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## Assisted Reproductive Equality: An Institutional Analysis

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# ASSISTED REPRODUCTIVE EQUALITY: AN INSTITUTIONAL ANALYSIS

Andrew B. Coan<sup>†</sup>

*Should the constitutional right to procreative liberty extend to assisted reproductive technologies? Unlike most commentators to address this question, Radhika Rao appreciates that the answer turns not only on constitutional values but also on the competence of the institutions called upon to carry those values into effect. On that basis, she urges courts to focus on reproductive equality rather than recognizing a broad liberty right or leaving the regulation of assisted reproductive technologies wholly to an unsupervised political process. This brief symposium contribution assesses the institutional promise and limitations of Rao's reproductive equality approach.*

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## INTRODUCTION

Nearly forty years after *Roe v. Wade*,<sup>1</sup> a woman's constitutional right to terminate her pregnancy remains intensely controversial. The affirmative right to have children, by contrast, attracts relatively little attention and even less controversy. Virtually no one thinks today's

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

Supreme Court should (or would) permit population control measures akin to China's one-child policy, much less the sort of mandatory sterilization it upheld in *Buck v. Bell*<sup>2</sup> during the heyday of American eugenics. Rather, among ordinary citizens and constitutional lawyers alike, there seems to be an unspoken consensus that *Skinner v. Oklahoma*<sup>3</sup> was right to describe procreative liberty as "one of the basic civil rights of man."<sup>4</sup>

Behind this apparent consensus, however, lurks an important ambiguity. Just how far does the procreative liberty protected by the Constitution extend? Does it encompass a right to use noncoital methods of reproduction like artificial insemination and in vitro fertilization? A right to select the sex—or even the genes—of one's offspring using techniques such as flow cytometry<sup>5</sup> and preimplantation genetic diagnosis (PGD)?<sup>6</sup> A right to pay for gametes for use in any or all of these processes? Over the past fifteen years or so, these questions have attracted increasing attention from scholars.<sup>7</sup> With rapid advances in the development of assisted reproductive technologies, dramatic expansion in their use, and persistent calls for more stringent regulation, courts will soon have little choice but to follow suit.

How should they proceed? Commentators generally agree that the Supreme Court's prior decisions neither compel nor preclude extension of the constitutional right to procreative liberty beyond coital reproduction.<sup>8</sup> Attention has therefore focused on the normative question: Should courts extend the right to procreative liberty to

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<sup>2</sup> 274 U.S. 200 (1927).

<sup>3</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

<sup>4</sup> *Id.* at 541.

<sup>5</sup> Flow cytometry uses a fluorescent dye to sort sperm by sex. All eggs carry a female sex chromosome, so it is the sex chromosome of the fertilizing sperm that determines the sex of any resulting child. See John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 12 (2004).

<sup>6</sup> Preimplantation genetic diagnosis, or PGD, involves the biopsy and genetic or chromosomal analysis of a single cell from an embryo created through in vitro fertilization, allowing prospective parents to test for a range of genetic or chromosomal disorders. See Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL'Y L. & ETHICS 283, 290–91 (2008).

<sup>7</sup> See, e.g., JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994); Carter Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 5–6 (2007); King, *supra* note 6, at 326–29; Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077 (1998); Sonia M. Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514 (2008).

<sup>8</sup> See, e.g., Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1462–68 (2008) [hereinafter Rao, *Equal Liberty*] (acknowledging that procreative liberty decisions could be read as extending ARTs but urging against it); Suter, *supra* note 7, at 1530–36 (same).

assisted reproductive technologies (ARTs)? If so, which ones, and in what circumstances? Answers range widely but share one basic feature in common: they confuse the question whether different forms of procreative liberty are worthy of protection with the question whether courts in particular should protect them. These are different questions and will often have different answers, as I have argued at length elsewhere.<sup>9</sup>

I shall not repeat those arguments here. Instead, in this brief symposium contribution, I want to focus on one approach that does not fall victim to such confusion—that of Radhika Rao.<sup>10</sup> Unlike most other commentators in this area, Rao appreciates that normative constitutional analysis must attend not only to goals and values but also to the capacities of the institutions that carry (or attempt to carry) those goals and values into effect. On this basis, among others, she urges courts to focus on reproductive equality rather than recognizing a broad liberty right or leaving the regulation of assisted reproductive technology wholly to the political process. Only a reproductive equality approach, she argues, is consistent with the judiciary's special institutional role in the American system of government.<sup>11</sup>

