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B I O E T H I C S

States' Regulation of Assisted Reproductive Technologies

What Does the U.S. Constitution Allow?

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Abstract

This paper addresses the extent to which the rights of privacy and reproductive liberty protected by the United States Constitution prevent states from regulating assisted reproductive technologies (ARTs). It concludes that under the best interpretation of the Supreme Court's existing case law, states have ample room to regulate individuals' decisions to procreate, including decisions to use ARTs. States, pursuant to their police powers, may regulate ARTs in order to protect the health, safety, and welfare of their citizens. However, courts will strictly scrutinize any regulation of procreation that distinguishes socially disfavored groups for different treatment. Similarly, even where a regulation would apply equally to all citizens, it must serve a legitimate governmental interest, rather than merely reflect "out-moded taboos."

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Introduction

Assisted reproductive technologies (ARTs) are almost completely unregulated in the United States. This fact makes ARTs unusual within American medicine, and it makes the U.S. unusual among developed countries. The lack of regulation is not because ARTs have flown under the public's radar. ARTs often make for splashy news — the past few months alone have brought us such eye-popping headlines as “California Woman Gives Birth to Octuplets,” “Fertility Expert: ‘I Can Clone a Human Being,’” and “A Baby Please. Blond, Freckles — Hold the Colic.”¹ Nor is concern about ARTs confined to any particular ideology; to the contrary, various aspects of the multibillion-dollar ART industry rouse the ire of liberals, feminists, social conservatives, Green Party types, and a host of other strange bedfellows.²

Academics and journalists cite multiple explanations for the lack of regulation despite this potential for overlapping consensus. One common explanation is that policy makers are reluctant to tread in an area protected by federal constitutional rights to privacy and reproductive liberty.³ But the belief that the U.S. Constitution prevents the government from regulating ARTs is based on a misunderstanding of the law: For better or worse, the best reading of the existing case law is that the government *can* regulate ARTs without violating the U.S. Constitution.

The government already may regulate “natural” procreation — the only method of procreation the Supreme Court has yet had occasion to consider. While the Court has recognized that procreation is important to both individuals and the survival of the species, it has permitted quite substantial regulations of procreation in order to protect public health and safety, the quality of public education, and the prevention of births that would tax scarce social resources. Importantly, such governmental interests fall squarely within the broad police powers of the states, making them, rather than the federal government, the most natural regulators of procreation. If the government may regulate natural procreation, it stands to reason that it may also regulate assisted forms of procreation that, if anything, raise more public welfare concerns. Under this reasoning, notably, the government's ability to regulate ARTs has nothing to do with any distinction between assisted and natural reproduction.⁴

Yet while the U.S. Constitution does not erect an impenetrable sphere around decisions to procreate, and in fact leaves

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considerable room for states to regulate such decisions, states' ability to limit individuals' liberty to procreate does remain subject to some federal constitutional constraints. The cases discussed below highlight two such constraints: regulations must not treat similarly situated individuals dissimilarly, and they must not be arbitrary.

Constitutional Law 101

The Due Process Clauses of the Fifth Amendment of the U.S. Constitution, which applies to the federal government, and the Fourteenth Amendment, which applies to the states, provide that the government shall deny no person "life, liberty, or property, without due process of law." Although this language, on its face, suggests that the government need only provide certain procedural safeguards before depriving an individual of these things (such as a trial by jury, or notice and a hearing), the Supreme Court has long held that the Due Process Clauses have "a substantive component as well, one barring certain government actions regardless of the fairness of the procedures used to implement them." The Court has explained that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."⁵

Two aspects of such constitutional liberty rights are important to note for present purposes. First, they constitute negative rights to make certain decisions or take certain actions without government interference, not positive rights to government assistance in achieving one's ends. The question, then, is whether the Constitution protects a negative right to be let alone by the government to decide to use ARTs (or, more broadly, to procreate). No one seriously argues that, under the Supreme Court's interpretation of the Constitution, individuals have a positive right to government assistance in obtaining the *means* to procreate, whether through ARTs or otherwise.

Second, as the constitutional text itself suggests, these rights to be let alone operate only against government action. They do not apply to private parties. Thus, whatever the Constitution may prevent the government from doing, it does not bar private entities, such as many fertility clinics, from enacting policies that could be construed as interfering with individuals' procreative liberty – say, by refusing to serve same-sex couples wishing to procreate. (Of course, such policies may run afoul of other state and federal laws, a possibility that is beyond the scope of this paper.)

Choosing the Right Precedents: Decisions to Procreate Versus Decisions Not to Procreate

Perhaps the best-known constitutional liberty rights are the right to avoid pregnancy by using contraceptives and the right to terminate a pregnancy prior to viability for any reason, or after viability in order to protect the woman's life or health.⁶ In deciding

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that the Constitution protects these rights, the Supreme Court emphasized the intensely personal nature of reproductive decisions.

