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RECONCEIVING PRIVACY: RELATIONSHIPS AND REPRODUCTIVE TECHNOLOGY

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In this Article, Professor Radhika Rao sketches out the parameters of the constitutional right of privacy and applies the right to "new" reproductive technologies, such as artificial insemination, in vitro fertilization, and surrogacy. The thesis of the Article is that privacy—currently miscast as an individual right—must be reconceived as a relational right in order to capture its social

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dimension. By attaching the right of privacy to entire relationships rather than to isolated individuals, Professor Rao both explains existing jurisprudence and offers a fresh mode of analysis to resolve some seemingly intractable problems posed by assisted reproduction.

INTRODUCTION

The constitutional right of privacy is currently misunderstood. It is typically invoked in support of the individual's right to marry, to form a family, to procreate or not procreate, to rear children, and to engage in sexual activity. Indeed, privacy has become synonymous with individual rights to these various activities. But it is a mistake to equate privacy with a general constitutional right to engage in any or all of these important activities free from governmental interference.[1] Rather, the constitutional right to privacy simply casts a mantle of immunity from state interference around certain intimate and consensual relationships.[2] Although privacy is often perceived as a personal right, the prevailing concept fails to capture privacy's social dimension.[3] Privacy is not a right attached to isolated individuals; it nurtures social institutions, such as marriage and the family, that mediate between the individual and the state.

Indeed, the right of privacy is a principle concerning the allocation of power between individuals and the state, not the allocation of power

1. *See* Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting) (declaring that "the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior"); *cf.* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (arguing that the right to privacy consists not of the freedom to perform certain fundamental acts, but rather "the . . . freedom not to have one's life too totally determined by . . . [the] state").

2. Intimacy and consent are clearly necessary, but they may not be sufficient conditions to invoke the right to privacy under prevailing doctrine, for not all intimate and consensual relationships currently receive constitutional protection. *See, e.g., Bowers*, 478 U.S. at 196 (upholding a Georgia statute criminalizing homosexual sodomy); Reynolds v. United States, 98 U.S. 145, 166 (1878) (upholding a federal law against polygamy). *But cf.* Romer v. Evans, 517 U.S. 620 (1996) (striking down a Colorado initiative that barred state and local laws protecting homosexuals unless approved by a majoriry of tbe state's electorate on the grounds that such status-based discrimination against homosexuals was irrational); Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (protecting homosexual's right to marry a person of the same sex). What further conditions are required under existing privacy doctrine remains to be seen. *See* Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) (pluraliry opinion) (looking to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified" in order to determine what rights receive constitutional shelter under the Due Process Clause of the Fourteenth Amendment).

3. *Cf.* MARY ANN GLENDON, RIGHTS TALK *passim* (1991) (arguing that the peculiarly American rhetoric of rights is missing the important language of relationship and responsibility).

among individuals.[4] Individuals joined in a close relationship possess privacy rights against the state, not against each other. Privacy protects the freedom to create and maintain intimate associations apart from the state,[5] not the right to prevent the state mediation of conflicts within existing relationships. Accordingly, once dissent divides the individuals in a relationship, their privacy disappears, for the state is necessarily entangled in assigning their relative rights and responsibilities. Furthermore, privacy is the quintessential negative right—a right to be free from governmental interference with intimate associations. This very principle, however, implies an important limitation: The right of privacy fails to support individuals who are calling upon the state to assist them actively in their interactions with other individuals.

In the context of assisted reproduction, therefore, the right to privacy shelters procreation, but only when it occurs within the confines of a close personal association. There is, however, no right to enter into the commerce of reproduction—to trade freely in sperm, eggs, embryos, and gestational services—because such activities do not implicate private relationships.[6] In addition, the right to privacy protects the reproductive activities of individuals who are allied against the state. But if the individuals involved in reproduction are at odds, the right to privacy cannot insulate them, either from the state or from the claims of one another.[7]

This Article examines the right to privacy in the context of assisted reproduction, developing the preceding arguments in six steps. Part I sets forth the case law regarding the constitutional status of assisted reproduc-

4. *See* Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1011 (1987) (arguing that the right to privacy functions to police the boundary between public and private, "defining private spheres within which individuals must be left free from government interference").

5. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626 n.8 (1980) (arguing that "a concern to protect this freedom [of intimate association] lies behind many of the Supreme Court's . . . decisions in the areas of marriage, procreation, and parent-child relations").

6. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 621–22 (1984) (denying constitutional protection to members of a professional club who sought to associate only with others of the same sex because the organization involved the parricipation of strangers and was not sufficiently small, selective, and secluded from others to merit privacy rights); Village of Belle Terre v. Boraas, 416 U.S. 1, 6–7 (1974) (holding that six unrelated college roommates did not have a constitutional right to reside together).

7. *See, e.g.*, *Michael H.*, 491 U.S. at 129–30 (holding that privacy does not protect the right of biological father to parent a child born to an existing union between a married woman and her husband); Smith v. Organization of Foster Families for Equity & Reform, 431 U.S. 816, 855–56 (1977) (holding that privacy does not protect the foster parents' right to retain custody over children in their care for more than one year, when opposed by claims of the biological parents).

tion. Part II describes the historical development of the right to privacy and sketches out its modern parameters. After distilling privacy's central principle—the protection of intimate and consensual relationships—Part III develops a relational concept of privacy that assigns the right to entire associations rather than to isolated individuals. Part IV distinguishes cases involving contraception, abortion, and compulsory sterilization—issues that implicate rights of bodily integrity as well as equal protection principles. Part V considers the claim that the Constitution guarantees reproductive autonomy but finds no general right to procreate or not procreate; instead, the rights of privacy, bodily autonomy, and equal protection work together in certain contexts to afford protection to discrete acts involved in procreation. Part VI ends by applying the right of relational privacy to the process of assisted reproduction, concluding that many current practices may not receive constitutional protection.

I. THE CONSTITUTIONAL STATUS OF ASSISTED REPRODUCTION

A. Reproduction with the Assistance of Technology

A married couple's[8] choice to reproduce by means of sexual intercourse clearly merits constitutional protection under current privacy doctrine.[9] It is less clear, however, whether the right of privacy also extends to reproduction without sex—reproduction that takes place with the assis-

8. Whether the act of sexual reproduction continues to receive constitutional protection when it occurs outside the boundaries of marriage is an open question. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 688 n.5 (1977) (conceding that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults") (internal quotation omitted) (alteration in original). The Supreme Court's repeated endorsement of laws prohibiting fornication and adultery, however, suggests that the prevailing formulation of privacy may not encompass all procreative activity. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (refusing to hold that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription"); Paris Adult Theatre v. Slaton, 413 U.S. 49, 68 (1973) (declining to find that the Constitution "incorporates the proposition that conduct involving consenting adults only is always beyond state regulation"); Griswold v. Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (declaring that "the constitutionality of [Connecticut statutes prohibiting fornication and adultery] is beyond doubt"); Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (rejecting the suggestion that "adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced").

9. *See Griswold*, 381 U.S. at 485–86 (suggesting, though not expressly affirming, that sexual reproduction falls within the scope of marital privacy).

tance of technologies,[10] such as artificial insemination,[11] intracytoplasmic sperm injection,[12] or in vitro fertilization.[13]

1. Artificial Insemination

Courts have seldom addressed the constitutionality of restrictions on techniques of assisted reproduction. The only cases that directly confront the question whether a married couple possesses the right to procreate by means of artificial insemination with the husband's own sperm involve prisoners. In *Goodwin v. Turner*,[14] for example, the U.S. Court of Appeals for the Eighth Circuit considered a prisoner's claim that he be allowed to provide a container of semen to his wife for the purpose of artificial insemination. The prison refused to afford its male inmates access to artificial insemination because of the expenses that would be incurred if female inmates were accorded the same rights as well.[15] Assuming that there exists a fundamental "right to procreate by means of artificial insemination [that] actually survives incarceration,"[16] the court nevertheless rejected the prisoner's claim. It found the prison's policy against assisted reproduction to be constitutional because it was "reasonably related to . . . the legitimate

10. Some scholars believe that the Constitution protects a right to reproduce with the assistance of technology. Professor John Robertson is the most prominent proponent of this theory: he advocates an expansive principle of procreative liberty that encompasses "a negative constitutional right to use a wide variety of reproductive technologies to have offspring." JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 38–39 (1994). Indeed, Robertson argues that almost every practice necessaty to procreate should receive constitutional protection. Thus, he finds a constitutional right to purchase sperm, eggs, and gestational services, and even to enforce preconception agreements to rear offspring. *See id.* at 131–41; *see also* John A. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 942 (1986); John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983). For a critique of Robertson's theory, see Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473 (1995).

11. Artificial insemination is the oldest and most firmly entrenched of all the "new" reproductive technologies. Indeed, artificial insemination hardly qualifies as a technology at all, for it can be readily accomplished by a woman acting alone with such easily obtainable implements as a syringe or a turkey baster.

12. Intracytoplasmic sperm injection is a process whereby individual sperm are injected directly into the egg, enabling conception even in cases of low sperm count or impaired motility.

13. In vitro fertilization (IVF) requires the surgical removal of eggs after ovarian stimulation, fertilization with sperm in a laboratory, and subsequent implantation in the uterus.

14. 908 F.2d 1395 (8th Cir. 1990).

15. *See id.* at 1400.

16. *Id.* at 1398.

penological interest of treating all inmates equally, to the extent possible."[17]

This ruling was followed by *Anderson v. Vasquez*,[18] in which a federal district court denied death row prisoners the option to preserve their sperm for artificial insemination on the ground that the fundamental right to procreate is inconsistent with imprisonment and hence does not survive incarceration. And in *Percy v. New Jersey Department of Corrections*,[19] a state appellate court assumed that prisoners possess a fundamental right to procreate, but determined that security risks, scarce resources, and equal protection concerns justified a prison policy prohibiting inmate procreation through artificial insemination.

By uniformly upholding such prison regulations, these decisions deny even married inmates the ability to reproduce by means of artificial insemination using their own sperm. Because these decisions are confined to the penal context, however, they do not address the question of whether there exists a right to procreate outside of prison. Yet, cases involving custody and visitation rights to children born of artificial insemination with donor sperm imply that there may be a right to use artificial insemination to conceive a child, even if there is no corollary right exclusively to parent the resulting child.[20]

2. In Vitro Fertilization

Several courts have strongly suggested that privacy protects at least a married couple's right to conceive by using in vitro fertilization to unite their own gametes. In *Smith v. Hartigan*,[21] a federal district court dismissed a lawsuit brought by a married couple challenging the constitutionality of one provision of the Illinois Abortion Law,[22] which arguably limited in

17. *Id.* at 1400.
18. 827 F. Supp. 617 (N.D. Cal. 1992).
19. 651 A.2d 1044 (N.J. Super. Ct. App. Div. 1994).
20. *See* discussion *infra* Part I.B.1 (describing sperm donor cases).
21. 556 F. Supp. 157 (N.D. Ill. 1983).
22. The challenged statute, section 6(7) of the Illinois Abortion Law, provided:
> Any person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall . . . be deemed to have the care and custody of a child for the purposes of Section 4 of the Act to Prevent and Punish Wrongs to Children.

