

## HOW NEW GENETIC TECHNOLOGIES WILL TRANSFORM *ROE v. WADE*

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Today most people identify *Roe v. Wade*<sup>1</sup> with the proposition that there is a constitutional right to privacy located in the Due Process Clause of the Fourteenth Amendment. Debates about whether *Roe* was correct or incorrect tend to focus on whether there is or should be a doctrine of substantive due process, whether the Supreme Court was right to extend the right of privacy to abortion, and whether the right should even limit state legislatures at all. Because of the way that the Supreme Court originally thought about the issue, most people assume that *Roe*'s future is the future of substantive due process and the right to privacy—whether that right will be cut back, limited, or eliminated.

But *Roe* has two other holdings that were equally important to resolving the case and will prove equally important in the future. Counsel for the State of Texas argued that human life begins at conception and that therefore fertilized ova, blastocysts, embryos, and fetuses alike are “persons” under the Fourteenth Amendment and have their own rights under the Fourteenth Amendment’s Due Process and Equal Protection Clauses.<sup>2</sup> Indeed, their constitutional rights were equal to those of the adult women who sought abortions.<sup>3</sup> In *Roe*, the Court noted that if “personhood is established, the appellant’s case, of course, collapses, for the fetus’s right to life would then be guaranteed specifically by the Amendment.”<sup>4</sup> Before Justice Blackmun could hold that the right of privacy extends to abortion, he first had to conclude that fetuses (and all prior stages of development) were not “persons.”<sup>5</sup> That is *Roe*’s first holding. Next,

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> *Id.* at 156–57.

<sup>3</sup> *See id.* at 162.

<sup>4</sup> *Id.* As Justice Stewart put it to Sarah Weddington in the second *Roe* oral argument, if the Court adopted the view that constitutional personhood began at conception, advocates of a constitutional right to abortion would face “almost an impossible case.” Transcript of Oral Reargument at 20–21, *Roe*, 410 U.S. 113 (1972) (No. 70-18).

<sup>5</sup> *Roe*, 410 U.S. at 158 (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

in developing the trimester framework, Blackmun had to explain why, given the right of privacy, the state could regulate abortion at all before viability and why it could prohibit it almost entirely after viability.<sup>6</sup> This led to *Roe*'s second holding—that the state has important and legitimate interests in the protection of potential human life.<sup>7</sup>

*Roe* was decided when abortion and contraception were the major objects of controversy. Since then, in vitro fertilization has become commonplace and we are on the cusp of new technological advances involving the manipulation of human genetic material. Research on embryonic stem cells has divided social conservatives otherwise opposed to the right to abortion. Soon, science will enable parents to alter their children's genetic makeup to prevent disease and deformity, and—more controversially—to include desirable characteristics and delete undesirable ones.<sup>8</sup> Changing technological assumptions will bring changing understandings about *Roe*'s political meaning and legal salience: This is yet another example of the principle of ideological drift at work.<sup>9</sup>

In the long run, *Roe*'s first and second holdings—about personhood and the legitimacy of protecting potential life—may prove even more important than its third holding about privacy. Moreover, *Roe*'s third holding will ultimately make the most sense not in the way that the Court initially conceptualized it—as a claim about a generalized right to privacy—but rather as a claim about social equality. The right to abortion is a liberty to be sure, but its proper basis is not privacy but equal social standing. In the particular world we live in today, with its technological limitations and expectations about economic life and family structure, women must possess a right to abortion as a necessary but not sufficient condition for securing their equal citizenship under the Fourteenth Amendment.

Women's equal status in society depends on their not having the same constitutional status as blastocysts, embryos, or fetuses. If a woman and an embryo are constitutionally equivalent, the state cannot prefer one to the other

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<sup>6</sup> *Id.* at 163.

<sup>7</sup> *Id.* at 162 (holding that the state has an "important and legitimate interest in protecting the potentiality of human life").

<sup>8</sup> To some extent parents using in vitro methods can already do this. Pre-implantation genetic diagnosis (PGD) allows potential parents to learn whether embryos contain genes that might contribute to or cause diseases; parents can then choose to implant only embryos lacking these genetic markers. See, e.g., Preimplantation Genetic Diagnosis (PGD) and Screening, <http://www.genetics-and-society.org/technologies/other/pgd.html> (last visited Feb. 19, 2007).

<sup>9</sup> See Jack M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993).

and so not only is abortion not constitutionally guaranteed, but also it is likely forbidden in almost every case by the demands of equal protection of the laws. And not only abortions: The state would have to prohibit almost any manipulation or use of fertilized ova that causes their mutilation or destruction, including discarding embryos not used for in vitro fertilization and using embryos for stem cell research. But even if the unborn are not persons, the state still has important and legitimate interests in how reproductive technology and medical research are conducted because it has interests in the protection of potential human life.

As new genetic and reproductive technologies move to the forefront of public concern, the relative importance of these three holdings will shift; as this happens, *Roe*'s legal and political meaning will change. *Roe*'s first and second holdings will become just as important as the third, if not more so. Thus, in the future *Roe* will stand for a proposition that seems quite different from the way we currently imagine it: How the state regulates the manipulation and treatment of unborn life and the human genome should be left to the political process except insofar as it conflicts with guarantees of equal citizenship and social equality. Put in these terms, *Roe* will have a very different political valence within a generation, as new alliances form among people whom we today term "pro-choice" and "pro-life."

### I. *ROE*'S THREE HOLDINGS

*Roe v. Wade* was premised on three ideas: First, a fertilized ovum does not obtain constitutional rights from the moment of conception.<sup>10</sup> Second, the state nevertheless has legitimate and powerful interests in the life and potential personhood of the developing embryo or fetus.<sup>11</sup> Third, those interests, although quite important, must yield, at least in the earlier stages of the pregnancy, to preserve the rights of women.

