chapter 12

Constitutional Considerations

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The extent to which States can ban or regulate noncoital reproduction depends on the extent to which procreation is protected by the U.S. Constitution. A State constitutional guarantee of a right to privacy or a right to procreate can also affect the extent to which a State could regulate noncoital reproduction, but a discussion of State constitutions and their propensity for protection in this area is beyond the scope of this report.

The more zealously procreation is guarded by constitutional guarantees, the more compelling and narrowly drawn must be State efforts to regulate or restrict use of procreative techniques. Procreative freedom can extend to questions of ***who*** may procreate and ***how*** they may procreate (43).

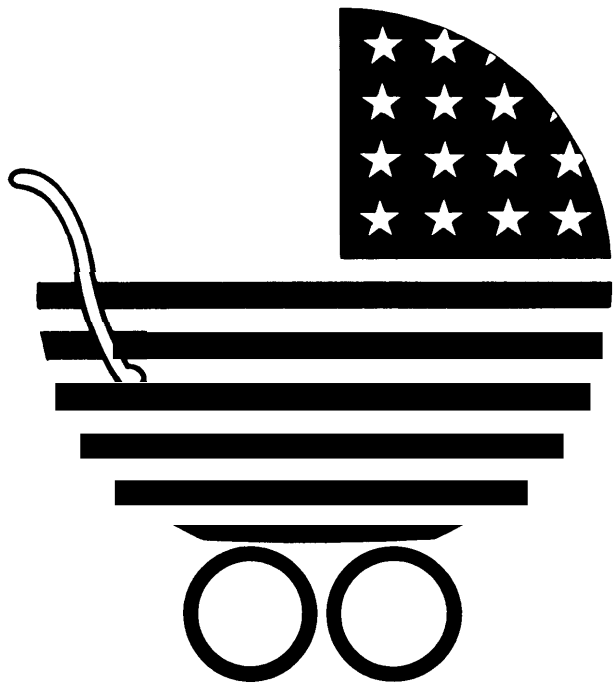
This chapter examines two aspects of reproductive liberty: the freedom ***to*** procreate (i.e., the extent of the right held by married and single, by heterosexual and homosexual, to conceive, bear, and raise children) and freedom ***in*** procreation (i.e., freedom to choose noncoital reproductive techniques, and the limits of legitimate State regulation of that choice).

FREEDOM TO PROCREATE

The right to procreate, that is to bear or beget children, is widely considered one of the rights implied by the Constitution. It is grounded in both individual liberty and the integrity of the family unit, and is viewed as a "fundamental" right, one that is essential to the notion of liberty or justice.

The Supreme Court has not explicitly considered whether there is a positive right to procreate —i.e., whether every individual has a right to actually bear or beget a child. It has, however, considered a wide range of related issues, including the right of the State to interfere with procreative ability by forcible sterilization, the right of individuals to prevent conception or continued pregnancy, and the right of individuals to rear children and to form nontraditional family groups.

The State's ability to interfere with natural reproductive abilities has been considered in two cases: ***Buck v.Bell*** and ***Skinner v. Oklahoma (4,47).*** In the ***1927 Buck*** decision, the Court upheld sterilization of the mentally retarded on the basis of eugenic considerations. Since 1927, the eugenic justifications relied on in ***Buck*** have been repudiated (9), and the 1942 ***Skinner*** decision has become the more durable statement on forced sterilization. ***Skinner*** held that the State could not use sterilization to selectively punish certain classes of repeat felons. Although the decision focused largely on the unfairness of applying the punishment to some criminals and not others, thereby violating the 14th Amendment's equal protection clause, the Court did discuss the tremendous importance of reproduction. The discussion was important to the Court's decision to apply a strict



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A "Right To Have Offspring"?—*Skinner* v. *Oklahoma*

level of scrutiny to any State effort to use interference with procreation as a form of punishment or deterrence, and to be particularly scrupulous in reviewing any State effort to arbitrarily destroy procreative ability:

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right ***to have offspring*** (emphasis added).
>
> [This legislation] involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . There is no redemption for the individual whom the law touches. He is forever deprived of a basic liberty (47).

The Skinner decision is notable for its explicit mention of a "right to have offspring." Although procreation is not mentioned explicitly in the Constitution, the Court characterizes it as a basic human right, justifying a strict level of scrutiny for any State action that would interfere with its exercise. Further, while the grouping of marriage and procreation in the same breath indicates that the Court considered the two as intimately related, it nevertheless recognized a distinct "right" to procreate and seemed to characterize the right as one held by the individual, not the couple.

Individual Rights and Freedom To Procreate

The implication that procreative rights are held by individuals rather than by married couples is further supported by other Supreme Court decisions concerning reproductive and familial liberties. In 1965, the Court held in Griswold v. ***Connecticut*** that married couples have a right to be free of State interference in their decision to obtain and use contraceptives, basing its decision on the concept of marital privacy, a sphere of personal interest largely immune from State regulation (17). In the 1972 decision ***Eisenstadt v. Baird,*** the Court explicitly extended this principle to individuals, when it held that the individual's right to obtain and use contraceptives is also protected by the right to privacy, and that marital privacy is simply one aspect of a more general right to privacy. That case featured one of the Court's strongest statements in support of an individual's liberty to make decisions concerning reproduction:

> It is true that in Griswofd the right of privacy . , . inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the ***individual,*** married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child (12).

Similarly, in cases upholding the right to terminate pregnancy, the Court has made clear that the right extends to married and unmarried, adult and minor, even if some narrowly tailored regulation is permitted to protect maternal health or to ensure informed consent by a minor (2,20,33,45).

These decisions appear, then, to support the idea that the right to privacy, including the right to procreate, extends to individuals, married or not. Certainly, for example, no State could require contraceptive use by unmarried persons in order to prevent them from procreating. However, as most of the reproductive liberty cases considered the right to prevent conception or continued pregnancy, they are not precisely on point and thus there is still some room for doubt (48).

Permitting unmarried persons to use contraceptives to prevent their unwilling formation of families is consistent with traditional State preferences for two-parent homes. Acknowledging that unmarried persons have a right to form families is somewhat different.

