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CONSTITUTIONAL MISCONCEPTIONS

Radhika Rao*


"59-Year-Old Woman Becomes a Mother";1 "Black mother, white baby: artificial conception stirs Europe[an] debate";2 "South Africa Woman Gives Birth to 3 Grandchildren, and History";3 "Healthy Baby Is Born After Test to Screen Out Deadly Gene";4 "The Hot Debate About Cloning Human Embryos";5 "Infertility doctors plan to use eggs from aborted foetuses."6 This bewildering barrage of headlines reveals a reproductive revolution in the making. Children of Choice: Freedom and the New Reproductive Technologies ambitiously endeavors to shed light upon and bring order to the chaotic brave new world spawned by advances in reproductive technology. Professor John A. Robertson7 proposes a unifying principle — the presumptive primacy of procreative liberty — that is elegant in its simplicity. Applying this principle, he methodically canvasses each technology and concludes that almost every practice necessary to procreate should receive constitutional protection. He finds a constitutional right to reproduce technologically, to

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Postscript: For a wide range of critiques of Robertson’s book published subsequent to the writing of this review, see the Symposium on John A. Robertson’s Children of Choice, 52 WASH. & LEE L. REV. 133 (1995).

1. A 59 Year-Old Woman Becomes a Mother, USA TODAY, Jan. 7, 1994, at 11A (cartoon).
7. Thomas Watt Gregory Professor of Law at the University of Texas, Austin.
purchase sperm, eggs, and gestational services, and even to enforce preconception agreements to rear offspring.

Robertson's principle of procreative liberty possesses merit as an ethical precept, but it falters as an axiom of constitutional law because it lacks a solid foundation in Supreme Court jurisprudence. In his effort to distill a single principle that encompasses myriad contexts, moreover, Robertson forgoes a more nuanced constitutional analysis, one that takes into account the many ways in which individuals experience liberty in various categories and clauses of the Constitution. He focuses almost exclusively upon the right to procreate, overlooking other constitutional privacy interests, such as the right of body integrity and the right of parental autonomy.

More fundamentally, Robertson's effort to constitutionalize conception is unavailing because global constitutional principles are ill-suited to resolve the problems posed by the new reproductive technologies. Perhaps for this reason, Robertson's approach, though cast in constitutional terms, traces its roots more closely to contractual principles. He conceives reproductive freedom in terms of an individual's right to participate in a free market — a market whose commodity is the means of producing children. In so doing, Robertson actually constitutionalizes freedom of contract in the name of protecting procreative rights.

I. A CONSTITUTIONAL RIGHT TO PROCREATE BY ANY MEANS NECESSARY

Robertson begins with a brief description of "the scope of the reproductive revolution that technological change has now wrought" (p. 4). The reproductive revolution originated in the 1960s when the development of the pill made possible sex without procreation. This revolution has culminated in the 1990s with the development of technology that allows procreation without sex. "[T]he most visible marker of the technological reproductive revolution" was the birth of Louise Brown — the first child conceived in a petri dish — in 1978 (p. 4). This birth proved to be just the vanguard of the revolution to come, foreshadowing modern reproductive technologies that enable individuals to control conception and manipulate offspring characteristics in ways previously unimaginable. "Like Caesar crossing the Rubicon," Robertson predicts, "there is no turning back from the technical control that we now have over human reproduction" (p. 5). As a result, "[t]he decision to have or not have children is ... no longer a matter of God or nature, but has been made subject to human will and technical expertise" (p. 5). The current sources of conflict in the reproductive revolution include RU486, Norplant, frozen embryos, surrogate motherhood, genetic screening, manipulation of embryos,
forced caesarean section, criminal punishment of pregnant drug users, and fetal tissue transplants (p. 5). Robertson attempts to address all of these issues, dividing them into four main categories that provide the structure of the book: avoiding reproduction, assisted reproduction, quality control, and nonreproductive use of reproductive capacity.

Armed with his principle of procreative liberty — which protects “the freedom to decide whether or not to have offspring and to control the use of one’s reproductive capacity” (p. 16) — Robertson enters the fray, mapping out a framework for resolving the controversies engendered by the new reproductive technologies. He defines procreative liberty as “the freedom to reproduce or not to reproduce in the genetic sense” (pp. 22-23), and extends the term to include gestation as well because “gestation is a central experience for women and should enjoy the special respect or protected status accorded reproductive activities” (p. 237 n.1). Procreative liberty, according to this view, consists of a negative right to be free from state interference, rather than a positive right to call upon the state to provide the means or resources necessary to exercise procreative choice (p. 23). Robertson advocates the “presumptive primacy of procreative liberty” (p. 22) because reproduction is “central to personal conceptions of meaning and identity” (p. 4). “To deny procreative choice,” he believes, “is to deny or impose an all-encompassing reproductive experience on persons without their consent, thus denying them respect and dignity at the most basic level” (p. 220).

Attempting to ground his principle of procreative liberty in the constitutional right to privacy, Robertson parses it into its component parts — the right not to procreate and the right to procreate. The former aspect of procreative liberty finds a firm footing in Supreme Court precedents that clearly delineate a constitutional right to avoid reproduction by means of contraception and abortion. Constitutional jurisprudence provides sketchy support, however, for the latter aspect of procreative liberty. Robertson points primarily to Skinner v. Oklahoma, a case in which the Court struck down an Oklahoma statute authorizing forcible sterilization of thrice-convicted chicken-thieves. Relying upon Skinner and


broad dicta from several other cases, Robertson determines that "laws restricting coital reproduction by a married couple would have to withstand the strict scrutiny applied to interference with fundamental constitutional rights" (p. 36).

Building upon his reading of the case law, Robertson makes the following argument: if fertile persons possess a constitutional right to reproduce under Skinner, then infertile persons must possess such a right as well because "the values and interests that undergird the right of coital reproduction clearly exist with the coitally infertile" (p. 39). Drawing an analogy between infertility and blindness, he reasons that the inability to procreate sexually should not preclude an infertile person from exercising the right to reproduce, just as the inability to see should not preclude a blind person from exercising the First Amendment right to receive information. First Amendment protection should extend to books read by sight or by braille: "Similarly, if bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally" (p. 39). It follows that the right to procreate protected by Skinner encompasses "a negative constitutional right to use a wide variety of reproductive technologies to have offspring" (pp. 38-39). Therefore, laws restricting the use of reproductive technology must also withstand strict scrutiny. Robertson concludes, "Noncoital reproduction should thus be constitutionally protected to the same extent as is coital reproduction, with the state having the burden of showing severe harm if the practice is restricted" (p. 39). Because such strong justifications seldom exist, Robertson believes that decisions about reproductive technology should almost always be left to the individual.