*Roe*'s first idea—that "persons" refers only to human beings after birth<sup>12</sup>—is well supported by arguments from text, history, and consequences. The Constitution refers to persons in many places, and most of those references make no sense when applied to embryos or fetuses. For example, immediately before the Fifth Amendment's Due Process Clause, the Constitution states that

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<sup>10</sup> 410 U.S. at 157–58.

<sup>11</sup> *Id.* at 162.

<sup>12</sup> *Id.* at 157–58.

“[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>13</sup> It is hard to see how a fetus could be compelled to testify against anyone, much less against itself. Section 2 of the Fourteenth Amendment, written contemporaneously with that Amendment’s Due Process and Equal Protection Clauses, says that “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”<sup>14</sup> This language does not suggest that embryos and fetuses would be counted for purposes of enumeration, nor is there any evidence that this was intended.<sup>15</sup>

Historical evidence supports these textual arguments. In 1868, several states still retained the common law rule that abortion was not a felony before quickening—around the fourth or fifth month.<sup>16</sup> During the middle of the nineteenth century, most states began to treat abortions before quickening as felonies, but they made various exceptions and did not treat abortion as identical to first-degree murder.<sup>17</sup> Texas’s 1857 law, the one involved in *Roe* itself, did not prohibit abortions performed by women on themselves—for example, by ingesting abortifacients.<sup>18</sup>

Finally, there are arguments based on consequences. Treating blastocysts, embryos, and fetuses alike as constitutional persons would strongly suggest that states could have only one policy regarding abortion: They must treat it like other premeditated murders.<sup>19</sup> If embryos—even those as small as the period at the end of this sentence—are constitutional persons, they presumptively should be entitled to equal protection of the laws against murder like everyone else. Exceptions for abortions performed in cases of rape and incest would likely violate equal protection. Why could states decriminalize murder simply because of who the victim’s parents were or because the victim’s conception was not consensual? These conclusions do not mesh well with how most people—even those with strong moral objections—feel about abortion. For example, people may seek to punish the doctor who performs the abortion but not the mother, even though the mother seeks and pays for the

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<sup>13</sup> U.S. CONST. amend. V.

<sup>14</sup> *Id.* amend. XIV, § 2.

<sup>15</sup> Justice Blackmun added in *Roe* that “[w]e are not aware that in the taking of any census under [the Apportionment Clause of Art. I, § 2, cl. 3], a fetus has ever been counted.” *Roe*, 410 U.S. at 157 n.53.

<sup>16</sup> *See id.* at 139.

<sup>17</sup> *See id.*; Paul Benjamin Linton, *Roe v. Wade and the History of Abortion Regulation*, 15 AM. J.L. & MED. 227, 232–33 (1989).

<sup>18</sup> 1879 TEX. CRIM. STAT., ch. 7, arts. 531–36.

<sup>19</sup> *See Roe*, 410 U.S. at 157–58 n.54.

procedure. In contrast, most people would want to punish a woman who pays a contract killer to eliminate her husband or her born child.

To be sure, the Constitution does not require that all killing of human beings be treated the same. States can punish negligent homicide and murder committed in the heat of passion less severely than other forms of murder. But abortion involves a premeditated act with the specific intent of ending the life of the embryo or fetus. Premeditated homicide is the most severely punished in virtually all jurisdictions. If abortion really is the murder of a constitutional person with full rights under the Equal Protection Clause, it is hard to see why states could have lesser penalties for premeditated murder of fetuses and embryos than they do for the premeditated murder of persons already born; the same would seem to be true of laws banning murder for hire.

If embryos and fetuses are constitutional persons, states would also probably have to severely limit in vitro fertilization, which normally creates many more fertilized embryos than are actually successfully implanted. These unused embryos are either discarded or frozen. If embryos are constitutional persons, why can the state allow parents to discard them? Why can it permit parents to make contracts about their storage and disposal, as at least one state has done?<sup>20</sup> Nor is it clear that states could constitutionally permit embryonic stem cell research that leads to the destruction of embryos while simultaneously prohibiting medical experimentation on children or adults that would lead to their death.<sup>21</sup>

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<sup>20</sup> See *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (treating embryos as property of their progenitors whose status would be determined by contractual arrangements between the couple and holding that the husband's interest in avoiding parenthood outweighed the wife's interest in donating the pre-embryos to another couple for implantation); see also *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (recognizing that frozen embryos are the property of their genetic progenitors and holding that an in vitro fertilization clinic held these embryos under a bailment relationship based on the contract between the parties). I do not assume that the property metaphor used by these courts is the correct way to conceptualize biological parents' interests in frozen embryos, although a full discussion of the issues is beyond the scope of this Article.

<sup>21</sup> To avoid this conclusion, one might argue that constitutional personhood does not begin until the embryo is successfully implanted in the womb. Under that theory, destruction of unused or unimplanted embryos does not raise any equal protection concerns because they are not constitutional persons. This does not eliminate all difficulties. Doctors using in vitro fertilization techniques sometimes implant multiple embryos in order to increase the chances that at least one will successfully develop in the mother's womb. If too many begin to develop, however, this may raise health issues for both the woman and for the embryos. Hence doctors may terminate one or more embryos, a process called selective reduction. It is not clear why this procedure could escape laws against first-degree murder unless the doctor can show that the removal was reasonably necessary to preserve the life of the mother or of the other embryos.