Further, Supreme Court decisions have upheld State authority to regulate sexual activity, including the recent Bowers decision, upholding prohibitions on specific sexual acts; the Bowers decision also stated in dictum that State laws against sexual activity outside marriage could continue to be upheld (3). ((’Dictum" is commentary that is not strictly necessary to the decision on the case before the court. Judges use it to explain their reasoning and to draw analogies to other fact situations, and it can provide a clue as to future judicial decisions in related areas of law.)

Photo credit: Library of Congress

Nontraditional couples may want to use noncoital reproductive technology.

If the Supreme Court were to approve a prohibition on coitus outside marriage, it would be somewhat inconsistent with a stance that those same unmarried persons have a right to achieve by noncoital means what they may not attempt by coitus —i.e., to procreate. If the ***Bowers*** dictum is taken at face value, then it would seem unlikely that the Court would find a constitutional right for unmarried persons to use noncoital means to procreate.

Thus, it is still somewhat unclear that the Supreme Court would find that the right to procreate is an aspect of individual rights. There is little doubt, though, that it exists as an aspect of marital privacy and family autonomy. When procreation is viewed not as an individual right, but rather as an aspect of family privacy, limits on governmental intervention will be affected by whether the family group under consideration is constitutionally protected.

Family Privacy and Freedom To Procreate

Family privacy is an outgrowth of a history of leaving many decisions concerning marriage, childbirth, and childrearing relatively free of governmental intervention (7). For some married, infertile couples, expanding their families will entail the choice to use noncoital reproductive techniques. Nontraditional parents, such as single parents or unmarried heterosexual or homosexual couples, may need or want to use these techniques as well. State authority to regulate who may engage in noncoital reproduction may depend in part on whether the choice to procreate this way is an aspect of family privacy, and, if so, whether that privacy extends to all family forms or only to married couples.

State authority to regulate family structure and sexual preferences has had a mixed history in the United States (18). An 1878 decision affirmed that the State has authority to outlaw polygamy (4o), and the U.S. courts have never recognized a right to marry someone of the same sex, despite recognition of a general right to marry (27,29,59). The Supreme Court has countenanced societal condemnations of "irresponsible liaisons beyond the bounds of marriage" (58), "illegitimate relationships" (M), and homosexuality (3), and as a result courts have frequently lacked sympathy for the equal protection claims of unmarried parents.

on the other hand, nontraditional parents are slowly becoming more successful in their efforts to adopt children or to have custody and visitation rights after divorce (24,50). Further, a number of decisions have emphasized that the family unit need not be defined by specific generations living together (3o), by genetic relationships (49), or by marriage (51). In one case, the Court commented that "the Constitution prevents {government] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns" (30).

More recently, the Supreme Court has stated that the degree to which a relationship deserves freedom from governmental interference depends on '(where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments" (41). This freedom of association logically extends to nontraditional as well as traditional families. In its ***Roberts*** decision, the Court stated:

> IBlecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of personal relation-

> ships a substantial measure of sanctuary from unjustified interference by the State. . . .
>
> IPlersonal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted State interference therefore safeguards the ability independently to define one's identity that is central to any concept of ordered liberty. The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on ***the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a fam***ily—marriage; childbirth; the raising and education of children; and cohabitation with one's relatives (citations omitted; emphasis added) (41),

Nontraditional families—whether they consist of a single parent and child, same-sex parents and child, or multiple parents due to divorce and joint custody of child—provide emotional satisfaction and expression of personal identity in the same fashion as more traditional marital unions. Logically, then, this reasoning would extend the freedom of association and the freedom to procreate to any family form. However, the difficulty of reconciling this reasoning with that which continues to support State authority to prohibit certain forms of sexual activity among consenting adults makes it impossible to predict with certainty the Supreme Court's likely reaction to an assertion that nontraditional family privacy supports a right to procreate that extends to the use of noncoital reproductive techniques.

RESTRICTIONS ON FREEDOM IN PROCREATION

Given that there is a right to procreate for married couples, and possibly for all individuals, one commentator argues that married couples have a right to use any means to procreate, including noncoital techniques:

> The couple's interest in reproducing is the same, no matter how conception occurs, for the values and interests underlying coital reproduction are equally present. . . . The use of noncoital techniques such as IVF [in vitro fertilization] or artificial insemination to unite egg and husband's sperm, made necessary by the couple's infertility, should then also be protected (44).

Noncoital reproduction need not be used solely to overcome infertility, however, as donor gametes might be used to avoid passing on a genetic disorder or to enhance the possibility of obtaining desirable characteristics, and surrogate mothers could be hired for convenience or to overcome the lack of a female partner. The commentator argues that freedom in procreation extends to use of noncoital reproductive techniques for any or all of these purposes:

> The right of married persons to use noncoital and collaborative means of conception to overcome infertility must extend to any purpose. . . , Restricting the right . . . to one purpose, such as relief of infertility, contradicts the meaning of a right of autonomy. . . .
>
> Procreative autonomy is rooted in the notion that individuals have a right to choose and live out the kind of life that they find meaningful and fulfilling. . . . IMlany people . . . consider reproduction meaningful only if the child is in good health. . . .
>
> The freedom to select offspring characteristics includes the right to abort fetuses or refuse to implant embryos with undesired gender or genetic traits. Just as people are now free to pick mates, they would have the freedom to pick egg, sperm, or gestational donors to maximize health or desirable physical features. . . . [TJhis freedom would [also] provide the right genetically to manipulate egg, sperm, or embryo to provide a child with a certain genetic makeup (43).

This expansive view of procreative autonomy goes considerably beyond the mere "right to have offspring, " as expressed by the Supreme Court in Skinner, and encompasses the right to plan completely, within technological limits, the means and results of conception.

Given the present legality of State regulation of sexual relations among consenting adults and the doubt concerning whether the right of an unmarried individual to procreate even by coital means is protected by the Constitution, it maybe premature to discuss these extensions of the basic right to have offspring. That right, as expressed by noncoital reproduction, already opens up the possibility of competing concerns that are the subject of legitimate State regulation. The 1988 New Jersey Supreme Court decision concerning surrogacy stated:

> The right of procreation is best understood and protected if confined to its essentials, and when dealing with rights concerning the resulting child, different interests come into play (21).