For her sensitivity to institutional considerations, Rao deserves credit. Her analysis of those considerations, however, leaves many important questions unanswered. On one hand, she overlooks important limitations of the judiciary that, given certain plausible assumptions about the capacities of courts and legislatures, might well recommend a rule of minimal constitutional protection over Rao's reproductive equality approach. On the other hand, she glosses over shortcomings of the political process that, given different but equally plausible assumptions, might recommend a strong, judicially enforced liberty right. Perhaps most important, she fails to carefully compare the courts and the political process, generally focusing on the flaws of one or the other in isolation. As a result, she overlooks the possibility that a seriously flawed judiciary (or legislature) might nevertheless be the best available option.

In the discussion that follows, I elaborate on the institutional promise and limitations of Rao's reproductive equality approach. Part I briefly summarizes that approach, situating it in the relevant literature and highlighting its self-consciously institutional foundations. Part II demonstrates the shakiness and incompleteness of those foundations. I do not rule out the possibility that Rao's

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<sup>9</sup> See Andrew B. Coan, *The Future of Reproductive Freedom* (October 24, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1697347](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697347).

<sup>10</sup> Rao, *Equal Liberty*, *supra* note 8.

<sup>11</sup> See *id.* at 1459–60.

approach might ultimately prove correct, but substantial additional work would be required to support that conclusion persuasively.

In fairness to Rao, I should emphasize that her institutional argument is only one part of a broader case for her reproductive equality approach. She plainly did not set out to perform a complete comparative institutional analysis, and I do not mean to criticize her for failing at something she had no notion of attempting. On the other hand, Rao quite explicitly presents institutional considerations as a compelling reason for adopting her reproductive equality approach. It seems both fair and important to point out how far short her argument falls in this regard. In doing so, my principal object is not to criticize Rao, whose work I admire, but to demonstrate how much more work remains to be done.

A broader takeaway is that comparative institutional analysis is both necessary to sound constitutional reasoning and more complex than many otherwise able constitutional analysts have appreciated.<sup>12</sup> This is hardly a new or an original point, but the problem remains pervasive, which makes it worth revisiting periodically.

### I. REPRODUCTIVE EQUALITY IN CONTEXT

Most discussion of procreative liberty and ARTs has focused on substantive due process. In particular, the sharpest battle lines have been drawn over the question whether freedom to use ARTs qualifies as a fundamental liberty for purposes of due process analysis. There is ample ambiguity in the Supreme Court's prior decisions to support significant debate. Most basically, the Court has never addressed the constitutionality of regulating ARTs. Indeed, it has squarely addressed the due process right to procreate—as opposed to the right *not* to procreate—only once, in the long since discredited *Buck v. Bell*.<sup>13</sup> Nevertheless, there is substantial dicta in the Court's due process decisions extolling “the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>14</sup> And, of course, as noted earlier, *Skinner v. Oklahoma*

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<sup>12</sup> Rao is in excellent company here. See generally NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994) (criticizing shallowness of institutional analysis among eminent constitutional scholars, including John Hart Ely, Bruce Ackerman, and Richard Epstein); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (making a similar critique of William Eskridge and John Manning, among others).

<sup>13</sup> *Buck v. Bell*, 274 U.S. 200 (1927) (rejecting procedural and substantive due process challenges to mandatory sterilization of the “feeble-minded”).