Those who argue that the Constitution poses a substantial obstacle to the regulation of ARTs often suggest – not implausibly – that the principle that individuals have a right to be let alone to make highly personal decisions *not* to procreate entails the conclusion that they have the right to be let alone to make similarly personal decisions *to* procreate. Indeed, the Court itself has opined that “[i]f the right of privacy means anything, it is the right of the individual ... to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision *whether to bear or beget a child.*”⁷

Despite its initial plausibility, there are two problems with this argument. First, assuming that the abortion cases have essentially decided the question of the constitutionality of regulating ARTs, the Court’s abortion jurisprudence has never stood for the simplistic proposition that the government may not interfere with a woman’s private decision regarding abortion. As a result, the Court’s abortion jurisprudence cannot, by extension, stand for the proposition that the government may not interfere with individuals’ private decisions regarding other reproductive choices, including choices to use ARTs.

Prior to fetal viability, a woman has a right to choose to have an abortion, and to exercise this right without “undue” interference by the state. Under this standard, however, the Supreme Court has upheld parental consent requirements for minors, waiting periods, the disbursement of “informed consent” materials designed to encourage childbirth, and the prohibition of one method of abortion altogether (unless required to protect the woman’s life), finding that none of these restrictions constituted a “substantial obstacle” to a woman’s ability to obtain an abortion. Moreover, after viability, the government may ban abortion altogether, so long as it permits exceptions to protect the life and health of the woman.

Despite its sometimes-sweeping language about personal privacy, then, the Supreme Court has held several significant restrictions on abortion to be constitutional. By analogy, a variety of regulations of ARTs, though certainly not all, ought to withstand constitutional scrutiny.

However, a second, more important objection – and a reason for not dwelling on the kinds of regulations of ARTs that the contraception and abortion cases might justify – is that these cases addressing the right *not* to procreate are less relevant to the constitutionality of regulating ARTs than are cases addressing the right *to* procreate. In those latter cases, the Supreme Court has recognized that individuals’ interest in procreating is important. But the Court has nevertheless upheld quite substantial regulations of procreation – in some cases permanently preventing individuals from procreating – in order to protect various public goods, including health, safety, and education.

Regulation of Procreation as an Exercise of the States' Police Power

The procreation cases begin with the 1927 case of *Buck v. Bell*.⁸ Carrie Buck was one of three generations of women said to be “feeble-minded,” and was accordingly committed to an institution run by the Commonwealth of Virginia. “Feeble-mindedness” was a broad term of the era encompassing “insanity,” “idiocy,” “imbecility,” and other vaguely defined “defects” believed to be highly heritable and the cause of a wide range of social ills including poverty, criminality, promiscuity, and alcoholism. A Virginia statute permitted state hospitals and colonies to surgically sterilize residents suffering from such heritable conditions if doing so would be in the best interests of both the resident and society. As the Supreme Court, echoing language in the statute, explained, “the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society.”

Buck challenged the constitutionality of the statute, arguing that it violated her right to bodily integrity and her personal prerogative to have children. Justice Oliver Wendell Holmes, Jr., writing for the Court, rejected those arguments, likening state-mandated sterilization to compulsory vaccination and to the military draft. In both cases, he said, the states properly exercise their police power to compel individuals to make certain sacrifices for the welfare of society. Because it was believed that the feeble-minded tended toward crime and incompetence, and thus were likely to become substantial burdens on the state, reducing their numbers through sterilization was seen as an effective way to protect the public health and safety and to conserve scarce social resources. Justice Holmes infamously concluded, “[t]hree generations of imbeciles are enough.”

Buck has at least two important lessons to teach with respect to the regulation of ARTs. First, if the state, in order to protect the public welfare, may force individuals to submit to an invasive surgical procedure with the result that they may never again procreate, then surely the state, to achieve the same ends, may preclude individuals from engaging in certain *kinds* of procreation, often (though not always) leaving them free to procreate in other ways, and usually without invading their bodily integrity by subjecting them to the scalpel.

Second, the kinds of governmental interests that the Supreme Court has held may justify interfering with individuals' reproductive liberty — public welfare, health, and safety — fall squarely in the broad police powers of the states.⁹ Thus, while some commentators have pointed to the United Kingdom's national Human Fertilisation and Embryology Authority as a model to which President Obama should look when reforming health care, under our constitutional framework, states — and not the federal government — are the most natural regulators of procreation.¹⁰

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However, it is now widely agreed that *Buck v. Bell* was a shameful decision. The eugenics underlying the statute was little more than social prejudice masquerading as science. The “feeble-minded” included those whose mental deficits were genuine but not hereditary as well as those — like the Bucks themselves — who had no mental deficits whatsoever but were simply considered socially undesirable.¹¹ Does *Buck* really have any precedential value today?