Id. at 159–60. Section 4 of the Act to Prevent and Punish Wrongs to Children made it unlawful for any person having the care or custody of a child to permit or cause the health or life of the child to be endangered. *See id.*

vitro fertilization (IVF).[23] In that case, the Illinois attorney general interpreted the statute to allow IVF, but the court implied that the law would have been unconstitutional otherwise.[24] Although *Smith* left open the question whether there exists a right to procreate by means of IVF, a subsequent case, *Lifchez v. Hartigan*,[25] answered this question in the affirmative by striking down a different provision of the Illinois Abortion Law on the ground that it impermissibly restricted assisted reproduction in violation of the Constitution. In that case, the court expressly affirmed that the constitutional right to privacy encompasses procreative freedom, stating:

> Section 6(7) of the Illinois Abortion Law is . . . unconstitutional because it impermissibly restricts a woman's fundamental right of privacy, in particular, her right to make reproductive choices free of governmental interference with those choices. . . .
>
> . . . .
>
> . . . It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy. . . . By encroaching upon this protected zone of privacy, [section] 6(7) is unconstitutional.[26]

Taken together, these cases suggest that the right to privacy includes a married couple's choice to reproduce with the assistance of technology. The fact that assisted reproductive techniques receive constitutional protection, however, does not necessarily mean that the right to privacy also extends to procreation with the assistance of gamete donors and surrogate gestators. Such situations implicate third parties who may lack intimate

23. *See id.* at 159.

24. *See id.* The court declined to consider the couple's claim that the Illinois statute unconstitutionally burdened their fundamental right to procreate because the law, as definitively interpreted by the Illinois attorney general, permitted them to conceive by means of in vitro fertilization. *See id.*

25. 735 F. Supp. 1361 (N.D. Ill. 1990). The court in *Lifchez* struck down a provision of the Illinois Abortion Law prohibiting experimentation unless therapeutic to the fetus on the grounds that the law was unconstitutionally vague and impermissibly restricted the privacy right to make reproductive choices free of governmental interference by limiting the range of reproductive techniques available to potential parents.

The state of Illinois subsequently chose not to appeal the district court's ruling. Moreover, when a private citizen attempted to appeal on behalf of himself and his unborn child, the court of appeals held that he lacked standing to compel enforcement of the criminal law because the defense of state statutes is entrusted solely to the state's attorneys; private citizens disappointed by the decisions of their public officials have redress only at the ballot box. *See Lifchez*, No. 90-2208, 1990 WL 130686, at *1 (7th Cir. Sept. 10, 1990).

26. *Lifchez*, 735 F. Supp. at 1376–77.

associations with the progenitors and who may themselves acquire countervailing interests of constitutional magnitude.

B. Noncoital Reproduction with Donors and Surrogates

1. Disputes with Sperm Donors

As the following cases make clear, the right to privacy extends at most to conception that takes place with the assistance of donated gametes; it does not also include the right to enlist unwilling individuals to participate in the venture, nor does it encompass the right to maintain an exclusive relationship with the resulting child.

In *Jhordan C. v. Mary K.*,[27] for example, a California court refused to divest a sperm donor of parental rights when he was known to the child's biological mother and supplied his sperm directly to her for self-insemination. The court ruled that the sperm donor was the child's legal father, despite an alleged oral agreement surrendering his parental rights and despite the existence of a California statute requiring the donor to be treated in law as if he were not the child's father when his semen was provided to a licensed physician. The court further held that the licensed physician requirement did not violate the woman's "right to procreative choice . . . encompassed by the constitutional right of privacy" because it imposed no restriction on her ability to conceive a child by means of artificial insemination: "The statute simply address[ed] the . . . legal status of the semen donor."[28] Nor did the court's ruling infringe upon the woman's right "to family autonomy, encompassed by the constitutional right to privacy," because the sperm donor in this case was not excluded from her family "either by anonymity, by agreement, or by the parties' conduct."[29] To the contrary, he was permitted to develop a relationship with both mother and child by maintaining contact with the mother during the course of her pregnancy and by visiting the child monthly after birth, purchasing baby furniture, and creating a trust fund for the child.

Similarly, in *Thomas S. v. Robin Y.*,[30] the New York Appellate Division held that a sperm donor who was known to the child as her biological father and who spent time with the child with the consent of her biological mother was entitled to seek visitation with the child, even though he had

27. 224 Cal. Rptr. 530 (Ct. App. 1986).
28. *Id.* at 537.
29. *Id.* at 536.
30. 618 N.Y.S.2d 356, 357 (App. Div. 1994).

apparently agreed to relinquish all parental rights. Indeed, the court intimated that any other interpretation of New York law might violate the sperm donor's constitutional rights as the child's biological father.

Therefore, even if the right to privacy extends to use of the technique of artificial insemination with donor sperm in order to conceive a child, it does not also empower one biological parent to bar the other from contact with a child born from assisted reproduction, regardless whether the parties agreed upon this result. On the contrary, the artificial insemination cases suggest that terminating the sperm provider's parental rights pursuant to such an agreement, at least when he has come forward and made significant efforts to participate in the parenting process, may violate his own constitutional right to rear his biological child.[31] Furthermore, just as privacy does not protect the right to exclude some progenitors from a child's family, it also does not protect the right to compel other individuals to become part of a child's family against their will. Accordingly, the right to privacy does not authorize a married woman who is artificially inseminated with donor sperm without her husband's knowledge or consent to have her husband declared the legal father of the child if that would eviscerate his own right not to procreate.[32]

2. Custody Battles for Frozen Embryos

The frozen embryo cases reinforce the conclusion that the boundaries of the right to privacy are staked out by the countervailing interests of other individuals. *Davis v. Davis*,[33] for example, demonstrates that privacy does not protect a general right to procreate—to conceive and gestate a pregnancy—if it conflicts with or is opposed by another person's right not to procreate. *Davis* involved a divorced couple's dispute over the disposi-

31. If it is unconstitutional to divest a sperm donor of parental rights even when he consented to this result, then it necessarily follows that it must also be unconstitutional to terminate the parental rights of a sperm donor who expressly reserved the right to participate in rearing his biological child. *See* C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio C.P. 1994) (suggesting that interpreting an artificial insemination statute to extinguish the parental rights of a known sperm donor who agreed to retain his relationship with the child would be unconstitutional); McIntyre v. Crouch, 780 P.2d 239, 244 (Or. Ct. App. 1989) (holding that an Oregon statute denying a sperm donor paternal rights because he was not married to the child's mother was unconstitutional as applied to a known donor who allegedly possessed an agreement with the mother to participate in raising the child).

32. *See* Witbeck-Wildhagen v. Wildhagen, 667 N.E.2d 122, 126 (Ill. App. Ct. 1996) (refusing to declare the husband of a married woman who was artificially inseminated without the husband's knowledge or consent to be child's legal father because that would violate the husband's right not to procreate).

33. 842 S.W.2d 588 (Tenn. 1992).

tion of seven cryogenically preserved embryos remaining from the in vitro fertilization process. In the case, the Tennessee Supreme Court emphasized that "the right of procreation is a vital part of an individual's right to privacy" and explained that this "right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[34] The court proceeded to balance these conflicting constitutional interests, ruling that the husband's right not to procreate—to avoid genetic parenthood—outweighed his former wife's right to procreate by donating the extra embryos to others to gestate and rear:

> Balanced against Junior Davis's interest in avoiding [genetic] parenthood is Mary Sue Davis's interest in donating the preembryos to another couple for implantation. Refusal to permit donation of the preembryos would impose on her the burden of knowing that the lengthy IVF procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children. While this is not an insubstantial emotional burden, we can only conclude that Mary Sue Davis's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood. If she were allowed to donate these preembryos, he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it. . . .
>
> The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means.[35]

The court distinguished cases striking down spousal consent requirements for abortion as unconstitutional, stating that "[n]one of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here."[36] In addition, the court suggested that the interests of the individuals who provide the gametes necessarily trump those of the state:

> [T]he state's interest in potential human life is insufficient to justify an infringement on the gamete-providers' procreational autonomy. . . . [N]o other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do.[37]

34. *Id.* at 600–01.
35. *Id.* at 604.
36. *Id.* at 601 (citing Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976)).
37. *Id.* at 602.

In *Kass v. Kass*,[38] on the other hand, a New York court adopted a radically different approach to resolve a similar controversy, awarding five frozen embryos to their genetic mother to be implanted and carried to term over the objections of her ex-husband, the genetic father. Like the *Davis* court, the *Kass* court recognized "the existence of a constitutionally protected right of privacy involving 'procreational autonomy', a right which includes both a 'right to procreate' and a 'right to avoid procreation.'"[39] For the *Kass* court, however, the dispositive factor was the status of the embryos, not the manner of their conception.[40] The court explained that a husband has no right to procreate or avoid procreation following an in vivo fertilization because he cannot compel or prevent an abortion: "The simple fact of the matter is that an in vivo husband's right[] and control over the procreative process ends with ejaculation. From that moment . . . the fetus' fate rests with the mother to the exclusion of all others."[41] But if a husband has no right to procreate or not to procreate when conception takes place within his wife's body, the court reasoned that he gains no additional rights simply because conception occurs externally, in a test tube or petri dish:

> [T]here is no legal, ethical, or logical reason why an in vitro fertilization should give rise to additional rights on the part of the husband. From a propositional standpoint it matters little whether the ovum/sperm union takes place in the private darkness of a fallopian tube or the public glare of a petri dish. Fertilization is fertilization and fertilization of the ovum is the inception of the reproductive process. Biological life exists from that moment forward. . . . The rights of the parties are dependent upon the nature of the zygote not the stage of its development or its location. To deny a husband rights while an embryo develops in the womb and grant a right to destroy while it is in a hospital freezer is to favor situs over substance.[42]

Consequently, the court ruled that "the rights of the wife must be considered paramount and her wishes with respect to disposition [of the embryos] must prevail."[43] In an attempt to justify its departure from *Davis v. Davis*, the court noted that "[t]he cornerstone of the *Davis* opinion is the in vitro

38. No. 19658-93, 1995 WL 110368, at *1 (N.Y. Sup. Ct. Jan. 18, 1995).
39. *Id.* at *2.
40. *See id.* (stating that "the key to an intelligent discussion is the question of whether there is a conceptual or propositional difference between the product of an in vitro fertilization and the product of an in vivo fertilization").
41. *Id.*
42. *Id.* at *3.
43. *Id.*

husband's constitutional right to avoid procreation."[44] But the *Kass* court denied the existence of such a right, arguing that "a 'right to avoid procreation' cannot logically survive the initial act of procreation. . . . [Otherwise] the right has been transformed from one founded in restraint into a right to take positive steps to terminate a potential human life."[45]

Kass illustrates the flaw in mechanically transplanting constitutional rights from one situation to another, without attention to the context or to the consequences for the constitutional interests of others. The *Kass* court erred in dismissing the significance of the place and method of conception. Because a wife's right to procreate overrides her husband's right not to procreate when conception takes place in vivo, the court mistakenly concluded that her right to procreate must also outweigh his right not to procreate when conception occurs in vitro. But a vast gulf separates these two modes of conception, for protection of a husband's right not to procreate in the latter context poses no threat to the constitutional interests of his wife, specifically to her right to be free from physical invasions of her body. What the *Kass* court failed to recognize is that vindication of the husband's right not to procreate by discard of the frozen embryos would not violate his wife's right to bodily autonomy. This lack of attention to context is problematic because constitutional rights do not exist in a vacuum: they are not unidimensional—one size does not fit all. Rather, the contours of constitutional rights may be drawn only with close regard to their context[46] and consequences for the interests of others.[47]

Like the cases involving artificial insemination with donor sperm, the frozen embryo disputes demonstrate that the right to privacy is bounded by the constitutional interests of others. The right to privacy ends at the point when individuals within a protected relationship assert contradictory

44. *Id.* at *4.

45. *Id.* at *3.

46. *See* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364–69 (1984) (arguing that rights do not exist in the abstract but instead depend upon their context, so that "relatively small changes in technology would make it impossible—or at least very difficult—to talk about a right to an abortion").