<sup>14</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 565 (1989); *Roe v. Wade*, 410 U.S. 113, 169–70 (1973); see also *Planned Parenthood*

memorably described procreation as “one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.”<sup>15</sup>

These statements would supply plausible precedential cover for the Court to recognize a broad right to procreative liberty extending to all manner of ARTs. But as most commentators have recognized, the cases hardly compel such a result.<sup>16</sup> Attention has therefore turned to the normative question: *Should* the right to procreative liberty be interpreted as encompassing the use of some or all ARTs? Answers to this question have varied widely.<sup>17</sup> Virtually all commentators, however, have understood it as primarily a question about constitutional values. Proponents of a broad right see the Court’s prior decisions as embodying an attractively broad vision of individual autonomy over most or all reproductive decisions. They see no reason constitutional protection should vary with the technology involved.<sup>18</sup> Opponents of a broad right, by contrast, trace the Court’s past decisions to some important constitutional value implicated by abortion, contraception, and forced sterilization, but not the use of ARTs. The most common examples are bodily integrity and sexual equality.<sup>19</sup>

Radhika Rao takes a different approach. Though she is hardly insensitive to the importance of constitutional values, she understands that they are never the only factor in constitutional analysis. Institutions matter, too. Indeed, any given value may be consistent with multiple and radically different constitutional rules, depending on the relative competence we attribute to courts and other relevant decision-making institutions. Moreover, in some cases, consideration of institutional competence may lead adherents of apparently

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of *Se. Pa. v. Casey*, 505 U.S. 833, 846–53 (1992) (reaffirming this principle as stated in the *Roe*).

<sup>15</sup> 316 U.S. 535, 541 (1942); *Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977) (quoting *Skinner*, 316 U.S. at 541).

<sup>16</sup> *See, e.g.*, Suter, *supra* note 7, at 1530–36 (acknowledging that procreative liberty decisions could be read as extending to ARTs); Rao, *Equal Liberty*, *supra* note 8, at 1462–64 (same).

<sup>17</sup> Compare ROBERTSON, *supra* note 7 (arguing for a broad right that extends to most uses of assisted reproductive technology), with Suter, *supra* note 7 (arguing for a narrower right of “relational autonomy,” limited by the effects of reproductive decisions on individuals, families, and the community at large).

<sup>18</sup> *See, e.g.*, John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 426 (1996).

<sup>19</sup> *See, e.g.*, Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 856 (2007) (“Cloning and other genetic technologies are not necessary to ameliorate women’s inequalities with men, and indeed . . . one can easily imagine how these technologies might someday be used to undermine women’s equality.”); Suter, *supra* note 7, at 1545 (“Because IVF and [PGD] disembodied reproduction, it is difficult to protect these technologies under such a theory of reproductive rights.”).

competing values to converge on a single constitutional rule, despite their normative disagreements.<sup>20</sup>

Drawing on these basic but frequently overlooked insights, Rao rejects a broad due process right to use ARTs. But she also rejects the other extreme, a rule of no (or minimal) constitutional protection. Instead, her reproductive equality approach would generally permit ART regulation aimed at particular technologies, techniques, and even purposes, but would not permit regulation that discriminates on the basis of status or group membership.<sup>21</sup> She would, for example, permit state or national legislatures to ban a technique like PGD altogether.<sup>22</sup> She would also permit them to ban the use of any ART for the purpose of sex selection.<sup>23</sup> She would not, however, permit regulations limiting the use of PGD or in vitro fertilization (IVF) to married or heterosexual couples. Under her approach, such a ban would unconstitutionally discriminate on the basis of status.<sup>24</sup>

There is only one form of status distinction Rao would not subject to heightened scrutiny: regulations that afford infertile persons greater access to ARTs. The example she offers is Italy's Law 40, which restricts ART access to infertile couples.<sup>25</sup> Her rationale for permitting such regulations is similar to that frequently offered to support affirmative action (or reasonable accommodations for the disabled). Not all status distinctions are created equal. When such distinctions reflect a benevolent effort to level the playing field, rather than a lack of equal respect, they are not constitutionally problematic, as Rao sees it.

Rao's defense of this approach is based in part on her substantive commitment to equality and in part on her interpretive judgment that equality is a constitutionally significant value. Nevertheless, at nearly every stage, her argument draws heavily on institutional considerations. A broad liberty right, she contends, would require

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<sup>20</sup> See Coan, *supra* note 9 (discussing these points at length in the context of ARTs and procreative liberty); see also Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889 (2003) ("[I]nstitutional analysis may . . . allow interpreters who hold different commitments to converge on particular interpretive rules while bracketing disagreements about their preferred first-best accounts.").