The fact that a right exists and is classified as of "fundamental" importance does not act as an absolute bar to State regulation.

Both explicit and implicit individual rights can be limited by the State, if the rationale is compelling and the methods used are the least restrictive possible. Thus, the right to free speech may be sacrificed where its exercise causes a clear and present danger. The classic example is the prohibition on shouting "fire" in a crowded theater. The freedom of peaceable assembly maybe regulated by local laws requiring permits to use certain public areas, if the permits are necessary to ensure public safety and convenience and if they are granted in a nondiscriminatory fashion. The exercise of the right to privacy, such as choosing to terminate a pregnancy, maybe left unassisted, as when governmental programs fail to pay for the necessary services even when individuals cannot afford them otherwise.

These three areas of State influence-prohibiting, regulating, or failing to assist the exercise of a right—are permissible under more or less compelling circumstances. However, there is much room for disagreement concerning what constitutes a compelling circumstance, or whether the means chosen by the Government are the least restrictive possible.

As a constitutionally protected aspect of personal privacy, preventing continued pregnancy can be subject only to minimal Government regulation (6)15,33,52) carefully tailored to accomplish the one legitimate Government purpose—protecting health—with only minimal interference with the individual's rights. It would seem consistent that the Government could not prohibit the use of medical or surgical treatments to cure or circumvent infertility, although it could ensure the quality of the medical care by appropriate regulation (see ch. 9). Therefore, regulation to ensure that infertile individuals are given adequate information to make an informed choice among available infertility treatments, to provide offspring with nonidentifying medical and possibly personal information on their genetic and gestational parents, and to protect gamete recipients from transmissible infectious disease would seem both within State power and not unduly burdensome on the exercise of the right to procreate.

At the same time, the Government does not appear to have the obligation to finance the choice to use noncoital reproduction. At least with respect to abortion, legislation prohibiting Government funding has been upheld (19)28) on the basis that failure to fund abortions does not impinge on a woman's right to have an abortion. By failing to fund abortions for poor women, the Court reasoned, the State places no obstacles in the pregnant woman's path to an abortion—i.e., the State did not create the woman's poverty that prevents her from obtaining an abortion. This makes the regulation constitutional as long as it rationally furthers any legitimate State purpose.

Similarly, governmental policies to give financial support to infertile couples using treatments that do not require donor gametes, surrogates, or maintenance of extracorporeal embryos while not financing other techniques would probably be justifiable on the basis of State policy to encourage the use of reproductive techniques that minimize difficult family law questions or questions concerning the appropriate management of embryos (see chs. 9, 13, and 14).

When treatment of infertility involves third parties other than medical personnel, however, the question also arises whether protection of their interests or societal interests could justify interfering with procreative liberty. "A person's rights of privacy and self determination are qualified by

the effect on innocent third persons," said the New Jersey Supreme Court decision on surrogacy arrangements (21). Such third parties include gamete donors and surrogates, and societal interests might be expressed with respect to management of extracorporeal embryos or the generalized effect of commercialization of noncoital reproduction.

Protecting the Extracorporeal Embryo

Some techniques for noncoital reproduction, such as in vitro fertilization or embryo donation, involve the creation or maintenance of an extracorporeal embryo. The legal status of such an embryo, and the protection the State can afford it against destruction or manipulation, are unclear. Guidance can be found in the series of decisions, beginning with Roe v. Wade, that permit a woman to choose to discontinue a pregnancy. Thus, where an individual woman's right to terminate pregnancy is balanced with a possible State interest in allowing all potential children to be brought to term, the interests of the woman are superior.

If the decision to become pregnant is similarly an aspect of the right to privacy and to procreate, then one would expect that the State could not easily prohibit all use of techniques that necessitate the creation of extracorporeal embryos, at least for those couples who cannot conceive by any other means. This is particularly true in light of the fact that the embryo does not have the status of a "person" under the 14th Amendment (45) and therefore any interests ascribed to it are unlikely to outweigh the identifiable interests of living adults seeking to exercise their right to procreate.

The fact that creation of extracorporeal embryos is protected for the purpose of infertility therapy does not necessarily mean, however, that management of these embryos may not be subject to State regulation. Efforts could be made to regulate certain forms of embryo research, or the discard, transfer, or cryopreservation of embryos (see chs. 9 and 13).

In the interest of emphasizing the value placed on embryos, States could try to ban the discard and destruction of embryos not transferred following IVF. Such a ban would not directly violate the principles laid down in ***Roe v. Wade,*** as absent a rule that an embryo must be reimplanted in the egg donor's uterus, the prohibition does not interfere with her right to make decisions concerning the continuation of pregnancy. It does, however, arguably violate the parental or property rights of the gamete donors to dispose of their embryo as they see fit. Further, if the prohibition on discard were accompanied by a requirement that the embryos be frozen and offered for transfer to someone who wished to '(adopt" them, then it might violate the gamete donors' desire to avoid having unknown genetic offspring.

This latter argument is weakened, however, by the fact that there are already situations in which individuals are not allowed to prevent the birth of unwanted lineal descendants. A man may not force a woman to have an abortion, even if he does not desire to have a child, and his desire to avoid fatherhood will not eliminate his obligation to support that child if born. Further, a physician performing a postviability abortion has an obligation to try and save the fetus regardless of the mother's desires (8), unless to do so would threaten the mother's physical or psychological health (10, 45)55). Although these cases are distinguishable, it does appear that States might be able to place some limitations on the destruction of embryos not transferred following IVF (44).

The constitutionality of State efforts to limit the use of cryopreservation of embryos is similarly difficult to assess. Cryopreservation currently results in a loss of a substantial number of embryos (see ch. 15). State interests in preventing the loss of embryos could be used to try to justify limitations on the use of the technique. Other rationales that might be suggested include an interest in preventing the development of embryo banks, and the desire to avoid complex family relations created when children are born long after the deaths of their genetic parents. Further, the procedure is not strictly necessary to achieve procreation, as fresh embryos could be used instead, and so it may be argued that prohibiting cryopreservation of embryos does not interfere directly with the right to procreate.