Having established the presumptive primacy of procreative liberty, Robertson proceeds to apply this principle to controversies involving various reproductive technologies. He first addresses the battle over abortion, which pits a woman's presumptive right to terminate her pregnancy against the claims of the fetus. For Robertson, the resolution to this conflict lies within the reach of new

11. Robertson quotes sweeping pronouncements on the right to privacy delivered by the Court in cases such as Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting that constitutional liberty includes "the right of the individual . . . to marry, establish a home and bring up children"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The rights to conceive and raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious . . . than property rights.' " (alteration in original) (citations omitted)); Eisenstadt, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); and Casey, 112 S. Ct. at 2807 ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."). Pp. 36-37.
abortion technology. "[A] fertilized egg, embryo, or fetus cannot be a person or even a moral subject," he believes, "because it is too undeveloped biologically. In the earliest stages, it lacks differentiated organs and a nervous system" (p. 51). Only at sentience — which occurs near the time of viability — does a fetus become a moral subject in its own right. The viability line embodies this "biological reality of progressive fetal development" (p. 53), whereas a position that "[c]all[s] all abortion 'murder' overlooks the very different biologic stages of embryonic and fetal development, and the moral distinctions that rest on them" (p. 48). Because "biological status is morally relevant" (p. 55) to Robertson, technology holds out the hope of ending the bitter battle over abortion. Robertson believes that "[p]reventing a fertilized egg from implanting or interrupting implantation shortly after an embryo has developed is less morally or symbolically problematic than surgically destroying a much more developed fetus" (p. 64). Therefore, a new drug such as RU486 — which interrupts pregnancy at a very early stage — has the potential to "defuse some of the heat of the abortion controversy" (pp. 63-64).

Robertson next applies his principle of procreative liberty to proposed legislation to restrict irresponsible reproduction by means of new contraceptive technology. Such proposals focus upon the drug Norplant, a surgically-implanted contraceptive approved by the FDA in 1990, which Robertson believes to be safe, convenient, and effective at preventing pregnancy for up to five years.\(^\text{12}\) The

\(^{12}\) Pp. 69-70. Robertson's optimism regarding the safety and convenience of Norplant, however, is by no means universal. Several class action lawsuits have been filed against Wyeth-Ayerst, the primary U.S. manufacturer of Norplant, alleging, inter alia, failure to warn women of the magnitude of the drug's side effects, which include headaches, weight gain, acne, nervousness, nausea, mood swings, dizziness, depression, hair gain or loss, heart palpitations, enlargement of the ovaries and fallopian tubes, and irregular or increased bleeding. Norplant may carry additional risks, moreover, for women who suffer from diabetes, hypertension, or kidney disease. Finally, although Norplant's contraceptive effect is reversible once it is removed, extraction is not always the simple process Robertson describes, consisting of just a small incision under local anesthetic in a quick procedure. P. 70. Instead, if the contraceptive implant migrates or scar tissue forms around it, removal may become extremely complicated. In some cases, removal can be accomplished only by means of surgery under general anesthesia. See Gina Kolata, Avalanche of Suits Hits Norplant, S.F. EXAM­INER, May 28, 1995, at A1, A9; Tamar Lewin, Class Action Suit Says Norplant Hard to Remove, S.F. CHRON., July 8, 1994, at A3; Norplant easier to get than to get rid of, say women suing its maker, CHI. TRIB., July 5, 1994, at 2; Shari Roan, Rising Legal Battles Tarnish Norplant's Bright Promise, L.A. TIMES, Oct. 9, 1994, at A3; Jamie Talan, Norplant Lawsuits: Women Say Birth Control Implant Causes Side Effects, and Removal Can Be Difficult, NEWS­DAY, Aug. 30, 1994, at A5; Fawn Vrazo, Difficulties Surfacing for Norplant: Users Are Suing Over Pain and Scarring from its Removal, PHILADELPHIA INQUIRER, July 7, 1994, at A1; Karin Winegar, Norplant's Faded Promise, STAR TRIB., Sept. 18, 1994, at A1; see also Anita Hardon, Norplant: Conflicting Views on Its Safety and Acceptability, in ISSUES IN REPRODUCTIVE TECHNOLOGY I: AN ANTHOLOGY 11 (Helen B. Holmes ed., 1992). According to one woman, for example, it took five surgeries over the course of a year to extract a Norplant capsule intractably embedded in her arm. Stephen Smith, Women Sue Manufacturer of Norplant, MIAMI HERALD, July 19, 1994, at 1BR.
author concludes that programs that encourage the voluntary use of Norplant, either by paying women on welfare a "bonus" to accept Norplant\textsuperscript{13} or by requiring them to use Norplant as a condition to receive welfare,\textsuperscript{14} do not infringe upon procreative liberty. Although a Norplant bonus "may be attractive enough to get a woman's attention and even influence her decision, it does not deny her something that she would otherwise receive, and thus should not be considered coercive" (pp. 87-88). Similarly, conditioning the receipt of welfare on Norplant use does not offend the Constitution because "a state has no constitutional obligation to provide welfare at all, [so] it would be free to provide it only if certain conditions rationally related to the program are met" (p. 89). Programs that make the use of Norplant compulsory, however, rather than tying it to the distribution of public funds, are unconstitutional because even convicted child-abusers, HIV-positive women, and teenagers possess "interests in procreation or bodily integrity which mandatory use of Norplant violates" (p. 93). Only severely retarded women, who are "so mentally impaired that the concept of reproduction and parenthood has no meaning" (p. 90), may be forced to use Norplant because they lack the capacity to exercise procreative choice. For such women, Robertson believes, "the notion of reproductive choice is no more meaningful ... than is electoral choice" (p. 90).

After analyzing technologies that prevent reproduction, Robertson turns his attention to those that facilitate procreation. He focuses his discussion upon in vitro fertilization (IVF), a procedure that involves collecting eggs surgically after ovarian stimulation, fertilizing them in the laboratory, and then implanting them in the uterus (p. 98). In order to maximize the probability of a pregnancy, Robertson explains, most IVF practitioners hyperstimulate the ovaries to retrieve multiple eggs (p. 99). If too many fertilized eggs are placed in the uterus at one time, however, there is an increased risk of multiple pregnancy, which may, in turn, require selective abortion. Therefore, such practitioners usually implant only three or four embryos in the uterus; the extra embryos generated by the process may be cryogenically frozen and later thawed for use in subsequent IVF cycles (p. 99).

\textsuperscript{13} Legislation that would provide women on welfare with a cash bonus if they accept Norplant has been proposed in several states. E.g., H.R. 5130, 1994 Conn. Sess.; S. 2520, 1994 Fla. Sess.; H.R. 2776, 1994 Kan. Sess. See generally Jeanne L. Vance, Note, Womb for Rent: Norplant and the Undoing of Poor Women, 21 HASTINGS CONST. L.Q. 827 (1994). To date, none of these proposed statutes have been enacted into law.

\textsuperscript{14} In two states — Florida and Mississippi — bills have been introduced that would condition receipt of welfare on a woman's consent to use Norplant. See Don't Use Norplant Against Welfare Mothers, USA TODAY, Feb. 16, 1993, at 10A; Barbara Kantrowitz & Pat Wingert, The Norplant Debate, NEWSWEEK, Feb. 15, 1993, at 36. See generally Vance, supra note 13, at 829 (describing proposed Norplant legislation).
Robertson predicts that a law banning IVF altogether “would no doubt be found unconstitutional because it [would] directly impede[ ] the efforts of infertile married couples to have offspring, thus interfering with their fundamental right to procreate” (p. 100). But if the state cannot prohibit IVF directly, Robertson poses the question whether it could restrict the use of IVF indirectly “by limiting the number of eggs that may be inseminated, banning discard, or requiring donation of unwanted embryos” (p. 108). He concludes that it could not, even though current privacy doctrine leaves open the constitutionality of laws regulating extracorporeal embryos:

The constitutionality of laws that prevent the discard or destruction of IVF embryos is independent of the right to abortion established in 
Roe v. Wade and upheld in Planned Parenthood v. Casey . . . . Under Roe-Casey the state would be free to treat external embryos as persons or give as much protection to their potential life as it chooses, as long as it did not trench on a woman’s bodily integrity . . . . [p. 108; footnote omitted]

Nevertheless, embryo protection laws, “even if they do not infringe [upon] bodily integrity, do . . . limit procreative choice” (p. 108). Because the efficient operation of IVF requires power to create and control spare embryos, Robertson reasons that the procreative liberty right to use IVF implies both the right to create additional embryos and the “right to give binding advance instructions” regarding the disposition of any unused embryos (pp. 106-07).