The Supreme Court accepted as scientific fact the theory that a wide range of serious social ills were straightforwardly heritable, and its holding — that states, in order to protect the public welfare, may force individuals to submit to surgical sterilization — has never been overruled. Of course, *Buck* is unlikely to be explicitly overruled absent the unlikely emergence of a modern-day state program of involuntary sterilization. Although proposed legislation, trial court sentences, and private initiatives regularly seek to stem procreation by criminals, those on public assistance, and drug-addicted women, much — though not all — of this activity has suffered political defeat or appellate court reversal, and none of it would have risen to the level of the mass state-mandated sterilization programs that were rampant in the United States in the twentieth century and led to an estimated 60,000 sterilizations.¹²

If the political tides were to change significantly and a sterilization program akin to that at issue in *Buck* were to emerge today, the Supreme Court might well begin by requiring the state to show that sterilization is rationally related to the legitimate end of protecting the public welfare by providing sound scientific evidence that the social ills it seeks to avoid are strongly heritable. The Court might also probe the adequacy of the procedural due process protections involved, and ensure that the sterilization program applies equally to all similarly situated individuals (see the discussion of *Skinner v. Oklahoma*, below). These modest inquiries alone likely would have substantially reduced the number of sterilizations performed by the states in the *Buck* era.

However, there is no particular reason to believe that today's Supreme Court would necessarily overturn *Buck's* core principle by holding that the state may never, for any reason, order an individual to submit to sterilization. Even if the Court did hold that state-mandated surgical sterilization is per se unconstitutional, few regulations of ARTs designed to protect the public welfare require such invasive and permanent deprivations of procreative liberty. There is still less reason to suspect that the Court would overturn *Buck's* more general principle that the state, pursuant to its police powers, may require individuals to sacrifice some degree of procreative liberty. In *Roe v. Wade* itself, the Supreme Court emphasized that “[t]he Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate,” and cited *Buck* favorably for the proposition that one does not have “an unlimited right to do with one's body as one pleases.”¹³

The Importance of Regulating Procreation Equally

The next case in this line reaffirmed *Buck's* central principle while adding an important qualification: when regulating procreation, states must do so equally.

The 1942 Supreme Court case of *Skinner v. Oklahoma* involved an Oklahoma law permitting the state to compel the surgical sterilization of anyone who had been convicted three or more times of certain felonies involving “moral turpitude.”¹⁴ The statute assumed that (at least some) criminality is heritable, and sought to reduce crime by preventing those criminals from reproducing. Jack Skinner had been convicted twice of armed robbery and once – memorably – of stealing chickens, and was ordered to submit to sterilization. The Supreme Court struck down the statute as unconstitutional, noting that “the right to have offspring” is a “human right,” “one of the basic civil rights of man,” “a basic liberty,” and “fundamental to the very existence and survival of the race.” Many contemporary legal commentators – including the Supreme Court itself – have seized upon this language as evidence that *Skinner* established a constitutional “right to procreate.”¹⁵

A careful reading of *Skinner* suggests, however, that it does not establish a “right” to procreate – if, by “right,” we mean a trump against government power, an individual interest so strong that it may not be put into balance against, and outweighed by, other interests. Although today we view constitutional rights as “trumps (winners despite claims of public purpose),” in 1942, “the general doctrinal rule was that legal rights could be defeated by claims of the general welfare.”¹⁶ In fact, the *Skinner* Court expressly declined “to reexamine the scope of the police power of the States” established in *Buck v. Bell*.

Instead, the problem with the statute was that it did not *equally* burden the procreative liberty of similarly situated individuals: the statute exempted from its purview white collar crimes that were otherwise identical to the blue collar crimes covered by the statute, and the state made no attempt to distinguish these classes of felons by arguing that the propensity to commit blue collar felonies was heritable while the propensity to commit white collar felonies was not. As a result, the statute violated the Equal Protection Clause.

Skinner did hold, however, that when a sterilization law distinguishes between classes of individuals, it must be subjected to the most rigorous level of judicial review, known as strict scrutiny. The Court likened the classification at issue in *Skinner* to discrimination on the basis of race or nationality, and concluded that strict scrutiny of this classification was necessary, “lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals.”

Although the opinion is less than clear on this point, the Court reasonably suggested that at least two factors make sterilization a particularly powerful tool of discrimination. First, it is permanent; the individual is “forever deprived of a basic liberty.” Second, it

allows the state to discriminate not only against present members of a disfavored group, but, by preventing those individuals from reproducing, against future members of the same group who are thereby prevented from coming into existence: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."

Importantly, however, the statute received strict scrutiny because of the *combination* of the irreparable harm done to an important liberty interest and the unequal way in which the state infringed upon that interest — not simply because the statute affected procreation. The next and final case — where the regulation of procreation was nonpermanent and did not involve bodily integrity, and where no Equal Protection argument was raised — confirms that bare regulations of procreation do not, standing alone, merit strict scrutiny.