Balanced against these considerations is the fact that the procedure is used so that further laparoscopies and their attendant risks can be avoided. This medical justification may be sufficient to justify the increased risk to the embryo's potential for future development. Further, State rationales based upon concern for avoiding the destruction of embryos must be considered in light of the very high rate of embryonic loss in natural reproduction (see ch. 2), and the fact that cryopreservation is usually undertaken to facilitate future implantations and births. Thus, the State interest may arguably be viewed as overly solicitous on the one hand, and self defeating on the other.

Prohibitions on embryo research, and particularly on the deliberate creation of embryos for their use in research, might possibly be constitutional, as there is no direct interference in an individual interest in procreation or bodily autonomy. Although prohibitions on research with embryos might slow or even halt the development of certain types of infertility treatments, as well as other medical developments, the State interest in protecting embryos might be sufficient to justify this indirect interference with the future expression of the right to procreate. Medical researchers could argue that such a prohibition also interferes with their First Amendment right to freedom of expression, as it interferes with the development and dissemination of information concerning embryonic development. This would be, however, a novel interpretation of the First Amendment (42), and it is unclear how courts would react,

Regulating Surrogacy Arrangements

Prohibiting all forms of surrogacy, including those involving no compensation beyond direct expenses, raises the question of interference with the right to procreate for couples, as opposed to individuals. Most commonly, surrogacy involves a man who hires a woman to be artificially inseminated with his sperm and to relinquish the resulting child to him and his wife. The man in this situation is fertile, and can procreate coitally without surrogacy, albeit outside marriage, His wife will not procreate even if surrogacy is used, but instead will adopt a child. Thus, limitations on surrogacy would not interfere with the man's ability to procreate, nor would it affect his wife's inability to procreate. Rather, it interferes with their ability, as a couple, to raise a child genetically related to at least one of them.

The Michigan appellate court in ***Doe v. Kelley*** characterized surrogacy as an effort to use contract law to further the statutory right to use adoption to change the legal status of a child, rather than an effort to exercise the right to procreate per se (11).

The New Jersey Supreme Court endorsed this line of analysis in its 1988 Baby M decision, concerning a custody dispute between Mary Beth Whitehead, a surrogate mother, and William Stern, who had hired her (see box 14-A inch. 14 for further details on this case):

> The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that. Mr. Stern has not been deprived of that right. Through artificial insemination of Mrs. Whitehead, Baby M is his child. The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation; they are rights that may also be constitutionally protected, but that involve many considerations other than the right of procreation (21).

This analysis does not fully address exercising the right to procreate by hiring surrogate gestational mothers, who bring to term a child to whom they are not genetically related. In such cases, this form of surrogacy may be the only means by which the genetic mother can expect to pass her genes on to the next generation. Further, prohibiting women to earn money by selling their ova, when men are permitted to sell sperm, may violate the Equal Protection Clause of the 14th Amendment, even if ova sales could be more closely regulated in light of the greater medical risks they pose to donors.

The point made by the ***Doe v. Kelley*** and Baby M courts can be recast as the question of whether there is a right to obtain custody of a ***biologically*** related child. To the extent that surrogacy ensures a man (and through gestational surrogacy, possibly his wife) the ability to raise a genetically related child, rather than the ability to procreate,

it is really a technique for obtaining custody. In the past, no constitutional right to custody has been identified when there is a dispute between biological parents (although courts have been constitutionally permitted to give custodial preference to a biological parent over a nonbiological parent).

> There is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the mother to the same child (21),

Thus, prohibitions on surrogacy raise a somewhat more attenuated consideration of interference with the right to procreate.

The question of the constitutional right to use a surrogate mother has been discussed by a few State courts. Although reversed on appeal, the ***Baby M*** trial court decision considered surrogacy a constitutionally protected option for a couple seeking a child:

> If it is the reproduction that is protected, then the means of reproduction are also to be protected. . . . This court holds that the protected means extends to the use of surrogates. . . . ***The third party is essential if the couple is to rear a genetically related child*** (emphasis added) (21).

For a married, infertile couple, other State courts might accept the same reasoning, especially if they view the right to procreate as encompassing not only the right to gestate or to pass on genetic heritage, but also as a right to enjoy the fruit of that procreation and to rear the resulting child.

Should the intended rearing parents be nontraditional or seek a surrogate for reasons other than infertility or fear of passing on a serious genetic disorder, courts may be less sympathetic to the claim of constitutional protection, particularly if the court views freedom to procreate as an aspect of marital privacy rather than of individual privacy, as discussed earlier in this chapter. For example, where surrogacy is sought by a single man as a method for forming a family without the ties of marriage, as has been done on at least one instance (23), courts might not be as sympathetic,

Further, protecting the choice to make a surrogacy arrangement and finding that States are constitutionally required to enforce such agreements are somewhat different propositions. One commentator argues that enforcement of the underlying agreement is important to the viability of surrogacy arrangements, and the State has an obligation to enforce them, lest it unduly interfere with procreative freedom (43).

On the other hand, the unenforceability of pre-birth adoption agreements has not prevented couples from using the technique for private adoption. Therefore, failure to enforce surrogacy contracts is not necessarily a direct interference with the right to procreate or even the privilege to adopt. In addition, finding that the genetic father has a constitutional right to obtain custody of his child would be to find that the surrogate mother does not have the same constitutional right to custody. "It would be to assert that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's right of procreation," said the New Jersey Supreme Court (21).

Even if States were obligated to enforce the agreements, that enforcement need not necessarily extend to ordering "specific enforcement ," i.e., full performance of the agreement to relinquish custody of the child and to terminate the mother's parental rights (14). Assessing monetary damages for breach of contract could be considered a sufficiently strong mechanism for ensuring the general regularity of these arrangements, and should meet any test of a State's obligation to facilitate the use of social arrangements for family formation.

Protecting Children Conceived by Noncoital Techniques

The State has a traditional interest in protecting children from physical harm. Under compelling circumstances, this interest may justify protecting a child from genuine psychological harm as well, as for example when the State forbids child labor, which, while not unhealthful, nevertheless interferes with schooling (35). If children were genuinely harmed by the fact of their noncoital conception, then State efforts to regulate or even ban certain practices might well be held to be constitutional. As procreation is a fundamental right,

however, State regulation would have to be narrowly drawn to accomplish its goal of protecting children while minimizing the interference with freedom in procreation.