Given the combination of arguments from text, history, and consequences, it is not surprising that the *Roe* Court found it easy to conclude that fetuses are not persons. What is equally important, however, is that the two dissenting Justices did not argue to the contrary.<sup>22</sup> Indeed, in all of the abortion cases since *Roe*, not a single Justice—no matter how opposed to the constitutional right to abortion—has ever contested *Roe*'s first holding about constitutional personhood. Instead, they have argued that the issue of abortion should be left to the political process, a position that is as inconsistent with constitutional personhood for the unborn as *Roe*'s third holding about the right of privacy.<sup>23</sup>

Now consider *Roe*'s second holding: Although embryos and fetuses are not constitutional persons, states have legitimate and important interests in their development and potential for personhood.<sup>24</sup> We tend to overlook this point because the Court went on to hold that the state's interest was trumped by the abortion right. Consequently, Blackmun's statement about important state interests may have seemed like a makeweight or an attempt to mollify potential critics. But *Roe*'s holding that states have important and legitimate state interests in protecting potential human life was hardly dicta—it was necessary to the trimester framework's assumption that statutes regulating abortion both before and after viability could be constitutional notwithstanding the

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<sup>22</sup> *Roe*, 410 U.S. at 177 (Rehnquist, J., dissenting) ("The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."); *id.* at 222 (White, J., dissenting) ("This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.").

<sup>23</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).

The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.

*Id.*; *id.* at 982 ("The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a *human life* . . . . There is of course no way to determine that as a legal matter; it is, in fact, a value judgment.").

<sup>24</sup> Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive . . . . [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.

*Roe*, 410 U.S. at 153–54; see also *id.* at 162 (holding that the state has an "important and legitimate interest in protecting the potentiality of human life").

constitutional right to privacy.<sup>25</sup> Moreover, the Court reaffirmed this holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, offering it as a reason why legislation that did not impose an undue burden on the right to abortion was constitutional.<sup>26</sup> The Court emphasized the state's legitimate interest in the fetus's potential life still more recently in *Gonzales v. Carhart*.<sup>27</sup> Again, this holding has never really been questioned. Dissenting Justices have argued that it does not go far enough in articulating the state's interests because some people believe that embryos and fetuses are already human lives and persons in their own right<sup>28</sup> or because the state's interest in potential human life is compelling from the moment of conception.<sup>29</sup> The dispute, in other words, has not been about whether the state has powerful interests in protecting and promoting the welfare of potential human life, but whether and when those interests must yield to the rights of pregnant women. The point, however, is that where women's rights are not at stake, the state's legitimate interest remains.

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<sup>25</sup> *Id.* at 163–64. In *Roe*'s original formulation, the state interest in maternal health became compelling at the end of the first trimester, and its interest in potential life became compelling at viability, thus producing the trimester system. *Id.*

<sup>26</sup> 505 U.S. at 871 ("That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases.").

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

*Id.* at 876.

<sup>27</sup> 127 S. Ct. 1610 (2007) (*Carhart II*) (upholding Federal Partial-Birth Abortion Act of 2003 as promoting the government's legitimate interest in the protection of potential life.). One can criticize *Carhart II* on the ground that banning a specific abortion procedure—in this case intact dilation and extraction (D&E)—does not substantially further the state's asserted interest. After all, women and their doctors could substitute other methods for abortion that would equally result in the destruction of the fetus. Nevertheless, the Court viewed the state interest in potential life as central to its decision, holding that Congress could reasonably conclude that intact D&E bore too close a resemblance to infanticide.

<sup>28</sup> See *Casey*, 505 U.S. at 982 (Scalia, J., dissenting).

<sup>29</sup> See *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting).

[P]otential life is no less potential in the first weeks of pregnancy than it is at viability or afterward . . . . The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.

*Id.*; *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting) ("[T]he State's interest, if compelling after viability, is equally compelling before viability."); *id.* at 828 (O'Connor, J., dissenting).

This brings us to *Roe*'s third holding. *Roe* premised women's right to abortion on a right of sexual privacy. The Court described the right to abortion as flowing out of constitutional protections for marriage, procreation, contraception, family relationships, and child rearing and education.<sup>30</sup> Put in these terms, *Roe* is a case about liberty and freedom from state interference in decision making in relationships and intimate life, a right that applies to men and women equally. As the Court explained in *Eisenstadt v. Baird*, "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>31</sup>

There are several problems with this approach. First, the Court had to rely on the idea of "privacy," which encompassed a wide range of different activities that were not necessarily all connected to each other. In *Roe* itself, the Court lumped together cases involving electronic surveillance<sup>32</sup> with cases involving the right to view pornography in the home,<sup>33</sup> the right to use contraceptives,<sup>34</sup> the right against compulsory sterilization,<sup>35</sup> and the right to direct the education of one's children.<sup>36</sup>

Second, the Court located this right in the substantive protections of the Fourteenth Amendment's Due Process Clause,<sup>37</sup> when a more logical place was among the rights of national citizenship protected by the Privileges or Immunities Clause.<sup>38</sup> That clause was not available, of course, because the Court's narrow interpretation in the *Slaughter-House Cases*<sup>39</sup> made it largely irrelevant. The Privileges or Immunities Clause was originally designed to protect basic rights necessary to equal citizenship. By writing this clause out of the Constitution, the Court shifted the focus of substantive rights protection to the Due Process Clause. In doing so, the Court did far more than create a

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<sup>30</sup> *Roe*, 410 U.S. at 152–53.

<sup>31</sup> 405 U.S. 438, 453 (1972).

<sup>32</sup> *Roe*, 410 U.S. at 152 (citing *Katz v. United States*, 389 U.S. 347, 350 (1967); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

<sup>33</sup> *Id.* (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

<sup>34</sup> *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965)); *id.* (citing *Eisenstadt*, 405 U.S. at 453–54).

<sup>35</sup> *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942)).

<sup>36</sup> *Id.* at 153 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925)); *id.* at 152–53 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

<sup>37</sup> *Id.* at 153.

<sup>38</sup> U.S. CONST. amend. XIV, § 1.

<sup>39</sup> 83 U.S. (16 Wall.) 36 (1873).



semantic puzzle of how “due process” guaranteed substance: It severed the connection between substantive rights and equal citizenship.

