

ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE CONSTITUTION

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Assisted reproductive technologies (“ARTs”) have generated a host of new choices that were unimaginable to persons in previous generations. Since the first child conceived through in vitro fertilization (“IVF”) was born nearly twenty-five years ago, infertility has been transformed from an uncontrollable life circumstance into a “disease,” and medical treatment has come to be seen as the standard response.¹ ARTs have also expanded reproductive options for individuals without fertility problems. Donor insemination, available since the 1950s, but not taking off until the 1970s and 1980s,² permits women to have children without a partner of the opposite sex. With egg donation, women can reproduce long after menopause,³ and the ability to freeze gametes and embryos means

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1. Some commentators believe that the characterization of infertility as a disease has had negative consequences, as it creates a societal expectation that people with infertility should pursue medical treatment. As a result, infertile couples may be considered abnormal if they choose to remain childless. *See, e.g.,* Hilde Lindemann Nelson, *Dethroning Choice: Analogy, Personhood, and the New Reproductive Technologies*, 23 J. L. MED. & ETHICS 129, 133 (1995) (“Medicalizing subfertility with the help of procreative technologies sets up norms: bodily norms, behavioral norms, ethical norms.”).

2. *See* N.Y. STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 74 (1998).

3. *See* R.J. Paulson et al., *Successful Pregnancy in a 63-Year Old Woman*, 67 FERTILITY & STERILITY 949, 949-51 (1997). The ability to freeze eggs would further expand reproductive options for postmenopausal women, as young women would have the option of freezing their own eggs to use later in life. While oocyte cryopreservation is still considered experimental, researchers have reported a few successful pregnancies following fertilization of previously-frozen eggs. K.L. Winslow et al., *Oocyte Cryopreservation: A Three Year Follow Up of Sixteen Births*, 76 FERTILITY & STERILITY S120, S120-21 (2001). Despite the limited evidence of effectiveness, one ART program in California recently began offering oocyte cryopreservation, for a fee, to “women in their 30s who are busy in their professional lives or aren’t sure they’ll get married anytime soon.” Amy Dockser Marcus, *Fertility Clinic Set to Open First Commercial Egg Bank*, WALL ST. J., Apr. 17, 2002, at D1.

that even death need not mark the end to one's reproductive life.⁴

In addition to expanding individuals' choices about whether and when to reproduce, ARTs increasingly offer the ability to control specific characteristics of one's future children. Through pre-implantation genetic diagnosis ("PIGD"), individuals who undergo IVF can screen their embryos for certain genetic diseases and select for implantation only those embryos that are not affected.⁵ These technologies are not limited to the identification of disease-related characteristics; already, some physicians are using PIGD, as well as less accurate, but less controversial sperm-sorting technologies, for prospective parents who want to have children of a particular sex.⁶ Future developments in trait selection technologies, including techniques for affirmative genetic manipulation, may give individuals even greater control over their children's genetic makeup.⁷ Eventually, cloning may become the ultimate form of controlled procreation; if the somatic cell nuclear transfer technique used to create Dolly the sheep proves successful in humans, a child created in this manner would have virtually the identical genetic makeup as the person from whom the somatic cell was obtained.⁸

As indicated by the diverse speakers at this conference, there is substantial disagreement about whether the new choices offered by ARTs are a positive social development. Speaking from a Roman Catholic perspective, Helen Alvare argued that separating sex and procreation is invariably harmful, because the conception of a child should always result from an intimate and loving act.⁹ In contrast,

4. See generally Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 902-03 (1997) (discussing the ethical and legal issues surrounding the posthumous use of reproductive material).

5. Y. Verlinsky et al., *Preimplantation Genetic Diagnosis – An Integral Part of Assisted Reproduction*, 17 J. ASSISTED REPROD. & GENETICS 75, 76 (2000).

6. See John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 422 (1996) [hereinafter Robertson, *Genetic Selection*] (discussing trait selection technologies); John A. Robertson, *Preconception Gender Selection*, 1 AM. J. BIOETHICS 2, 2 (2001) [hereinafter Robertson, *Preconception Gender Selection*].

7. See generally Maxwell J. Mehlman, *The Law of Above Averages: Leveling the New Genetic Enhancement Playing Field*, 85 IOWA L. REV. 517, 524-26 (2000) (discussing the social implications of "genetic enhancements").