State protection of children conceived by noncoital techniques might be manifested by regulating access to information concerning genetic and gestational parentage, by regulating or prohibiting surrogacy, or by restricting the kinds of nontraditional adult groups that might be allowed to use these techniques in order to forma family.

With the rapidly increasing usefulness of environmental and genetic information in predicting susceptibility to particular disorders, States might find that children are entitled to have access to medical information about their genetic and possibly gestational parents. Indeed, one commentator suggests that the State has an obligation to provide that such information is gathered for the child, even in light of the fact that some nonadopted children are unaware of their full genetic parentage (l).

Adoptees have long argued unsuccessfully that they have a right to information about their biological parents (38)39), even though some nonadopted children also do not know their full genetic parentage, but scientific developments and the increase in the number of children conceived by artificial insemination might persuade legislatures to provide a recordkeeping system that ensures the transmission of nonidentifying medically useful information. There is little question that such a law would be constitutional.

Release of identifying information is more troubling, as this might override the genetic or gestational parent desire for privacy. However, if State regulations were prospective—i.e., if these parents were to know at the time they agree to participate in these arrangements that their identity might be revealed—then there seems little question that the State interest in even the psychological well-being of these children could justify making the information available. Research on the psychological effects of having been conceived noncoitally is just beginning (see ch. ***15).***

States might choose to protect children from custody battles by legislatively adopting a strong presumption of custody with the intended rearing parents-e. g., the genetic father and adopting mother in the case of surrogacy. This would help avoid situations in which a child is moved from one home to another during or following a lengthy custody dispute, but it raises troublesome questions concerning the violation of the surrogate mother's own constitutional rights. Some argue, for example, that enforcing surrogacy contract provisions that deny the surrogate mother parental rights to her child or full control over medical and dietary decisions is tantamount to peonage (32). Peonage, the forced performance of certain personal service contracts when the employee opts to breach (34), is illegal in the United States (18 U.S.C. 1581-1588).

In contrast, States might try to protect children from undesirable custody battles or home arrangements by refusing to enforce surrogacy contracts, thereby allowing the traditional principles of family law to guide judicial decisions concerning maternity, paternity, and custody. Basing custody of a child on a surrogacy contract does not allow a court to make its traditional judgment concerning which home is superior. Such judgments are normally part of any dispute between parents. Further, surrogate matching services generally do not operate as licensed adoption agencies, and therefore do not screen the intended rearing parents (see ch. 14). Thus, automatic enforcement of contract terms concerning custody and termination of parental rights might leave the child without the protection of either adoption agency screening or judicial oversight.

Another possibility for protecting children is to regulate surrogacy arrangements in some fashion that assures adequate homes to the resulting children, However, to the extent that such regulatory efforts are used to screen participants for fitness to be parents, the regulations will raise questions concerning interference with the right to procreate and violation of the 14th Amendment's guarantee of equal protection to all citizens under the law. The fact that no such screening takes place for coital reproduction would be a factor.

To the extent that the right to procreate is viewed as a fundamental right of the individual,

any discrimination among types of people must be justified by a compelling State interest. While protection of a child against immediate physical danger would certainly constitute a compelling circumstance, protection against speculative psychological harms attributable to growing up in a nontraditional home probably could not.

Thus, while singles and homosexuals have had limited success in adopting children, as courts have supported agency decisions to place available infants with parents fitting a more traditional model (31), such individuals have had conspicuously more success in obtaining and retaining custody of their own biological children (50). The speculative harm attributed to growing up in a nontraditional family might be sufficient to place existing children in the most certainly favorable home, but it is not sufficient to bar nontraditional parents from forming and maintaining families generally.

Interference with the exercise of a fundamental right is permitted only when accomplished by the least restrictive means possible, narrowly tailored to a specific governmental purpose. Further, even if such harms could be documented in certain cases, a blanket prohibition against any use of noncoital techniques by singles and homosexuals would likely be considered overly inclusive, as it would not distinguish among individuals who could provide a satisfactory home and those who could not. Although not finding a fundamental right to engage in homosexual conduct, one 1988 Federal court decision held that homosexuals as a class may not be subjected to governmental discrimination absent compelling reasons (57).

PROHIBITING COMMERCIALIZATION OF NONCOITAL REPRODUCTION

Even if the right to procreate extends to the use of noncoital techniques, donor gametes, and surrogacy arrangements, the question remains whether the State may prohibit commercialization of these services —i.e., the payment of fees beyond actual and reasonable expenses. Commercial relationships are ordinarily subject to a wide range of Government regulation. Nevertheless, the Court is reluctant to accept limitations on the individual's right to spend money to exercise his or her own individual rights (5) when such exercise does not directly interfere with the rights of anyone else. Prohibitions on commercialization would most likely be based on the need to protect public morality and to avoid the effects of encouraging individuals to view gametes, embryos, mothers, or babies as articles of commerce (36,37).

The sale of sperm has long been tolerated in the United States. Sperm selling seems to be socially acceptable, in part because it generally does not conjure up images of selling a particular, potential human being. In addition, there is no physical risk associated with sperm donation, although the psychological consequences of selling sperm are largely unknown. Sale of ova would probably be tolerated on the same basis if the associated medical risks of laparoscopy or sonography - guided retrieval could be minimized (see ch. 7).

Sale of embryos is more troublesome, however, and has been outlawed by Florida and Louisiana (see ch. 13). Embryo sales raise the specter of choosing the likely characteristics of a child in the way that those seeking artificial insemination can select the characteristics of a sperm donor, but beyond that of being able to select an embryo based on the characteristics of both parents, rather than only one. Further, selecting embryos is viewed by some as closer to selection of living children than is the selection of sperm. Moreover, there is fear that certain characteristics would garner a premium price. The fear is not totally without justification, as two noncommercial sperm banks already advertise that they only accept donors who have superior education or IQ. Another sperm bank is finding that market demands make certain donors unpopular, and as a result is no longer anxious to use donors who are below average height (46).