The Importance of Regulating Procreation *Rationally*

The 1975 case of *Cleveland Board of Education v. LaFleur* — decided two years after *Roe v. Wade* — is rarely mentioned in discussions of the Supreme Court's reproductive freedom jurisprudence.¹⁷ *LaFleur* involved the mandatory maternity leave rules adopted by school boards in Ohio and Virginia. The Ohio school board required a pregnant teacher to take unpaid maternity leave beginning five months before the expected birth of her child, and not to return until the beginning of the next semester following the date on which her child reached three months. The Virginia school board's rules were similar. The Supreme Court found that these policies affected the teachers' constitutionally protected freedom, recognized in *Skinner*, to decide to have a child.

However, in deciding whether the state's interference with the freedom to procreate was *justified*, in this case, where no Equal Protection claim was raised, the Court applied the lowest, most deferential level of scrutiny — known as rational basis review. Under this standard, the state need only show that its action is "rationally related" to a "legitimate" governmental interest.

Turning to this test, the Court held that the states' stated purposes in enacting these policies — ensuring continuity of instruction and keeping physically unfit teachers out of the classroom — were legitimate. But the Court found that some aspects of the policies were not rationally related to these legitimate ends, but instead "needlessly, arbitrarily, or capriciously," impinged on the teachers' procreative liberty, and were therefore unconstitutional. For example, although it was reasonable to require teachers to give notice of their pregnancy so that a suitable substitute could be hired and to prevent any unfit teachers from remaining in the classroom, the requirement that *all* teachers leave their jobs precisely five months prior to their due dates — regardless of their fitness to teach — was arbitrary and did not serve these purposes.

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Allowing teachers to choose their own departure dates, based on the individualized circumstances of their pregnancies, would have served these purposes just as well. In fact, in some cases, individualized leave dates would have served those ends better, since they would have allowed some teachers not expected to give birth until, say, summer or fall to complete the school year (thus providing complete continuity of instruction).

The Court noted that despite the school boards' *stated* reasons for establishing the maternity leave regulations, the evidence suggested that these policies "may have originally been inspired by other, less weighty, considerations," including the desire "to insulate schoolchildren from the sight of conspicuously pregnant women." Under rational basis review, the government's actual motivations are officially irrelevant; the government need only put forth a legitimate governmental interest that would be served by its action, and it may contrive this interest for purposes of litigation. And because the state did not attempt to argue that sparing children from the sight of pregnant women was a legitimate governmental interest, the Court's preemptory rejection of this interest does not amount to a holding which is binding on courts today. Nonetheless, the Court's characterization of the school boards' thinking as based on "outmoded taboos," and its strong suggestion that such outmoded taboos could not be the basis for a legitimate governmental interest, should give policy makers pause as they consider various regulations of reproductive technologies that might be based on similarly outmoded taboos, especially if regulations based on such taboos suffer from the additional potential constitutional infirmity of either directly targeting or having a disparate impact on particular groups.

Reading the Tea Leaves

It is impossible to know what the Court will do when it is squarely confronted with a particular infringement of an asserted right to use a particular assisted reproductive technology. Although the Supreme Court (usually) follows the precedents established in its prior decisions, just as there are important differences between decisions to procreate and decisions not to procreate, there are enough differences among state-mandated sterilization, mandatory maternity leaves, and ARTs to permit the Court to distinguish these cases. And the already-difficult task of extrapolating from related, but distinct, cases to the case of ARTs is made all the more difficult by the fact that no single theory of substantive due process explaining all of the Court's decisions in this area enjoys majority support by either the current members of the Court or legal academics.

Moreover, potentially legally relevant differences exist even among ARTs. For instance, some ARTs, such as in vitro fertilization, truly assist procreation, and thus serve the same interests as "natural" procreation. Other ARTs, however — like preimplantation genetic diagnosis, which already exists, and other

technologies on the horizon — allow individuals to control the *kinds* of children they have. These ARTs arguably serve different interests, ones that may or may not be protected by the Constitution.

So, too, are there differences among various regulations of ARTs. Two regulations may serve the same legitimate government interest but do so in different, legally relevant ways, such that one passes constitutional muster while the other does not. For example, a law requiring a woman carrying octuplets to selectively reduce the number of fetuses she is carrying would raise serious constitutional concerns — including the right to bodily integrity protected by the Fourteenth Amendment and the right to free exercise of religion, protected by the First Amendment — whereas a law preventing anyone from transferring more than two or three embryos into a woman's uterus in the first place likely would not.

Lessons for the States

With these caveats aside, what lessons can states interested in regulating ARTs learn from the Supreme Court's procreative liberty cases to date?

