

12-2011

## Is There a Constitutional Right to Select the Genes of One's Offspring?

Andrew B. Coan

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### Recommended Citation

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# Is There a Constitutional Right to Select the Genes of One's Offspring?

ANDREW B. COAN\*

*The Supreme Court has long recognized a due process right to make deeply personal decisions such as whether to bear or beget a child. Might this right extend to selecting the genes of one's offspring? Perhaps more important, should courts interpret it to do so? Thus far, discussion of these questions has focused almost exclusively on the normative goals that a constitutional commitment to procreative liberty should be taken to embrace. That is undoubtedly an important issue, but it cannot tell us whether courts are the institution best suited to carry any particular goal into effect. This is a basic but frequently overlooked point in constitutional analysis and one that has received next to no attention in the context of assisted reproductive technologies. This Article begins to remedy the oversight. In so doing, it has two overlapping goals: to enrich the constitutional analysis of emerging issues in reproductive liberty and to use those issues as a vehicle for exploring the complexities of institutional analysis more generally.*

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## TABLE OF CONTENTS

INTRODUCTION .....	234
I. A HAZY SHADE OF LIBERTY .....	238
II. THE IMPORTANCE OF INSTITUTIONS.....	241
III. A SECOND LOOK AT THE CASES .....	246
A. THE COURT’S IMPLICIT INSTITUTIONAL ANALYSIS .....	246
1. <i>History</i> .....	247
2. <i>Public Consensus</i> .....	249
3. <i>Empirical Questions</i> .....	251
4. <i>Politically Vulnerable Groups</i> .....	252
B. PUTTING IT ALL TOGETHER.....	254
IV. A MORE SYSTEMATIC APPROACH.....	260
A. ASKING THE RIGHT QUESTIONS .....	261
B. A RATIONAL CHOICE ANALYSIS .....	264
1. <i>Step One: Stakeholders</i> .....	266
2. <i>Step Two: Costs and Benefits of Participation</i> .....	267
3. <i>Step Three: Comparing Institutions</i> .....	270
4. <i>Takeaways</i> .....	274
V. THE CHALLENGES OF INSTITUTIONAL CHOICE.....	275
A. THE NORMATIVE GAP .....	276
1. <i>Measuring the Gap</i> .....	278
2. <i>Closing the Gap</i> .....	279
B. DISENTANGLING NORMATIVE AND INSTITUTIONAL CONSIDERATIONS .....	281
C. UNCERTAINTY AND THE PROBLEM OF PERSPECTIVE .....	285
D. BEYOND ERROR COSTS .....	290
1. <i>Decision Costs</i> .....	290
2. <i>Dynamic Institutional Effects</i> .....	292
CONCLUSION .....	294

## INTRODUCTION

For the past four decades in the United States, “reproductive freedom” has largely been shorthand for a woman’s right to terminate her pregnancy without governmental interference. That is about to change—not this year or next, but soon.

Already a number of technologies allow prospective parents some measure of control over the chromosomal and genetic makeup of their

offspring. These range from techniques for preconception sex selection<sup>1</sup> to preimplantation genetic diagnosis of embryos<sup>2</sup> to prenatal tests for assessing the genetic makeup of a developing fetus.<sup>3</sup> In the case of prenatal testing, the only genetic control afforded parents is the option *not* to have offspring with a particular genetic or chromosomal makeup, exercised through selective abortion. At some point in the future, prospective parents might also have the option of creating and implanting embryos through somatic cell nuclear transfer cloning, which would share the same genome as another human being, or of engaging in germ-line genetic manipulations, to knock out undesirable genes or introduce desirable ones.<sup>4</sup>

With the exception of prenatal testing, which is used in some form in a substantial majority of pregnancies, the presently available technologies are expensive and have been used relatively infrequently, primarily to avoid the birth of children with very serious heritable diseases like Tay-Sachs and chromosomal abnormalities like Down Syndrome. But geometric advances in knowledge of the human genome and improvements in genetic-testing techniques will soon create the option of testing—and selecting—for a much broader range of genetic traits (though almost certainly fewer than have been imagined in some science fiction scenarios).<sup>5</sup> This prospect has generated an extraordinary amount of controversy, with dramatic headlines warning of “designer babies,” “neoeugenics,” even a “posthuman future.”<sup>6</sup>

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1. The most reliable is flow cytometry, which 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) [hereinafter Robertson, *Harm to Offspring*].