47. *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 360–62 (1993) (arguing that individual rights are conceptually interconnected with governmental powers, so that the contours of constitutional rights are determined by the scope of government's power to protect countervailing interests); *see also* Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989) (refusing to "look[] at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people").

interests. Thus privacy does not protect one person's right to procreate if that would entail denial of another person's right not to procreate[48] or deprivation of another person's parental rights.[49]

3. Conflicts over Surrogacy Contracts

Privacy's limits are most apparent in the surrogacy context, in which multiple parties may raise conflicting constitutional claims. In *In re Baby M.*,[50] the foremost example of a surrogacy agreement that soured, the New Jersey Supreme Court declined to enforce a contract that required a woman to be artificially inseminated, to carry her pregnancy to term, and to surrender her child at birth to the biological father in exchange for a fee of $10,000, holding that such surrogacy contracts conflict with New Jersey law and public policy. The court rejected the biological father's argument that his right to procreate entitled him to enforcement of the contract, stating:

> We find that the right of procreation does not extend as far as claimed . . . .
>
> . . . 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 . . . .[51]

The court proceeded to balance the parties' competing interests, ruling that a biological father's right to procreate cannot extend so far as to deprive the biological mother of her own right of procreation:

> To assert that Mr. Stern's right of procreation gives him the right to the custody of Baby M would be to assert that Mrs. Whitehead's right of procreation does *not* give her the right to the custody of Baby M; 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.[52]

48. *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
49. *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986); Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 357 (App. Div. 1994).
50. 537 A.2d 1227 (N.J. 1988).
51. *Id.* at 1253.
52. *Id.*

Suggesting that constitutional rights are qualified by their effects upon the interests of other parties,[53] the court concluded that "[t]here 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."[54] By refusing to enforce the surrogacy contract, moreover, the court obviated the need to address the biological mother's counterclaim that enforcement would violate her own constitutional right to the companionship of her child.[55] Instead, the court adjudicated the case as if it were a custody dispute over a coitally produced child, holding that the child's best interests required that she reside with her biological father while awarding visitation rights to her biological mother.[56]

Similarly, in *Johnson v. Calvert*,[57] the California Supreme Court confronted the question who is the mother of a child conceived from the egg of one woman but gestated in the womb of another. Faced with such a conflict, the court tuled that the woman who intended to parent the child was the child's mother under California law.[58] The court rejected the gestational mother's argument that this result deprived her of her constitutional right to the companionship of her child on the grounds that "[s]ociety has not traditionally protected the right of a woman who gestates and delivers a baby pursuant to an agreement with a couple who supply the zygote from which the baby develops and who intend to raise the child as their own."[59] Indeed, "[t]o the extent that tradition has a bearing on the present case," the court declared, "it supports the claim of the couple who exercise their right to procreate in order to form a family of their own, albeit through novel medical procedures."[60] The *Johnson* court acknowledged the clash between the competing constitutional interests of the parties and concluded that protecting the rights of the gestational mother would necessarily diminish the rights of the child's genetic parents: "[I]f we were to conclude that Anna enjoys some sort of liberty interest in the companionship of the child, then the liberty interests of Mark and Crispina, the

53. *See id.* at 1254 (stating that "[o]ur conclusion may thus be understood as illustrating that a person's rights of privacy and self-determination are qualified by the effect on innocent third persons of the exercise of those rights").

54. *Id.*

55. *See id.* at 1255.

56. *See id.* at 1261–63.

57. 851 P.2d 776 (Cal. 1993).

58. *See id.* at 782.

59. *Id.* at 786.

60. *Id.*

child's natural parents, in their procreative choices and their relationship with the child would perforce be infringed."[61] The court also suggested that the choice to enter into a surrogacy contract is not part of the right to privacy, but merely the provision of a commercial service:

> [T]he choice to gestate and deliver a baby for its genetic parents pursuant to a surrogacy agreement is [not] the equivalent, in constitutional weight, of the decision whether to bear a child of one's own. . . . A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own.[62]

The court's statement intimates that privacy does not protect an individual's right to enter into surrogacy contracts because such contracts are commercial transactions, not intimate associations.

In re Baby M. and *Johnson* are not unique; other surrogacy cases strengthen the conclusion that privacy does not protect the individual's right to enter into and enforce surrogacy contracts. Accordingly, several state courts have upheld statutes that prohibit surrogacy agreements, proffering a variety of different rationales.[63] In *Doe v. Kelley*,[64] for example, the court considered the constitutionality of a Michigan statute prohibiting the exchange of money in connection with adoption. A married couple challenged the statute on the grounds that it interfered with their right to reproduce by means of surrogacy, but the court found the statute to be constitutional because it did not forbid conception of a child—it merely precluded the payment of consideration to transfer parental rights over the child:

> While the decision to bear or beget a child [is] a fundamental interest protected by the right of privacy, we do not view this right as

61. *Id.* The lower court also commented on the clash between competing rights in this case, bluntly remarking:

> [L]iberty interests have a way of bumping into each other in cases involving husbands, wives, and unmartied individuals when all are claiming parental rights. To hold that Anna has a liberty interest in her relationship with the child is to diminish the liberty interest of Mark and Crispina in *their* relationship with the child.

Anna J. v. Mark C., 286 Cal. Rptr. 369, 380 (Ct. App. 1991).

62. *Johnson*, 851 P.2d at 787.

63. *But see* Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (striking down an Arizona statute prohibiting surrogacy contracts and declaring the surrogate to be the legal mother of the child on equal protection grounds, because the statute afforded the genetic father the opportunity to prove paternity while denying the genetic mother any opportunity to prove maternity).

64. 307 N.W.2d 438 (Mich. Ct. App. 1981).

> a valid prohibition to state interference in the [parties'] contractual arrangement. The statute . . . does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration . . . to change the legal status of the child . . . . We do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.[65]

In another case, *In re Paul*,[66] a New York court upheld a similar statute, basing its decision upon precisely the same rationale.[67] *Doe v. Attorney General*[68] likewise determined that a subsequent Michigan statute expressly outlawing paid surrogacy was also constitutional, though for a different reason. The court conceded that the statute encroached upon the constitutionally protected zone of privacy, which guarantees "freedom from government interference in matters of marriage, family, procreation, and intimate association."[69] Concluding that "there are compelling interests sufficient to warrant governmental intrusion into the otherwise protected area of privacy in the matter of procreation,"[70] however, the court upheld the statute as narrowly tailored to achieve the state's interests in protecting the best interests of children, preventing them from becoming commodities, and precluding the exploitation of women.[71]

The only decision to date holding that constitutional privacy protects the right to enter into and enforce surrogacy contracts is the discredited trial court opinion in *In re Baby M.*[72] In that opinion, which was later overturned by the New Jersey Supreme Court, Judge Sorkow reasoned: "if one has a right to procreate coitally, then one has the right to reproduce non-coitally. If it is the reproduction that is protected, then the means of reproduction are also to be protected."[73] Therefore, although "a state could regulate . . . the circumstances under which parties enter into reproductive contracts, it could not ban or refuse to enforce such transactions altogether without compelling reason."[74] Rather, the court suggested that a state's

65. *Id.* at 441 (citation omitted).
66. 550 N.Y.S.2d 815 (Fam. Ct. 1990).
67. *See id.* at 817 (upholding a New York statute prohibiting the payment of money in connection with adoption) (citing Doe v. Kelley, 307 N.W.2d 438 (Mich. Ct. App. 1981)).
68. 487 N.W.2d 484 (Mich. Ct. App. 1992).
69. *Id.* at 486.
70. *Id.* at 487–88; *see also id.* at 486 (suggesting that privacy guarantees "freedom from government interference in matters of marriage, family, procreation, and intimate association").
71. *See id.* at 486–87.
72. 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987).
73. *Id.* at 1164.
74. *Id.*

prohibition of money payments or refusal to enforce surrogacy contracts would unconstitutionally interfere with the procreative liberty of childless couples, which falls within the protected realm of privacy.[75]

II. THE PARAMETERS OF THE RIGHT TO PRIVACY

If the Constitution guarantees a right of procreation, such a guarantee must fall within the ambit of the amorphous right to privacy, which has been variously located in the Due Process Clause of the Fourteenth Amendment,[76] the Ninth Amendment,[77] and the penumbras and emanations surrounding several other specific provisions of the Bill of Rights.[78] This right of privacy is not to be confused with the expectation of privacy in one's home and person provided by the Fourth Amendment,[79] or with the freedom from unwanted publicity granted by tort law.[80]

A. Privacy's Origins

Privacy's earliest origins lie in two *Lochner*-era[81] cases that established the right of parents to teach their children foreign languages and send them to private schools. In *Meyer v. Nebraska*,[82] the Supreme Court declared for the first time that the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment includes "not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children."[83] *Pierce v. Society of Sisters*[84] reaffirmed that due process protects "the liberty of parents and guardians to direct the upbringing and education of children under their control" because "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[85] These

75. *See id.* at 1163–64.
76. *See* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).
77. *See id.* at 499 (Goldberg, J., concurring).
78. *See id.* at 484 (Douglas, J.) (locating the right to privacy in penumbras and emanations surrounding the First, Third, Fourth, Fifth, and Ninth Amendments).
79. *See, e.g.*, Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).
80. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
81. Lochner v. New York, 198 U.S. 45 (1905).
82. 262 U.S. 390 (1923).
83. *Id.* at 399.
84. 268 U.S. 510 (1925).
85. *Id.* at 534–35.

cases, however, were premised primarily upon the right of teachers and schools to engage in their chosen occupation, and not upon the family's right to privacy.

The constitutional right of privacy actually surfaced several decades later. In *Poe v. Ullman*,[86] the Supreme Court confronted challenges by a married couple and their physician to the constitutionality of a Connecticut law criminalizing the use of contraceptives. Because the law had not been enforced in over eighty years, the Court dismissed the case for lack of a justiciable controversy.[87] Dissenting from the Court's decision, Justice Harlan would have struck down the statute as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[88] He grounded his dissent in previous decisions protecting a "private realm of family life which the state cannot enter,"[89] arguing that "it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."[90]

Although references to *Poe* usually quote from Justice Harlan's famous dissent,[91] the dissenting opinion of Justice Douglas also merits mention. Justice Douglas agreed that the Connecticut statute infringed upon the right of privacy by "reach[ing] into the intimacies of the marriage relationship."[92] But Justice Douglas envisioned privacy as a right that "emanates from the totality of the constitutional scheme under which we live" and intimated that its purpose is to protect intermediate institutions that stand between the individual and the state, such as the family.[93] In so doing, privacy preserves separate spheres of power, functioning as a bulwark against totalitarianism:

> One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. The State then is not one vital institution among others . . . [but] seeks to be coextensive with family and school, press, business community, and

86. 367 U.S. 497 (1961).

87. *See id.* at 508 ("Eighty years of Connecticut histoty demonstrate a . . . tacit agreement . . . [not] to press the enforcement of this statute[,] depriv[ing] these controversies of the immediacy which is an indispensable condition of constitutional adjudication.").

88. *Id.* at 539 (Harlan, J., dissenting).

89. *Id.* at 552 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) (internal quotation marks omitted).

90. *Id.*

91. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 848–50 (1992).

92. *Poe*, 367 U.S. at 519 (Douglas, J., dissenting).

93. *Id.* at 521–22.

> the Church, so that all of these component interest groups are . . . reduced to organs and agencies of the State.[94]

Justice Douglas's opinion thus reveals the principle underlying the right to privacy and illuminates the deep connection between privacy and democracy.