8. Nat'l Bioethics Advisory Comm'n, *Cloning Human Beings* 13 (1997), available at <http://www.georgetown.edu/research/nrcbl/nbac/pubs/cloning1/cloning.pdf>. The child would also receive a small amount of mitochondrial DNA from the source of the egg used in the cloning procedure. *Id.* at 20.

9. Helen M. Alvare, *Catholic Teaching and the Law Concerning the New Reproductive Technologies*, 30 FORDHAM URB. L.J. 107, 111-13 (2002).

others maintained that ARTs offer important benefits to infertile couples, particularly those whose religious beliefs preclude legal adoption.¹⁰ Yet, even among this latter group, some speakers expressed concern about certain aspects of ARTs. Cynthia Cohen, for example, argued that using ARTs “to produce made-to-order children who have been shaped to meet arbitrary parental or social standards of beauty or perfection” raises significant problems from a Protestant theological perspective.¹¹ Although stopping short of calling explicitly for legal prohibitions on trait-selection technologies, she noted that the use of ARTs to engineer particular types of children risks “reinforcing discriminatory and harmful stereotypes”¹² and “raises the question of what sort of society we want to become.”¹³

Proposals for greater social oversight of ARTs challenge us to confront basic questions about the allocation of authority between individuals and society in the area of reproductive decision-making. Should decisions about the use of ARTs be viewed as primarily private matters, to be presumptively protected from societal control? Or is the technological transformation of reproduction a species-level issue,¹⁴ in which individual preferences should give way to a collective determination of the overall social good? Under the former view, the role of public policy would be limited to purposes such as facilitating informed decisions by individuals,¹⁵

10. Hossam E. Fadel, *Assisted Reproductive Technologies: An Islamic Perspective*, 25 J. ISLAMIC MED. ASS'N 14, 17-18 (1993). Although Islam permits adoption and views it as a charitable act, adopted children are not “legally considered as one’s own children.” *Id.* at 18.

11. Cynthia B. Cohen, *Protestant Perspectives on the Uses of the New Reproductive Technologies*, 30 FORDHAM URB. L.J. 135, 141 (2002).

12. *Id.*

13. *Id.*

14. See George Annas, *Genism, Racism, and the Prospect of Genetic Genocide* 5-6 (Sept. 3, 2001) (article prepared for presentation at UNESCO 21st Century Talks: *The New Aspects of Racism in the Age of Globalization and the Gene Revolution* at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, Sept. 3, 2001), at <http://www.bumc.bu.edu/www/sph/lw/pvl/genism.pdf> (calling for an international prohibition on “species-altering techniques and species-endangering experiments,” including cloning and certain types of genetic alteration of embryos).

15. An example of such an approach is the federal law requiring all ART programs to report their success rates annually to the Centers for Disease Control and Prevention (“CDC”), and requiring the CDC to make the information available to the public. 42 U.S.C.A. §§ 263a-1, 263a-5 (2001).

enhancing the quality of services by ART practitioners,¹⁶ and clarifying the parental rights and responsibilities of persons involved in the process.¹⁷ By contrast, the latter view would support restricting or even prohibiting practices that society deems inconsistent with overall social welfare.¹⁸

How these questions are resolved will depend to a large extent on the way in which the principle of procreative liberty is interpreted by the Supreme Court. If decisions about the use of ARTs are entitled to no special constitutional protection, the government could regulate these decisions in virtually any manner it chooses, subject only to the constitutional constraints that apply to lawmaking generally. If, however, individuals have a constitutionally protected interest in making decisions about the use of some or all ARTs, any regulation of these technologies would be subject to heightened judicial scrutiny. Restrictions on ARTs would then have to be supported by a strong justification, including specific evidence that the regulations are necessary to avoid actual harm.

While a finding that ARTs implicate constitutionally protected interests would not undermine all government efforts to regulate these technologies, it might preclude outright prohibitions on the use of ARTs.¹⁹ In addition, laws that indirectly affect access to ARTs, such as embryo research bans,²⁰ or laws that limit access to sperm banks to licensed physicians,²¹ also would be vulnerable to

16. For example, New Hampshire has passed legislation requiring ART practitioners to adhere to standards of the American Society for Reproductive Medicine, the professional society of ART practitioners. N.H. REV. STAT. ANN. § 168-B:31 (2000).