Third, by viewing the abortion right as part of a generalized right of privacy, the Court obscured the relationship between women’s reproductive liberty and their equality with men. It detached the issue of abortion (and contraception) from the social context that made these rights so important—the particular situation faced by women in a society that structures work and public life in ways inconsistent with being the primary caregiver of small children and that simultaneously expects women to devote themselves to motherhood. Restricting contraception imposes special burdens on women by forcing them to choose between having sex at all and risking becoming mothers. And when the state prevents women who become pregnant from having abortions, it not only limits their sexual lives, but also treats women as beings whose job it is to bear children and to sacrifice their lives and ambitions for the raising and care of children. The best argument for the right to abortion is not that it follows from a more general right to privacy. It is that given key current features of our society, women’s equality demands it. Therefore, its most logical source is not the substantive protections of the Due Process Clause, but the guarantees of equal citizenship under the Equal Protection Clause. The abortion right is best conceptualized as an issue of women’s equal status and practical freedom. It should not have been viewed as a free-floating question of liberty or “choice” isolated from the actual social situation of women, a situation in which traditional gender roles and social and economic forces combine to push large numbers of women repeatedly into conditions of economic and social inequality and dependency. Although today people use the word “choice” to describe the right to abortion, it should more properly be called “choice under conditions of sex inequality.”

The obligations of parenthood and child care continue to fall far more heavily on women than on men, and this is so even after the successes of the feminist movement in the 1970s.

Restrictions on abortion force women to become mothers against their will, imposing life-altering obligations on them in ways that our society has never demanded of men. As my colleague Reva Siegel aptly puts it, abortion laws treat women not as murderers, but as mothers, as people who exist to rear children, often in situations of economic and social dependency.<sup>40</sup> And during

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<sup>40</sup> Reva B. Siegel, *Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION* 81 (Jack M. Balkin ed., 2005).

pregnancy itself, prohibitions on abortion require women, unlike men, to surrender their bodies to the state for the purpose of bearing children, sometimes while risking their lives and health.<sup>41</sup> Prohibitions on abortion single women out for special burdens not imposed on men: By compelling women to take on life-altering obligations, they help keep women in a subordinate and dependent position in society, limiting their practical ability to enjoy equal citizenship with men. The idea that the Fourteenth Amendment prohibits legislation that imposes special burdens on a social group and tends to perpetuate their subordinate status has deep roots in the purposes behind that Amendment. The purpose of the Equal Protection Clause and, to a lesser extent the Due Process Clause, was to “abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.”<sup>42</sup> Restrictions on abortion, which compel motherhood, are a form of class legislation prohibited by the Fourteenth Amendment.<sup>43</sup>

We should have no illusions that abortion rights by themselves are sufficient to secure equal citizenship for women. The right to abortion is simply an unhappy alternative to a worse situation; it is a response, often arising out of dire necessity, to social constraints and expectations that threaten to keep many women in conditions of social dependency and subordination. The structural forces that produce the need for a right to abortion are broad and

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<sup>41</sup> Thus, there are actually two rights to abortion: The first is the right not to be forced to risk life or health in order to bear children; the second is the right to decide whether to take on the responsibilities of motherhood. The first right continues throughout pregnancy, but the second right need not. To vindicate the second right, women need only have a reasonable time to decide whether to become mothers. *Roe* and *Casey* judicially demarcated that the second right ends at viability, but this is not the only possible choice, and a reasonable time to decide might be quite different for women facing different circumstances. For a more detailed discussion, see Jack M. Balkin, *Judgment of the Court, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 40, at 45, 52–54; Jack M. Balkin, *Abortion and Original Meaning* (Yale Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 119, 2006), available at <http://ssrn.com/abstract=925558>.

<sup>42</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2764–68 (1866) (statement of Sen. Howard). Senator Howard, a member of the Committee of Fifteen that drafted the Fourteenth Amendment, introduced it on the floor of the Senate. His statement comes from a speech he gave introducing the proposed amendment to Congress and explaining the purposes of the Equal Protection and Due Process Clauses. Although the Equal Protection Clause was the primary guarantor against class legislation, the antebellum idea of due process also included the notion that laws should be general and impartial and not for the benefit of any particular class. See Mark G. Yudof, *Equal Protection, Class Legislation and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's "Social Statics,"* 88 MICH. L. REV. 1366, 1376 (1990) (“The idea that laws should be general and not tainted by considerations of class or caste was widely recognized and accepted before the fourteenth amendment was enacted. It was part-and-parcel of the presumed fairness of governmental processes, of due process of law.”); see also Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 258–59 & n.58 (1997).

<sup>43</sup> This argument is developed in more detail in Balkin, *supra* note 41.

deep. The problem is far more than mere lack of access to abortion itself. Motherhood—the work of raising and caring for children as it is currently constituted and as it interacts with the structure of the market and social expectations about women’s roles—thrusts many women into lives of economic and social dependence. Allowing women to avoid motherhood through contraception and abortion will not by itself cure these larger ills of social life. Contraception and abortion give women practical sexual freedom and a possible exit from unwanted motherhood. But for women who want to become mothers and want motherhood on their own terms consistent with a true equality of citizenship with men, the right to abortion provides only a limited solution.

The right to abortion, in fact, is only a small subset of the rights that are necessary to secure women’s equal citizenship in this country, and while the right to abortion is currently judicially protected, many of the other rights must come from the legislative process rather than from courts. Robin West has described abortion, standing by itself, as a “pathetically inadequate remedy” for the ways that society limits women’s full participation.<sup>44</sup> To secure women’s equal citizenship, our legislatures must honor and support the work of motherhood far more than they currently do. They must invest in health care, nutrition, child support, and workplace reforms. They must get over their qualms and make contraception (and education about contraception) more widely available, particularly to poor women. Both access to contraception and education about its sustained and proper use are essential. In fact, around half of the unplanned pregnancies that happen each year in the United States occur among the 11% of women who did not practice contraception in the month they became pregnant.<sup>45</sup>

Sadly, legislatures too often are unwilling to make these necessary reforms. Instead, they insist on creating ever new restrictions on abortion directed at poor women because they are easiest to deter and control. Reproductive autonomy must be furthered by a larger class of reforms that help parents raise their children, educate women about their reproductive choices, and help free them from the hardships and the often desperate straits that lead to abortions. Abortion is a tragedy of circumstances. If the state can prevent those circumstances and help secure women’s equality in the process, it has a

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<sup>44</sup> Robin West, *Concurring in the Judgment, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 40, at 121, 141.

