105 and accompanying text.

431 THE PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 43–44 (2004) [hereinafter REPRODUCTION AND RESPONSIBILITY]; *see also* Leon R. Kass, *Preventing a Brave New World*, NEW REPUBLIC, May 2001, at 34 (arguing that the process of creating an embryo through IVF is a form of manufacture because "any child whose *being*, character, and capacities exist owing to human design does not stand on the same plane as its makers" (emphasis added)).

possibility of moving human procreation in the direction of manufacture, by introducing technical approaches or attitudes into the activity of human reproduction."[432] A related worry is that our views of parenthood and childhood may change if we view sexual reproduction as "simply one option among many, with no special significance for how we understand the coming-to-be of the next generation."[433]

Although such concerns may not be sufficient to sustain state attempts to restrict access to these technologies under most of the other theories of reproductive rights we have examined,[434] these are just the kinds of concerns that fall within the *Gonzales* repugnance approach. One could imagine a legislative body successfully asserting these concerns as it restricts access to IVF, PIGD, prenatal testing, and reproductive genetic modification. In some cases, concerns about risks to the future child[435] might bolster the strength of the state's interest because these concerns would directly tie to the state interest in potential life. But the combination of *Gonzales*'s repugnance approach and vision of relational privacy gives the legislative body a firmer footing for declaring more amorphous concerns about the way in which the advanced reproductive technologies threaten social attitudes toward reproduction and the relationship between parent and child. Indeed, Kennedy's romanticized language[436] about procreation and the "bond of love"[437] between mother and child is a powerful vehicle for state claims about the profoundly sensitive and sacred process of sexual reproduction and establishing bonds between parent and child. Albeit indirectly, *Gonzales* adds some weight to the idea that the state has a legitimate interest in protecting procreation from being "sullied" by the commodifying effects of advanced reproductive technologies.

Having said this, moral concerns and worries about coarsening humanity might be found more or less persuasive depending on the technology at issue. In suggesting that partial-birth abortion coarsens

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432 REPRODUCTION AND RESPONSIBILITY, *supra* note 431, at 44. The President's Council also noted additional concerns, including possibly "altering the biological relationships that are central to normal sexual reproduction, and thus for confounding the human relationships that follow from it." *Id.* Not only may people become parents through the use of anonymous donors of gametes or sperm from deceased males, but it may eventually be possible to obtain gametes from aborted fetuses and to produce eggs and sperm from embryonic stem cells such that one could create a child "with *two male* or *two female* embryonic progenitors." *Id.*

433 *Id.*

434 *See generally supra* Part I.

435 *See supra* notes 57, 140, and 222–23 and accompanying text.

436 *See supra* note 424 and accompanying text.

437 Gonzales v. Carhart, 127 S. Ct. 1610, 1634 (2007).

humanity to the vulnerability of life,[438] Kennedy tapped into a widely shared repugnance to the banned procedure. But the community is unlikely to find all reproductive technologies equally repugnant, or even repugnant at all. Indeed, as various reproductive technologies have become more commonplace, public attitudes toward them have changed. For example, public reaction to IVF evolved from social repulsion toward "test-tube" babies to the now fairly widespread acceptance.[439] Prenatal testing for disease is similarly widely accepted; in fact, it has become "routinized."[440] PIGD for disease, still a less widely used technology, may be more morally problematic in the eyes of the community, but given that it shares the interests at stake with IVF and prenatal testing, it is not likely to be viewed with the repugnance of partial-birth abortion. Trait selection through prenatal testing or PIGD and genetic enhancement, however, are technologies most likely to be found repugnant in the public eye.[441]

Kennedy offers no guidance as to how widespread the repugnance must be to override constitutional rights. Although it was fairly widespread with respect to partial-birth abortion, would a statute survive constitutional challenges if only a minority found a procedure repugnant? Morever, even if a majority is required to find a banned procedure repugnant, such a majoritarian approach would seriously threaten liberty interests. A majority might find homosexuality repugnant, but as Kennedy so wisely pointed out in *Lawrence*, that fact cannot determine the scope of liberty interests.[442]

Perhaps one factor to couple with the repugnance approach would be whether the reproductive technology is consistent with the conception of relational privacy that seems to drive Kennedy's evaluation of partial-birth abortion. If so, laws that prohibit IVF might be less likely to be upheld than laws that prohibit prenatal testing and PIGD, since IVF promotes life and thus the creation of familial relationships, whereas prenatal testing and PIGD increase the chance that people will terminate pregnancies based on unwanted diseases or

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438 *See id.* at 1633.