Indeed, Robertson’s principle of procreative liberty appears to possess no logical stopping point, expanding to the outer limits of technological possibility and human ingenuity. It protects not only the right to conceive by means of reproductive technologies such as IVF, but also the right to engage the services of reproductive collaborators, such as gamete donors and surrogates. If a couple lacks the physical capacity to conceive through coitus, Robertson contends, the right to procreate “should include the right to use noncoital means of conception to form families” (p. 126). Likewise, “[i]f the couple lacks the gametes or gestational capacity to produce offspring, a commitment to procreative liberty should also permit them the freedom to enlist the assistance of willing donors and surrogates” (p. 126). In the next stage of his analysis, Robertson implicitly equates procreation with parenting: because couples procreate primarily in order to become parents, he reasons that an infertile couple’s constitutional right to procreate with the assistance of third parties “should include enforcement of preconception [agreements to rear the resulting child, such as] surrogate contracts” (p. 131). In a final leap of logic, Robertson finds that the Constitution guarantees even the right to purchase the sperm, eggs, and gestational services supplied by gamete donors and surrogates.
A ban on payment would unconstitutionally interfere with the right to procreate because it might "prevent [infertile couples] from obtaining the collaborative services they need to rear biologically related offspring" (p. 141). Therefore, Robertson concludes, "such an infringement could be justified only if banning payment prevented a substantial harm that clearly outweighed the burden on procreative choice."15

Only at quality control technologies does Robertson draw the line, determining that some of these practices fall outside the scope of constitutionally protected procreative choice. He distinguishes between negative and positive interventions, finding this difference, "[i]ike the difference between killing and letting die . . . [to be] morally weighty" (p. 160). He argues that negative interventions — such as the discard of genetically undesirable embryos or sex-selective abortions — should be constitutionally protected because "[a] voiding conception or terminating an affected pregnancy rather than living with the burdens of handicapped birth would appear to be a central part of procreative liberty" (p. 150). "If discard of unwanted embryos is accepted," he reasons, then "discard on the basis of genetic traits should also be acceptable" (p. 156). In like vein he says, "[i]f abortion is accepted generally, then it should be available for genetic selection reasons as well" (p. 159). Moreover, even positive interventions "designed to prevent serious disease or defect in expected offspring" merit constitutional protection as part of procreative liberty (p. 161).

Robertson's analysis leads him inevitably to the following dilemma: if the Constitution protects therapeutic intervention to correct a genetic disease or defect, what if "a gene for height, intelligence, coordination, beauty, or some other desirable characteristic could be inserted in an embryo or fetus to enhance those characteristics in an otherwise normal, healthy child" (p. 165)? Robertson is reluctant to stretch his principle of procreative liberty

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15. P. 141. According to Robertson, none of the arguments for banning payment reach that level of justification. He first addresses the argument that commercializing reproduction may "exploit and depersonalize women, turning them into mere cogs in the machinery of reproduction" (p. 140), but he responds that "markets for the sale of gestational services are no more exploitive than the sale of other kinds of physical labor" (p. 141). "If people are free to sell their labor as petrochemical workers, cleaning persons, or construction workers in the hot Texas sun," Robertson inquires, "why should the sale of gestational services be treated any differently? Much paid labor is equally or even more risky to health." P. 141. A second argument against payment is that it commodifies women and children, transforming them into objects that may be bought and sold on the market. Robertson rejects this argument as well because it fails to explain "why certain attributes such as gestation and sexuality may not be sold, while other attributes, such as physical size, skill, attractiveness, and intellectual prowess may be." P. 141. For these reasons, Robertson determines that "the need to protect female gestation from the taint of filthy lucre does not seem compelling enough to justify stopping infertile couples from obtaining the services they need to rear biologic offspring." P. 142.
so far, recognizing that "[i]f everything material to a decision to reproduce is part of procreative liberty, then its scope would extend to [genetic] enhancement, cloning, and the Bladerunner scenario" of a genetically-engineered class of subnormal human beings (p. 167). Desperately seeking some logical limit, he appeals to a "constitutive notion of why reproduction is important" (p. 263 n.40). He finds this limit in "a core view of the goals and values of reproduction such that . . . procreative liberty would protect only actions designed to enable a couple to have normal, healthy offspring whom they intend to rear" (p. 167). On this view, "actions that aim to produce offspring that are more than normal (enhancement), less than normal (Bladerunner), or replicas of other human genomes (cloning) [do] not fall within procreative liberty because they deviate too far from the experiences that make reproduction a valued experience." Therefore, "prenatal interventions for non-therapeutic enhancement, cloning, or diminishment of offspring will not be protected by procreative liberty because these actions conflict with the values that undergird respect for human reproduction."17

Having found one limit to the principle of procreative liberty, Robertson readily discovers others. He determines that the right to procreate is not implicated by the regulation of conduct that poses the risk of prenatal harm to offspring. Although his principle of procreative liberty might seem broad enough to encompass, for example, a woman's decision to smoke cigarettes or consume alcohol during the course of her pregnancy, Robertson concludes that it is not because "the core values that underlie procreative liberty . . . [do not] include[ ] the right to make offspring less than healthy and normal, when a healthy birth is reasonably possible" (p. 178). Robertson points out, however, that other constitutional rights such as "a woman's right of liberty and bodily integrity" may be infringed

16. P. 167. Robertson refers to the replicants in the movie Bladerunner to illustrate his idea of a genetically-engineered class of subnormal human beings (pp. 170-71), but these replicants could actually be deemed superior, genetically-enhanced beings. By highlighting the question of what is "normal," Robertson's reference to Bladerunner thus reveals the ambiguity inherent in his "core view" of procreative liberty.

17. P. 172. Robertson himself appears to recognize the arbitrariness of the line he has drawn when he asks "why only the interest in raising 'normal' children should be protected, if individuals find the same or greater meaning in raising supernormal children." P. 263 n.40. For, by his own reasoning, if procreative liberty is constitutionally protected "because of the importance of reproduction to personal identity and meaning" (p. 171), then the "right to procreate . . . [should] imply the right to take actions to assure that offspring have the characteristics that make procreation desirable or meaningful for [a particular] individual" (p. 153), including genetic enhancement. Yet Robertson's only response to this question is that "at some point a constitutive notion of why reproduction is important has to inform the debate, or else there are no limits to shaping offspring characteristics at all, not even when cloning or intentional diminishment is involved." P. 263 n.40. Robertson's failure to advance any theory to justify his core view of the purpose of procreative liberty renders his belated attempts to confine his constitutional right to procreate inadequate.
by the regulation of maternal conduct during pregnancy, "not because it is reproductive, but because [a woman's] body and liberty . . . are involved."¹⁸ Nor does procreative liberty extend to nonreproductive uses of reproductive capacity, such as the creation of embryos for research or the deliberate conception and abortion of a fetus in order to obtain tissue for transplantation, although such uses might fall within the right to "liberty in the use of one's reproductive capacity" (p. 200). The principle of procreative liberty does, however, safeguard such practices when they are employed to produce a child, as they were by the Ayala family, who received national attention for their decision to conceive and give birth to one child for the purpose of providing bone marrow to another.¹⁹

In sum, Robertson believes that "procreative liberty should include the right to have children for any motive, including to serve as a marrow donor, if such goals or uses of the child independently respect that child's interests" (p. 217).