Protecting public morality against a developing view of the commercial value of certain kinds of human beings is one basis on which restrictive legislation might be proposed. Such legislation

Commercial Sperm Bank's List of Semen Donor Characteristics

DOWN ID#	RACE	BLOOD TYPE	ETHNIC ORIGIN MOTHER/FATHER	HEIGHT	WEIGHT	BODY BUILD	SKIN TONE	EYE COLOR	HAIR COLOR/TYPE	YEARS COLLEGE	Occupation	SPECIAL INTERESTS
#I	Cauc	A -	English/English	6-0	165	Medium	Fair	Green	Brown/Straight	3	Student/Acct	Sports,Flshing,Piano
#b	Cauc	O +	Welsh/German	5-8	145	Medium	Fair	Brown	Brown/Straight	8	S!udent/Dental	6uitar,Swimming,Read
#~	Cauc	B +	Swedish/English	6-4	210	Medium	Fair	Blue	Brown/Wavy	4	Student/Biol	Water Spts/Piano/Dance
#9 **	Cauc	A -	Czech/Irish-Ger	6-2	195	Medium	Fair	Blue	Blond/Wavy	8	Student/Dental	*Tennis/Music/Sailing*
#10	Cauc	AB -	Italian/Italian	5-11	190	Medium	Olive	Brown	Brown/Straight	8	*Student/Dental*	Piano/Sports
#11	Cauc	AB +	European Jewish	5-11	175	Medium	Olive	Brown	Brown/Straight	2	Student/Anthro	6uitar/Raquet Ball
#12	Cauc	O +	Scand/Engl	6-0	155	Medium	Fair	Hazel	Brown/Straight	4	Stu/Real Est	Computer/Tennis/Skiing
#29 (j)	Cauc	O +	Irish-Ger/Czech	5-10	130	Light	Fair	Green	Brown/Wavy	1	Student/BusAdm	Music/skiing
#33	Cauc	A +	Jewish/Jewish	5-10	165	Medium	Fair	Blue	Red/Straight	1	Student/Bus/Adm	Tennis/Skiing
#35	Cauc	B +	Irish/Welsh	5-11	170	Medium	Fair	Brown	Brown/Wavy	7	Administrator	Music/Sports/Travel
#37	Cauc	O +	Irish/English	6-3	210	Medium	Fair	Blue	Brown/Straight	10	Student/Med	Contact Sports/Reading
#40	Cauc	AB +	Dutch/Irish	6-2	170	Medium	Fair	Hazel	Black/Straight	2	Student/BusAdm	Racquet Ball/Computers
#41	Cauc	O +	Scottish/Scot	5-10	190	Medium	Fair	Blue	Brown/Straight	b	Student/Antn	Music/Sports/Travel
#42	Cauc	A +	German/Irish	6-1	160	Medium	Olive	Blue	Brown/Wavy	4	Student/Econ	Music/Sports/Reading
#44	Cauc	B -	German/Swedish	5-11	155	Medium	Fair	Hazel	Brown/Straight	2	Student/Intl	Piano/Vocal/Sports
#47	Cauc	O +	Italian/Irish	5-11	115	Light	Fair	Brown	Brown/Straight	3	Student/Psyc	Music/Sports/Computers
#48	Cauc	O -	Swedish/English	6-2	168	Medium	Fair	Blue	Blond/Wavy	3	Student/Hist	Reading/Art
#55 (k)	Cauc	O -	Polish/English	5-9	163	Medium	Fair	Blue	Blond/Straight	1	Student/Law	Music/Sports
#63 (l)	Cauc	O +	German/English	6-1	180	Medium	Olive	Brown	Brown/Straight	2	Student/BusAdm	Sports/Fishing
#64 (l)	Cauc	O +	Irish/German	6-0	180	Medium	Fair	Brown	Brown/Straight	1	Student/BusAdm	Wrestling
#67	Cauc	O +	Italian/Irish	5-10	150	Medium	Olive	Brown	Brown/Curly	7	Student/Engl	Guitar/Tennls/Fishing
#68	Cauc	O +	Italian/Engl	5-6	155	Medium	Fair	Brown	Brown/Curly	7	Nursing Ed	Music/Running/Language
#76 (j)	Cauc	O +	English/Irish	5-8	155	Medium	Fair	Brown	Blond/Wavy	2	Student/Soc	Sports/Coins/Autos

Source: Fairfax Cryobank, Fairfax, VA

could take the form of regulation to minimize the development of explicitly eugenic gamete or embryo banks) or of a complete ban on sales) particularly of embryos. If prohibitions on such sales were a direct interference with procreative rights, Legislation based on concern for public morality might fail to withstand the strict scrutiny brought to bear upon interferences with the exercise of

fundamental rights. As gametes and embryos can be obtained without payment, however, a prohibition on the sale of sperm, eggs, or embryos would not necessarily unduly burden exercise of the right to procreate. Under such circumstances, any rational State policy would be sufficient.

The commercialization of surrogate motherhood poses somewhat different questions. Such arrangements may be justified as freely chosen techniques for forming a family. The contracts are entered into by adults at a time when no baby has yet been conceived, in furtherance of the right to procreate, and it can be argued that States have a constitutional obligation to enforce them. The Michigan appellate court, however, found no constitutional right to employ surrogate mothers, stating:

> While the decision to bear or beget a child has thus been found to be a fundamental interest protected by the right of privacy, we do not view this right as a valid prohibition to State interference in the plaintiffs' contractual arrangement. The statute in question does not directly prohibit John Doe [sperm donor and intended rearing father] and Mary Roe [surrogate mother] from having the child as planned. It acts instead to preclude plaintiffs from paying consideration [money] in conjunction with their use of the State's adoption procedures [citations omitted; explanatory comments added] (11).

The New Jersey Supreme Court came to the same conclusion, distinguishing commercial surrogacy, which it banned, from other forms:

> We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a "surrogate" mother, provided that she is not subject to a binding agreement to surrender her child (21).

The Michigan and New Jersey decisions are premised on the idea that banning payment to surrogates is not a direct interference with the right to procreate, but rather a legitimate State regulation that does not preclude exercising the right to procreate in other, noncommercial forms, If viewed as the latter, any rational State interest could justify the prohibition.

The question may turn on whether there will be any practical ability to find surrogates should payments beyond expenses be banned. Women's self-reported motivations for becoming surrogates usually include noncommercial considerations, such as a desire to help other people, and there are known instances of intra-family arrangements that do not involve payment (see ch. 14). Whether the lack of a large commercial market in surrogates would constitute a direct interference with procreative liberty is difficult to determine without further guidance from the Federal courts.