<sup>21</sup> See Rao, *Equal Liberty*, *supra* note 8, at 1459–60.

<sup>22</sup> See *id.* at 1481–82.

<sup>23</sup> See *id.* at 1483.

<sup>24</sup> More precisely, it would be a constitutionally suspect discrimination on the basis of status, subject to heightened judicial scrutiny. Rao does not believe that distinctions based on marital status or sexual orientation could survive such scrutiny, but she hints that the right sort of age-based distinction might. See *id.* at 1475–78.

<sup>25</sup> Law 40/2004 of Feb. 19, 2004, 2004 Gazz. Uff. No. 45 (Feb. 24, 2004); see Rao, *Equal Liberty*, *supra* note 8, at 1458–59. There are other aspects of Law 40 Rao would view as unconstitutional if they were enacted in the United States. Most notable is its restriction of ART use to "stable" heterosexual couples. *Id.* at 1476–78.

courts to make too many policy judgments better left to political decision-makers.<sup>26</sup> Minimal rational basis review, on the other hand, would leave politically powerless groups subject to the unjust and unequal deprivations of the powerful.<sup>27</sup> A chief selling point of Rao's reproductive equality approach is that it avoids both horns of this dilemma. When the political process can most be trusted, Rao counsels deference. When it cannot, she counsels close judicial supervision. The argument is quintessentially institutional.

## II. INSTITUTIONAL OVERSIGHTS

In a field where institutional issues have received virtually no attention, Rao deserves credit for recognizing their importance. Unfortunately, she seems not to appreciate their complexity. In particular, she fails to recognize the significant demands her reproductive equality approach would place on an imperfect judiciary. She also overlooks serious limitations of the political process. Most fundamentally, she never seriously compares the competence of the judiciary and the political process with respect to ART regulation.

### A. *Imperfect Courts*

Rao recognizes that the judiciary is an imperfect institution. Indeed, that is her primary argument for opposing a broad constitutional right to use ARTs. For some reason, however, she loses sight of this fact in considering the merits of her own reproductive equality approach. Among other difficult tasks, that approach would require courts to distinguish regulations targeting conduct from those targeting status—a notoriously tricky matter. It would also require courts to determine when, if ever, group status justifies differential regulatory treatment. Finally, it would require courts to distinguish invidious status discrimination from benevolently motivated status accommodations, which Rao would not subject to heightened scrutiny. In each of these tasks it seems obvious that courts would make mistakes.

Let us take them one by one. It is a core tenet of the reproductive equality approach that regulations of ART targeting conduct are distinct from those targeting status. For present purposes, we can assume that this distinction exists in principle.<sup>28</sup> The important point

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<sup>26</sup> *Id.* at 1461.

<sup>27</sup> *Id.* at 1475.

<sup>28</sup> In fact, its metaphysics are complicated and contested in ways that Rao fails to grapple with. Cf. Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 445 (1997) (describing the "amplitude of conceptual relationships between status and conduct" in the context of sexual



for institutional analysis is that it is difficult to apply in practice. Consider the following examples: (1) a statute banning the use of ARTs by persons taking anti-depressants or anti-psychotics; (2) a statute requiring ART users to demonstrate the financial means to care for a child; (3) a statute banning ART altogether. Any one of these could be plausibly characterized as a regulation targeting conduct (use of particular drugs, conceiving a child one is unable to support, use of ART) or a status-based discrimination (against the mentally ill, the poor, the infertile). Even assuming that one characterization is uniquely correct in each case, courts are exceedingly unlikely to get it right every time. Just how unlikely is, of course, an empirical question. But it is a question Rao never asks.

That is only the beginning. Once a court identifies a regulation as status-based discrimination, Rao's reproductive equality approach requires it to consider whether the regulation is nevertheless justified by an important state interest.<sup>29</sup> Consider the following possibilities: (1) a statute restricting ART use to couples in stable long-term relationships; (2) a statute banning ART use by the mentally ill; (3) a statute banning ART use by persons with prior convictions for physical or sexual abuse of a child. Each of these hypothetical statutes is at least plausibly connected to the state's indisputably important interest in child welfare. But whether that connection is strong enough in any given case turns on complex judgments of fact and value of the sort courts are bound to get wrong some of the time. Indeed, Rao cites judicial fallibility (and lack of legitimacy) in such matters as an important reason for rejecting a broad liberty right to use ART. Just how significant this problem will be in the narrower class of cases implicating reproductive equality is a difficult empirical question. But again, it is one that Rao fails to ask.