439 *See* Judith F. Daar, *The Prospect of Human Cloning: Improving Nature or Dooming the Species?*, 33 SETON HALL L. REV. 511, 523 (2003) (explaining that when IVF was first introduced "public reaction was initially negative . . . but grew increasingly positive as the safety and effectiveness of the [procedure] became apparent").

440 Suter, *supra* note 102, at 270.

441 Of course, even these technologies may become less repugnant as they become more available and widely used, demonstrating the temporal moral relativism of evaluation by repugnance.

442 *See supra* note 384 and accompanying text.

traits. State laws that prohibit the destruction of embryos or require their donation to other couples might be viewed as constitutional under *Gonzales* because they would help some infertile couples create families.[443] Finally, the general repugnance argument against genetic enhancement might be strengthened by concerns that it threatens the parent-child relationship and reflects a particularly sinister form of oppressive parenting.[444]

Ultimately, however, we are left to speculate precisely because the repugnance approach lacks transparency and reasoned analysis and offers no clear guidelines for constitutional analysis. The most we can say is that *Gonzales* offers a lens for evaluating reproductive rights with such a potentially wide range of focus that it threatens to undo many reproductive rights that seemed well established before.

C. Finding a Balance in Understanding Reproductive Rights

George Annas and others have criticized the *Gonzales* opinion for repudiating the idea emphasized in *Casey* that the abortion decision is for the individual, in consultation with her doctor, to make.[445] As noted earlier, the opinion seems to suggest that Kennedy believes he has been let down by the *Casey* compromise, which allowed previable abortions if physicians used the health exception sparingly with late-term abortions.[446] Whether or not a complete repudiation of *Casey*, *Gonzales* severely undercuts *Casey*'s conception that reproductive rights protect individualistic autonomy interests and are central to self-definition.[447]

Although I am troubled by much in *Gonzales*, there is a partial silver lining in this cloud on reproductive rights. In prior works, I have criticized the libertarian individualism of *Casey*, which relies on an "atomistic conception of self-definition, in which the individual

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443 *See supra* text accompanying note 426.

444 Of course, the concerns about oppressive parenting have little to do with whether a parent uses prenatal or postnatal means and much more to do with the general approach to parenting. *See supra* notes 218–19 and accompanying text.

445 *See, e.g.*, Annas, *supra* note 322, at 2206.

446 *See supra* text accompanying notes 348–49.

447 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992) (describing the unique sacrifices and suffering that women endure in carrying a child to term, suffering "too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

shapes herself without reference to others."[448] Relying on philosophers like Alasdair MacIntyre, Charles Taylor, and Michael Sandel, I have suggested that a richer notion of self-definition (and the autonomy or decisional privacy interests that derive from this conception) requires us to think of the self in relation to family, friends, and community.[449] Indeed, I have argued that to evaluate the moral propriety of advanced reproductive decisions, one must examine these choices in terms of a relational conception of the self as opposed to an understanding of the self acting without interests and attachments,[450] as if we are all "unencumbered" and "independent" selves.[451]

Although *Casey* acknowledged that the abortion decision does not occur in a vacuum, but is "fraught with consequences for others," including the physician, the spouse, family, and society,[452] ultimately the liberty interests of the woman took precedence.[453] More importantly, the *Casey* Court described a thin notion of self-definition and autonomy that fails to see the self in relational terms.[454] It suffers from treating the reproductive decision as if all that matters is the woman's self-definition in making these reproductive decisions, without regard to the way in which she is also defined based on her relationship to others, including the fetus, her doctor, her family, and her community, or the way her decisions affect the integrity of these relationships.

Kennedy's focus on the broader social impact of partial-birth abortion is a response to this individualistic notion of self-definition and liberty interests. It specifically asks us to consider the impact of a woman's reproductive decisions on the many entities who make up her community, including her physician, the medical profession, and

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448 Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737, 772 (2004).

449 *See id.* at 772–73 & nn.173–75, 763 n.112; *see also* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY OF MORAL THEORY 221 (2d ed. 1984) ("What I am . . . is in key part what I inherit, a specific past that is present to some degree in my present."); *id.* at 220 ("I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, inheritances, rightful expectations and obligations. . . . This is in part what gives my life its own moral particularity.").

450 *See* Suter, *supra* note 448, at 778–98. Others have described such an individualist conception of the self as defining the self "in terms of mere isolated actions," MACINTYRE, *supra* note 448, at 217, or as "independent from the interests and attachments we may have at any moment, never identified by our aims but always capable of standing back to survey and assess and possibly to revise them." MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 175, 178 (2d ed. 1998).