<sup>45</sup> Alan Guttmacher Institute, *Facts on Induced Abortion in the United States*, [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html).

constitutional obligation to do so, even—and especially—if the obligation to vindicate equal citizenship through social legislation is not easily enforceable by courts.<sup>46</sup>

Many opponents of abortion rights support reforms that protect the interest of mothers and children after birth as well as before. Supporters of abortion rights can find common cause with them on many of these issues. Although we now expend a great deal of energy fighting about abortion on the one hand, and “family values” on the other, the practical equality of women and the economic and practical security of women with children are the family values to which our political process currently pays least attention. The abortion right is only a small part of what justice demands for women and for family life in this country.

When *Roe* was decided, the Justices were not sympathetic to an equality theory of abortion rights.<sup>47</sup> Their major concern about equality was the effect abortion restrictions had on the poor.<sup>48</sup> This is ironic in many different respects. Ultimately, the Court declined to afford the poor significant constitutional protections, and it signaled as much in *San Antonio Metropolitan School District v. Rodriguez*,<sup>49</sup> decided two months after *Roe*. Moreover, attitudes about abortion were changing in part because the women’s movement had pushed for contraceptive and abortion rights as a key element of sex equality. In the same Term that it decided *Roe*, the Supreme Court decided *Frontiero v. Richardson*.<sup>50</sup> Several women’s organizations filed amicus briefs presenting abortion rights as an issue of women’s equality.<sup>51</sup> And to top it off, Congress passed the proposed Equal Rights Amendment and sent it to the states for ratification only ten months before *Roe*. Nevertheless, the Justices in 1973—who were all male—could not or would not put two and two together. Interviewed many years later, Justice Blackmun scoffed at the idea that *Roe*

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<sup>46</sup> For a powerful argument along these lines, see West, *supra* note 44, at 140–46.

<sup>47</sup> THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT OPINIONS 804–13 (Del Dickson ed., 2001) (notes of Court’s deliberations over *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973)).

<sup>48</sup> *Id.* at 808 (comments of Justices Douglas, Marshall, and Brennan).

<sup>49</sup> 411 U.S. 1, 27–35 (1973) (holding that education is not a fundamental right and that disparities in expenditures between rich and poor school districts did not violate the Equal Protection Clause).

<sup>50</sup> 411 U.S. 677 (1973) (holding that the statutory difference in awards of dependent benefits for male and female military personnel violated the Due Process Clause of the Fifth Amendment).

<sup>51</sup> See Siegel, *supra* note 40, at 79, 245–46.

could have been decided on sex equality grounds in 1973: There simply were not enough votes for that proposition.<sup>52</sup>

Nevertheless, by the time the Court decided *Casey*, sex equality ideas had begun to creep into the joint opinion<sup>53</sup> and particularly Justice Blackmun's concurrence.<sup>54</sup> And in the Court's most recent decision, *Gonzales v. Carhart*, Justice Ginsburg's dissent—joined by three other Justices—explicitly grounded the right to abortion on “a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.”<sup>55</sup> It is better late than never; the Court's tardy discovery that abortion rights are about sex equality and, more generally, equal citizenship, is especially important because of the legal issues we are about to confront.

## II. *ROE*'S FUTURE

The equality interpretation of *Roe*—and particularly the notion that limits on abortion are a form of class legislation—will be increasingly important as we encounter new reproductive technologies like cloning and genetic engineering and new forms of medical research like stem cell research. As the technological context changes, it will make a great deal of difference whether *Roe* is a decision about reproductive privacy per se or whether the liberty it protects arises from considerations of sex equality and equal citizenship.

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<sup>52</sup> Justice Harry A. Blackmun Oral History Project, Interview by Harold Hongju Koh with Harry A. Blackmun, Supreme Court Justice, at the U.S. Supreme Court and the Federal Judicial Center (July 6, 1944–Dec. 13, 1995), available at <http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09>.

<sup>53</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835 (1992) (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”); *id.* at 838 (stating that the spousal notification requirement “embodies a view of marriage consonant with the common-law status of married women but repugnant to this Court's present understanding of marriage and of the nature of the rights secured by the Constitution”); *id.* at 912 (Stevens, J., concurring in part and dissenting in part) (“*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.”).

<sup>54</sup> See *id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life.”).

[R]estrictions on a woman's right to terminate her pregnancy . . . implicate constitutional guarantees of gender equality . . . . This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.

*Id.*

<sup>55</sup> 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting).

If *Roe* is about reproductive choice in the abstract, about the right of people to reproduce (or not reproduce) without interference from the state, future litigants will demand that courts insulate new reproductive technologies from regulation on the grounds that individuals should be free to have children by any means that science permits. Currently, there is no clear boundary that makes a generalized right to reproductive autonomy inapplicable to new reproductive technologies like cloning or genetic engineering. One might argue that only traditional methods of reproduction are protected, but such arguments may be unavailing precisely because the technology never existed before. The question will be whether the privacy principle applies in the new technological context, just as courts have asked whether free speech principles apply to the Internet<sup>56</sup> or whether the Fourth Amendment's prohibition against unreasonable searches applies to infrared sensors directed at people's homes.<sup>57</sup> Nor can we easily draw lines between "natural" methods of reproduction protected by the right to privacy and technologically assisted methods that are not.<sup>58</sup> By now, the process of reproduction for many couples is thoroughly imbued with various forms of medical and technological assistance, including fertility clinics and in vitro fertilization. Assuming for the moment that the right to reproduce extends to using fertility clinics and in vitro fertilization, it will be difficult for courts to draw lines. The privacy interpretation of *Roe* may have a stopping point, but it may not be the one we now imagine, or it may simply be unprincipled and ad hoc.