Finally, Rao's approach requires courts to distinguish between invidious status-based discrimination and benevolently motivated status accommodations. In the affirmative action context, of course, the distinction between benign and malign status distinctions has proven politically explosive. It has also, according to at least some judges, proven difficult to apply in practice.<sup>30</sup> Both of these

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orientation).

<sup>29</sup> See, e.g., Rao, *Equal Liberty*, *supra* note 8, at 1475-78 (recognizing age-based classifications as potentially valid in light of the governmental interest in children being born to living parents able to provide adequate care for them).

<sup>30</sup> Perhaps the most famous expression of this view is *City of Richmond v. J. A. Croson Co.* 488 U.S. 469, 493 (1989) (plurality opinion) ("Absent searching judicial inquiry . . . there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial

complications would almost certainly be less serious in the context of ART regulation, where there is only one logical candidate for accommodation—the infertile—and no long history of social conflict pitting that group against others. Still, real difficulties might emerge. Consider the following examples: (1) a health insurance regulation mandating subsidized coverage of IVF but prohibiting such coverage of contraceptives; (2) a statute limiting ART use, including PGD use for medical and genetic enhancement purposes, to the infertile.<sup>31</sup> Both of these could plausibly be characterized as remedying an arbitrary disadvantage suffered by the infertile or as granting them a special privilege not enjoyed by persons capable of coital reproduction. Whatever the correct answer, courts are unlikely to arrive at it every time.

The point is not that courts should stay out of the reproductive equality business. It is that we cannot know whether they should do so without a much more rigorous institutional analysis than Rao has to offer. Such an analysis could cut in any number of directions. For example, if courts applying the reproductive equality approach would mistakenly uphold too many discriminatory regulations, they might do better by enforcing a broad liberty right to use ARTs.<sup>32</sup> Conversely, if the reproductive equality approach would mistakenly invalidate too many nondiscriminatory regulations (or justified status-based regulations), courts might do better by subjecting all ART regulations to minimal rational basis review. Of course, both of these approaches would produce their own share of mistakes, which might well be more serious than the mistakes courts would make

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politics.”); *see also* *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 778 n.27 (2007) (Thomas, J., concurring) (“It is no answer to say that these cases can be distinguished from *Brown* because *Brown* involved invidious racial classifications whereas the racial classifications here are benign. How does one tell when a racial classification is invidious?” (citation omitted)); Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 24 (“The exception [for benign racial classifications] is inadmissible, because it requires the court not only to consider whether there is discrimination but to decide whether the discrimination harms or hurts a particular racial group, and to weigh the competing claims of different racial groups, and the additional inquiries rob the principle of its precision and objectivity.”). *But see* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564 n.12 (1990) (“We are confident that ‘an examination of the legislative scheme and its history’ will separate benign measures from other types of racial classifications.” (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (citation omitted))).

<sup>31</sup> PGD, recall, allows parents to select embryos for implantation on the basis of their genetic make-up. Obviously, that option is unavailable to couples that reproduce coitally.

<sup>32</sup> Rao alludes to this possibility in passing at the very end of her article, but says it would be justified only if the political process is more deviously discriminatory than she believes it to be. *See* Rao, *Equal Liberty*, *supra* note 8, at 1487. She fails to recognize that it might also be justified as a response to judicial fallibility.

applying Rao's approach. She has offered no compelling reason, however, to believe that this is the most likely scenario.

### *B. Imperfect Politics*

Rao's analysis of the political process suffers from similar problems. As with the judiciary, she understands that the political process is imperfect. Indeed, political malfunction is a primary justification for her reproductive equality approach. But somehow she forgets this fact when it comes to conduct-based (as opposed to status-based) regulation of ARTs. Assisted reproduction, she states flatly, "does not involve the interests of a group that lacks political power."<sup>33</sup> This is unsatisfactory on a number of levels.