Most importantly, it is not the case that, under existing case law, the Constitution treats all reproductive decisions as taking place within an impenetrable sphere of privacy. Under *Buck*, states may regulate procreation — in the most extreme of ways, by subjecting individuals to state-mandated surgery — under their broad police powers. *Buck* suggests that states may do so in order to serve the public health and safety, and perhaps to preserve scarce social resources. *LaFleur* further suggests that states may burden the liberty interest in procreating in order to serve other legitimate governmental interests, such as ensuring that state employees and their unborn children are safe, that their employees are able to perform their jobs, and that consumers of state goods, such as public school students, receive a quality product.

On the other hand, *LaFleur* also suggests — without holding — that “outmoded taboos” about procreation may not form the basis of legitimate state interests in regulating procreation. And *Skinner* establishes a second constraint on states' ability to regulate procreation pursuant to their police power: They may not do so in a way that treats similarly situated individuals unequally.

How would these principles work in the context of ARTs?

Consider how the Supreme Court might have responded to one recently proposed piece of legislation. It has long been known that multiple-fetus gestation carries significant health risks for the women and children involved relative to singleton pregnancies. For women, risks include diabetes, hypertension, preeclampsia, prolonged bed rest, and Cesarean section. In addition to miscarriage and stillbirth, risks for children include preterm birth and low and very-low birth weight, which in turn typically require very expensive, lengthy stays in neonatal intensive care units as

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well as long-term developmental follow-up for conditions like cerebral palsy. The heightened risk is present even in twin pregnancies but substantially increases with each additional fetus.

On January 26, 2009, California resident Nadya Suleman gave birth to octuplets after she and her doctor agreed to transfer six embryos into her uterus and two of the embryos spontaneously twinned.¹⁸ In February of 2009, the Georgia Senate considered a bill that sought to “reduc[e] the risk of complications for both the mother and the transferred in vitro embryos” by limiting the number of embryos that may be transferred into a woman’s uterus.¹⁹ As suggested above, if states, for public health reasons, may constitutionally subject individuals to mandatory surgery that prevents them from ever (again) exercising their right to procreate, then there is good reason to think that states can regulate the number of embryos fertility clinics may transfer into women to protect them and the resulting children from the significant dangers of multiple births. Such regulation neither implicates bodily integrity nor permanently and absolutely frustrates the individual’s liberty interest in procreating.

Although the bill distinguished among women on the basis of age — permitting only two embryos to be transferred into women under the age of forty, but three embryos into older women — this distinction, which is standard practice in the fertility industry, is based on the scientific fact that women’s fertility declines with age, so that transferring more embryos into older women is generally necessary in order to achieve the same success rate. Because transferring the same number of embryos into younger women generally would have the effect of producing higher-order births, with all the concomitant risks for mother and children, this distinction is rationally related to the legitimate governmental interest of protecting mother and child.

However, the bill contained other provisions that are more constitutionally suspect. To understand their implications, it is necessary to briefly review the typical in vitro fertilization process.

A woman preparing to undergo IVF and embryo transfer usually takes daily hormone injections in order to stimulate her ovaries into producing more than the standard one egg per menstrual cycle. Although their long-term effects are not fully known, the known risks of fertility drugs include bloating, abdominal pain, mood swings, and headaches. At the appropriate time in the woman’s menstrual cycle, the physician places an ultrasound-guided needle through the woman’s vagina and into her ovaries, where all of the eggs are retrieved. Although usually performed as an outpatient procedure, this is an invasive surgery carrying risks of discomfort, adverse reactions to anesthesia, bleeding, infection, and damage to structures surrounding the ovaries, including the bowel and bladder. The eggs are then combined with sperm in the hope that embryos will form. Any embryos that are not transferred into the woman’s uterus are

destroyed, frozen for future use, or donated to research or to another couple for purposes of initiating a pregnancy.

Importantly, there is significant attrition at all stages of the process. Although it is hoped that the stimulation process will produce several eggs, sometimes few or none are produced. Of those that are produced, not all will be of sufficient quality to be mixed with sperm. Of those eggs that are placed in a petri dish with sperm, not all will be fertilized. Of the fertilized eggs, not all will successfully develop into embryos of sufficiently high quality to be transferred. Finally, of the embryos that are transferred, not all will implant and develop to term.

Returning to the Georgia bill, in addition to reasonably requiring that only two or three embryos be *transferred*, it also mandated that no more than those two or three embryos be *created* in the first place. As a result, regardless of how many high-quality eggs are retrieved from the woman, only two or three of them may be placed in a petri dish with sperm, thus exacerbating the attrition problem and possibly resulting in few or no embryos to transfer. No extra embryos may be created to help ensure a sufficient number to produce a pregnancy, with the extras either discarded or frozen for future use. The bill does not prohibit extra eggs from being frozen for future use, but while sperm and embryo freezing have long been standard practices within the fertility industry, egg freezing is a relatively new practice and has produced relatively few offspring. Under the Georgia bill, the many women whose first trials of IVF fail to produce a term pregnancy would likely have to endure the expensive, risky, and invasive ovary stimulation and egg retrieval processes again rather than using any leftover frozen embryos.