But it was not until 1965 that the constitutional right of privacy achieved explicit recognition. In *Griswold v. Connecticut*,[95] a majority of the Court[96] employed privacy to strike down the very statute that had been challenged a few years earlier in *Poe v. Ullman*.[97] Justice Douglas, writing for the Court, found the right of privacy lurking in the penumbras formed by emanations from several specific provisions of the Bill of Rights.[98] He concluded that marriage is a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[99] By penalizing a married couple's use of contraception, the Connecticut law unconstitutionally invaded their privacy.[100] Justice Douglas ended his opinion with a tribute to marriage:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a

94. *Id.* (quoting Robert L. Calhoun, *Democracy and Natural Law*, 5 NAT. L.F. 31, 36 (1960)).

95. 381 U.S. 479 (1965).

96. Justice Douglas authored the majority opinion, which struck down the Connecticut statute pursuant to the right of privacy. He was joined by Chief Justice Warren, as well as Justices Brennan and Goldberg. Justices Harlan and White concurred separately on the ground that the Connecticut statute violated the Due Process Clause of the Fourteenth Amendment.

97. The Connecticut statute provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.* at 480 (quoting CONN. GEN. STAT. § 53-32 (1958 rev.) (repealed 1971)).

98. According to Justice Douglas:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surtender to his derriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. at 484 (citations omitted). He concluded that these provisions "create zones of privacy." *Id.*

99. *Id.* at 485.

100. *See id.*

> coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[101]

Though generally dismissed as an afterthought, this passage suggests that privacy's core purpose is to protect personal relationships. This understanding of privacy is confirmed by *Paris Adult Theatre v. Slaton*,[102] which declared:

> [T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.[103]

Consequently, the Court rejected the customers' claim that privacy protected their right to view pornographic material in commercial establishments.

B. Privacy's Scope

Griswold and *Poe* indicate that the right of privacy attempts to preserve the integrity of intimate associations, sheltering them from intrusions by the state. This reading of the right also comports with subsequent cases that protect the right to marry,[104] the right of extended family members to reside together,[105] and the right of parents to raise their children free from ernmental interference,[106] all under the expansive umbrella of privacy.[107]

101. *Id.* at 486.

102. 413 U.S. 49 (1973).

103. *Id.* at 66 n.13.

104. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (categorizing "the decision to marry as among the personal decisions protected by the right of privacy").

105. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (applying careful scrutiny to a zoning ordinance preventing a grandmother from living with her grandson because "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation").

106. *See* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that the Free Exercise Clause of the First Amendment and the right of privacy protected by the Fourteenth Amendment prevent the state from compelling Amish parents to send their children to public schools beyond the eighth grade); *see also* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (holding that parents have a constitutional right to direct the upbringing of their children that prevents the state from requiring public school attendance); Meyer v. Nebraska, 262 U.S. 390,

In *Zablocki v. Redhail*,[108] the Supreme Court struck down a Wisconsin law prohibiting residents with unfulfilled child support obligations from marrying without prior court approval, stating that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[109] "It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships," the Court explained, because "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[110] Similarly, in *Moore v. City of East Cleveland*,[111] the Court found unconstitutional a zoning ordinance precluding a grandmother from living with her two grandsons on the grounds that "[a] host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.'"[112] And, in *Wisconsin v. Yoder*,[113] the Court held that the state could not require Amish parents to send their children to public school beyond the eighth grade, relying in part upon the constitutional right to privacy.[114]

These cases make clear that the right to privacy encompasses close personal associations. Privacy does not, however, extend to mere collections of unrelated individuals[115] or to loose and distant business connections.[116] Thus, *Village of Belle Terre v. Boraas*[117] ruled that the right to privacy does not protect the living arrangements of a group of college

399–401 (1923) (holding that a state law prohibiting the teaching of foreign languages to young children violated the Fourteenth Amendment rights of students and teachers).

107. *But see* Bowers v. Hardwick, 478 U.S. 186, 190–91 (1986) (denying that the constitutional "right of privacy . . . extends to homosexual sodomy" because "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated").

108. 434 U.S. 374 (1978).

109. *Id.* at 384.

110. *Id.* at 386.

111. 431 U.S. 494 (1977).

112. *Id.* at 499 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

113. 406 U.S. 205 (1972).

114. *See id.* at 234.

115. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 7–9 (1974) (upholding a zoning ordinance preventing six unrelated college roommates from living together).

116. *See* Roberts v. United States Jaycees, 468 U.S. 609, 621 (1984) (refusing constitutional protection to members of a club who sought to associate only with others of the same sex because the organization involved the participation of strangers and was not sufficiently small, selective, and secluded from others to merit privacy rights).

117. 416 U.S. 1 (1974).

roommates. Similarly, *Roberts v. United States Jaycees*[118] determined that the right of privacy does not insulate the members of a same-sex club from state antidiscrimination laws. In the latter case, the Court observed that the Constitution "afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[119] Such associations merit protection, the Court explained, because they "act as critical buffers between the individual and the power of the State."[120] The Court described in detail the qualities that entitle a relationship to the protection of privacy:

> 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 family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives. Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.[121]

Accordingly, *Roberts* declined to afford constitutional shelter to the Jaycees's decision to exclude women from their organization. Because the Jaycees were "neither small nor selective," and because "much of the activity central to the formation and maintenance of the association involve[d] the participation of strangers to that relationship," the Court decided to "place the organization outside of the category of relationships worthy of this kind of constitutional protection."[122]

118. 468 U.S. 609 (1984).
119. *Id.* at 618.
120. *Id.* at 619.
121. *Id.* at 619–20 (citations omitted).
122. *Id.* at 620–21.

C. Privacy's Limits

In all of the previous cases, the right to privacy shielded the activities of individuals who were allied against the state. This was true in *Stanley v. Illinois*,[123] which required the state to conduct a hearing to determine an unwed father's fitness as a parent before taking his children away from him following the death of their mother.[124] Unless he is found unfit, the Supreme Court reasoned, the interests of the biological father and his children would converge in continuing their association.[125] When the individuals involved in an intimate relationship are in conflict, however, the right to privacy cannot immunize them, either against the state or against each other. Thus, in *Smith v. Organization of Foster Families*,[126] the Court failed to extend the same protection to foster families.[127] Rejecting the foster families' claim that they possessed a "'right to familial privacy' . . . in the integrity of their family unit," the Court refused to require a hearing before the removal of children in their care for more than one year.[128] To support this result, *Smith* distinguished between cases involving families united against the state and those involving discord between family members, stating:

> It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered . . . . [but] [i]t is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest . . . .[129]

Consequently, the Court declined to protect the foster family, concluding that "[w]hatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the

123. 405 U.S. 645 (1972) (invalidating a statute that automatically deprived unwed fathers of custody of their children upon the mother's death).

124. *See id.* at 658.

125. *See id.* at 654–57; *see also* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (requiring clear and convincing evidence of abuse or neglect before the state can constitutionally terminate parental rights).

126. 431 U.S. 816, 856 (1977) (sustaining as constitutional state procedures that allowed children to be removed from foster families with whom they resided for more than one year without a prior hearing).

127. *See id.*

128. *Id.* at 842.

129. *Id.* at 846.

proposed removal from the foster family is to return the child to his natural parents."[130]

Similarly, in *Quilloin v. Walcott*,[131] the Supreme Court conceded that the right to privacy prevents governmental interference with a unified family, declaring that

> the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[132]

But the Court applied a different standard in that case because the biological father's claim was opposed by the child's biological mother and her husband. The Court ruled that a statute allowing the child to be adopted by her stepfather upon a mere showing that adoption would be in the child's best interests was constitutional, for "the result of the adoption in this case is to give full recognition to a family unit already in existence."[133]

Most recently, in *Michael H. v. Gerald D.*,[134] the Court upheld a California law conclusively presuming that a child born to a married woman living with her husband is a child of the marriage, despite the biological father's claim that this presumption denied him parental rights.[135] The Court acknowledged that prior cases protected the privacy rights of biological fathers on the rationale that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."[136] Yet the Court found this case to be different because the biological father's claim undermined the integrity of the preexisting marital family: "Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."[137] In such situations, the Court

130. *Id.* at 846–47.

131. 434 U.S. 246 (1978).

132. *Id.* at 255 (alteration in original) (quoting Smith v. Organization of Foster Families, 431 U.S. at 862–63 (Stewart, J., concurring)).

133. *Id.*

134. 491 U.S. 110 (1989).

135. *See id.* at 129–30.

136. *Id.* at 128–29 (alteration in original) (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)) (internal quotation marks omitted).

137. *Id.* at 129. Accordingly, the biological father's rights were limited "by the circumstance that the mother is, at the time of the child's conception and birth, married to, and

observed, "to *provide* protection to an adulterous natural father is to *deny* protection to a marital father."[138] Faced with a clash between conflicting claims, the Court concluded that "[i]t is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted."[139] Here, the state of California decided to protect the privacy of the marital family at the expense of the biological father by "excluding inquiries into the child's paternity that would be destructive of family integrity and privacy."[140] *Michael H.* suggests that the balance between such contradictory interests should be left to the states as a matter of policy, rather than imposed by a court under the rubric of constitutional principle.

III. PRIVACY'S PRINCIPLE—A RIGHT OF RELATIONSHIPS

Despite its ample history, the right of privacy displays a paucity of actual analysis. The constitutional right of privacy originated in the protection afforded parental rights of child rearing.[141] It has evolved into a right invoked in a wide range of cases involving individuals seeking to marry,[142] to form a family,[143] to procreate[144] or not to procreate,[145] to serve as parents,[146] to rear children,[147] and to engage in sexual activity.[148] Yet, from the very beginning, the Supreme Court has never defined precisely what

cohabitating with, another man, both of whom wish to raise the child as the offspring of their union." *Id.*

138. *Id.* at 130.

139. *Id.* at 129–30.

140. *Id.* at 120; *see also* Carl E. Schneider, *State-Interest Analysis and the Channeling Function in Privacy Law*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 97, 119–23 (Stephen E. Gottlieb ed., 1993) (arguing that the state's interest in channeling individuals into social institutions such as the marital family may both explain and justify the Court's decision in *Michael H. v. Gerald D.*).

141. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

142. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

143. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

144. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

145. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

146. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983); Santosky v. Kramer, 455 U.S. 745 (1982); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

147. *See, e.g.*, Wisconsin v. Yoder, 405 U.S. 205 (1972).

148. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

privacy protects: on the contrary, "[a]t the heart of the right to privacy, there has always been a conceptual vacuum."[149]

The prevailing explanation of privacy lies in the concept of personhood—the notion that certain decisions central to an individual's personal identity must be shielded from state interference.[150] Professor Jed Rubenfeld would replace the personhood formulation of privacy with his own antitotalitarian right to privacy, an approach that looks not to what a law prohibits but to what it affirmatively requires.[151] Rubenfeld argues that, rather than protecting the individual's right to define his or her own identity, privacy prevents the state from imposing a defined identiry upon individuals by dictating the course of their lives.[152]

What is missing from both accounts, however, is a recognition of privacy's social dimension.[153] The principle that connects the series of cases involving marriage, the family, procreation, parenting, and sexuality is not "the right to be let alone."[154] On the contrary, it is the right to come

149. Rubenfeld, *supra* note 1, at 739.

150. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-1 to -3, at 1302–12 (2d ed. 1988); J. Braxton Craven, Jr., *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, 702–03; Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 38–44 (1976). In *Planned Parenthood v. Casey*, the Court apparently grounded the constitutional protection afforded to abortion in this right of personhood, stating:

> Our law affords constitutional protection to personal decisions relating to martiage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

505 U.S. 833, 851 (1992).

151. Rubenfeld recommends that privacy analysis begin "by asking not what is being *prohibited*, but what is being *produced*." Rubenfeld, *supra* note 1, at 783. Drawing upon Foucault's conception of power, Rubenfeld suggests that "we look[] not to the negative aspect of the law—the interdiction by which it formally expresses itself—but at its positive aspect: the real effects that conformity with the law produces at the level of everyday lives and social practices." *Id.*

152. *See id.* at 794 (stating that "[t]he anti-totalitarian right to privacy . . . prevents the state from imposing on individuals a defined identity, whereas the personhood right to privacy ensures that individuals are free to define their own identities").