451 SANDEL, *supra* note 450, at 178–79.

452 *Casey*, 505 U.S. at 852.

453 *See id.* at 853.

454 *See* Suter, *supra* note 2, at 951.

the community at large. *Gonzales* barely focuses on the individual, emphasizing instead that the partial-birth abortion decision threatens the integrity of various levels of relationships: it potentially "coarsen[s]" society; undermines the integrity of the medical profession; and symbolically harms fetuses and the "bond of love" between mother and child.[455] *Gonzales* unequivocally, if not explicitly, adopts a relational conception of the interests at stake, suggesting that some bonds and relationships are constitutive in ways that a more individualistic rights-based approach does not recognize.

Casey and *Gonzales* represent two extreme approaches to reproductive rights: the heightened, atomistic individualism in *Casey*—much of which is reflected in the Ginsburg dissent of *Gonzales*;[456] and the heightened focus on relationships and community in *Gonzales*. Ultimately, however, both approaches go too far in their respective directions. They tend to ignore important considerations in the evaluation of constitutional interests in reproduction and create potentially boundless frameworks for such an evaluation.

The focus on the individual and her right to self-definition is appealing, particularly in twenty-first century America; this perspective is culturally embedded and informs the way we talk and think about deeply personal matters like reproduction. But it leaves little room for the recognition that we are defined by much more than just our choices; we are also defined by objective factors including the relationships of which we are a part. As a result, the individualistic analysis of reproductive rights tends to be less contextual than an approach that understands autonomy in terms of "the development and expression of the relational self."[457] In addition, the atomistic conception of autonomy opens the door to an unlimited number of constitutional claims about reproduction (and other personal matters). Lines drawn to distinguish different kinds of reproductive technologies are always vulnerable to the push of claims that these personal issues are central

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455 Gonzales v. Carhart, 127 S. Ct. 1610, 1633–34 (2007). The opinion also emphasizes the importance of dialogue not just between woman and physician, but among the "political and legal systems, the medical profession, expectant mothers, and society as a whole . . . ." *Id.* at 1634.

456 *See id.* at 1641 (2007) (Ginsburg, J., dissenting) ("As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.'" (quoting *Casey*, 505 U.S. at 869)); *id*. at 1649 ("[T]his Court has repeatedly confirmed that '[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society.'" (quoting *Casey*, 505 U.S. at 852)).

457 Suter, *supra* note 2, at 954.

to self-definition precisely because, under this view, it is individual choice that defines us.[458]

The repugnance approach of *Gonzales*, with its focus on community interests, is also potentially too expansive. To limit reproductive options, especially before viability, the Court must do far more than merely note that the procedure has the potential to coarsen society. It must show why the alleged moral coarsening is significant enough to ban this procedure. Otherwise the justification is boundless in the other direction and threatens to erode any interests in reproduction in the way that heightened individualism threatens to erode relational interests.

Even more problematic, viewing relationships through the repugnance lens of *Gonzales* runs the risk of being hostile to those who are not embraced by the community. In *Bowers v. Hardwick*, for example, the community's repugnance to homosexual behavior influenced the Court's determination that homosexuals had no fundamental right to engage in acts of consensual sodomy, even in the privacy of their own homes.[459] Abortion, of course, raises different issues. But the *Bowers* example highlights the need to focus on those most likely to be affected by the contested state action, which *Gonzales* does not do. By focusing almost exclusively on the community effect of partial-birth abortion, *Gonzales* expresses a similar hostility to those most affected by the partial-birth abortion ban—women for whom a partial-birth abortion is medically necessary (as determined by a substantial portion of the medical community) and their families.

With its heavy dose of paternalism and privileging of certain relationships at the expense of others, *Gonzales* is ultimately quite threatening to women's interests and, I would argue, society's interests. Part of the complex calculus of applying a relational understanding of autonomy and privacy to reproductive decisions is determining which relationships count most when certain decisions have different effects on different relationships.[460] *Gonzales* asks us to consider the relational impact of the partial-birth abortion decision with respect to the woman's relationships it considers most important: her relationships with the community at large and with the fetus. The relationships that seem most central in these decisions—the relationship between the woman and her physician and the relationship between the woman and her family—must not only share the stage with these other rela-

458 *See supra* Part I.A.

459 *See* Bowers v. Hardwick, 478 U.S. 186, 218–19 (1986) (Stevens, J., dissenting).