Even as statements of "rational" State interest, though, arguments based on protecting public morality are generally weak, if only because the harms to society are usually speculative and attenuated. Opponents of commercialized surrogacy might be pleased that the technique finally acknowledges the economic value of women's reproduction, i.e., that "labor" is labor, but at the same time assert that it makes biological mothers into "workers on a baby assembly line, as they try to convert their one economic asset—fertility—into cash for their other children" (25).

The argument that these women have a right to sell their reproductive potential is countered by noting that other sales of the body, whether in prostitution, peonage, or slavery, are prohibited under law when there is broad social agreement that the sale violates basic principles of personhood. These arguments are valuable as part of the political debate, but should surrogacy be seen as one aspect of a constitutionally protected right to procreate, they may not be sufficiently compelling to justify direct State interference or prohibition.

In this case, however, the State rationale is further supported by a history of prohibitions against buying adoptable babies (see ch. 14), because it degrades human life and puts children at risk of being placed in inappropriate homes simply because the occupants were able to outbid a competing set of aspiring parents. The New Jersey Supreme Court's Baby M decision considered this a crucial point:

> There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not

> living with her natural mother. This is the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father. , . . In surrogacy, the highest bidders will presumably become the adoptive parents regardless of suitability, so long as payment of money is permitted (21).

Undoubtedly the ban on baby-selling in ordinary adoption makes it more difficult for some couples to raise a family, but the limitation has been tolerated in light of the need to protect the interests of the available children. Despite the fact that childlessness is an unhappy affliction for many, there has never been a recognized right to obtain custody of a child.

In surrogacy, however, the child is relinquished to the genetic father by a woman who may be quite sure that working as a surrogate for this particular man is in her own best interests and those of the child. Although reversed on appeal, the Baby ***M*** trial court considered whether failure to enforce these agreements would interfere with the adult participants' liberty to make contracts:

> The constitutional test is to balance whether there is "a fair, reasonable and appropriate exercise of the police power of the State as to an unreasonable unnecessary and arbitrary interference }vith the right of the individual to his personal liberty to enter into these contracts . . ***."Lochner v. ,Vew York, 198*** U.S. *45 (1905).* Legislation or court action that denies the surrogate contract impedes a couple's liberty that is otherwise constitutionally protected. The surrogate who voluntarily chooses to enter such a contract is deprived of a constitutionally protected right to perform services (21).

The trial court's opinion cites ***Lochner,*** a decision used to strike down laws protecting workers from excessively long hours and excessively low wages (26). It was used in subsequent years to strike down laws prohibiting child labor or unsafe work settings. Subsequent **to** the New Deal era, the scope of the ***Lochner*** decision was reinterpreted, to allow the Government to prohibit what it saw as inherently exploitative employment arrangements (53). Essential to those definitions of ***exploitative*** were sociological observations of class differences between employers and employees, and inherent differences in bargaining power.

If States choose to view the income disparity between surrogates and those who hire them as similar to the inequities they identified during the New Deal, they might have a justifiable interest in refusing **to** enforce surrogate contracts or regulating their terms to protect all the participants from exploitation and undue bargaining power. This would be sufficient to justify State regulation of surrogacy in order to protect all the parties involved. It is not clear whether it would be sufficient to justify a general prohibition.

Another concern related to recognizing commercial surrogacy is that its practice might lead to a view of women as childbearers for hire and of babies as articles of commerce (16) (see apps. D, E, F). One leading proponent for the constitutional protection of commercial surrogacy speculated that prohibitions on private, paid adoptions might indeed be affected by finding that there is a right to contract for reproductive services:

> Recognition of such a [surrogacyl contract right also raises the question of why contracts to adopt children made before or after conception but before birth would not be valid, nor why parties should not be free after birth to make private contracts for adoption directly with women who want to relinquish their children. The logic . . . is that ***persons, at least if married, have a right to acquire a child for rearing purposes,*** and may resort to the medical or social means necessary to do so. Although IVF and its variations preserve a genetic or gestational link with one of the rearing parents, the right at issue may not be so easily confined. It may be that the law of adoption needs to be rethought in light of the right to contract for noncoital reproductive assistance (emphasis added) (44).

Traditionally, prohibitions on paying for adoptable babies are based on a collective judgment that certain things simply should not be bought and sold, Prohibitions against buying human organs have been based on the same reasoning (56), with no successful challenge ever mounted to the fact that this interferes with the rights of individuals willing to purchase organs without which they

might die. The New Jersey Supreme Court, considering this point in the ***Baby M*** case, stated:

> There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was "voluntary" did not mean that it was good or beyond regulation and prohibition. Employers can no longer buy labor at the lowest price they can bargain for, even though that labor is "voluntary," or buy women's labor for less money than paid to men for the same job, or purchase the agreement of children to perform oppressive labor, or purchase the agreement of workers to subject themselves to unsafe or unhealthful working conditions. There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life (citations omitted) (21).

Some assert that surrogacy contracts are not forms of baby-selling as the "money to be paid to the surrogate is not being paid for the surrender of the child to the father. . . .[The biological father pays the surrogate for her willingness to be impregnated and carry his child to term" (21). This view is somewhat disingenuous, as fees to surrogates are usually quite minimal unless a baby is delivered at term; miscarriages or a failure to surrender custody do not entitle the surrogate to full fees (22) (see ch. 14).

Even if, however, the fee were one for services rather than for a baby, the transaction overall is one that has the potential to submerge biological ties and a child's interests to monetary and contractual considerations. "The profit motive predominates, permeates, and ultimately governs the transaction," said the New Jersey Supreme Court (21). State regulations forbidding parents to buy and sell custody rights to each other have long been recognized as constitutional. Overall, commercialization of familial rights and duties is one area in which courts have consistently upheld the constitutionality of legislation based both on protecting the interests of the children involved and more generally on protecting societal morals.

Finally, surrogacy is viewed by some as an arrangement that can lead to the exploitation of certain women (see chs. 11 and 14; app. D). Because of the often considerable difference in income between surrogates and those who hire them (see ch. 14), some argue that there is an inherent element of coercion in surrogacy arrangements, even if the surrogate is free of the pressure of an unwanted pregnancy at the time she agrees to enter into the contract.