153. *See* FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM 8 (1992) (arguing that "privacy is important largely because of how it facilitates association with people, not independence from people"). *Cf.* GLENDON, *supra* note 3 (arguing that the peculiarly American rhetoric of rights fails to capture the language of relationship and responsibility).

154. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (declaring privacy to be "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men"), *overruled by* Berger v. New York, 388 U.S. 41 (1967).

together in close consensual relationships.[155] Privacy does not simply guarantee individuals the right to sexual, reproductive, and parental autonomy. It protects the relationships between people that develop in the course of these activities, rather than the individual's solo right to engage in such activities.[156]

Accordingly, the right of privacy should not attach to isolated individuals; it belongs instead to close relationships, fostering intimate associations that mediate between the individual and the state. Privacy should be viewed as a relational right that "afford[s] the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."[157] This concept of relational privacy comports with feminist and communitarian theories that envision persons not as atomized individuals, but as constituted by and embedded within a network of close relationships.[158] For communitarians,

155. *See, e.g.*, Karst, *supra* note 5, at 626 n.8 (arguing that "a concern to protect [the freedom of intimate association] lies behind many of the Supreme Court's . . . decisions in the areas of marriage, procreation, and parent-child relations"); *see also* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1108 (1990) (contending that the right to privacy protects the freedom of intimate association rather than the freedom of procreation, so that "a supposed 'fundamental right' to use a sperm bank would represent a particularly bold leap" and "a 'right' to enforce a surrogacy contract against a woman who has changed her mind and wishes to keep her gestational child entails a leap across a constitutionally unbridgeable void").

156. Professor Schoeman draws a similar distinction between the philosophical concepts of autonomy and privacy, stating:

> Both privacy and autonomy suggest that some people have no business crossing a threshold. But in addition to this, privacy suggests that on the other side of that threshold there may be something still interpersonal. The point of the restrictions on access is in large part not to isolate people but to enable them to relate intimately or in looser associations that serve personal and group goals.

SCHOEMAN, *supra* note 153, at 21. By describing two types of privacy, Schoeman explicitly acknowledges both the individual and social aspects of privacy:

> Whereas privacy suggests involvement and intimacy, autonomy suggests isolation. That is to say, privacy has two aspects: "privacy from" and "privacy for." The "privacy from" aspect suggests restrictions on others' access to a person. But typically there is this other dimension to the concept, the "privacy for" dimension. For instance, I am accorded privacy from others vis-à-vis my domestic life so that I may form deep and special relationships with family or friends. . . . Characteristic defenses of privacy as well as characteristic associations with what we mean by privacy suggest interpersonal or even social affairs.

Id. at 156.

157. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

158. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (describing the ways in which women exhibit a distinct relational model of moral development that relies upon their relationships with intimate others); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL.

the differences between the individual right of privacy—the right to be left alone, and the relational right of privacy—the right to connect with others, may mirror a fundamental conflict between liberalism and republicanism. For certain feminists, the distinction between these two forms of privacy may instead reflect deep divisions in the moral development of males and females. As Professor Suzanna Sherry writes: "Whether personal or political, the moral structure of 'mature' males reflects a paradigm of independent rights, while that of females emphasizes relational responsibilities."[159]

In addition, privacy should not be deemed a purely personal entitlement. It is an umbrella right that shields entire associations rather than the attributes of individuals. The right of privacy shelters social institutions, such as marriage and the family, that "act as critical buffers between the individual and the power of the State."[160] It preserves a sphere of decentralized decision making, creating a zone of immunity surrounding close relationships.[161] Privacy is a structural right that protects private relationships as a mechanism to check excessive governmental power. This understanding of privacy as a shield protecting intimate associations that stand between the individual and the state resonates with the theory underlying the original privacy cases.[162] It also reveals that privacy is not a constitutional foundling—a right that emerges from nowhere. Rather, the right to privacy is an integral part of a broader vision of constitutional law that regards the Constitution as a document separating and dividing gov-

L. REV. 521, 534 (1989) (setting forth the communitarian defense of the right to homosexual intimacy).

159. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 591 (1986). Sherry suggests that constitutional law will increasingly come to reflect recent developments in psychology and literary theory which suggest that a uniquely feminine perspective exists and is embodied "in the tension between women's primary concern with intimacy or connection and men's primary focus on separation or autonomy." *Id.* at 580.

160. *Roberts*, 468 U.S. at 619.

161. *Cf.* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing that property creates zones within which the state must yield to the owner).

Other interesting parallels may be drawn between the right of privacy and the right of property. Privacy, like property, may be understood to consist of a bundle of rights. Privacy, like property, is a relational right that protects the relationships between people with respect to certain activities, rather than the individual's right to engage in an activity. And privacy, like property, preserves a sphere of decentralized decisionmaking free from state intrusion. For a more extensive comparison of the two rights, see Radhika Rao, Property and Privacy (forthcoming).

162. *See supra* text accompanying notes 88–101 (describing the reasoning underlying the dissents of Justices Douglas and Harlan in *Poe*, as well as Justice Douglas's reasoning in *Griswold*).

ernmental power, while simultaneously preserving competing centers of private power such as the church, the press, and the family.[163]

As a normative principle, privacy yields constitutional protection for every truly close and consensual association.[164] Whenever two or more individuals are engaged in intimate activities without oppression within the group and without external effects upon others, they should receive shelter under the right of relational privacy. This right extends to nontraditional associations as well as to the marital and biological family. Accordingly, the Supreme Court erred in *Reno v. Flores*[165] by rejecting the right of illegal alien children to be released from government detention centers and placed in the custody of responsible unrelated adults when such a course posed no threat to the interests of their biological parents. Relational privacy, by contrast, would protect the formation and preservation of

163. Professor David Richards has articulated one version of such a theory, declaring that: "Constitutional guarantees not only define and regulate spheres of political self-government (federalism, separation of powers, and the like) . . . . [but] also define substantive spheres of moral self-government wholly immune from state power, for example the rights to conscience and free speech . . . ." David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 843 (1986). Richards believes that "[t]his larger conception of essential moral spheres must include protection of the right of intimate association that underlies . . . the traditional understanding, reflected in *Griswold*, of a fundamental right to marriage," and he finds this "understanding [to be] quite explicit in the scope of unenumerated rights assumed by the Founders." *Id.* at 843 & n.251; *see also* Seidman, *supra* note 4, at 1015 (arguing that the function of constitutional law is to police the boundary between separate public and private spheres, and contending that "most modern constitutional law can be reduced to a series of rules prohibiting government interference with nongovernmental power centers" such as newspapers, churches, and families).

164. As a description of actual practice, however, this concept of relational privacy clearly fails to account for every privacy case. While intimacy and consent are clearly necessary, they may not be sufficient conditions to invoke a right of privacy under prevailing doctrine, for not all intimate and consensual relationships currently receive constitutional protection. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia statute criminalizing homosexual sodomy); Reynolds v. United States, 98 U.S. 145 (1878) (upholding a federal law against polygamy). *But cf.* Romer v. Evans, 517 U.S. 620 (1996) (striking down a Colorado initiative that barred state and local laws protecting homosexuals unless approved by a majoriry of the state's electorate on the grounds that such discrimination against homosexuals was based merely upon their status and was irrational); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (protecting a homosexual's right to marry a person of the same sex). What further conditions are required under existing privacy doctrine remains to be seen. *See* Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) (plurality opinion) (looking to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified" in order to determine what rights receive constitutional shelter under the Due Process Clause of the Fourteenth Amendment).

165. 507 U.S. 292, 302–03 (1993) (denying the right to be released into the custody of responsible adults when there is no available parent, close relative, or legal guardian to illegal alien children housed in government detention centers).

such family-like associations against interference from the state, at least in the absence of any conflict with the biological family.

When privacy is reconceived as a relational right, however, its boundaries are delineated by the countervailing interests of others within the protected relationship. Thus, the right to relational privacy ends once individuals entwined in a close relationship assert contradictory interests. At that point, they are all exposed to the state, which is necessarily involved in balancing their relative rights and responsibilities. Accordingly, decisions to marry, to engage in sexual activity, to procreate or not to procreate, to form a family, and to rear children all receive constitutional shelter from the state when they occur within the context of intimate and consensual relationships. Relational privacy, however, does not prevent state intervention designed to defend the interests of individuals threatened by disagreement within a relationship.

By this reasoning, *Bowers v. Hardwick*[166] is clearly incorrect because it denied constitutional protection to an intimate and consensual association. The Court should have struck down the Georgia statute prohibiting homosexual sodomy, not because it deprived Michael Hardwick of the right to be left alone in his own bedroom, but because it denied homosexuals the same opportunity to conduct intimate relationships that *Griswold* afforded married couples and that *Eisenstadt* extended to unmarried individuals.[167] Under the right of relational privacy, *Reynolds v. United States*[168] is a much more difficult case. But laws prohibiting polygamy or incest may not violate this right to the extent that they serve a prophylactic role, systematically protecting weaker parties to a relationship when the quality of their consent is in question.[169] In addition, adultery may also be shielded by the right of relational privacy under certain circumstances. In the absence of consent by all of the parties involved, however, the right of relational privacy is lost, both because of the conflict within the adulterous association and because of the harm inflicted upon any children.[170] But prostitution

166. 478 U.S. 186 (1986) (denying constitutional protection to homosexual relationships).

167. *See* Sandel, *supra* note 158, at 533–38 (arguing that the dissent in *Bowers* should have defended the privacy of homosexual relationships not based upon autonomy, but rather by articulating the substantive virtues homosexual intimacy shares with heterosexual intimacy).

168. 98 U.S. 145 (1878) (denying constitutional protection to polygamous relationships).

169. *See Bowers*, 478 U.S. at 209–10 n.4 (Blackmun, J., dissenting) (distinguishing homosexual sex from incest on the grounds that "[w]ith respect to incest, a court might well agree . . . that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted").

170. *See id.* (distinguishing homosexual sex from adultery on the grounds that "a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs").

remains completely unprotected by the right of relational privacy because sex is simply exchanged in the course of a commercial transaction, rather than uniting individuals entwined in an intimate relationship.

IV. CONTRACEPTION, ABORTION, AND COMPULSORY STERILIZATION

This concept of privacy as a relational right is not inconsistent with the class of cases involving contraception, abortion, and compulsory sterilization. By safeguarding a woman's right to use contraception or have an abortion over the objections of her husband and her parents, and by guaranteeing individuals freedom from forced sterilization, such cases appear to protect the privacy of the individual rather than relational privacy. Upon closer consideration, however, these decisions are readily distinguishable because they actually result from the confluence of relational privacy, rights of bodily integriry,[171] and equal protection.[172]

Although *Griswold* shielded the privacy of married couples, *Eisenstadt v. Baird* subsequently extended constitutional protection to single persons as well.[173] In *Eisenstadt*, the Court determined that a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons was unconstitutional. While this ruling ostensibly rested upon the Equal Protection Clause,[174] it also appears rooted in the constitutional right to privacy. Conceding that the privacy protected by *Griswold* "inhered in the marital relationship," the Court reasoned that "the marital couple is not an independent entity with a mind and heart of its own, but an association of

171. *See, e.g.*, Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327 (1991) (arguing that the right of bodily integrity provides at once a narrower and stronger protection for abortion rights than the right of privacy).