2. 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. In vitro fertilization, in turn, involves harvesting eggs from a woman’s ovaries and fertilizing them in a Petri dish for later implantation in the uterus. See Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL’Y L. & ETHICS 283, 290–91 (2008).

3. The most familiar is amniocentesis, which involves the needle extraction of amniotic fluid from the uterus and analysis of the genetic material therein. See *Amniocentesis*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/prenataltesting/amniocentesis.html> (last visited Oct. 31, 2011).

4. Both of these techniques, however, are a very long way from clinical use and may never prove safe or practically feasible. See King, *supra* note 2, at 298–300.

5. Commonly hypothesized examples include hair and eye color, deafness, homosexuality, athletic ability, physical beauty, and intelligence. See *id.* at 300 (describing impending advances). The major constraint on expansion of genetic selection is that all existing—and indeed, foreseeable—techniques require the use of in vitro fertilization, which is invasive, modestly risky for mother and child, imperfectly successful, and above all, expensive. The one exception is preconception sex selection, which can be accomplished through the much simpler and cheaper expedient of artificial insemination. See Robertson, *Harm to Offspring*, *supra* note 1, at 12.

6. See, e.g., FRANCIS FUKUYAMA, *OUR POSTHUMAN FUTURE* 17 (2002) (coining this memorably alarmist term); cf. Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L.J.

Calls for regulation—or outright prohibition—have come from groups as diverse as Christian conservatives<sup>7</sup> and leftist communitarians,<sup>8</sup> both concerned about the risk of turning children into deliberately manufactured commodities; the disability-rights community, concerned that selection against children with disabilities will reduce respect for existing persons with disabilities;<sup>9</sup> and some feminists, concerned that women will be pressured by their male partners and doctors into undergoing physically and emotionally burdensome medical procedures against their own best interests.<sup>10</sup> But opponents of genetic selection face a problem: The Supreme Court has long recognized a due process right to make deeply personal decisions such as whether to bear or beget a child.<sup>11</sup>

Might this right extend to selecting the genes of one's offspring?<sup>12</sup> Perhaps more important, should the courts interpret it to do so? These are difficult questions, on which a substantial and growing body of literature has sprung up over the past fifteen years. There is much of interest in this work. Thus far, however, it has been focused almost exclusively on the normative goals a constitutional commitment to procreative liberty should be taken to embrace. This is an important issue, to be sure. But however it is resolved, the question remains whether courts are the institution best suited to carry any particular goal into effect. To answer that question requires not just careful scientific, policy, and philosophical analysis of the interests implicated by genetic selection, but also close and systematic attention to the comparative competence of courts and other potential decisionmaking institutions.

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897, 922–23 (2007) [hereinafter Suter, *A Brave New World*] (discussing the term “neoeugenics”). See generally PRESIDENT'S COUNCIL ON BIOETHICS, *BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS* (2003).

7. See, e.g., Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679, 687 (1998).

8. See, e.g., MICHAEL J. SANDEL, PUBLIC PHILOSOPHY 207–09 (2005) (arguing that some forms of genetic selection may “erode our appreciation of life as a gift”); Michael J. Sandel, *The Case Against Perfection*, ATLANTIC MONTHLY, Apr. 2004, at 50, 54 (similar).

9. See, e.g., Tim Stainton, *Missing the Forest for the Trees? A Disability Rights Take on Genetics*, 13 J. DEVELOPMENTAL DISABILITIES 50 (2007). But see Adrienne Asch, *Disability Equality and Prenatal Testing: Contradictory or Compatible?*, 30 FLA. ST. U. L. REV. 315, 341 (2003) (expressing grave concerns about the implications of PGD for disabled persons but ultimately “accepting consumerism in the reproductive marketplace”).

10. See, e.g., JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* ix (1993); Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457 (2008).

11. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977); *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

12. Here and henceforward, I leave to one side *prenatal* (as opposed to *preconception* and *preimplantation*) genetic screening, which for constitutional purposes is best understood as *sui generis*, both because of its close linkage with abortion and its exceptionally widespread use.