Coercion may include "situational coercion," in which an outside force such as poverty or illness severely reduces a person's choices (13). A person faced with starvation may choose to work for less than minimum wages; undocumented aliens often do, and while their choice is autonomous, it is not genuinely free. Whether the economic pressures that lead some women to become surrogates for hire rises to the level of situational coercion that justified overturning the ***Lochner*** decision and instituting minimum wage and worker protection laws in the 1930s and 1940s is a question of both factual inquiry and value judgment. The New Jersey Supreme Court, while recognizing that surrogates give their consent to the arrangement before conception, nevertheless equated surrogacy with traditional baby-selling:

> The essential evil is the same, taking advantage of a woman's circumstances (unwanted pregnancy or the need for money) in order to take away her child, the difference being one of degree (21).

One added factor, beyond economic need, that may need to be considered is that surrogacy may be the most efficient way for women with children to supplement the family income without having to leave home. With this consideration, surrogacy may be viewed as either a welcome or sinister relief from the situational coercion created by the combination of a widespread preference for in-home parental care of small children, coupled with the small proportion of fathers willing to take on that responsibility.

Overall, the legitimacy of State efforts to prohibit commercialization of reproductive materials and services is likely to turn on whether courts view the prohibition as a direct or indirect interference with the right to procreate. If viewed as a direct interference, States would find it difficult to show that a general prohibition is narrowly tailored to prevent specific, concrete harms while interfering only minimally with the exercise of a fundamental right. They could, however, regulate the arrangements to ensure protection of all

parties to the contract, and to ensure that an adequate home will be available for the child at birth. If prohibition of paid surrogacy is viewed as an indirect interference, States might successfully assert a rational State interest based on protecting public morality, surrogate mothers, and possibly even the children conceived by these techniques as the justification for forbidding commercialization of reproductive services.

SUMMARY AND CONCLUSIONS

Evaluating noncoital reproductive techniques involves examining the underlying values at stake in procreative privacy. These include freedom of association, freedom to make decisions that drastically affect a person's self-identity, and rights to have intimate relationships with a view toward producing a child. Although the Supreme Court is split on the reach of privacy outside of a heterosexual union, there is no such split concerning privacy within a heterosexual union when that union is aimed at procreation.

The Supreme Court might well conclude that in vitro fertilization and gamete intrafallopian transfer, if conducted within the context of marriage at least (and probably if done in any stable heterosexual relationship), are within the ambit of the right to privacy. Accordingly, only laws aimed primarily at restricting performance to physicians, monitoring the safety and efficacy of the procedures, and ensuring informed consent could be used to regulate these activities.

Where there are public health risks or third parties who may be harmed, stricter regulation or an outright ban might be permissible. Examples might include surrogacy, experimentation on human embryos, and gamete donation. Regulations for artificial insemination by donor or ovum donation could probably also be strict, since they more indirectly interfere with any right to procreate as well as involve another participant—the gamete donor—whose interests are to be considered. Governmental involvement in this area could include regulation of information dissemination to offspring and donors, as well as medical screening.

prohibiting commercialization of surrogacy or embryo donation may well be constitutional, as it is consistent with earlier traditions outlawing the sale of human organs, babies, or familial rights and duties. In this case, social and legal tradition would probably support legislation specifically premised on a rejection of the commercialization of familial relationships. The validity of this justification will likely turn on the degree of interference that prohibitions on payment are deemed to have on the exercise of the right to procreate.

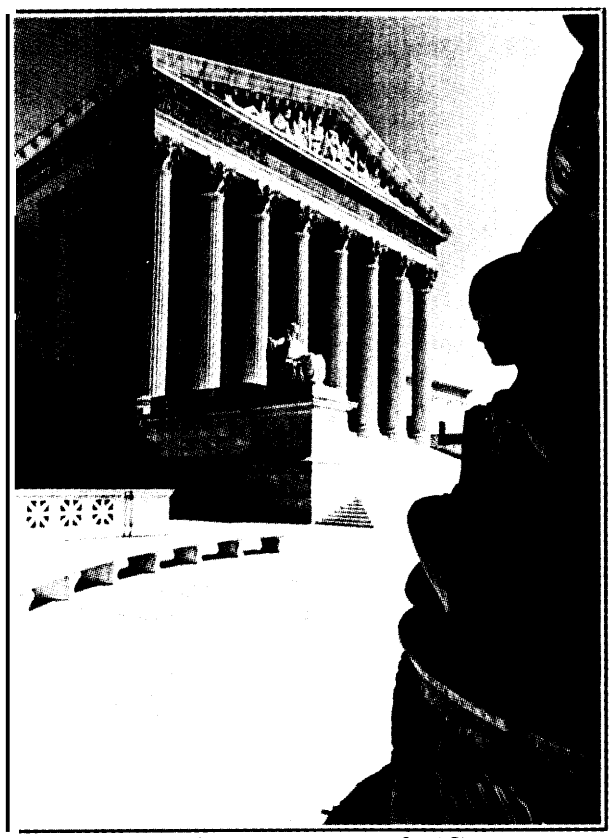

Photo credit: Washington Stock Photo, Arlington, VA

It is difficult to predict whether the Supreme Court would uphold legislation restricting the use of IVF, embryo transfer, donor insemination, and gamete intrafallopian transfer to traditional families only. To do so requires demonstrating either that the right to procreate is a right premised

largely on family privacy, and that nontraditional families do not enjoy this privacy, or that the right to procreate is an individual right that must nevertheless be curbed in certain persons because they pose a compelling danger to their children or society. Historical precedents on these points are mixed, but recent case law indicates a growing acceptance of nontraditional homes.

It is, however, the interests of the resulting children that largely determine the extent of the State's power to regulate or prohibit noncoital reproductive techniques. Indeed, it is precisely the creation of children that distinguishes a decision to procreate from a decision not to procreate, While the latter can be exclusive to an individual couple, since no child will result, the decision to procreate cannot, Whether or not future children can be seen as having rights, society has an obligation to protect them in reasonable ways from foreseeable harms, and States and the Federal Government have some constitutional authority to do so.

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