After sketching out the ramifications of his constitutional principle of procreative liberty, Robertson finally recounts and rebuts three major critiques of this approach. First, the "class critique" capitalizes upon the fear that collaborative reproduction could result in "a breeder class of poor, minority women whose reproductive capacity is exploited" by the rich and powerful (pp. 226-27). Robertson responds by saying that "denying poorer women [such] opportunity . . . denies them a reproductive role which they find meaningful. Given that poorer women serve as nannies, babysitters, housekeepers, and factory workers, gestational services might also be sold, even though it will offend the respect that some persons have for maternal gestation" (p. 227). Second, the "feminist critique" suggests that such practices may "further patriarchal domination of women by reinforcing the traditional identification of women with childbearing and childrearing" (p. 228). According to

¹⁸. P. 178. The fact that such regulation implicates the constitutional right to bodily integrity is only the beginning and not the end of the inquiry, because no constitutional right is absolute: "At a certain point one's right to use one's body as one wishes . . . must take account of the interests of others . . . ." P. 179. Robertson points out that "[w]omen are in a special relationship with the fetus . . . because of its location inside their bodies" (p. 190); the special geography of pregnancy may warrant the imposition of a special duty to avoid inflicting harm upon offspring prenatally. According to Robertson, such a duty would prohibit a pregnant woman from engaging in "actions [that] have very little benefit to her and pose great harm to offspring" or require her to accept medical treatments that are "moderately or minimally risky . . . but will prevent great harm to offspring." P. 179. To impose such a duty, he argues, is not discrimination on the basis of gender so long as it is "[v]iewed broadly as a question of the parental duties of both men and women" to their offspring before and after birth. P. 192. Consistent with his vision of prenatal duties as just a subset of the obligations all parents owe to their children, Robertson would impose upon all parents "postnatal moral obligations to donate tissue when the risk/benefit ratio justifies the intrusion." P. 193.

Robertson, this criticism falters because it fails to recognize that precisely the opposite result is likely: collaborative reproductive arrangements actually upset and overturn gender-role stereotypes by "undercut[ting] traditional notions of reproductive orthodoxy that identify women with gestation and childrearing" (p. 230). This argument also "overlooks the many ways in which technology offers options that expand the freedom of women . . . [and] assures women a large measure of control over their reproductive lives" (p. 229). Collaborative reproduction, for example, affords infertile women the chance to experience the joys of gestating or rearing biologically related children, and it offers fertile women an opportunity to earn money by serving as surrogates. "On balance," Robertson concludes, "there is no reason to think that women do not end up with more rather than less reproductive freedom as a result of technological innovation" (p. 231). Third, the "communitarian critique" contends that "[d]isaggregation and recombination of reproductive components [may] undermine the traditional importance of genetic and gestational bonds" (p. 232), thereby contributing to the destruction of the traditional family. Robertson rejects this argument as well, avowing that "[r]ather than undermin[ing] family, these practices present new variations of family and community that could help fill the void left by flux in the shape of the American family" (p. 233).

II. A CONSTITUTIONAL LAW CRITIQUE

To anyone acquainted with the burgeoning scholarship prompted by recent developments in reproductive technology, John Robertson is already a familiar name, and this work should add luster to his well-deserved reputation in this fertile field. To address all of these issues in one comprehensive volume is itself an accomplishment, but Children of Choice does much more than that. It introduces and applies a coherent constitutional framework to the perplexing problems posed by the new reproductive technologies.

Robertson's constitutional framework views the landscape of reproductive conflict through the lens of procreative liberty, inquiring whether the constitutional right to procreate or avoid procreation encompasses each one of these new technologies. From the Supreme Court's decision to strike down a compulsory sterilization law in *Skinner* and from broad dicta in several other cases, Robertson derives "a negative constitutional right to use a wide variety of reproductive technologies to have offspring" (pp. 38-39). Based upon this freshly minted constitutional right, he extrapolates not only a constitutional right to employ gamete donors and surrogates to assist in the reproductive venture, but also a constitutional right to obtain court enforcement of preconception contracts that purport to bargain away rearing rights to the resulting child.21

Robertson erects this elaborate edifice upon *Skinner*, but *Skinner* is too weak a reed to carry so much constitutional weight. As the sole precedent supporting the constitutional right to procreate, *Skinner* is indeterminate: the case may be read in several different ways, all of which are equally consistent with current constitutional doctrine.22 Just as the constitutional right to an abortion established in *Roe* and reaffirmed in *Casey* does not preclude states from prohibiting the destruction of extracorporeal embryos,23 so the constitutional right not to be sterilized announced in *Skinner* may not prevent states from regulating extracorporeal reproduction.24 The result in *Skinner* may simply rest upon the constitutional right to

21. See supra text accompanying note 15.

22. Some commentators contend, for example, that the right to privacy protects freedom of intimate association, rather than freedom of procreation. By this reasoning, "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." Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 557 U. CHI. L. REV. 1057, 1108 (1990).

23. Under current constitutional doctrine, state attempts to preserve the life of the fetus, even when it is within the woman's womb, are constitutional so long as they do not pose any additional risks to the woman's health. Planned Parenthood v. Ashcroft, 462 U.S. 476, 485 n.8 (1983) (upholding second-physician requirement during postviability abortions to provide additional protection for the life of the fetus); cf., Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-69 (1986) (striking down requirement that physician use abortion technique with best chance for fetus to be aborted alive because it balanced the woman's health against the fetus' life).

24. *Skinner* may not even establish a constitutional right to be free from sterilization. The compulsory sterilization law at issue in *Skinner* was struck down only because it discriminated between chicken-thieves and embezzlers. By locating the case in the Equal Protection Clause rather than the Due Process Clause, the Court implied that such laws are constitutional so long as they treat all criminals equally. See *Skinner* v. Oklahoma, 316 U.S. 535, 541 (1942) ("[S]trict 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. . . . 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.").
privacy of person, which prohibits state intrusions upon bodily integrity. If this is its rationale, then *Skinner* protects only the right to refuse abortion and carry a coital pregnancy to term, as well as the right to resist compulsory contraception or sterilization. Thus it is not at all clear that *Skinner* extends constitutional protection to noncoital methods of reproduction, such as artificial insemination and in vitro fertilization.

Moreover, recognition of a negative right to procreate does not imply a positive right to call upon the apparatus of the state for assistance in procreation. Therefore, even if *Skinner* does create a constitutional right to be free from state interference with the use of reproductive technology, it does not follow that the state possesses an affirmative obligation to assure the exercise of procreative choice by placing its prestige and power behind the enforcement of preconception contracts. If government need not supply the fi-

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25. Even if *Skinner* is not cabined as a case involving bodily integrity, but stems instead from a broader right to privacy, Robertson offers no reason why this broader right to privacy should be interpreted to protect an individual’s right to make decisions that are central to personhood, rather than to prevent the state from enacting regulations that affirmatively occupy individual’s lives. See Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989) (distinguishing between personhood right to privacy and antitotalitarian right to privacy). According to Rubenfeld, “The 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.” *Id.* at 794. This distinction is significant because, although both visions of privacy protect the right to abortion, only the personhood theory of privacy would prevent the state from enacting laws limiting reproduction. *Id.* at 797.