17. For a survey of such laws, see N.Y. STATE TASK FORCE, *supra* note 2, at 327-59.

18. Current examples of such an approach include laws prohibiting commercial surrogacy, *see, e.g.*, N.Y. DOM. REL. LAW §§ 121-124 (McKinney 2001), and laws prohibiting the destruction of human embryos, *see, e.g.*, LA. REV. STAT. ANN. § 9:129 (West 2000).

19. Some commentators have argued that a broadly defined principle of procreative liberty would not necessarily preclude regulations of ARTs designed to prevent social harm. Lori Andrews, for example, argues that, even if procreative liberty includes the right to have a child through cloning, the government could ban the procedure because of the danger of profound psychological harm to the cloned child and broader social harms from a reduction in genetic diversity. Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J. L. & TECH. 643, 652-56 (1998). Whether the Court would uphold a prohibition of activity deemed to trigger heightened constitutional protection depends in large part on how it defines the applicable standard of review. See *infra* text accompanying notes 64-67.

20. *See, e.g.*, LA. REV. STAT. ANN. § 9:122.

21. *See, e.g.*, OKLA. STAT. tit. 10, § 553 (1998) (providing that only licensed physicians may perform artificial insemination with donor sperm); *see also* Daniel Wikler & Norma J. Wikler, *Turkey-baster Babies: The Demedicalization of Artificial Insemina-*

constitutional challenges. Whether such challenges would be successful would depend on how broadly the courts frame the applicable constitutional interests, the extent to which the laws in question restrict individual decision-making, and the strength of the government's asserted policy goals.

I. EXISTING LAW AND COMMENTARY

Unfortunately, any constitutional analysis of ARTs must rely on a great deal of speculation. The Supreme Court has never explicitly recognized a constitutional right to procreate, even through sexual intercourse, although a number of decisions have strongly suggested that such a right exists. For example, in *Skinner v. Oklahoma*,²² the Court observed in dicta that the right to reproduce is "one of the basic civil rights of man."²³ Similarly, in *Eisenstadt v. Baird*,²⁴ the Court stated that, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁵ The Court's abortion decisions also include language about the importance of procreative decisions. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁶ a plurality of the Court stated that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" are "central to the liberty protected by the Fourteenth Amendment."²⁷ In light of these cases, most commentators agree that the Court would recognize a constitutional right to reproduce through sexual intercourse, at least for married couples.²⁸

A few lower courts have explicitly recognized such a right and have extended it to reproduction through ARTs. For example, in 1990, a federal court in Illinois struck down a state statute banning fetal experimentation on the ground that the vague statutory lan-

tion, 69 MILBANK Q. 5, 23-35 (1991) (questioning the appropriateness of laws that require physician involvement in assisted insemination).

22. 316 U.S. 535 (1942).

23. *Id.* at 541.

24. 405 U.S. 438 (1972).

25. *Id.* at 453.

26. 505 U.S. 833 (1992).

27. *Id.* at 851.

28. See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 37 (1994) [hereinafter ROBERTSON, CHILDREN OF CHOICE].

guage might deter physicians from providing IVF.²⁹ According to the court, if the right to privacy includes the right to avoid reproduction, it must also include “the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.”³⁰ In a recent Ninth Circuit decision striking down Arizona’s recent fetal research ban, a concurring judge relied on a similar constitutional analysis.³¹

In the absence of directly applicable Supreme Court precedent, commentators have suggested a variety of approaches to interpreting the scope of constitutionally protected procreative liberty. John Robertson, a leading commentator on the legal implications of ARTs, argues that the principle of procreative liberty broadly protects the freedom to have a biologically-related child.³² Under his framework, if a procedure is necessary to achieve biological reproduction, governmental efforts to regulate the procedure are subject to heightened judicial review.³³ Robertson justifies this approach by citing the importance of having children to most individuals. “If bearing, begetting, or parenting children is protected as part of personal privacy or liberty,” he argues, “those experiences should be protected whether they are achieved coitally or noncoitally. In either case they satisfy the basic biologic, social, and psychological drive to have a biologically-related family.”³⁴ Robertson initially expressed some hesitation about applying the principle of procreative liberty to reproductive cloning,³⁵ although more recently he has suggested that the principle might apply to individuals who are unable to have “a child genetically or biologically related to the rearing partners” through other available reproductive techniques, such as IVF.³⁶

29. *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1363 (N.D. Ill. 1990), *aff’d*, 914 F.2d 260 (7th Cir. 1990).