On the other hand, suppose we view the abortion right not as part of a generalized right to reproductive autonomy, but rather as a specific right designed to help secure women's equal citizenship in a world in which reproductive burdens and the life-altering obligations of parenthood fall particularly heavily on them. Then we obtain a very different perspective. Cloning and other genetic technologies are not necessary to ameliorate women's inequalities with men, and indeed, as described more fully below, one can easily imagine how these technologies might someday be used to undermine women's equality. To give only one example, existing biomedical research in cloning requires large numbers of eggs to produce even a single

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<sup>56</sup> See *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (holding that ordinary First Amendment protections apply to communications on the Internet).

<sup>57</sup> See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of thermal scanning devices not generally available to the public to explore the details of a private home constitutes an unlawful search under the Fourth Amendment).

<sup>58</sup> See JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 22-42 (1994).

successful result.<sup>59</sup> Researchers and, later on, biomedical companies who seek to profit from human genetic engineering will have to locate vast sources of human eggs to make genetic engineering both practical and commercially viable. That may lead them to pressure large numbers of women—particularly poor women—to serve as professional human egg donors or incubators, possibly at risk to their health.<sup>60</sup> Where new reproductive technologies do not further equality between the sexes, their connections to the underlying justification for the abortion right become greatly attenuated, and we should leave their regulation to the political process in most cases.<sup>61</sup>

This point can be generalized: The feminist or sex equality interpretation of *Roe* is not the same as a libertarian interpretation, even though women's equality is secured through liberty. The two interpretations of *Roe* begin to come apart precisely when reproductive rights no longer serve the goal of establishing women's equal status with men.

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<sup>59</sup> See 149 CONG. REC. H1397, H1416 (daily ed. Feb. 27, 2003) (statement of Rep. Manzullo) ("Just to treat 16 million Parkinson's patients [using therapeutic cloning techniques], it is estimated that a minimum of 800 million human eggs would be needed from a minimum of 80 million of childbearing age."). The predicted shortfall of available eggs for cloning research has led scientists to consider new ways to obtain them from healthy women. See, e.g., Ian Sample & Donald MacLeod, *Cloning Plan Poses New Ethical Dilemma*, GUARDIAN, July 26, 2005, at 3; Denis Campbell, *Women Will Be Paid to Donate Eggs for Science*, OBSERVER, Feb. 18, 2007, <http://www.guardian.co.uk/medicine/story/0,,2015823,00.html>.

<sup>60</sup> On the health risks associated with multiple egg donations, see Lynette Reid, Natalie Ram & Blake Brown, *Compensation for Gamete Donation: The Analogy with Jury Duty*, CAMBRIDGE Q. (forthcoming 2007).

Fears about the coercion of women in order to obtain necessary egg donations are not idle speculation. In 2005, Korean scientist Hwang Woo-Suk was forced to admit that his groundbreaking work on an efficient method of creating stem cell lines from cloned embryos with a small number of eggs was a fraud. See Nicholas Wade & Choe Sang-Hun, *Human Cloning Was All Faked, Koreans Report*, N.Y. TIMES, Jan. 10, 2006, at A1. Hwang had failed to create stem cell lines from the cloned embryos and had used hundreds more eggs than he had initially reported. See, e.g., William Saletan, *Breaking Eggs: The Lesson of the Korean Cloning Scandal*, SLATE, Jan. 4, 2006, <http://www.slate.com/id/2133745>. In addition, Hwang paid numerous women for the eggs in violation of generally accepted ethical norms among scientists. He even pressured one of his junior researchers into donating eggs for free. *Id.* The women were given medication to stimulate hyperovulation; some of them, including Hwang's research assistant, suffered significant side effects from the medication. *Id.*

The Hwang scandal suggests that there will be enormous economic pressures to find women willing to take the drugs that will allow them to donate multiple eggs. See Donna Dickenson, *Commodification of Human Tissue: Implications for Feminist and Development Ethics*, 2 DEVELOPING WORLD BIOETHICS 55 (2002) (noting a general shortage of egg donors in the richer, more developed nations of the Northern Hemisphere and the likely consequences for women in the poor, less developed Southern Hemisphere).

<sup>61</sup> The contraceptive cases, *Griswold* and *Eisenstadt*, which give people the right not to become parents, would remain correct under this interpretation of *Roe*; in fact, each case would also gain an additional justification based on sex equality. If abortion is necessary for women to achieve equal citizenship, a fortiori women have basic rights to use contraceptives.

The very expression “reproductive rights” hides an important ambiguity. Reproductive rights could refer either to women’s ability to control their reproductive lives or to the ability to choose when and how to have offspring. In the former case, reproductive rights would help secure equality with men and avoid the subordination that comes from forced motherhood. In the latter case, reproductive rights might include the right to have a child engineered to lack a particular disease or disability, or more fancifully, the right to have a child with blonde hair and blue eyes, or even a clone of one’s self. The latter account of reproductive rights may increase the personal liberties of parents without promoting the relative equality of women.

Indeed, an equality-based interpretation of reproductive rights may conflict with a libertarian interpretation in a number of different ways. Consider the following possible scenarios:

- (1) Engineering genetically enhanced abilities in offspring, which only the rich can afford, thus perpetuating and entrenching social stratification;
- (2) Creating men and women with exaggerated or stereotypical features designed to enhance sex differentiation;
- (3) Using genetic engineering or abortion to choose the sex of a baby, leading to overrepresentation of males over females;<sup>62</sup>
- (4) Using genetic engineering or abortion to eliminate fetuses thought to have undesirable traits or predilections like homosexuality, to the extent these predispositions are genetically marked;

Finally, outside the realm of reproductive rights, but using related technologies:

- (5) Using collection of DNA to mark people with undesirable traits, predispositions and health risks, and then passing laws that treat those persons differently on this basis.