26. The only other argument Robertson sets forth in support of the proposition that *Skinner* extends constitutional protection to technological methods of procreation rests upon his analogy between infertility and blindness. See supra text accompanying note 11. This analogy, however, fails because it glosses over the critical fact that reproduction cannot be accomplished in isolation — it is an activity which necessarily implicates the rights of others. An appropriate analogy would ask not whether the First Amendment protects a blind person’s right to receive information by means of braille, but rather whether it protects a blind person’s right to purchase the eyes of a sighted person. Certainly, no one would contend that the First Amendment right to receive information stretches so far.

27. The Court has drawn the same distinction in the abortion funding cases. See, e.g., *Harris v. McRae*, 448 U.S. 297, 316 (1980) (holding that the constitutional right to an abortion does not impose an affirmative obligation upon 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.”).

28. Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that the court enforcement of private racially restrictive covenants constitutes state action). Several commentators have made a similar point, arguing that the state has no affirmative obligation to enforce procreative contracts. See, e.g., Laurence H. Tribe, *American Constitutional Law* 1360 (2d ed. 1988) (suggesting that the state’s ability “to withhold from would-be parents the financial means necessary for in vitro fertilization or artificial insemination” implies that the constitutional right to privacy does not “automatically entitle infertile couples . . . to buy genetic material from others or to contract” for gestational services); John Lawrence Hill, *What Does
nancial resources necessary to exercise the right to procreate, it is not clear why government must supply the judicial resources necessary to exercise the right either. Robertson attempts to evade the logic of the abortion funding cases by simply labelling state enforcement of procreative contracts as a negative rather than a positive right (p. 23), yet he fails to provide any reason why this form of state assistance should be so characterized. Robertson could have argued as follows: state withdrawal from the procreative enterprise by means of selective refusal to enforce procreative contracts would interfere with the negative right to procreate in the same way that selective refusal to enforce contracts providing abortion services in exchange for payment would interfere with the negative right to abort. This argument depends, however, upon whether the state’s decision not to enforce procreative contracts represents a deviation from traditional precepts of contract law or whether it comports with common law contract rules.

It Mean To Be a “Parent”? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 367 (1991) ("[T]he right of procreation elaborated in Skinner appears as a negative right to make procreational decisions without government interference. This is quite distinct from a positive right requiring government assistance to enforce reproductive-services contracts between commissioning couples and surrogates.").

29. More than one court has refused to enforce a surrogacy contract under this rationale. See, e.g., Doe v. Kelley, 307 N.W.2d 438 (Mich. Ct. App. 1981) (holding that the fundamental right to bear or beget a child was not infringed by the state’s refusal to enforce a surrogacy contract based upon state law prohibiting the payment of fees for adoption); In re Baby M, 537 A.2d 1227, 1253-54 (NJ. 1988) (holding that the right of procreation does not require government enforcement of a surrogacy contract).

30. Under traditional principles of contract law, not all voluntary agreements are legally binding as contracts. Some promises are not enforced because they impair family relations, see McCoy v. Flynn, 151 N.W. 465 (Iowa 1915) (refusing to enforce a promise to pay $5,000 if the recipient remained unmarried for three years); Lowe v. Doremus, 87 A. 459 (N.J. 1913) (determining that a contract in general restraint of marriage is void), or because they require the performance of illicit personal services, see Troutman v. Southern Ry. Co., 441 F.2d 586, 589 (5th Cir. 1971) (recognizing that “a contract to influence a public official in the exercise of his duties is illegal and unenforceable when that contract contemplates the use of personal influence”); Taylor v. Fields, 224 Cal. Rptr. 186 (Ct. App. 1986) (holding that a contract providing lifetime financial support in exchange for sexual services was unenforceable because based on illegal, meretricious consideration), or because they contravene public policy, see Gault v. Sideman, 191 N.E.2d 436, 443 (III. App. Ct. 1963) (denying enforcement of doctor’s express warranty to cure his patient because “ordinary rules dealing with mercantile contracts” should not be applied to a contract between a physician and a patient but instead the court should consider “a balance of the legal policies of protecting the public”); Capazzoli v. Holzwasser, 490 N.E.2d 420 (Mass. 1986) (holding that promise of financial support in exchange for promisee’s abandoning her marriage was unenforceable as a matter of public policy). Moreover, court enforcement of preconception agreements would not necessarily effectuate the parties’ intentions in regard to raising the resulting child. A court would be more likely to remedy breach of such contracts by means of damages rather than specific performance — specific performance is usually viewed as an extraordinary remedy. See H.W. Gossard Co. v. Crosby, 109 N.W. 483, 486 (Iowa 1906) (stating that it is a “universally recognized general rule” that damages are the sole remedy for breach of a “contract to perform personal service”). Indeed, a court’s failure to order specific performance of procreative contracts could hardly be construed as a departure from general contract principles. See, e.g., Foxx v. Williams, 52 Cal. Rptr. 896 (Dist. Ct. App. 1966) (refusing to specifically enforce a contract by compelling employee to continue to provide services to employer); Fitzpatrick
draws between negative and positive procreative rights is less clear than he suggests. 31

Yet the real problem with interpreting the constitutional right to procreate to require court enforcement of preconception contracts is not a question of semantics — of whether the right is labelled positive or negative. Rather, it is that recognition of such an expansive version of the right to procreate may diminish other constitutional rights and disregard the constitutional rights of others. Robertson's reading of this right conflates procreation and parenting, but the two are distinct. Even if Skinner supports a constitutional right to procreate, therefore, parental prerogatives need not follow. The right to reproduce does not necessarily entail the right to rear one's biological child. 32 Should one right accompany the other, moreover, how do we determine which procreator — the gamete contributors, the gestator, or the intending parents — possesses these related rights? Robertson candidly acknowledges these difficult questions when he asks:

Are couples who use these techniques 'procreating' in a significant way, even though one of them may lack a genetic or biological connection to offspring? Is a collaborator meaningfully procreating if he or she is merely providing gametes or gestation without any rearing role? Do such limited procreative roles deserve the same respect and protection that traditional coital reproduction warrants? [p. 120]

These questions are often more illuminating and instructive than any available answers.

Robertson's difficulties stem from the fact that constitutional rights "have a way of bumping into each other in cases involving husbands, wives, and unmarried individuals when all are claiming parental rights." 33 Protecting the parental rights of one procreator

v. Michael, 9 A.2d 639 (Md. Ct. App. 1939) (declining to specifically enforce a contract promising to render nursing and caretaking services during employer's lifetime in exchange for a substantial interest in his estate after his death).

31. Like the question of whether governmental action imposes a penalty or withdraws a subsidy, the characterization of a constitutional right as negative or positive also depends upon the baseline against which it is measured. See, e.g., Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415 (1989) (arguing that the characterization of unconstitutional conditions as "coercive" is a conclusory label that draws upon a normative baseline); Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 9 (1992) (arguing that "the description of a right as positive or negative depends on the baseline").