172. A wide range of scholars now suggest that abortion is more properly framed as an equal protection right, rather than as a privacy right. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985) (observing that *Roe* is "weakened . . . by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective"); Catharine MacKinnon, Roe v. Wade: *A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 45–54 (Jay L. Garfield & Patricia Hennessey eds., 1984) (arguing that abortion is inextricably intertwined with the issue of gender inequality and "criticiz[ing] the doctrinal choice to pursue the abortion right under the law of privacy"); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992).

173. 405 U.S. 438 (1972).

174. *See id.* at 454–55 (striking down a Massachusetts statute because it discriminated against unmarried persons with respect to the distribution of contraceptives, in violation of the Equal Protection Clause).

two individuals each with a separate intellectual and emotional makeup."[175] Consequently, the Court declared that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[176] In spite of its expansive rhetoric, *Eisenstadt* simply affords unmarried couples the same freedom of intimate association that *Griswold* guaranteed to married couples. In so doing, *Eisenstadt* is entirely compatible with the concept of relational privacy.

One year later, in *Roe v. Wade*,[177] the Court relied upon privacy grounds to strike down a Texas statute criminalizing abortion. Citing a long line of past cases, the Court inferred that the right to privacy "has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education."[178] The Court concluded that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[179] Observing the existence of a conflict between the interests of the woman and the potential life within her, the Court emphasized that "[t]he pregnant woman cannot be isolated in her privacy" because "[s]he carries an embryo and, later, a fetus."[180] Thus, the Court recognized that "[t]he situation . . . is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education," for "[t]he woman's privacy is no longer sole."[181] The Court drew the line at viability, permitting the state to proscribe abortions only after that time[182] because "the fetus then presumably has the capability of meaningful life outside the mother's womb."[183] By defending the abortion right despite this potential

175. *Id.* at 453.
176. *Id.*
177. 410 U.S. 113 (1973).
178. *Id.* at 152–53 (citations omitted).
179. *Id.* at 153.
180. *Id.* at 159.
181. *Id.*
182. *Roe* authorizes states to proscribe abortions after viability in order to further their interest in potential life, unless such abortion restrictions pose a threat to the woman's life or health. *See id.* at 163–64.
183. *Id.* at 163. Perhaps the Court intended to imply that viability defines the point at which the right of relational privacy is lost because the fetus may be deemed an independent entity with interests distinct from those of its mother. If so, *Roe* is arguably consistent with the right of relational privacy because it protects a woman's right to terminate her pregnancy only prior to viability, when she and the fetus may be considered as one.

conflict between woman and fetus, *Roe* draws upon women's rights of bodily integrity and principles of equal protection.

The result in *Planned Parenthood v. Danforth*[184] also cannot be explained solely by reference to the right of relational privacy. In that case, the Supreme Court considered a provision of a Missouri statute requiring spousal consent in order to obtain an abortion. The Court acknowledged the husband's interest "in his wife's pregnancy and in the growth and development of the fetus she is carrying," but determined that the state lacked the authority to delegate to a spouse a veto power that the state never itself possessed.[185] Balancing the conflicting interests of the parties, the Court implicitly concluded that a woman's rights always outweigh those of her husband because of the profound and direct effects of pregnancy upon her body:

> The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.[186]

The Court also struck down another provision of the Missouri statute that required parental consent for a pregnant minor to obtain an abortion, relying upon a similar rationale. The Court noted that it is impossible to maintain the integrity of the family unit when "the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy has already fractured the family structure."[187] Thus the family's right to be free from state interference vanishes when parent and child claim conflicting privacy rights: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."[188] *Danforth* held that a woman possesses the sole right to terminate her pregnancy, over the opposition of her husband and her parents and in the face of conflict with the interests of the potential life within her. However, this right flows not simply from relational privacy, but rather from the woman's own rights to bodily integrity and equal protection.

184. 428 U.S. 52 (1976).
185. *Id.* at 69.
186. *Id.* at 71.
187. *Id.* at 75.
188. *Id.*

This distinction was made explicit in the Supreme Court's most recent affirmation of *Roe*. In *Planned Parenthood v. Casey*,[189] the Court candidly recognized that the abortion right "stands at [the] intersection of two lines of decisions."[190] First, constitutional protection for abortion flows from the set of cases exemplified by *Griswold*, which are rooted in the right of privacy—that is, "the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child."[191] But the Court also emphasized that "*Roe* . . . may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to [a second line of] cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."[192] In addition, a majority of the Court acknowledged, for the first time,[193] that the right to an abortion rests upon equal protection "because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."[194] Observing that "[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear," the Court concluded:

> That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture.[195]

Casey makes clear that the abortion right does not depend solely upon the right to privacy. When the family is fragmented and a pregnant woman and her husband or parents disagree, their privacy disappears and they possess no right to be free from state interference in their intimate relationship. Nevertheless, the woman alone retains the right to terminate her pregnancy because of the profound impact of pregnancy upon her body and because a contrary result might undercut the "ability of women to participate equally in the economic and social life of the Nation."[196] The woman

189. 505 U.S. 833 (1992).
190. *Id.* at 857.
191. *Id.*
192. *Id.*
193. The majority consists of the three Justices who authored the joint opinion, Justices O'Connor, Kennedy, and Souter, as well as Justices Blackmun and Stevens.
194. *Id.* at 852.
195. *Id.*
196. *Id.* at 856.

alone retains the right to an abortion even though this may conflict with the interests of the potential life within her, the wishes of her husband, and the command of her parents. Protection of a woman's decision making is required not by constitutional privacy, but because any other result would invade a woman's bodily integrity and violate her equal protection rights.

In addition to protecting contraception and abortion, the Constitution also prevents compulsory sterilization,[197] at least when it is conducted in a discriminatory fashion. In *Skinner v. Oklahoma*,[198] for example, the Court struck down Oklahoma's Habitual Criminal Sterilization Act, which authorized the sterilization of persons thrice convicted of a felony involving moral turpitude. Because the statute permitted the sterilization of chicken thieves but not embezzlers, the Court ruled that it contravened the Equal Protection Clause: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[199] Consequently, "strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[200] By declaring that "[m]arriage and procreation are fundamental to the very existence and survival of the race,"[201] however, the Court implied that its holding rested upon privacy as well as equal protection principles. But laws authorizing the sterilization of certain categories of persons are unconstitutional not simply because they invade the integrity of intimate relationships. Rather, such laws are unconstitutional because they violate the individual's right of bodily autonomy and endanger the equal protection rights of minorities by raising the threat of eugenics.

197. *But see* Buck v. Bell, 274 U.S. 200 (1927) (upholding a Virginia law authorizing sterilization of "mental defectives" in state institutions). In his infamous opinion in *Buck*, Justice Holmes wrote:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsoty vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

Id. at 207.

198. 316 U.S. 535 (1942).

199. *Id.* at 541 ("The power to sterilize, if exercised, may have subtle, farreaching 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.").

200. *Id.*

201. *Id.*

Accordingly, the right of privacy, although occasionally associated with cases involving intrusions upon the body,[202] must be distinguished from bodily autonomy, an ancient right that predates privacy[203] and is embodied in such common law principles as the tort of battery and the doctrine of informed consent. The right of bodily integrity protects a woman's sole right to bar the fetus from entering her body by means of contraception and to rid her body of the fetus by means of abortion. It also encompasses the right to resist compulsory sterilization. Bodily integrity does not, however, guarantee infertile persons the right to conceive with the assistance of reproductive technologies and reproductive collaborators because such procedures do not prevent any invasion of the body.[204] To the

202. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 279 n.7 (1990) ("Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.").

203. This right to be free from physical invasions of the body possesses an ancient pedigree. *See id.* at 278 (declaring that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"); Washington v. Harper, 494 U.S. 210, 221 (1990) (declaring that prisoners possess a "significant liberty interest in avoiding the unwanted administration of anti-psychotic drugs"); Winston v. Lee, 470 U.S. 753, 764 (1985) (stating that the forcible removal of a bullet from an accused person's body "would be an 'extensive' intrusion on [his] personal privacy and bodily integrity"); Rochin v. California, 342 U.S. 165, 172 (1952) (holding that forced stomach-pumping of the accused to extract evidence "shocks the conscience" in violation of the Due Process Clause); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (balancing an individual's liberty interest in resisting immunization against the state's interest in preventing disease); Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) (stating, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law").

204. *Cf.* Susan M. Wolf, *Physician-Assisted Suicide, Abortion, and Treatment Refusal: Using Gender to Analyze the Difference*, *in* PHYSICIAN-ASSISTED SUICIDE 167, 170 (Robert F. Weir ed., 1997). Professor Wolf argues that constitutional protection should be afforded to abortion and to the refusal of life-sustaining medical care, but not to physician-assisted suicide, because the latter does not implicate the right of bodily integrity. Declaring that *Casey* "recognizes a right to be free of [the] invasion [of] unwanted pregnancy," Wolf distinguishes physician-assisted suicide on the grounds that the Constitution "clearly embraces the right to be free of unwanted bodily invasion. But it is not at all clear that it covers a right to be free to obtain bodily invasions for the purpose of ending your own life." *Id.* at 173. Wolf continues:

> Certainly both abortion and treatment refusal can require a second bodily invasion—the doctor may have to enter the body to remove the fetus or the feeding tube. . . . Yet the fact that abortion and treatment refusal may require invasion does not alter the point of all this activity—removal of something from the body. This is not the case in assisted suicide. No primary invasion is being removed when the physician supplies the means of bodily invasion for suicide.

Id. The same arguments hold true for assisted reproduction, a process that also does not involve the removal of anything from the body. On the contrary, techniques such as in vitro fertilization often entail affirmative invasions of the body in order to initiate conception, pregnancy, and childbirth.

contrary, assisted reproduction may actually require affirmative invasions into the body of some participants in the process in order to initiate conception, pregnancy, and childbirth.

Nor does equal protection require a constitutional right to assisted reproduction. Indeed, many feminist critics persuasively contend that these new modes of reproduction actually create inequality by reinforcing a woman's primary role as that of child bearer, reducing women to their wombs and perpetuating patriarchy.[205] Other scholars argue that reproductive technologies also endanger equality by reflecting and reinforcing racial[206] and other hierarchies.[207]

V. PRIVACY AND PROCREATION

In a slightly different context, *Washington v. Glucksberg*[208] teaches the lesson that the Constitution contains no expansive and all-encompassing right to die. On the contrary, its promise of bodily integrity protects only a limited right to disconnect the body from the invasive medical apparatus keeping it alive.[209] Similarly, the preceding sections of this Article suggest that there is no general constitutional right to marry, to form a family, to

205. *See, e.g.*, JANICE G. RAYMOND, WOMEN AS WOMBS (1993) (arguing that technological and contractual reproduction result in the reproductive exploitation of women and undermine women's right to equality); REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES (Joan C. Callahan ed., 1995); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989); SUSAN SHERWIN, NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE (1992). *But see* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 12 (1989) (arguing that it is consistent with feminism for women to be able to use their reproductive capacity to earn money and power); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 303 (arguing that rules which look to individual intentions to determine the legal parents of children born of assisted reproduction enhance gender equality).

206. *See, e.g.*, Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935 (1996); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

207. *See* Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007 (1996) (exploring ways in which infertility discourse constructs boundaries that divide women into different categories and oppress women of color, poor women, and lesbians in different ways).