Whether or not any of these scenarios come to pass, they all demonstrate that the liberty to choose the genes of one’s offspring or the freedom to discriminate on the basis of genetics, whether by the state or by private parties,

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<sup>62</sup> Abortion has already been used for this purpose in China, which has enforced a one child per family policy for years. Many parents have aborted female fetuses because girls are considered less valuable than boys. The result has been predictable: many more men than women. This combination of government limits on reproductive autonomy coupled with private choices demonstrates the contextual nature of the link between abortion rights and women’s equality. In China, with a very different background of state-imposed regulation and social norms, the ability to abort does not necessarily promote the equal citizenship of women.



does not necessarily promote equal status and equal citizenship. Quite the contrary: Technologies that require massive harvesting of eggs may lead to enormous pressures placed on women, and particularly poor women, to serve as sources of those eggs. Genetic engineering and the ability to locate and identify genetic markers can involve or can facilitate genetic discrimination, which, in turn, can produce new forms of inequality or new techniques for older forms.

The latter problem can arise in two distinct ways. First, the state might attempt to limit or prevent private parties—whether parents, researchers, or insurance companies—from engaging in genetic engineering or genetic discrimination that it regards as unfair and unjust. The question in this case is whether the Constitution prevents this regulation. Second, the state itself might engage in genetic manipulation or discrimination, or it might facilitate such manipulation or discrimination by private parties—like medical researchers or insurance companies—in ways sufficient to constitute state action. Here, the question is whether the state's actions violate the Constitution.

How we interpret *Roe*'s three holdings bears on each of these questions. Start with the first question—the constitutionality of the government's attempts to regulate genetic manipulation, cloning, and other forms of genetic engineering by private parties. The reproductive privacy interpretation of *Roe* would not affect state regulations of medical research that do not limit individuals' rights to reproduce offspring—like cloning for biomedical research and embryonic stem cell research.<sup>63</sup> However, it might limit the state's ability to regulate parents who want to clone themselves or genetically engineer their children. The reproductive privacy interpretation of *Roe* might restrict the state's ability to prohibit privately sponsored eugenics—for example, a couple's decision to engineer a child with a particular hair or eye color or a decision by deaf parents to engineer a child who is also deaf.

The equality interpretation of *Roe* has a somewhat different effect. As long as the state does not try to promote invidious discrimination—a point to which I shall return shortly—the equality interpretation leaves the regulation of genetic manipulation by private parties to the political process. That makes

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<sup>63</sup> This assumes that "reproductive rights" are rights to reproduce for the purpose of offspring and not rights to reproduce one's DNA for any reason at all, including, for example, producing cells that can be transplanted into one's body. Because cloning for biomedical research and reproductive cloning may use identical techniques, the argument that separates them may come down to the purposes behind the cloning.

*Roe*'s first two holdings particularly important. *Roe* holds that fertilized ova, blastocysts, embryos, and fetuses do not have independent constitutional rights, but that the state has legitimate and important interests in their protection. In addition, the state has legitimate and important interests in protecting the health of women who might donate (or be pressured into donating) their eggs. Under the equality interpretation of *Roe*, there is no independent constitutional right to prevent the beneficial development of these new technologies; but equally important, governments may regulate these technologies in the public interest and in the interest of future generations. In short, an interpretation of the abortion right grounded in sex equality leaves most of the big issues of how to deal with new reproductive technologies to the political process rather than to the courts.

Now consider the second question: Suppose the state engages in genetic engineering or genetic discrimination, or facilitates private parties so that there is state action. A reproductive privacy theory would probably limit some of this activity. It might not prohibit genetic discrimination against people already born. However, it could prevent the government from using people's genetic materials to produce offspring against their will.<sup>64</sup> It could prevent the government from requiring that people's offspring be genetically modified, for example, to eliminate undesirable traits or markers for disease. It might also limit laws that prevent parents from choosing to have offspring with certain genetic characteristics or markers.

An equality interpretation of *Roe* would also restrict much of this state regulation, but for different reasons. It would be based on the prohibition against class legislation and the idea that the state may not limit reproductive liberty to subordinate a group or deny it equal standing. Under this approach, state-imposed genetic engineering and genetic discrimination might be a new twenty-first century form of class legislation. The state, either directly or through facilitating private parties, discriminates against people with certain genetic markers, either by treating them differently after they are born (including hijacking their genetic material for the state's purposes) or by

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<sup>64</sup> Again, whether "reproductive rights" mean the right not to be forced to have offspring or the right not to have one's genetic material reproduced for any purpose whatsoever, including for medical research, is ambiguous. An individual might have property rights against the state's use of his genetic material without his consent. However, presumably, the government could alter those property rights by regulation. There is also a due process right not to have genetic material forcibly taken from one's body. The government might avoid this constitutional difficulty by using genetic material that was abandoned in the course of ordinary activity (for example, in skin cells or saliva) or was given with consent. The relevant concern here is whether an individual's reproductive rights would independently restrict the government's ability to do this.

preventing new people from being born with these genes in the first place. (Note that it is not necessary that the genetic markers targeted by the state reliably produce specific traits as long as state officials believe that they do. Genetic discrimination can justify itself with bad science as well as with good science, and indeed may be more likely to do so.) In this twenty-first century version of class legislation, the state picks out a particular group and imposes special disabilities on it, or, more alarmingly, simply engineers the group away.