Moreover, by equating the number of embryos created with the number to be transferred, the bill arguably requires that any embryo that is created must be immediately transferred into the woman, rather than discarded, donated, or frozen for future use. Suppose, for instance, that the woman and her physician wish ultimately to transfer only one embryo — perhaps because she does not feel she can care for twins or triplets, or because a multiple gestation is contraindicated for her, and does not want to selectively reduce a multiple pregnancy via abortion. Faced with the attrition problem, however, they wish to attempt to ensure one transferable embryo by creating the maximum number of embryos permitted by the bill. Then, contrary to expectations, all turn out to be viable. Or suppose the woman and her physician attempt to create the maximum number of transferable embryos because they in fact wish to transfer that many, but then new information comes to light (whether regarding the woman's medical condition or her broader life circumstances) that suggests that it would not be prudent to transfer that many. In both cases, the bill implies that all created embryos must be transferred, regardless of the woman's contemporaneous wishes or her physician's recommendation.

A court could similarly find that neither the limit on the number of embryos created nor the requirement that all created embryos be transferred rather than discarded, or frozen is rationally related to the bill's stated goal of reducing health risks to women and children by preventing high-order multiple births.

What might a court say about these provisions? Recall that the *LaFleur* Court found that requiring all pregnant women to take maternity leave five months before their due dates was not rationally related to the government's legitimate, stated goals of keeping unfit teachers out of the classroom and ensuring continuity of instruction. The policy already allowed the schools to require a physician's letter attesting to a teacher's fitness, so that allowing teachers to choose their own departure dates based on the individualized circumstances of their pregnancies could serve these ends just as well.

A court could similarly find that neither the limit on the number of embryos created nor the requirement that all created embryos be transferred rather than discarded, donated, or frozen is rationally related to the bill's stated goal of reducing health risks to women and children by preventing high-order multiple births. The bill already achieves its stated purpose by limiting the number of embryos that may be *transferred* into a uterus at one time. Neither limiting the number of embryos that may be *created* nor requiring all created embryos to be transferred does anything more to further this goal (absent evidence that, say, freezing embryos is harmful to the resulting children).

In fact, just as the *LaFleur* Court found that the mandatory leave policy actually worked against its goal of ensuring continuity of instruction — since most teachers not expected to give birth until summer or fall could, save for the five-month requirement, complete the school year — a court could find that both the ban on freezing embryos and the requirement that all created embryos be immediately transferred work against the goal of protecting women's health by forcing them to endure more risky IVF cycles than they otherwise would in order to achieve the same number of offspring, and by forcing them into higher-order gestations, respectively.

If some of the bill's provisions are not rationally related to the stated purpose of preventing multiple births, are they rationally related to another, unstated legitimate governmental purpose? The legislative history and even the text of the bill — titled the "Ethical Treatment of Human Embryos Act" — strongly suggest that its central purpose was less to protect women and children than to protect embryonic life *as such*.²⁰ The bill was drafted by the pro-life Bioethics Defense Fund, with the help of Georgia Right to Life and the anti-ART National Catholic Bioethics Center.²¹ In addition to limiting the number of embryos that may be transferred, the bill banned embryo-destroying stem cell research, both therapeutic and reproductive cloning, the creation of human-animal hybrid embryos, payment to sperm or egg donors (including even reimbursement of their out-of-pocket expenses), and the destruction of embryos for any reason. Finally, the bill defined a living embryo, even at the single-cell stage and even in vitro, outside the woman's body, as "a biological human being who is not the property of any person or entity." The bill provided that physicians

“owe a high duty of care” to such embryos and that in the event that there is a disagreement among the parties about an embryo, the courts will use a “best interests of the in vitro human embryo” standard to resolve such disputes.

Under *Roe* and *Casey*, the state has a legitimate interest in potential life, and insisting that all embryos be immediately transferred rather than cryopreserved or destroyed arguably serves to promote respect for the human embryo as potential life rather than as, say, an individual's or couple's property or the object of research. However, under *Roe* and *Casey*, prior to viability, the state's interest in fetal life is not strong enough to compel a woman to continue a pregnancy she wishes to terminate. Even after viability, the state may restrict abortion only where the woman's life or health is not at stake. The ban against freezing embryos trades off the state's interest in respecting potential life at its very earliest stages — a five-day-old blastocyst — against women's health. The requirement that all embryos created be transferred into the woman regardless of her wishes subjects the woman and, ironically, any resulting children to significant risks of harm while also interfering with the woman's bodily integrity by forcing her to gestate more embryos than she wishes to gestate. A court could find that either provision, but especially the latter one, is unconstitutional.