30. *Id.* at 1377.

31. *Forbes v. Napolitano*, 236 F.3d 1009, 1013-14 (9th Cir. 2000) (Sneed, J., concurring).

32. John A. Robertson, *Two Models of Human Cloning*, 27 HOFSTRA L. REV. 609, 619 (1999) [hereinafter Robertson, *Two Models*].

33. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 28, at 38-39.

34. *Id.* at 39.

35. See Robertson, *Genetic Selection*, *supra* note 6, at 438 (arguing that cloning “might fall outside the bounds of reproduction as commonly understood in today’s society”).

36. Robertson, *Two Models*, *supra* note 32, at 618. Other commentators have questioned Robertson’s focus on the individual’s reason for seeking to have a child through cloning. See, e.g., Elizabeth Price Foley, *The Constitutional Implications of Human Cloning*, 42 ARIZ. L. REV. 647, 704 (2000) (“[U]nless we are prepared to institute mind police to enforce the appropriate moral or ethical standards for con-

In fact, Robertson suggests that the principle of procreative liberty also should extend to procedures without which people might not *want* to reproduce, even if they would be physically capable of doing so.³⁷ For example, he suggests that there might be a constitutional right to use sperm-sorting technology in order to increase the likelihood of having a child of a particular sex, because some people might choose to forego reproduction if they were unable to determine their child's sex.³⁸ Such people, he claims, "should be free to use a technique essential to their reproductive decision unless the technique would cause the serious harm to others that overcomes the strong presumption that exists against government interference in reproductive choice."³⁹

Other commentators have proposed narrower interpretations of the scope of constitutional protection. Ann Massie, for example, argues that the constitutional right to procreate is based on the importance of sexual intimacy within marriage.⁴⁰ According to Massie, while ARTs may enable infertile couples to have children, they "do not directly implicate the values—bodily integrity, marital intimacy, or integrity of the family unit—that are central to the privacy cases."⁴¹ While Robertson's interpretation of procreative liberty focuses on the outcome of reproductive activities—the birth of a biologically-related child—Massie's approach is more concerned with the process and context. To the extent she recognizes a consti-

ceiving a child, there is no place in the law of procreational liberty for distinctions based upon the often inchoate and questionable motivations of parents.").

37. Robertson, *Two Models*, *supra* note 32, at 618-19.

38. Robertson, *Preconception Gender Selection*, *supra* note 6, at 3.

39. *Id.* at 4. In addition to procreative liberty, Robertson argues that the use of trait selection technologies might be protected under the principle of family autonomy. See Robertson, *Genetic Selection*, *supra* note 6, at 424 n.12.

If parents may "enhance" or better their offspring with special tutors, camps, orthodontia, rhinoplasty, or human growth hormone, then they might also have a right to bring about betterment by prebirth methods. As long as they are aiming to improve or benefit the child and their efforts will not harm the child, the timing of their efforts could be irrelevant.

Id.; cf. Owen D. Jones, *Reproductive Autonomy and Evolutionary Biology: A Regulatory Framework for Trait Selection Technology*, 19 AM. J.L. & MED. 187, 187, 199 (1993) (arguing that the principle of procreative liberty extends to trait selection technologies because such methods "can constitute an important part of larger 'reproductive strategies' that powerfully affect an individual's 'inclusiveness fitness,'" — a measure "of the proportion of a population, in a given future generation, that will carry copies of your various genes after your death").

40. Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 162 (1995).

41. *Id.*

tutional principle of procreative liberty, it is as an extension of a broader principle of marital privacy, rather than a right to have a child per se.