208. 117 S. Ct. 2258 (1997) (upholding a Washington law prohibiting physician-assisted suicide).

209. *See* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990) (acknowledging that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions," and suggesting that this principle encompasses the right to refuse life-saving hydration and nutrition).

procreate or not to procreate, to rear children, and to engage in sexual activity. Instead, the right to privacy secures the freedom to conduct intimate and consensual associations,[210] while the rights of bodily integrity and equal protection work together to afford constitutional protection to particular acts involved in procreation.[211]

Hence, it is a mistake to equate privacy with a general constitutional right to engage in any or all of these activities free from governmental interference.[212] Rather than granting an individual entitlement to engage in important activities, the right to privacy creates a zone of immunity around intimate relationships. Privacy does not furnish a sweeping right of reproductive freedom that can be transported from one setting to another.[213] Instead, the rights of privacy, bodily integrity, and equal protection, acting together,[214] protect the choice not to reproduce under certain circumstances, providing a right to prevent intrusions into the body by means of contraception and a right to free the body of intruders by means of abortion. If, however, it ultimately becomes possible to expel the fetus intact from a woman's body, without injuring it in the process, nothing in the case law suggests that there also exists a right to destroy the fetus, at least so long as the new procedure poses no threat to the life or health of the mother.[215]

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210. *See* discussion *supra* Part III.

211. *See* discussion *supra* Part IV.

212. *See* Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting) (declaring that "the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior"); *cf.* Rubenfeld, *supra* note 1, at 784 (arguing that the right to privacy consists not of the freedom to perform certain fundamental acts, but rather of the "freedom not to have one's life too totally determined by . . . [the] state").

213. *See* Tushnet, *supra* note 46, at 1364–69 (arguing that rights do not exist in the abstract but instead depend upon their context, so that "relatively small changes in technology would make it impossible—or at least very difficult—to talk about a right to an abortion").

214. *Cf.* David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753 (1994) (arguing for a transactional approach to constitutional adjudication that would require courts to aggregate constitutional rights, rather than to measure liberty in a fractured and myopic way through the constricting lenses of individual amendments).

215. Under current constitutional doctrine, state attempts to preserve the life of the fetus are constitutional so long as they do not pose any additional risks to the woman's health. *See* Planned Parenthood v. Ashcroft, 462 U.S. 476, 485 n.8 (1983) (upholding a second-physician requirement during postviability abortions to provide additional protection for the life of the fetus); *see also* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 768–69 (1986) (striking down a requirement that physicians use abortion techniques with the best chance for the fetus to be aborted alive because the requirement balanced the woman's health against the fetus's life), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

In the words of Professor Laurence Tribe:

> [T]he liberty that is most plainly vindicated by the right to end one's pregnancy is the woman's liberty not to be made unwillingly into a mother, the freedom to say no to the

Likewise, there exists no corresponding right to reproduce that can be transplanted to a radically different context. The right to bodily integrity prohibits physical invasions of the body, protecting "the right to refuse abortion and carry a coital pregnancy to term, as well as the right to resist compulsory contraception or sterilization," but it does not necessarily "extend[] constitutional protection to noncoital methods of reproduction."[216] And relational privacy encompasses the right of consenting adults entwined in an intimate relationship to engage in discrete acts involved in procreation. Specifically, it allows parties who are entirely in agreement to conceive by means of sexual intercourse or with the assistance of technology, to carry the pregnancy to term, and to rear the resulting child, all free from governmental interference. Relational privacy does not, however, protect commercial transactions between complete strangers, nor does it include a right to any form of state assistance or involvement in procreation.[217]

But because it is a relational right, privacy is bounded by the countervailing interests of others within the protected association. Accordingly, the right of relational privacy ends at the point when individuals within a protected relationship assert contradictory interests. Thus, relational privacy does not require the state to advance the right to procreate for some participants if that would entail denying the right not to procreate for other participants to the venture.[218] Similarly, the state need not vindicate

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> unique sacrifice inherent in the processes of pregnancy and childbirth. A 'rigbt' not to have a biological child in existence—the right during pregnancy, for example, to *destroy* one's fetus rather than simply being *unburdened* of it—is analytically distinct, and seems harder to support. . . . While there may be arguments in favor of recognizing a woman's right, early in pregnancy, to destroy the fetus growing within her for the very purpose of preventing a living child of hers from coming into being, this is not the liberty the Court undertook to protect in *Roe*.

LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 98–99 (1992); *see also* Tushnet, *supra* note 46, at 1366–69 (arguing that changes in technology would radically alter the right to an abortion).

216. Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1485 (1995).

217. *See* Hartis v. McRae, 448 U.S. 297, 316 (1980) (holding that the constitutional right to an abortion does not impose an affirmative obligation on the government to provide the financial resources necessary to exercise the right by subsidizing abortions, because "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation"); Maher v. Roe, 432 U.S. 464, 473–74 (1977) (holding that the constitutional right to an abortion is only a negative "right protect[ing] the woman from . . . interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds").

218. *See* Witbeck-Wildhagen v. Wildhagen, 667 N.E.2d 122 (Ill. App. Ct. 1996) (determining that privacy does not encompass the right to require the husband of a woman who engaged in artificial insemination with donor sperm without his knowledge or consent to serve as

one individual's right to procreate when doing so would violate another's right to bodily integrity.[219] In addition, the state is not obligated to protect the parental rights of some progenitors at the expense of extinguishing the parental rights of others,[220] nor is it required to enforce parenting agreements to rear exclusively the resulting child over the objections of other parties to the contract.[221] All of these are not part of the right of relational privacy. In these contexts, disputes divide the parties to the relationship. And when the association loses the capacity for decentralized decision making, it forfeits the relational privacy that provided constitutional protection to its intimate activities.

If the relationships between people with respect to an activity are entirely consensual, privacy may protect them all against interference by the state. But when there is dissent among the individuals involved in a relationship, individual assertions of a right to privacy become incoherent and the state is entitled to—indeed, may be obligated to—intrude in order to adjust the relative rights and relationships of the parties. Properly understood as a relational right, the right to privacy breaks down when it is applied to situations involving conflicts within the association. The right to privacy has no place in such situations, and decisions must be based on policy and not on constitutional privacy grounds.

VI. RELATIONAL PRIVACY AND ASSISTED REPRODUCTION

Application of the principle of relational privacy to the problems posed by assisted reproduction yields the following conclusions. At a minimum, relational privacy encompasses the right of a couple bound together in marriage or a similarly intimate union to combine their own gametes with the assistance of various reproductive technologies, such as artificial insemination, intracytoplasmic sperm injection, and in vitro fer-

the child's legal father if the requirement would interfere with the husband's own right not to procreate); Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (holding that privacy does not include the right to obtain and implant embryos over the objections of the other gamete-provider asserting a right not to procreate). *But see* Kass v. Kass, No. 93-19658, 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995) (finding that the right not to procreate is waived after initial participation in IVF, so that a husband has no right to prevent his ex-wife ftom gestating unused embryos), *rev'd*, 663 N.Y.S.2d 58 (App. Div. 1997).

219. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (striking down laws requiring spousal consent in order to terminate pregnancy by means of an abortion); *In re* Baby M., 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987) (stating in dicta that enforcement of a provision in a surrogacy contract prohibiting a surrogate ftom aborting would be unconstitutional).

220. *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986); Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994).

221. *See In re* Baby M., 537 A.2d 1227, 1243 (N.J. 1988).

tilization. That reproduction occurs in the presence of a physician does not deprive such couples of constitutional protection, for the privacy right attaches to their act of intimate association.[222] Moreover, the state lacks the power to intervene in this process because no other individual possesses a constitutional interest in preventing the couple's attempt to form a family[223] simply because conception takes place in a laboratory.[224]

There is, however, no constitutional right to buy or sell sperm, eggs, embryos, or gestational services, even when necessary for procreation within the context of an intimate association. Such commercial transactions are not part of the right of relational privacy. Gamete providers and surrogate gestators are not engaged in any act of affiliation; instead, they simply seek to trade goods and services. And although a couple attempting to form a family with the assistance of reproductive collaborators possesses a stronger claim, the purchase of gametes and gestational capacity does not fall within their freedom of intimate association. By introducing strangers into the relationship, the couple is at once diminishing the privacy of their association and simultaneously enhancing the state's interest in protecting these other individuals, who become potential parties to the relationship and whose own interests may diverge from those of the couple. Hence, the state possesses the power to outlaw markets in human gametes and gestational services. By this reasoning, laws preventing the purchase or sale of

222. This point was made explicit in *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), which declared:

> [T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.

Id. at 66 n.13.

223. The right of relational privacy shields the family from intervention by outsiders. This was the result reached in one well-publicized case, where the court definitively rejected the petitions of two strangers who sought appointment as legal guardians of a comatose pregnant woman and her 17-week-old fetus, respectively, in order to prevent her family's decision to allow an abortion, stating: "[T]he record confirms that these absolute strangers to the Klein family, whatever their motivation, have no place in the midst of this family tragedy." *In re* Klein, 145 A.D.2d 145, 148–49 (NY App. Div. 1989) (per curiam) (upholding trial court's appointment of husband to serve as temporary guardian of his comatose pregnant wife for the purpose of authorizing physicians to interrupt her pregnancy and perform any other medical procedures necessary to preserve her life, when there was no showing of a conflict between the interests of husband and wife and the husband's petition was supported by the woman's parents).

224. Of course, the state still possesses the power to prohibit use of particular methods of assisted conception if they pose a threat to the resulting children, in order to protect these vulnerable parties to the relationship. *Cf.* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (allowing the state to intervene in an intact family if there is clear and convincing evidence of parental neglect or abuse of the children).

human eggs and embryos,[225] or prohibiting commercial surrogacy contracts,[226] are entirely constitutional. In addition, although relational privacy embraces the right to select one's mate without regard to race,[227] it does not create a corresponding right to select donor sperm, eggs, or embryos for genetic reasons. The former falls within the act of constructing an intimate community, while the latter simply constitutes an arms-length commercial transaction. In *Roberts v. United States Jaycees*, the Court drew an analogous distinction when it declared that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees."[228] Thus, the Court affirmed the constitutional right to discriminate based upon race with respect to one's partner in marriage, but it refused to afford the same protection to the Jaycees' decision to exclude women from their professional organization.

Once a couple unites their own gametes with the assistance of reproductive technology, the right of relational privacy also extends to their joint decisions regarding the disposition of any resulting embryos. The couple may choose to implant the embryos and carry them to term or to preserve cryogenically the embryos for future use. Indeed, even a decision to discard extracorporeal embryos, though distinguishable from the act of abortion because it implicates no right of bodily integrity, might well be included within the couple's right of relational privacy on the grounds that

225. *See, e.g.*, FLA. STAT. ANN. § 873.05 (West 1996) (declaring that "[n]o person shall knowingly advertise or offer to purchase or sell, or purchase, sell, or otherwise transfer, any human embryo for valuable consideration" and criminalizing a violation of this section as "a felony of the second degree"); LA. REV. STAT. ANN. § 9:122 (West 1997) ("The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited."); R.I. GEN. LAWS § 11-54-1(f) (1996) (stating that "[n]o person shall knowingly sell, transfer, distribute, or give away any fetus for a use which is in violation of the provisions of this section"—namely, experimentation—and specifying that "the word 'fetus' shall include an embryo").