32. As the New Jersey Supreme Court noted in Baby M:

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.

537 A.2d at 1227.

risks denying the rights of other procreators. As the New Jersey Supreme Court stated in *Baby M*:

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.34

By requiring a court to enforce a preconception agreement that would wrest a child from the arms of one biological parent and transfer her to the home of another, Robertson's right to procreate has become so broad as to impinge upon parental rights.35 Such a sweeping right of reproduction threatens to swallow up other constitutional privacy rights.

All these weaknesses evidence a deeper flaw in Robertson's all-encompassing constitutional framework. Robertson strives to reduce the manifold issues raised by the new reproductive technologies to one constitutional right. In his search for simplicity, however, he forgoes a more nuanced constitutional analysis. He relies almost exclusively upon one constitutional principle—the primacy of procreative liberty. Yet a comprehensive constitutional analysis cannot apply procreational privacy rights in isolation; rather, it must take into account all of the ways in which an individual experiences liberty in various categories and clauses of the Constitution.36 At a minimum, it must reconcile the right to privacy of procreation with two other elements of the constitutional right to privacy, which I shall term privacy of person37 and privacy of

34. 537 A.2d at 1254.

35. Robertson concedes this flaw in his analysis, but he attributes it to his focus upon constitutional rights, rather than to the incompleteness of his constitutional analysis. He acknowledges that "[a] rights-based perspective tends to view reproduction as an isolated, individual act without effect on others" (p. 223), and he seems to believe that a communitarian model might better reflect the fact that reproduction is the act that most clearly implicates community and other persons. Reproduction ... always occurs with a partner, even if that partner is an anonymous egg or sperm donor . . . . Its occurrence also directly affects others by creating a new person who in turn affects them and society in various ways.

P. 223. According to Robertson, "[e]mphasizing procreative rights thus risks denying the central, social dimensions of reproduction." P. 223. But it is in his failure to respect other constitutional rights and to acknowledge the constitutional rights of others—not his application of a rights-based model—that Robertson denies the central social dimensions of reproduction.


37. A long line of cases establishes this right to privacy of person, guaranteeing freedom from physical intrusions upon an individual's body. See, e.g., *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 269 (1990) ("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 un-
Robertson’s framework falls short because it focuses upon procreational privacy, seldom considering personal privacy and almost entirely ignoring parental privacy.

III. TOWARD A NEW TAXONOMY

The new reproductive technologies enable humans to wield unprecedented power over the process of reproduction, making it possible to bring to life strange science-fiction scenarios. In so doing, they overturn settled notions of what is “natural” and call into question traditional doctrinal categories. No single legal framework clearly governs these technologies. Instead, they hang in a legal limbo, fitting neatly into no existing taxonomy. Constituent authority of law.” (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891))); Washington v. Harper, 494 U.S. 210, 221-22 (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 (1984) (stating that 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, 172-74 (1952) (holding that forced stomach-pumping of accused to extract evidence “shocks the conscience” in violation of the Due Process Clause); Jacobson v. Massachusetts, 197 U.S. 11 (1905). The abortion cases, themselves, stand at the intersection of two aspects of the right to privacy: they may be construed as flowing from both privacy of person and privacy of procreation. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2810 (1991) (“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 cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”).

38. The right to be free from state interference with parental autonomy possesses an equally ancient pedigree. See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down state statute prohibiting parents from teaching children foreign languages); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (overturning statute requiring parents to send children to public school); Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating statute that automatically deprived unwed biological fathers of their children upon the mother’s death); Quillio v. Walcott, 434 U.S. 246 (1978) (upholding state law allowing biological mother’s husband to adopt child over objection of biological father who had never resided with the child); Caban v. Mohammed, 441 U.S. 380 (1979) (striking down state law which gave biological mother of child veto power over adoption proceeding, while giving unwed biological father who enjoyed close relationship with the child only the right to show that the adoption would not be in the child’s best interests); Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence of abuse or neglect before state can constitutionally terminate parental rights); Lehr v. Robertson, 463 U.S. 248 (1983) (sustaining statute granting more procedural rights to biological mother of child than to biological father who lacked a substantial relationship with the child). Several cases suggest that this right to privacy of parenting does not extend, however, to procreators who claim parental rights in opposition to an intact marital family, see Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding statute enacting conclusive presumption that the husband of a child born to a married woman is the child’s father, thereby denying parental rights to biological father who had lived with the child), or to caretakers who lack a biological or legal connection to the child, see Reno v. Flores, 113 S. Ct. 1439 (1993) (determining that illegal alien children detained by government have no right to be released to unrelated adults); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (sustaining state procedures that allowed children to be removed from foster families with whom they resided for more than one year without prior hearing).

39. The new reproductive technologies challenge our basic structures of classification. They are like “flying squirrels,” which are “not unambiguously birds nor animals” and thus “are avoided by discriminating adults.” Michael H. Shapiro, Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters, 51 OHIO ST. L.J.
tional law represents one approach to adjudicating the conflicts such technologies create, but there are several others that I shall now classify and describe. Different courts and commentators appear to employ different doctrinal discourses, often without any explanation or justification of their choices. Each doctrinal model poses dramatically different questions, and each may yield different answers.

The first such model, the property law model, focuses upon the initial allocation of the entitlement: it asks who owns the property interest. In Moore v. Regents of the University of California, a case involving ownership of the human body, Moore alleged that the unauthorized use of his spleen cells to create a valuable cell line constituted tortious interference with his property. The California Supreme Court rejected his claim, ruling that the patented cell line was "the product of invention," owned by those who labored to create it and not by Moore, who merely supplied "the naturally occurring raw materials." Yet the issue of ownership is only the beginning of the property law inquiry. Once ownership is established, the question remains whether a particular property interest is alienable — whether it can be freely purchased and sold on the market. Much of the property law scholarship regarding the new reproductive technologies has revolved around this very question.

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331, 338 (1990) (quoting MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 196-97 (Pelican ed. 1966)).

40. My description tends to artificially exaggerate the differences between these doctrinal models in order to sharpen their essential characteristics. In reality, however, the boundaries between these different modes of discourse are much more fluid. For a good description of the blurring of boundaries between conceptual categories, see Elizabeth Mensch, The History of Mainstream Legal Thought, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13, 23-27 (David Kairys ed., 1990); see also Ronald Chester & Scott E. Alumbaugh, Functionalizing First-Year Legal Education: Toward a New Pedagogical Jurisprudence, 25 U.C. DAVIS L. REV. 21, 26-27, 36-37 (1991) (arguing that as courts borrow "concepts from one doctrinal category of law to further the development of another... the increased borrowing is slowly breaking down the artificial separation of common-law doctrines"); Duncan Kennedy, The Political Significance of the Structure of the Law School Curriculum, 14 SETON HALL L. REV. 1, 12-16 (1983) (contending that contracts, property, and torts are not doctrinally consistent or coherent but rather areiven by contradictions); Peter Linzer, The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory, 20 GA. L. REV. 323, 326 (1986) (stating that "the traditional approaches to tort, contract, and property are wrong, and that private law is a relatively seamless area").