To begin with, political power, like political malfunction, is relative. It is true that prospective ART users are, on average, financially better off than most other voters. They can also probably count on the political support of the booming fertility industry. And unlike many other groups for which the Court has shown special constitutional solicitude, ART users do not suffer from any significant historically entrenched disadvantage or stigma. Still, as a group, these users are numerically *tiny*, especially for the more specialized ARTs like PGD, which seem more likely to be strictly regulated than IVF.<sup>34</sup> At any given time, moreover, many members of this group will be unaware of the conditions—infertility or serious heritable diseases—that might eventually make ART attractive to them. For all of these reasons, prospective ART users are almost certainly substantially less powerful than many groups that Rao would grant special judicial protection—notably, women and racial minorities.

Perhaps more important, prospective ART users face a powerful organized opposition in the religious right and allied pro-life groups.<sup>35</sup> This is especially true in the Deep South, where regulations that would sharply curtail IVF and functionally prohibit PGD have already received serious consideration at the state level.<sup>36</sup> As technology advances, permitting PGD to be used for a broader range of traits and perhaps rendering human reproductive cloning safe and effective, the

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<sup>33</sup> *Id.* at 1478.

<sup>34</sup> *Cf.* Coan, *supra* note 9, at 128 n.103 (noting greater likelihood of regulation curtailing human cloning and genetic enhancement applications of PGD as compared with PGD used for medical purposes).

<sup>35</sup> Many such groups object to some or all ARTs on the grounds that they require the destruction of embryos and amount to "playing God" with the human reproductive process. *See, e.g.,* King, *supra* note 6, at 319 (discussing these objections).

<sup>36</sup> *See* Posting of William Saletan, Human Nature: The IVF Battlefield, <http://www.slate.com/blogs/blogs/humannature/archive/2009/03/08/the-ivf-battlefield.aspx> (Mar. 8, 2009, 11:22 EST).

conditions for majoritarian bias against users of these ARTs are likely to become increasingly ripe.<sup>37</sup> Indeed, public opposition to reproductive cloning and genetic enhancement applications of PGD already appears to be far higher than opposition to abortion at any time since *Roe v. Wade* and also higher than contemporaneous opposition to *Brown v. Board of Education*.<sup>38</sup> In such an environment, it is far from clear that the interests of ART users will receive appropriate consideration.

Rao makes two other points about the reliability of the political process in the context of ART regulation. Both are problematic.

The first is a casual assertion that legislatures are the appropriate institution to resolve controversial policy disputes.<sup>39</sup> Rao is not entirely clear about the basis for this. But to the extent it is distinguishable from her subsequent invocation of the countermajoritarian difficulty, it seems likely to rest on the commonly presumed superiority of legislative fact-finding. That presumption is hardly baseless. Legislatures do have formidable fact-finding capacities. But as Douglas Laycock points out, that does not mean they actually engage in serious factual investigations.<sup>40</sup> Indeed, their electoral accountability often leads them to accord significant weight to public views that are deeply ignorant and analytically confused.<sup>41</sup> The problem seems likely to be especially pronounced with respect to emerging technologies like ART, which are not only new and complex but also the subject of far-fetched science-fiction scenarios that seem to have greatly warped public views.<sup>42</sup>

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<sup>37</sup> See Coan, *supra* note 9, at 143–44 (elaborating the reasons for this).

<sup>38</sup> Compare Matthew C. Nisbet, *Public Opinion About Stem Cell Research and Human Cloning*, 68 PUB. OPINION Q. 131, 150–51 (2004) (reporting consistent and robust opposition to most uses of human reproductive cloning), and Kathy L. Hudson, *Preimplantation Genetic Diagnosis: Public Policy and Public Attitudes*, 85 FERTILITY & STERILITY 1638, 1641 (2006) (reporting 72% opposition to use of PGD for nonmedical traits), with Samantha Luks & Michael Salamone, *Abortion*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 80, 90 (Nathaniel Persily et al. eds. 2008) (documenting at least plurality support for *Roe v. Wade* since 1974), and Michael Murakami, *Desegregation*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra*, at 18, 21 (documenting slim but solid majority support for *Brown v. Board of Education* in months following decision).