226. *See, e.g.*, KY. REV. STAT. ANN. § 199.590(4) (Michie 1995) (proscribing surrogacy contracts for compensation); LA. REV. STAT. ANN. § 9:2713 (West 1997) (rendering paid surrogacy contracts null, void, and unenforceable); MICH. COMP. LAWS ANN. § 722.859 (West 1993) (prohibiting commercial surrogacy contracts and prescribing criminal fines and/or imprisonment for participation in or procurement of such agreements); NEB. REV. STAT. § 25-21,200 (1995) (declaring surrogacy contracts for compensation to be unenforceable); N.Y. DOM. REL. § 123 (McKinney Supp. 1997–1998) (forbidding commercial surrogacy and imposing civil and/or criminal penalties for violations); UTAH CODE ANN. § 76-7-204(1) (1995) (prohibiting surrogacy contracts for profit and providing that violations constitute a misdemeanor); WASH. REV. CODE ANN. § 26.26.230 (West 1997) (barring surrogacy contracts for compensation).

227. *See* Loving v. Virginia, 388 U.S. 1 (1967) (striking down a statute prohibiting interracial marriage).

228. 468 U.S. 609, 620 (1984).

it involves their formation of a family.[229] As the Tennessee Supreme Court declared in *Davis v. Davis*, "the state's interest in potential human life is insufficient to justify an infringement on the gamete-provider's procreational autonomy . . . [because] no other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process."[230] Accordingly, laws prohibiting the destruction of extra embryos[231] or requiring unused embryos to be made available to others for "adoptive implantation"[232] are most likely unconstitutional.

If the couple disagrees as to the disposition of their embryos, however, they forfeit their right of relational privacy. Once the integrity of their relationship has been impaired, the state is entitled to intervene in order to preserve the interests of the individuals involved. The state may elect to protect the party seeking to procreate because it wishes to favor potential life,[233] or it may adopt some other resolution to such controversies. In any event, so long as the state is acting in the interests of one or more of the individuals included within the relationship,[234] the intricate balance between their competing interests should be left to policy, rather than con-

229. The parents' decision to discard an embryo is encompassed within their right of relational privacy *unless* the embryo is itself deemed a party to the relationship. *Roe* authorizes states to proscribe abortions after viability on the grounds that "the fetus then presumably has the capability of meaningful life outside the mother's womb," implying that the fetus becomes an independent entity whose own interests may be protected at the point of viability. *See* Roe v. Wade, 410 U.S. 113, 163 (1973). But if viability turns on the fetus's ability to survive outside of its mother, rather than on the stage of biological development, then even extracorporeal embryos could be considered "viable" ftom the very moment of conception. This interpretation follows because early embryos can always be implanted in another woman's uterus and brought to term, without any assistance ftom their biological mother. *See* Jed Rubenfeld, *On the Legal Status of the Proposition That "Life Begins at Conception,"* 43 STAN. L. REV. 599, 620–21 (1991). Accordingly, state regulations in the interests of such embryos would not contravene the right of relational privacy whenever the embryos' interests conflict with those of the progenitors. On the contrary, embryo protection statutes would be constitutional so long as they do not impair other constitutional rights, such as the woman's rights of bodily integriry and equal protection.

230. 842 S.W.2d 588, 602 (Tenn. 1992).

231. *See, e.g.*, LA. REV. STAT. ANN. § 9:129 (West 1997) (providing that "[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any narural or other juridical person or through the actions of any other such person").

232. *See, e.g., id.* § 9:130 (requiring that "[i]f the in vitro fertilization patients renounce . . . their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation").

233. *See* Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1067 (1996) (arguing that courts should value the life of the embtyo or fetus when this approach does not conflict with a woman's liberty interest in not being pregnant).

234. For example, if one party wishes to implant the embtyos and carty them to term alone and the other parry wishes to destroy them, the state cannot simply disregard both parties' avowed wishes and donate the embryos to yet another couple for adoptive implantation.

trolled by constitutional law. Such a result follows because "[t]he new reproductive technologies . . . raise issues too complex to be decided according to constitutional principles that permanently balance basic values, setting them in constitutional stone."[235] Instead, states must possess the latitude to make trade offs between a multitude of conflicting interests and achieve rough accommodations that may differ depending upon the context and consequences.

Once a couple is able to obtain access to donated gametes and conceive a child by means of assisted reproduction, however, the complexity of the situation increases dramatically. Consider the case of artificial insemination with donor sperm.[236] Although a woman has no constitutional right to acquire semen from an anonymous donor, if the state allows her to do so,[237] then she will most likely escape interference in her relationship with the resulting child. The donor's very anonymity will probably preclude any attempts to enter the relationship, and absent a conflict among the parties to the protected relationship, they are all shielded from state intrusion under the umbrella of privacy.

But when a woman conceives by means of artificial insemination with semen supplied by a known donor, she risks including the donor within the relationship that is protected by the right to privacy. If the donor elects to come forward and makes significant efforts to participate in the parenting process, then he may be considered a member of the child's family. In that case, the right of relational privacy would not immunize the child's mother against state interference designed to protect the biological father's interest in his own child. The state may choose to preserve the biological father's relationship with his child, or it may favor maintaining the integrity of the woman's family. Neither result is compelled by constitutional principles under the rubric of relational privacy. And both comport with cases such as *Jhordan C.*, which rejected the woman's claim that privacy insulated her from state interference when she conceived a child with the sperm of a

235. Rao, *supra* note 216, at 1495–96.

236. The same reasoning may be applied, with minor modifications, to situations involving donor eggs or embryos.

237. At least 35 states currently possess statutes allowing artificial insemination with donor sperm. Thirteen of these statutes are modeled on the Uniform Parentage Act, an advisory statute developed in 1973 by the National Conference of Commissioners on Uniform State Laws. The states that have modeled their legislation on the UPA are: Alabama, California, Colorado, Illinois, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Washington, Wisconsin, and Wyoming. *See generally* Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 534–38 (1994).

donor who was not excluded from her family "either by anonymity, by agreement, or by the parties' conduct."[238] Both outcomes are also consistent with the result (if not the reasoning) of *Michael H.*, which affords states the opportunity to adopt a wide variety of approaches to address disagreements that develop between the parties involved in an intimate relationship.[239]

Likewise, even if a state fails to prohibit the purchase or sale of reproductive resources such as sperm, eggs, embryos, or gestational capacity, relational privacy does not embrace the right to enforce contracts purporting to transfer parental rights to the resulting child. A surrogacy contract, for example, by its very nature involves a close connection between the surrogate mother and child, who are necessarily entwined in an intimate and extensive relationship during the entire nine-month period of gestation. When the surrogate's interests conflict with those of the contract parents, therefore, the right of relational privacy vanishes and the state is entitled to regulate in tbe interests of the parties to the relationship. The state may refuse to enforce such contracts and protect the surrogate's relationship with her biological child, as it did in *Baby M.*,[240] or it may award the child to the contract parents and preserve the integrity of the marital family, as occurred in *Johnson v. Calvert*.[241] As long as there is no conflict with other constitutional rights, these solutions and many others are available to the state. Under the right of relational privacy, there is no single necessarily correct constitutional resolution to these controversies. To the contrary, within very broad constitutional parameters, states possess the latitude to deal with these problems in many different ways, all of which are equally constitutional.

CONCLUSION

A fundamental problem pervades the constitutional cases regarding assisted reproduction: It is the awkwardness and inadequacy of the language

238. 224 Cal. Rptr. 530, 536 (Ct. App. 1986); *see also* Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994).

239. 491 U.S. 110 (1989) (denying a biological father parental rights when opposed by the biological mother and her husband).

240. *See In re* Baby M., 537 A.2d 1227, 1234–35 (N.J. 1988) (refusing to enforce a sutrogacy contract but awarding custody to contract parents based upon the child's best interests, while affording sutrogate visitation rights with the biological child).

241. 851 P.2d 776 (Cal. 1993) (rejecting a gestational sutrogate's claim that she be recognized as the child's legal mother and awarding custody to child's genetic parents).

of liberal individual rights as applied to multiparty disputes.[242] "Constitutional law's strength lies in addressing disputes that pit the individual against the state. Cases that present a multiplicity of conflicting rights and a plethora of adverse parties, however, are less readily resolved by resort to global constitutional principles."[243] When each party to a conflict possesses his or her own personal right of privacy, no one necessarily receives constitutional protection. This scenario leads in turn to a situation of constitutional indeterminacy, granting courts almost unlimited power to strike whatever balance they please under the rubric of constitutional law. Once the balance is struck, moreover, rigid constirutional rules may freeze further development in an area where the facts are still in flux and where the values are as yet uncertain, manifesting no clear social consensus.[244]

These problems point to an even deeper deficiency in the prevailing conception of constitutional privacy. The right of privacy currently reflects the liberal paradigm, sheltering isolated individuals from the overwhelming power of government. This conception of privacy works well when its liberal assumptions hold true—that is, when individuals are united against the state. Yet the liberal conception of privacy appears inadequate when the state is simply mediating conflicts among those whose lives are intimately intertwined, intervening to protect some individuals from others in a relationship. Such situations call for a republican paradigm—one that envisions individuals as interconnected and that trusts government when it is acting to promote the welfare of all members of an association.[245]

242. Professor Carl Schneider points to a similar problem in the context of family law:

> [W]hen we in America think about rights, we tend to think in terms of the 'Mill paradigm.' That is, we think in terms of the state's regulation of a person's actions. In such conflicts, we are predisposed to favor the person, out of respect for his moral autonomy and human dignity. . . . In family law, however, the Mill paradigm often breaks down, because in family law conflicts are often not between a person and the state but between one person and another person. . . . Our legal thinking about rights has conspicuously, if understandably, failed to develop a satisfactoty alternative to the Mill paradigm with which to approach such conflicts.

Carl E. Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CAL. L. REV. 151, 157 (1988).

243. *See* Rao, *supra* note 216, at 1495.

244. *Cf.* Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 362–63 (1996) (urging courts to employ constitutional caution in the area of cyberspace, where underlying facts are as yet unknown and rapidly changing and underlying values are still in flux).

245. Of course, the republican conception of privacy is no more capable of yielding easy answers than its liberal counterpart. Difficult questions remain regarding the degree of intimacy necessaty for a relationship to receive constitutional protection and the extent of fragmentation within a relationship required to trigger the loss of such protection. *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 241–42 (1972) (Douglas, J., dissenting in part) (observing the existence of a potential

By reconceiving privacy as a relational right that attaches to entire associations rather than to isolated individuals, both the liberal and republican dimensions of this constitutional right are openly acknowledged and integrated. As a relational right, privacy is bounded by the countervailing interests of others: It ends at the point when individuals within a protected relationship assert contradictory interests. Accordingly, when individuals are aligned against the state, the right of relational privacy shelters them all in their associations with one another, consistent with the liberal vision. But, if the individuals involved in reproduction are at odds, then the right of relational privacy fails to insulate them, either from the state or from the claims of one another. Indeed, once discord divides those entwined in an intimate relationship, the state is entitled to intervene in order to protect the interests of the parties involved. In such areas of constitutional indeterminacy—of tragic choices between competing interests—there is no single necessarily correct constitutional resolution to a controversy. Instead, consistent with the republican vision, the state is entrusted to balance the multitude of conflicting individual interests based upon policy rather than by resort to constitutional principles. The right of relational privacy thereby affords states the latitude to address the complex problems posed by assisted reproduction in a wide variety of ways, all of which are entirely constitutional.

conflict between the Amish parents' right to inculcate their religion and the interests of their children in ohtaining a high school education and suggesting that such fragmentation within the family may result in forfeiture of parental rights). Nevertheless, the repuhlican approach focuses attention upon issues ignored under prevailing analysis. Rather than addressing intrafamily conflicts by balancing competing individual rights, the republican conception of privacy examines the nature and extent of associational relationships.