Conclusion

There may be real obstacles that will continue to frustrate attempts to regulate ARTs — such as the absence of consensus at the national level, and even at the state level in the more heterogeneous states.²² But the U.S. Constitution isn't one of those obstacles — at least not yet.

Instead, the Supreme Court's case law to date leaves ample room for the government to regulate individuals' decisions to procreate. As with any medical procedure, for instance, states may regulate ARTs through licensing and similar requirements. *Planned Parenthood v. Casey* further suggests that a range of regulations of ARTs that fall short of a ban — including mandatory waiting periods, parental consent requirements for minors, and state disbursement of informed consent materials designed to discourage some or all ARTs — would easily be found to be constitutional. Although *Casey* struck down a spousal notification law in the context of abortion, a state might constitutionally require one individual who wishes to use a particular ART to notify, or even obtain the consent of, one or more procreative partners (for example, spouses, surrogates, gamete providers), since ARTs typically initially take place outside a woman's body and therefore do not disproportionately implicate her interests in the way that the abortion decision does. Finally, in addition to statutes like Georgia's, which would have permitted IVF and embryo transfer but regulated the way in which those processes were conducted by limiting the number of embryos transferred, even a wholesale ban

of a particular ART — such as reproductive cloning — may well be constitutional in order to protect the welfare of the women involved and of any resulting children.

Policymakers should note, however, that courts will strictly scrutinize any regulation that distinguishes socially disfavored groups for different treatment with respect to procreative liberty. Thus, some potential regulations of ARTs — such as prohibiting the use of ARTs by same-sex couples or by unmarried individuals — would be constitutionally suspect. Similarly, even where a regulation would apply equally to all citizens, it must serve a legitimate governmental interest. Those regulations that can be said to serve interests at the heart of government's purpose, such as protecting the public health or safety, will fare better than those that can only be explained as reflections of "outmoded taboos."

Finally, the federal Constitution is a floor, not a ceiling; states are free — and, depending on their own constitutions and other laws, may be obligated — to acknowledge greater individual procreative rights than does the U.S. Constitution. Similarly, what is constitutionally permissible is not necessarily sound or effective public policy. Even if the Georgia bill were constitutional, for example, it would likely have minimal effect — whether on its stated purpose of improving the health of women and children, or on its unstated purpose of protecting embryonic life as such. Most consumers of ARTs are relatively wealthy and will simply engage in "reproductive tourism" — forum-shopping for the state with the most liberal fertility policies.

Endnotes

- 1 Joe Neel, "California Woman Gives Birth to Octuplets," National Public Radio (NPR), January 27, 2009; Steve Connor, "Fertility Expert: 'I Can Clone a Human Being,'" *The Independent*, April 22, 2009; Gautam Naik, "A Baby Please. Blond, Freckles — Hold the Colic," *The Wall Street Journal*, February 12, 2009, p. A10.
- 2 See, e.g., Rick Weiss, "Cloning Creates Odd Bedfellows," *Washington Post*, February 10, 2002, p. B1, <http://www.geneticsandsociety.org/article.php?id=112>.
- 3 See, e.g., Alicia Ouellette et al., "Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States," *American Journal of Law & Medicine* 31 (2005): 419-446 at 433 ("The lack of regulation at the federal level is a direct result of U.S. emphasis on personal autonomy and the sanctity of privacy. These rights make it difficult for states to issue restrictive policies on ART."); Rick Weiss, "Legal Barriers to Cloning Might Not Hold Up," *Washington Post*, May 23, 2001, p. A1 ("Some legal scholars suspect that even if a ban [on reproductive cloning] were to pass, it might be struck down as unconstitutional because it would abridge the fundamental right to procreate. That could mean there is little to stop anyone in this country from pursuing human cloning."); Alan Zarembo, "Octuplets Draw Critical Eyes to Fertility Industry," *L.A. Times*, February 14, 2009 ("Treatment is a private bargain between doctor and patient, insulated from the outside world.... [I]t escapes government regulation largely because policymakers have been uncomfortable treading into the minefield of reproductive rights.").
- 4 Of course, it is conceivable that, when the Supreme Court inevitably directly confronts the constitutionality of regulating ARTs, it might find the distinction between natural and assisted procreation to be constitutionally relevant.
- 5 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 847 (1992).