In the original nineteenth-century conception of class legislation, the affected group did not have to exist as a separate entity or group prior to the state's singling it out; class legislation could simultaneously create the class and discriminate for or against it.<sup>65</sup> The same is true of new forms of genetic discrimination. To violate the Equal Protection Clause under this interpretation, the state need not pick out an existing social group, like blacks, that understands itself as possessing a separate identity. Rather, by identifying a set of genetic markers, the state constructs a group that it then picks out for disparate treatment. Genetic groups, created by medical science and state policy, could well become the new classes of the future and the victims of a new form of class legislation that the Constitution should equally prohibit. Like homosexuals and (some) religious minorities, genetic groups will not necessarily be discrete and insular, or identifiable by outward appearance. Nevertheless, these new genetic groups will carry the information that can be used to discriminate against them in their genes. Like groupings by race and sex, groups marked by genetic characteristics are constituted by factors in place at the time of their birth. But they are not inevitably immutable characteristics—perhaps in time we will be able to change a person's genetic structure—and they do not necessarily have to correspond with any existing social group. That does not mean, however, that the state or private parties may not find reasons to pick them out for special regulation. Indeed, the more that we discover (or believe we have discovered) connections between our genes and our health, intelligence, and behavioral predispositions, the more the state will be tempted to categorize people into new groups based on their common genetic inheritance.

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<sup>65</sup> A special state grant of monopoly would be an obvious example; it simultaneously creates a limited class of favored citizens who enjoy special privileges and a much larger class of citizens who do not. See generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); Melissa L. Saunders, *supra* note 42, at 259–63, 289 n.198, 297–300 (noting that the creation of special burdens and benefits is key to class legislation); Yudof, *supra* note 42, at 1382–83 (noting that the law may create new “closed” classes that violate the principle against class legislation).

In a remarkable history of twentieth century eugenics centered around the 1942 case of *Skinner v. Oklahoma*,<sup>66</sup> Victoria Nourse has argued that *Skinner*, one of *Roe*'s antecedents, may be a key case for understanding the Constitution's role in the era of genetic engineering.<sup>67</sup> For when the state picks out groups and eliminates them by reason of their purportedly inheritable traits, it violates equal protection in its most basic sense.<sup>68</sup> In *Skinner*, the state decided to single out certain individuals as social undesirables and sterilize them so that they could not reproduce their genes, based on the assumption that criminal tendencies were inheritable. Notably, the state excluded people convicted of certain white-collar crimes like embezzlement from its sterilization program.<sup>69</sup> With a single law, the state created a "race" of second-class citizens and simultaneously exacted the penalty of elimination. As Justice Douglas explained in *Skinner*, when the state makes the possession of certain traits the basis for sterilization, "it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."<sup>70</sup> "The power to sterilize," Douglas argued, "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."<sup>71</sup>

*Skinner*, like *Roe*, is about both equality and liberty.<sup>72</sup> We have become accustomed to thinking about *Skinner* as a case about reproductive liberty, in part because it helped justify the line of cases from *Griswold* through *Eisenstadt* and *Roe*. But if *Roe* itself is best understood as a case about equality, and particularly about the Constitution's ban on class legislation, *Skinner*'s equal protection holding once again becomes particularly salient.<sup>73</sup> The best way to understand *Skinner* and *Roe* in the future is as limits on the state's control over reproduction or genetic technologies that single out groups for special disabilities or attempt to reduce them to a subordinate status. That interpretation preserves women's rights to reproductive choice, prohibits the state from invidious forms of genetic discrimination, and leaves to the

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<sup>66</sup> 316 U.S. 535 (1942).

<sup>67</sup> VICTORIA NOURSE, IN EVIL OR RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF EUGENICS (forthcoming 2007) (manuscript at ch. 9, 41–42, on file with the Emory Law Journal).

<sup>68</sup> *Id.*

<sup>69</sup> *Skinner*, 316 U.S. at 541.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> NOURSE, *supra* note 67.

democratic process regulation of new genetic and reproductive technologies in the public interest.

### CONCLUSION

Too much of the current coverage of debates about new reproductive technologies assumes that the pro-choice side will likely support them because it supports *Roe* and the pro-life side will likely oppose them because it opposes *Roe*. The reality will likely prove much more complicated, and we will see new alliances form as it becomes clear that the issues at stake are quite distinct from those that gave rise to the social movements for and against abortion rights.

Both pro-life and pro-choice forces believe that they are fighting for human dignity and for human equality. But they apply these values differently in the debate over women's reproductive rights; hence they find themselves on opposite sides. Pro-life forces argue that we must respect the human dignity of the unborn from the moment of conception because equality demands it. Pro-choice forces argue that to respect women's dignity and equality, the unborn cannot be treated as having equal status with pregnant women. But changing the focus from abortion to genetic engineering alters the context of these arguments from equality and dignity; it produces new potential alliances and new potential areas of agreement and disagreement.

We have already seen the beginnings of this shift in the debate over federal funding for stem cell research. Stem cell research focuses on potential new medical cures; it does not (directly) raise the question of women's equality or women's obligations to mother. Currently, the debate revolves around whether leftover embryos in fertility clinics that will not be implanted for reproduction should be treated more like persons or more like resources for medical experimentation. (Note, however, that at some point scientists might also create new stem cells through cloning for research and potential therapeutic use that would employ the same techniques as reproductive cloning).

Although President Bush and some religious conservatives have argued that embryonic stem cell research violates human equality and human dignity, several prominent pro-life politicians have taken the opposite view. For them, the question of human dignity properly focuses on the health of born persons who are suffering from diseases like Parkinson's. They deny that leftover embryos from in vitro fertilization clinics have equal status with born persons

that would prevent the embryos' use for medical research. Their argument, whether they realize it or not, is premised on *Roe*'s first two holdings, even though they reject the third. And because women's equality is not at stake in this controversy, they can join forces with those who also support abortion rights.

One should not assume that these new alliances will develop overnight. Much of the current controversy over abortion is connected to concerns about the status and role of women in American society and the structure of expectations about families and family life. Those debates will not go away soon. But new technological possibilities—and the problems they create—will likely disrupt existing expectations. They will shift our focus toward new controversies and new concerns. In these controversies, *Roe*'s first two holdings—together with a reinterpretation of its third holding premised on equality—may yet allow many people who are currently on opposite sides of the culture wars to find common ground. Although we often hear calls to abandon *Roe* these days, we should not give up on *Roe* just yet. It may prove quite valuable in the years to come.