Radhika Rao's analysis of procreative liberty reflects a similar focus on the context of particular reproductive activities.⁴² For Rao, procreative liberty extends to reproductive activities carried out exclusively between persons in close personal relationships.⁴³ Within such relationships, the right would extend to both coital and noncoital means of reproduction.⁴⁴ However, Rao does not believe that constitutional protection extends to the use of gamete donation or surrogacy, because these procedures involve individuals from outside the relationship.⁴⁵ In such cases, she argues, the couple's right to procreate must be balanced against the donors' and surrogates' own rights to reproduce, to parent, and to control the use of their own bodies.⁴⁶

Between 1995 and 1998, the New York State Task Force on Life and the Law undertook a project to develop recommendations for state law and policy in the area of ARTs.⁴⁷ The Task Force is an interdisciplinary state commission charged with recommending public policy on a broad range of bioethical issues.⁴⁸ As part of its ART project, the Task Force convened a special working group to consider the constitutional issues surrounding the use of ARTs.⁴⁹ Rather than attempting to define the precise contours of the constitutional right to procreate, the group developed a list of factors that it regarded as important elements of the constitutional protection of procreative freedom. The list included the following considerations:

- Bodily integrity
- Marital intimacy
- The relationship between coital reproduction and sexual intimacy
- The importance of being a parent and raising a child
- The importance of carrying on a genetic line

42. See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1078-80 (1998).

43. *Id.* at 1097.

44. *Id.* at 1115.

45. *Id.* at 1083.

46. *Id.* at 1090.

47. The Author served as Executive Director of the Task Force during this period.

48. N.Y. STATE TASK FORCE, *supra* note 2, at ix.

49. *See id.*

- The religious dimensions of decisions about procreation and child rearing
- The woman's interest in carrying a fetus and giving birth
- The intrusiveness of attempts to enforce laws limiting decisions about procreation
- The danger that placing control of reproduction in the hands of the state will lead to eugenic policies⁵⁰

The Task Force concluded that, "the constitutional protection afforded particular forms of assisted reproduction should be based on the degree to which the procedure at issue implicates the factors set forth above."⁵¹ Under this approach, ARTs by married couples using their own gametes would probably enjoy constitutional protection, as they implicate all of the factors on the list except for sexual intimacy.⁵² By contrast, surrogacy, cloning, or the use of trait selection technologies might not.⁵³ The Task Force specifically rejected the broad interpretation of procreative liberty advocated by Robertson and other commentators.⁵⁴ According to the Task Force, "[t]he fact that noncoital reproduction, like coital reproduction, is based on a desire to have a biologically-related child does not, in itself, mean that the use of ARTs implicates the same constitutional concerns."⁵⁵

II. HOW MIGHT THE SUPREME COURT RULE?

Of course, the analysis of lower courts and commentators is not necessarily any indication of how the Supreme Court will rule. In general, this Court has been reluctant to interpret substantive due process rights broadly. In upholding state laws prohibiting assisted suicide, the Court emphasized that not all deeply personal choices are constitutionally protected.⁵⁶ Some justices have emphasized the importance of limiting constitutional protection to practices supported by history and tradition,⁵⁷ an approach that would probably yield no special protection for decisions about ARTs.

50. *Id.* at 144-45.

51. *Id.* at 145.

52. *See id.*

53. *See id.* at 145-46.

54. *See id.* at 146.

55. *Id.* at 145.

56. *See Wash. v. Glucksberg*, 521 U.S. 702, 727 (1997) ("That 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.").

57. *See Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality) ("[W]e have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a

Yet, it is not unthinkable that the Court would extend the right to procreate to at least some forms of ARTs, 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.⁵⁸ The fact that ARTs require medical interventions does not mean they fall outside the scope of constitutional protection. After all, the right to abortion is a right to a medical procedure; the fact that terminating a pregnancy requires medical intervention has never been thought to be inconsistent with recognizing abortion as a constitutional right.

However, it is doubtful that the Court would extend the right to procreate to all medical procedures resulting in the birth of a child. Once third parties like gamete donors or surrogates enter into the picture, it is difficult to view ARTs as purely private decisions. The Court is also likely to draw a distinction between procedures that enable individuals to have a child and procedures that seek to provide the means to have a particular type of child. While Robertson may be correct that restrictions on trait selection would affect some people's willingness to have children,⁵⁹ the Court is unlikely to find that such indirect burdens on procreative decisions are constitutionally significant.

In the abortion context, the Court has upheld indirect restrictions on procreative liberty as long as those restrictions do not pose an "undue burden" on the individual's choice.⁶⁰ Moreover, the Court's application of the undue burden standard suggests that the restrictions must "substantially limit[]" the decisions of individuals in general; it is not enough to show that a law makes it difficult for a particular person to exercise her constitutional rights.⁶¹ Thus, in *Casey*, the Court upheld a twenty-four hour waiting period for obtaining abortions, despite the fact that some women would not be able to travel to abortion clinics twice within a twenty-four hour period.⁶² The Court concluded that waiting periods do not place substantial obstacles in the path of women in general, even though

concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.").