460 *See* Suter, *supra* note 2, at 954–57.

tionships, but in fact are pushed into the wings by them. By introducing these relational concerns at the expense of other equally or more important relational concerns, Kennedy essentially obliterates the central actors in this complicated drama of reproductive rights.

Further, given that *Gonzales* hints at Kennedy's openness (maybe even desire) to recognize the state's constitutional authority to prohibit at least some previable abortions, it also reflects a notion of relational privacy that privileges decisions that promote life over those that do not. As a result, it can threaten the well-being of some existing relationships for the sake of potential relationships. If reproductive decisions that promote life are privileged, this approach would give the state great power to limit or even ban some previable abortions. Although that would cultivate relationships between mother and child-to-be, it may do so at the expense of existing relationships. Some families may be unable to support another child, emotionally or financially,[461] and the inability to terminate a pregnancy in such instances could harm the relationships within the family—both parent-child and spousal. Similarly, as noted earlier, laws that require the donation of unwanted embryos to infertile couples might be upheld under Kennedy's vision of reproductive rights under the theory that they promote the creation of relationships that could not otherwise be formed.[462] But, as I previously noted, for some families, such laws could be disruptive by creating genetic ties to children who will be raised in another family.[463]

Allowing the state to intervene in such familial matters to promote the creation of new relationships creates a default rule that cannot account for the varied needs, concerns, and capacities of each family. Not all families will be harmed by such rules—they might not want to have an abortion or they might want to donate unwanted embryos to infertile families. But, as noted earlier, the state is both less invested in the well-being of each family than the family itself and the state has far less appreciation of the relevant factors and information to determine whether an abortion or donation of embryos to other couples is in the best interest of the family.[464]

By privileging potential relationships over existing relationships, Kennedy's approach to resolving these conflicts is problematic. Relational privacy should focus above all on protecting the integrity of re-

461 *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

462 *See supra* text accompanying note 443.

463 *See supra* note 206 and accompanying text.

464 *See supra* text accompanying notes 195–97.

lationships between *existing* individuals.[465] Existing individuals are clearly persons in a moral and legal sense and the relationships they form therefore have an integrity that is necessarily greater than potential relationships between existing individuals and embryos or fetuses, which do not yet have personhood status. Moreover, we privilege actual versus potential values. Therefore, *actual* relationships between existing individuals deserve greater protection than merely *potential* relationships that have not yet formed. If relational privacy concerns drive Kennedy's decision, they lack the nuance necessary to sort out the potential conflicts between future relationships and existing relationships that are inherent in the abortion debate.

Having criticized Kennedy's relative weighting of the many relationships affected by partial-birth abortion and his privileging of certain relationships—the community, the medical profession, and implicitly mother and unborn child—over the relationships most threatened by state intervention—the existing families—I do not want to suggest that these relationships should not be considered in evaluating the propriety of state intervention in reproductive matters. Kennedy is right to ask us to consider the ways in which reproductive decisions affect the many communities of which we are a part. In evaluating a technology like genetic enhancement, for example, we must take seriously the threat it poses to the community by promoting and exacerbating inequity[466] and balance it against the possible threat to the family of banning genetic enhancement of offspring.[467] Arguments might be made for how state prohibition of genetic enhancement could threaten the integrity of families, whose ultimate well-being may be increased if the children have greater opportunities in life. But there are also reasons to be troubled by the effects of this technology on *some* families if it is used in ways that lead parents to pressure children to fulfill the very expectations that led to the use of this technology.[468] Ultimately, we should consider the effects on all relationships, with special attention to those most affected by such regulations, the families themselves. Otherwise we run the risk of the hostile kind of exclusion of a *Bowers* approach.

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465 *Cf. supra* text accompanying note 200.

466 *See supra* note 286 and accompanying text.

467 *See supra* notes 209–10 and accompanying text.

468 Of course, as suggested earlier, this raises just the same concerns with parental actions that push extracurricular activities aggressively or even cosmetic surgery. *See supra* text accompanying notes 218–19. One would need to consider whether the harm to the community at large was as great in those contexts as with genetic enhancement.

Conclusion

What *Gonzales* and *Casey* show us is that we do not yet have a comfortable way of discussing liberty and social concerns in the context of reproduction that allows us to recognize the pluralism of our society and to protect individuals from oppression, while also recognizing the way in which reproductive decisions affect society and others. Difficult though it may be, we must not lose sight of the individual or the relationships that define the individual. Instead, we need a more balanced approach that understands autonomy in terms of the relationships that define us, a complex approach indeed, but one that seeks to balance social as well as individual concerns. I hope to develop such a theory as applied to reproductive decisionmaking in future works.