41. 793 P.2d 479 (Cal. 1990).
42. Moore, 793 P.2d at 493.
43. In his dissent in Moore, for example, Justice Mosk stated: [T]he concept of property is often said to refer to a "bundle of rights" that may be exercised with respect to that object — principally the rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift. ... But the same bundle of rights does not attach to all forms of property. For a variety of policy reasons, the law limits or even forbids the exercise of certain rights over certain forms of property.
The paradigm case involving application of a property law model to reproductive technology is Davis v. Davis, which involved a divorced couple's dispute over seven cryogenically frozen embryos. In this case, the Tennessee Supreme Court disavowed property law terminology, stating that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." Nevertheless, by concentrating upon the question of initial ownership, the court implicitly adopted a property law approach. Indeed, the court expressly acknowledged that the gamete contributors did possess "an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."

The property law model thus frames the issues around ownership and the attributes that accompany ownership. Applied to the problem of collaborative reproduction, for example, the property law model would ask who owns the product of reproductive efforts and what that ownership entails. Of course, the property law model does not provide a determinate answer to these questions, because at least three distinct parties — the two gamete contributors and the gestator — possess tenable claims to "ownership" by virtue of property law theories, the former based upon their investment of genetic resources in the reproductive venture and the latter based upon her labor in gestating and delivering the child.

The second model, the family law model, also focuses upon the initial allocation of entitlements, but from the perspective of the child. This model poses two critical questions: first, who are the child's "parents," and second, which placement serves the child's

45. 842 S.W.2d 588 (Tenn. 1992).
46. Davis, 842 S.W.2d at 597.
47. Davis, 842 S.W.2d at 597; see also York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (holding that cryopreservation agreement created a bailment relationship between couple and fertility clinic, obligating the clinic to return the subject of the bailment — one frozen embryo — to its owners once the purpose of the bailment had terminated); Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993) (holding that sperm stored in sperm bank is "property" to be distributed by the probate court according to the intent of the decedent as expressed in his will).
48. This model has been severely criticized for applying the language of ownership to issues that many believe should not be conceived in these terms. See Radin, supra note 44, at 1884-85 ("Market rhetoric, the rhetoric of alienability of all 'goods,' is also the rhetoric of alienation of ourselves from what we can be as persons.").
best interests. In *In re Baby M*, the New Jersey Supreme Court adopted what is essentially a family law approach to resolve the problems created by a surrogacy arrangement that soured. Rejecting the surrogacy contract as unenforceable, the court adjudicated the case as if it were a custody dispute over a coitally-produced child. After determining that the two biological progenitors were the child’s parents, the court held that the child’s best interests required that she reside with her biological father, but awarded visitation rights to her biological mother.

The family law model is equally incapable of providing precise answers to the problems posed by collaborative reproduction, however, because it remains unclear what should count in determining parenthood. In *Johnson v. Calvert*, for example, 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. The child’s biological progenitors, moreover, are not the only candidates for parental status. Several commentators have advocated an “intentional” theory of parenthood, one that would privilege the intent to parent over status-based biological ties to the child. Thus the distinctive characteristic of the family law

49. See Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 Geo. L.J. 1811, 1827 (1988) (“Once we know who the ‘parents’ of a surrogate-born child are, then custody disputes can reasonably be determined under the individual child-oriented ‘best interests’ standard of family law.”). For another good example of the family law model, see Judith Areen, *Baby M Reconsidered*, 76 Geo. L.J. 1741, 1758 (1988) (“[W]hen custody disputes arise following surrogacy, it is the altruistic ethic of family law that should guide the court, not the ethic of self-gratification of the marketplace and contract law.”).

50. 537 A.2d 1227 (N.J. 1988).
51. *In re Baby M*, 537 A.2d at 1255-56.
52. *In re Baby M*, 537 A.2d at 1261-63.
53. 851 P.2d 776 (Cal. 1993) (holding that each woman presented acceptable proof of maternity and therefore determining the “natural mother” to be the woman who originally intended to rear the child).

In her dissent in *Alison D.*, Judge Judith Kaye appeared willing to accept these arguments and extend parental status to intentional parents, criticizing the New York Court of Appeals’ decision for “fixing biology as the key to visitation rights” and advocating a broader definition of parenthood. 572 N.E.2d at 30 (footnote omitted). Accordingly, Judge Kaye would have remanded the case to the lower court to determine whether Alison D. was a “parent” to the child and, if so, whether visitation was in the child’s best interests. *Alison D.*, 572 N.E.2d at 33.
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model inheres in its centering of the discourse around the issue of parenthood. Yet different courts and commentators may arrive at different answers to the question who is a parent, some based upon biological connections and others based upon the significance of the bond that has developed or the clarity of the parties’ intentions.

The third model, the constitutional law model, speaks in the language of rights, not in the language of ownership or parenthood. The constitutional law model asks which constitutional rights are being exercised, and by whom. In Baby M, for example, the trial court ruled that the state’s refusal to enforce a surrogacy contract would violate an infertile couple’s constitutional right to privacy. The constitutional right to privacy, however, fails to furnish easy answers to these questions, for collaborative reproduction implicates three distinct strands of the privacy right — privacy of person, privacy of procreation, and privacy of parenting. In a typical surrogacy contract, for example, the surrogate mother promises, in exchange for payment, (i) to refrain from smoking cigarettes, drinking alcoholic beverages, or ingesting other substances harmful to the fetus; (ii) to abort if the fetus is physiologically abnormal, but otherwise to carry the pregnancy to term; and (iii) to relinquish her parental rights to the resulting child after birth. Such a contract involves conflicting constitutional rights. A holding that the infertile couple’s right to procreate requires enforcement of such a contract would deny the surrogate her constitutionally protected rights to be free from physical invasions into her body and to raise her biological child. Therefore, a court presented with such a contract cannot simply consider procreational privacy in isolation; rather, it must untangle and reconcile the three strands of the constitutional


57. See Anita L. Allen, Privacy, Surrogacy, and the Baby M Case, 76 Geo. L.J. 1759, 1775 (1988) (describing four models of privacy-right attribution in the surrogacy context: privacy rights can be viewed as belonging to either (1) the childless couple, (2) the biological father, (3) the contractual couple, or (4) the surrogate mother).


59. 525 A.2d at 1164-65. Trial court Judge Sorkow’s reasoning is strongly reminiscent of Robertson’s:

[I]f 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 . . . . This court holds that the protected means extend to the use of surrogates. . . . It might even be argued that refusal to enforce these contracts and prohibition of money payments would constitute an unconstitutional interference with procreative liberty since it would prevent childless couples from obtaining the means with which to have families.


right to privacy. The very agreement that enhances the infertile couple's constitutional right to privacy of procreation may impair the surrogate mother's constitutional rights to privacy of person and privacy of parenting. A clash of constitutional rights can be averted only by determining that the surrogate's constitutional right to procreate includes the power to alienate her constitutionally protected personal and parental privacy rights. For this reason, issues of waiver and alienability of constitutional privacy rights lie at the core of the constitutional law model.

The last model differs from the other three models because, in the Coasian world of contract, the initial allocation of entitlements is not binding — the parties are free to bargain around them. Under the contract law model, therefore, the important question is not who originally owns the entitlement, but rather what the parties intend. It assumes freedom of contract, and therefore requires no justification of the alienability of the underlying entitlement. Several commentators have applied a version of the contract law approach to disputes involving the new reproductive technologies, arguing for legal protection of intentions rather than biological connections to the child. Some of these commentators appear to advocate a pure contract law model, but others recommend contract with an overlay of required terms in order to enhance efficiency.