- 6 See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
- 7 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added). Importantly, this language was not necessary to the holding of the case and therefore constitutes dicta that does not constitute binding law.
- 8 274 U.S. 200 (1927).
- 9 The so-called “police powers” are those rights and powers “not delegated to the United States,” and therefore reserved to the states, under the Tenth Amendment of the U.S. Constitution.
- 10 See, e.g., Matt Collins, “The Need to Regulate “Designer Babies,” *Scientific American*, May 2009. The Human Fertilisation and Embryology Authority (HFEA) has broad power to regulate both research and clinical uses of gametes and embryos. It has, for instance, addressed the problem of dangerous, high-order births by limiting the number of embryos that may be transferred to women. The HFEA also determines which embryo traits prospective parents may choose (prohibiting sex selection for nonmedical reasons, for instance, but permitting selection of embryos to avoid some — though not all — genetic conditions). See www.hfea.gov.uk.
- 11 As it turns out, Carrie was sent to the colony because the nephew of her foster parents raped and impregnated her and her foster parents wished to be spared embarrassment. As a final injustice, Carrie’s “defense” was a sham; her lawyer was in cahoots with the statute’s proponents. See Paul Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore, MD: The Johns Hopkins University Press, 2008).
- 12 For instance, bills have been proposed that would reduce the sentences of criminals who agree to be surgically sterilized or provide cash incentives to women on public assistance who agree to be surgically implanted with long-term contraceptive devices. More rarely, legislation is proposed that would require courts to order mothers whose babies are born with conditions like fetal alcohol syndrome to submit to chemical contraceptive injections, or both parents to submit to surgical sterilization. Judges occasionally offer so-called “dead beat dads” the alternative of submitting to a vasectomy rather than serving jail time, or suggest that drug-addicted mothers’ right to custody of their existing children is contingent on their not becoming pregnant again. And private organizations have also initiated programs offering cash incentives to drug-addicted women who submit to sterilization. For a discussion of these modern-day, post-Buck proposals, see Paul Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore: The Johns Hopkins University Press, 2008), 275-277.
- 13 410 U.S. 413, 153-54 (1973).
- 14 *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535 (1942).
- 15 Importantly, the Court has done so only in dicta — extraneous material in an opinion that is not central to the holding and therefore is not binding.
- 16 Victoria F. Nourse, *In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics* (New York: W.W. Norton & Co., 2008), 151-52.
- 17 414 U.S. 632 (1974).
- 18 At the time of the octuplets’ birth, Suleman already had six other IVF-produced children under the age of eight, some with disabilities for which they receive state assistance, and she was an unemployed, single parent dependent on various forms of public welfare, living with her own parents in a preforeclosure house. The Senator who introduced the bill was quoted as saying that Suleman’s decision is “going to cost the state of California millions of dollars over the years; the taxpayers are going to have to fund the fourteen children she has. I don’t want that to happen in Georgia.” Betsy McKay, “In-Vitro Fertilization Limit Is Sought,” *The Wall Street Journal*, March 4, 2009, p. A3, <http://online.wsj.com/article/SB123603828823714509.html>.
- 19 The text of the bill as originally proposed is available at http://www.legis.state.ga.us/legis/2009_10/versions/sb169_As_introduced_LC_37_0857_2.htm.
- 20 Amid criticism from, among others, the leading professional society for practitioners of ART and a prominent infertility advocacy group, the bill was substantially amended. That version, which passed the Senate and, at the time of writing, is pending in the Georgia House of Representatives, prohibits cloning and the creation of embryos for stem cell research, but expressly permits embryos to be created and frozen for future use in initiating a pregnancy. The provisions aimed at protecting women and children from the risks of high-order

multiple gestations, which supposedly animated the bill in the first place, are nowhere to be found. The text of the amended version of the bill is available at http://www.legis.ga.gov/legis/2009_10/fulltext/sb169.htm.

- 21 See, e.g., Christian News Wire, Press Release, "Georgia Right to Life Introduces Legislation to Protect the Mother and Child," February 17, 2009, available at <http://www.christiannewswire.com/news/778499477.html>.
- 22 The congressional clone wars are a good example of how the lack of national consensus on moral issues surrounding ARTs can pose an obstacle to regulation. In the twelve years since Scottish scientists announced that they had successfully created the first mammal from the cell of an adult — Dolly the sheep — scores of bills aimed at preventing the birth of a cloned human have been introduced in the U.S. Congress. See The Center for Public Integrity, "Human Cloning," <http://projects.publicintegrity.org/genetics/report.aspx?aid=193&sid=200> (chronicling some 44 bills through 2003 alone). Despite broad consensus in Congress that reproductive cloning should be banned — at least until the safety concerns are addressed — one bill after another has succumbed to deadlock over whether legislation should also ban therapeutic cloning — in which the same method is used to create a cloned human preembryo (no more than fourteen days development) for research purposes, including stem cell research, rather than for purposes of initiating a pregnancy. See M. Asif Ismail, "In Congress, A Cloning Stalemate," The Center for Public Integrity, June 2, 2004, <http://projects.publicintegrity.org/genetics/report.aspx?aid=281>. Although moral consensus has proved elusive at the national level, some fifteen states have managed to achieve majority support for cloning legislation; some have banned only reproductive cloning, others have banned both reproductive and therapeutic cloning, and still others merely prohibit the use of public funds for one or both types of cloning. See National Conference of State Legislatures, "State Human Cloning Laws," January 2008, <http://www.ncsl.org/programs/health/Genetics/rt-shcl.htm>.