<sup>39</sup> See Rao, *Equal Liberty*, *supra* note 8, at 1461 (defending reproductive equality approach “because it does not call upon courts to make controversial choices as to which acts are worthy of constitutional protection”).

<sup>40</sup> See Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1174–75 (2007) (“Legislators can do serious investigations, but they rarely do. . . . They face constant fundraising, constituent service, importuning by lobbyists, political posturing and spin control, and thousands of bills in every session on every conceivable topic. They cannot possibly become expert on more than a few of those bills.”).

<sup>41</sup> See generally MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996) (describing widespread public ignorance).

<sup>42</sup> Cf. Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987,

Rao's second point is a similarly casual invocation of the countermajoritarian difficulty. Her implicit premise here is that any judicial invalidation of ART regulation must be against the wishes of a majority of the public. This view ignores a voluminous literature suggesting that the political process is frequently more responsive to well-organized minorities than it is to diffuse majorities.<sup>43</sup> Thus, even if ART users are able to muster majority support (as they have done on some issues),<sup>44</sup> there is no guarantee that support will protect them against burdensome regulation. Rao also ignores a complementary body of literature arguing that courts are frequently more in tune with national public opinion than legislatures, at least at the state level.<sup>45</sup> Finally, she ignores the complication that, on most policy issues of any complexity, a majority of the public has no well-formed view for courts to thwart (where well-formed is defined as internally coherent, consistent over time, and not easily susceptible to manipulation by question framing).<sup>46</sup>

Again, the point is not that Rao is wrong in rejecting a broad liberty right to use ART. It is that we cannot know whether she is wrong or right without a much more rigorous institutional analysis than Rao supplies. Here, too, such an analysis could cut in any number of directions. The political process might mishandle ART regulation so badly that courts would do best by enforcing a broad liberty right. On the other hand, courts enforcing such a right—or Rao's narrower reproductive equality approach—might do even worse than the badly flawed political process.<sup>47</sup> In that case, minimal rational basis review would be the most sensible course. Finally, Rao could be right that courts will do better than legislatures if and only if they restrict their attention to status-based discrimination. The

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996, 1005 (2002) (discussing scientific misconceptions that appear to underlie public unease about reproductive cloning); see also Elizabeth Price Foley, *The Constitutional Implications of Human Cloning*, 42 ARIZ. L. REV. 647, 658–77 (2000) (same).

<sup>43</sup> This, of course, is a core tenet of public choice theory, on which the classic statement is George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGT. SCI. 3 (1971). But see STEVEN P. CROLEY, *REGULATION AND THE PUBLIC INTERESTS* (2008) (vigorously critiquing public choice theory as comprehensive account of administrative agency behavior).

<sup>44</sup> See, e.g., Hudson, *supra* note 38, at 1641 (reporting 68% support for PGD to select embryos free from fatal childhood disease).

<sup>45</sup> See, e.g., Corinna Barrett Lain, *The Countermajoritarian Classics (and an Upside Down Theory of Judicial Review)* (August 31, 2010), available at <http://ssrn.com/abstract=1669560>. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009).

<sup>46</sup> See, e.g., James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 23 POL. BEHAV. 225 (2001); Thomas E. Nelson & Donald R. Kinder, *Issue Frames and Group-Centrism in American Public Opinion*, 58 J. POL. 1055 (1996).

<sup>47</sup> This is true whether “better” and “worse” are defined by the relative quality of fact-finding or relative consistency with majority preferences.

evidence she has offered, however, is far from sufficient to prove her case.

### *C. Imperfect Analysis*

The foregoing discussion boils down to this: at too many points, Rao is too content to rest her argument on timeworn institutional folklore. In a world of complex policy problems and complex institutions, this approach is insufficient to support meaningful conclusions. An even more fundamental problem is Rao's failure to seriously compare the capacities of different institutions. This point is implicit in the previous sections, but it is sufficiently important and sufficiently reflective of broader tendencies in constitutional analysis to merit a few additional words here.