Robertson's constitutional framework defines the right to procreate as the right to create genetically or gestationally connected progeny. In so doing, it specifies that the initial entitlement belongs

61. Along these lines, Allen states that "[c]ourts relying upon privacy arguments must seek to acknowledge all the privacy claims, dispel all the ambiguity about who is asserting them, and then decide which claims to legitimate." Allen, supra note 57, at 1782.

62. I shall use the term "waiver" to refer to relinquishment of a constitutional right and "alienation" to refer to the transfer or sale of a right to another party. See Seth Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. PA. L. REV. 1293, 1386 (1984) (distinguishing between waiver, which is the choice not to exercise a right, and alienation, which is the transfer of a right in exchange for a benefit).

63. See R.H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1, 16 (1960) (setting forth the Coase theorem, which holds that, in the absence of transaction costs, the initial allocation of entitlements is not determinative because the parties can freely bargain to achieve an efficient allocation).

64. See, e.g., Carmel Shalev, Birth Power: The Case for Surrogacy (1989) (arguing that it is consistent with feminism for women to be able to use their reproductive capacity to earn money and power); Schultz, supra note 55.


66. See Peter H. Schuck, Some Reflections on the Baby M Case, 76 GEO. L.J. 1793, 1809 (1988) ("[A] regime of private contract, constrained and modified by a small number of legislated rules and enforceable in the courts, should protect the relevant private and social values implicated by surrogacy."). State regulations of surrogacy contracts might require, for example, that the parties sign the contract in the presence of a designated public official, after psychological testing and counseling, and that there be a mandatory postsigning but preconception "cooling off" period during which either party is free to renounce the contract. See id. at 1805-06.
to those who are biologically reproducing. But by assuming without justifying why it is that this entitlement can be bargained away, Robertson seems to be operating in the Coasian world of contract and not in the realm of constitutional rights. Though it employs the rhetoric of rights, Robertson's constitutional model reveals itself to be a version of the contract law model. It concentrates upon policy questions central to contract law, ignoring or overlooking the question of the alienability of constitutional rights that lies at the core of constitutional law. Robertson has simply constitutionalized freedom of contract in the name of advancing reproductive rights.

Perhaps Robertson reverts to contract law because of the awkwardness of constitutional law in adjudicating family conflicts. 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.

The new reproductive technologies, moreover, raise issues too com-

67. Unlike the Coasian world of contract, in which entitlements are presumed alienable, in the realm of constitutional rights, some rights cannot be relinquished and others can be waived but not purchased and sold on the market. The idea of inalienable rights is deeply rooted in American constitutional law. See The Declaration of Independence para. 2 (U.S. 1776); Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights."); Townsend v. Townsend, 7 Tenn. (Peck) 1, 10 (1821) ("Constitutional rights are vested, unexchangeable, and unalienable."). Seth Kreimer notes that "the concept of inalienable rights is scarcely foreign to constitutional thinking" and that "there are constitutional rights that we do regard as inalienable." Kreimer, supra note 62, at 1386. The peonage cases, for example, demonstrate that the Thirteenth Amendment protects the inalienable right not to be a slave. See, e.g., Bailey v. Alabama, 219 U.S. 219 (1911) (holding that the Thirteenth Amendment barred Alabama from enforcing a voluntary contract of employment by imposing criminal penalties on the employee for its breach); Clyatt v. United States, 197 U.S. 207 (1905). Diana Meyers believes that inalienable rights also include the right to life, the right to personal liberty, the right not to suffer gratuitous pain, and the right to satisfaction of basic needs, such as food, water, clothing, shelter, and the medical care needed for survival. Diana T. Meyers, Inalienable Rights: A Defense 53 (1985). The process by which we should determine what rights are inalienable is far from clear, but Laurence Tribe offers some guidelines. He argues that "rights that are relational and systemic are necessarily inalienable: individuals cannot waive them because individuals are not their sole focus." Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330, 333 (1985); see also Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1111-15 (1972) (describing efficiency justifications for inalienability, such as externalities and paternalistic or moralistic concerns); Radin, supra note 44 (arguing for inalienability based upon aspiration for noncommodification); Note, Rumpelsiltskin Revisited: The Inalienable Rights of Surrogate Mothers, 99 Harv. L. Rev. 1936, 1941-49 (1986) (contending that rights central to personhood are inalienable).

68. In so doing, Robertson appears to be resurrecting the now-discredited Lochnerian notion that the right to make and enforce contracts is enshrined in the Constitution. See Lochner v. New York, 198 U.S. 45 (1905). Robertson, however, would safeguard freedom of contract in order to advance procreational privacy rather than economic liberty.

69. See Carl E. Schneider, Rights Discourse and Neonatal Euthanasia, 76 Cal. L. Rev. 151, 157 (1988). Schneider has argued that when 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,
plex to be decided according to constitutional principles that per-
manently balance basic values, setting them in constitutional stone.
Robertson's quest to constitutionalize conception is misguided be-
cause it would freeze the law in an area of rapidly developing tech-
nology with as yet unknown and potentially far-reaching implications for society.

The selection of a doctrinal framework thus sets the terms of the
debate. The property law model stimulates discussion on the issue
of ownership of the human body; the family law model encourages
exploration of the meaning of parenthood; the constitutional law
model probes the dimensions of constitutional privacy rights and
their alienability; and the contract law model presumes alienability
but inquires as to what market regulations enhance efficiency.

Each model's distinctiveness lies in the questions it asks and not
necessarily in the answers it supplies. The selection of a particular
model matters because legal rhetoric transmits cultural messages
about the values of our society. As Mary Ann Glendon observes,
"the way we name things and discuss them shapes our feelings,
judgments, choices, and actions"; thus we must be careful not to
become prisoners of our own language, "suspended in webs of sig-
nificance" that we ourselves have spun. Because each model car-
ders its own set of unwritten assumptions, the choice between

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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.

Id.

70. Of course, this description of the different models magnifies their differences,
whereas in reality the boundaries between these modes of discourse are somewhat blurry.
The market model, for example, relies upon the protection of both private property and
freedom of contract, see Radin, supra note 44, at 1888 ("The legal infrastructure of capitalism
— what is required for a functioning laissez-faire market system — includes not merely private
property, but private property plus free contract."). and intentional visions of
parenthood breach the artificial barrier between family law and contract law.

71. Mary Ann Glendon writes that the "'legalization' of popular culture is both cause
and consequence of our increasing tendency to look to law as an expression and carrier of the
few values that are widely shared in our society." Mary Ann Glendon, RIGHTS TALK:

72. Id. at 11; see also Katherine T. Bartlett, Re-Expressing Parenthood, 98 Yale L.J. 293,
295 (1988) (arguing that the law, by focusing upon parental responsibility rather than paren-
tal rights, should "express a view of parenthood based upon the cycle of gift rather than the
cycle of exchange"). Another commentator has described the impact of selecting the market
model as follows:

Market rhetoric... would indeed transform the texture of the human world. This rhet-
ic leads us to view politics as just rent seeking, reproductive capacity as just a scarce
good for which there is a high demand, and the repugnance of slavery as just a cost. To
accept these views is to accept the [inferior] conception of human flourishing they imply
... [and] [a]n inferior conception of human flourishing disables us from conceptualizing
the world rightly.

Radin, supra note 44, at 1884.
models is more than just a choice about what language to use: it is more fundamentally a choice about which questions to ask and which to mask, about what to reveal and what to conceal.