58. See *Roe v. Wade*, 410 U.S. 113, 148, 153 (1973).

59. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 28, at 152-53.

60. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

61. *Id.* at 875 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 (1977)).

62. *Id.* at 886-87.

they might affect access to abortion for particular women.⁶³ Regarding restrictions on trait selection technologies, the Court is also likely to ask whether such restrictions are substantial limitations for the average person seeking to have a child, not whether they interfere with the willingness of particular persons to reproduce.

Indeed, the Court's application of the "undue burden" standard in the context of procreative decisions may turn out to be at least as important as its determination of the type of reproductive activities that trigger heightened scrutiny. Before *Casey*, the Court applied "strict scrutiny" to laws that interfered with the right to abortion, which requires the government to show that its actions are "narrowly drawn" to achieve a "compelling state interest."⁶⁴ Applying this standard of review, commentators have questioned the constitutionality of many indirect restrictions on reproductive decisions, such as laws prohibiting payments to surrogate mothers,⁶⁵ or laws that do not permit men to "opt out" of parental rights and responsibilities when donating sperm to unmarried women, which arguably reduce these women's access to donor sperm.⁶⁶ However, under the "undue burden" standard, a constitutional challenge to these indirect restrictions would be far more difficult. While the Court struck down Pennsylvania's spousal notification requirement under the undue burden standard, it did so because of its belief that the requirement would effectively preclude a "significant number of women" from obtaining abortions "as surely as if the Commonwealth had outlawed abortion in all cases."⁶⁷ If the undue burden standard requires proof that a governmental action would make it impossible for a significant number of people to engage in protected activities, government could place substantial limits on ARTs even if they are found to implicate constitutionally protected rights.

III. CONSTITUTIONAL ANALYSIS AND PUBLIC POLICY

While the current Supreme Court is unlikely to interpret the principle of procreative liberty in a manner that embraces most forms of ARTs, it is not difficult to envision a differently consti-

63. *Id.* at 886.

64. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

65. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 28, at 141.

66. See Janet E. Durkin, *Reproductive Technology and the New Family: Recognizing the Other Mother*, 10 J. CONTEMP. HEALTH L. & POL'Y 327, 341-42 (1994) ("[T]he inability of donors to 'opt out' could deny the single woman her constitutionally protected right to procreate with the aid of artificial insemination.").

67. *Casey*, 505 U.S. at 893-94.

tuted Court adopting a broader view. Like all questions about the scope of substantive due process protections, the concept of procreative liberty is susceptible to multiple interpretations, depending on the level of generality at which the principle is defined.⁶⁸ Precedent alone cannot determine the appropriate level of generality at which to define a particular principle; both Robertson's broad interpretation and Massie's narrow view could easily be reconciled with the prior case law, depending on how those cases are read. Ultimately, whether ARTs *should* be considered part of procreative liberty is as much about values and policy as it is about precedent. The question cannot be answered without considering the larger purposes that heightened judicial scrutiny of governmental actions is designed to promote.

One reason to subject certain governmental actions to heightened judicial scrutiny is that they affect personal decisions that are deeply important to the individuals making them. Yet, subjective importance to the individual cannot be the sole requirement for heightened constitutional protection. Numerous activities are deeply important to particular individuals, ranging from smoking marijuana to polygamous marriage, yet restrictions on these activities need not, and should not have to, pass the test of heightened scrutiny. A constitutional system that required heightened scrutiny of all laws affecting decisions that individuals subjectively deem important would have profoundly undemocratic implications, as it would give judges expansive powers to second-guess a broad range of legislative and regulatory actions.

John Hart Ely's process-based theory of constitutional adjudication seeks to overcome this dilemma by focusing on the core democratic values our constitutional system is designed to promote.⁶⁹ According to Ely, judges should not apply heightened scrutiny to impose particular substantive values, but instead to correct defects in the political process that close out disadvantaged minorities.⁷⁰ Viewed in this light, the argument for an expansive definition of procreative liberty loses much of its force. There is no reason to believe that persons seeking to use ARTs lack the ability to pursue their interests effectively in the political process. Such individuals are not only disproportionately white and wealthy,⁷¹ but their in-

68. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

69. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1 (1980).