The basic point is simply expressed. Intelligent institutional choice requires a comparison of the plausible institutional alternatives. It is never enough to show that one institution functions well or poorly in the abstract. What matters is whether it functions better or worse than other institutions that might be called upon to decide the issue in question. So stated, the point seems glaringly obvious. But it is one that many eminent constitutional analysts have overlooked. That group includes John Hart Ely, the main inspiration for Rao's "representation-reinforcement" approach to reproductive liberty.<sup>48</sup>

Rao makes the same mistake. Where ART regulation discriminates on the basis of group status, she treats the untrustworthiness of the political process as a conclusive argument in favor of aggressive judicial review. Where ART regulation does not so discriminate, she treats the judiciary's lack of accountability as a conclusive argument in favor of leaving the issue to a basically unsupervised political process. In neither case does she consider the possibility that the alternative may be even worse.

As we have already seen, that possibility is very real. Even if political judgments are less trustworthy when legislators exempt themselves from the sting of their own laws,<sup>49</sup> courts might overestimate the extent of this problem, leading them to strike down well-justified regulations. Even if they appraise the problem accurately, they might still reach less reliable conclusions than a

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<sup>48</sup> See KOMESAR, *supra* note 12, at 197 (noting that Ely "define[s] the role of the judiciary in terms of the performance of the political process without parallel comparison with the judiciary itself"); Rao, *Equal Liberty*, *supra* note 8, at 1461 (describing her approach as "grounded in a process-based perspective reminiscent of John Hart Ely's").

<sup>49</sup> See Rao, *Equal Liberty*, *supra* note 8, at 1488 ("Equal liberty preserves fundamental freedoms by ensuring that legislators deprive themselves of the same rights they would deny to others.").

biased legislature, however reliability is defined. The opposite, however, is equally true. Even though courts are not electorally accountable, legislatures might be even more countermajoritarian (in particular contexts) or even worse at making controversial policy judgments (because the public views they respond to are ignorant or incoherent).

The problem is even more serious than it appears at first blush. It is not merely that comparison is an analytic necessity and that all institutions are highly imperfect. It is also that institutions tend to move together. When legislatures are at their worst, courts will tend to be also, and vice versa. There are differences, of course, or institutional choice would be of no consequence. Occasionally, these differences are very substantial. In general, however, the major decision-making institutions in American society are driven by similar dynamics of participation. They therefore tend to malfunction at the same times and for the same reasons.<sup>50</sup>

The upshot is that a “single-institutional”<sup>51</sup> analysis like Rao’s cannot function usefully even as a rough-and-ready shortcut. If the judiciary or the political process is flawed, the odds are that any substitute institution will also be flawed and for similar reasons. It may be less seriously flawed, in which case substitution will make sense. But one can reach that conclusion only through serious comparison of all the relevant alternatives.

#### CONCLUSION

The constitutional law of proactive liberty is about to enter a new era. Past experience provides no firm guide as to how or even in which direction courts should proceed. Many academic commentators have attempted to chart a course forward, but virtually all have understood the task as primarily a matter of constitutional values. Only Radhika Rao has meaningfully recognized the importance of institutional considerations. As we have seen, however, her analysis leaves much work to be done.<sup>52</sup> The limitations of Rao’s approach provide an opportunity to reflect on the state of institutional analysis

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<sup>50</sup> This is a central insight of Neil Komesar’s participation-centered approach to institutional analysis. See KOMESAR, *supra* note 12, at 27 (“The same factors that cause one alternative institution to vary often affect all the alternative institutions. Changes in numbers, per capita stakes, and the costs of participation . . . cause the ability of all the major institutions to vary, often in the same direction.”). For an application of this approach to ART regulation, see Coan, *supra* note 9, at 136–49.

<sup>51</sup> I borrow this term from Komesar. See KOMESAR, *supra* note 12, at 6 (defining “single institutionalism” as “the focus on only one institution”).

<sup>52</sup> For a fuller account of the magnitude of this challenge, see Coan, *supra* note 9.

more generally. Among constitutional scholars, Rao is by no means alone in her reliance on crudely incomplete institutional stereotypes. Nor is the single-institutional character of her approach out of the ordinary. We can and must do better. The future of reproductive equality, among other things, depends upon it.