70. See *id.* at 151.

71. See N.Y. STATE TASK FORCE, *supra* note 2, at 201.

terests also overlap with those of organized medicine and the pharmaceutical industry, two interest groups with considerable influence in the political process. The lack of any significant limits on access to ARTs in this country suggests that infertile people can effectively pursue their interests without enhanced constitutional protection.⁷²

Constitutional protection of ARTs also cannot be justified by the equality concerns that underlie some of the Court's recent abortion jurisprudence. In *Casey*, for example, the plurality linked the right to abortion to women's equality and noted that, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."⁷³ Restrictions on access to abortion and contraception raise significant concerns for gender equality, if for no other reason than it is only women who must endure the physical burdens of unwanted pregnancies. Restrictions on access to ARTs, however, affect both women and men.⁷⁴

Indeed, granting constitutional protection to ARTs may actually impede efforts to promote social equality. For example, one of the primary arguments for regulating the use of germline modification is to avoid creating a self-perpetuating "genetic divide," in which the descendants of the wealthy will have inborn advantages not available to children of the poor.⁷⁵ Equality considerations also underlie efforts to restrict the prices charged for human eggs.⁷⁶ Recognizing a broad constitutional principle of procreative liberty might frustrate societal efforts to limit the inequitable conse-

72. The fact that many states require private health insurers to cover infertility treatment, despite the absence of mandates for other important medical service, demonstrates that people with infertility do not lack power in the political process. See generally Lisa M. Kerr, *Can Money Buy Happiness? An Examination of the Coverage of Infertility Services Under HMO Contracts*, 49 CASE W. RES. L. REV. 599, 606 (1999).

73. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

74. Indeed, some feminists believe that ARTs are actually harmful to women, "by reinforcing sex-role stereotypes in which a woman's worth is dependent upon her reproductive capacity and also by reinforcing the power of men in the reproductive sphere." Karen Lebacqz, *Feminism and Bioethics: An Overview*, 17 SECOND OPINION 10, 11 (1991).

75. See Mehlman, *supra* note 7, at 553 (expressing concern that such modifications "could eventually create a political system dominated by a genetic aristocracy or 'genobility'").

76. See Ethics Comm. of the Am. Soc'y for Reprod. Med., *Financial Incentives in Recruitment of Oocyte Donors*, 74 FERTILITY & STERILITY 216, 217 (2000) (suggesting that high payments to egg donors "could be used to promote the birth of persons with traits deemed socially desirable, which is a form of positive eugenics," and also "make donor oocytes available only to the very wealthy").

quences of particular ARTs, to the extent that effective regulations might require some restrictions on individual choice.

The above discussion suggests that an expansive definition of procreative liberty may not be necessary to promote the core values that heightened due process protection is designed to protect. It is also worth considering whether such a definition would be desirable as a matter of sound health care policy. As with any new technological development, a cautious approach to introducing new ARTs is likely to maximize the benefits of these technologies while minimizing the harms. Even many of the most ardent supporters of procreative liberty note the wisdom of adopting a go-slow approach. For example, in the context of preconception gender selection, Robertson has argued that the most desirable public policy would be to introduce the practice “to increase the variety of offspring gender before extending it to firstborn gender preferences,” rather than simply making the technology available immediately to anyone on demand.⁷⁷ Similarly, he has suggested that reproductive cloning, if it ever becomes feasible, first should be limited to individuals unable to have children through other means.⁷⁸ Such a cautious approach would permit us to assess the implications of these technologies on a small-scale level and, if necessary, to develop mechanisms for minimizing any previously unforeseen harms. Yet, if all restrictions on ARTs are subjected to heightened scrutiny, this approach might be difficult to sustain. Given the limited and murky precedents in this area, it would not be inappropriate to consider these policy implications in defining the scope of constitutional review.

77. Robertson, *Preconception Gender Selection*, *supra* note 6, at 7.

78. See Robertson, *Two Models*, *supra* note 32, at 638 (arguing that cloning is best suited for couples who have “no other way than cloning to have a genetic kinship relation with the child whom they rear”).