This is a basic but frequently overlooked point in constitutional analysis<sup>13</sup> and one that has received next to no attention in the existing literature on assisted reproductive technologies.<sup>14</sup>

This Article begins to remedy the oversight. In so doing, it has two overlapping aims. The first is to deepen the constitutional analysis of emerging issues in reproductive liberty. The second is to use those issues as a vehicle for exploring the complexities of institutional analysis more generally. My pursuit of these aims proceeds as follows. Part I briefly surveys the existing law and academic commentary on the constitutionality of regulating genetic selection. Its central conclusion is that existing law neither compels nor precludes recognition of a constitutional right to select the genes of one's offspring.<sup>15</sup> The operative question, therefore, is whether courts *should* extend the right to procreative liberty recognized in prior decisions to the context of genetic selection. Part II considers the two leading academic approaches to that question, using their neglect of institutional issues to demonstrate the centrality of such issues to sound constitutional analysis. Put simply, virtually any view on the proper scope of reproductive liberty in the abstract is consistent with a variety of constitutional rules—ranging from no judicial protection to very strong judicial protection—depending on the relative institutional competencies of courts and other potential decisionmakers.

With this insight in mind, Part III turns back to the relevant case law, reconstructing from it an implicit framework for institutional analysis that other commentators have largely missed. Under that framework, the case for recognizing a constitutional right to select the genes of one's offspring is weak. The Court's approach, however, leaves much to be desired. It is tentative, incomplete, ad hoc, and impressionistic. Part IV therefore turns to the leading academic alternative, a variation on rational-choice theory, which is far more systematic. Applying that approach to the regulation of genetic selection yields much useful information. But it also reveals several important and previously overlooked difficulties in using this approach as a basis for normative

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13. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 49 (1994) [hereinafter KOMESAR, IMPERFECT ALTERNATIVES] (“An analysis based solely on goal choice can never reach conclusions about law and public policy. Any institutionally sophisticated reader confronted with a goals-based analysis . . . can always offer a valid two-word response: ‘So what?’”); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY I (2006) (similar).

14. The one partial exception I am aware of is Rao, *supra* note 10. For an assessment of the promise and limitations of her reproductive equality approach, see generally Andrew Coan, *Assisted Reproductive Equality: An Institutional Analysis*, 60 CASE W. RES. L. REV. 1143 (2010).

15. For the sake of convenience, I will use the terms “constitutional right” and “judicially enforceable constitutional right” interchangeably. I do not mean to imply that the two are in fact equivalent. It is simply that my interest here is confined to whether and when the courts should recognize a constitutional right to procreative liberty.

constitutional analysis. Part V addresses several of these difficulties in depth.

All of this leaves constitutional analysts and especially judges in a pretty pickle. The Article concludes with some thoughts on how each of these groups might proceed in light of the substantial institutional complexities facing them. Most important is the need for greater dialogue on institutional issues, both among academics and between academics and judges.

### I. A HAZY SHADE OF LIBERTY

The scope of the constitutional right to procreative liberty and the extent of its application to genetic-selection decisions is, in a nutshell, unclear. No Supreme Court case since the long-discredited *Buck v. Bell*<sup>16</sup> has squarely addressed the existence of a due process right to procreate. Nor have the lower courts considered the issue in any depth. There is, however, dicta in several Supreme Court decisions stating that the liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments includes “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>17</sup> Elsewhere, the Court has famously described procreation as “one of the basic civil rights of man. . . . fundamental to the very existence and survival of the race.”<sup>18</sup> And as recently as 2003, the Court reaffirmed that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>19</sup>

These statements would provide a plausible precedential basis for the Supreme Court to recognize a broad right to procreative liberty extending to all manner of genetic-selection techniques. But that is by no means the only way to read the relevant precedents. Most of the Court’s pronouncements on procreative liberty were made in decisions involving abortion and contraception.<sup>20</sup> A handful of others were made in the context of mandatory surgical sterilization, intimate personal association, and important child-rearing decisions, all by politically disfavored

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16. 274 U.S. 200, 207–08 (1927) (rejecting procedural and substantive due process challenges to mandatory sterilization of the “feeble-minded”).

17. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 923 (1992); *see also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 565 (1989); *Roe v. Wade*, 410 U.S. 113, 169–70 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

18. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *see also Maher v. Roe*, 432 U.S. 464, 472 n.7 (1977).

19. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

20. *See, e.g., Carey v. Population Servs. Int’l*, 431 U.S. 678, 694 (1977); *Roe*, 410 U.S. at 164; *Eisenstadt*, 405 U.S. at 453–54; *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

minorities.<sup>21</sup> In most instances, the courts that made them were not thinking about a right to procreate (as opposed to a right not to procreate), much less a right to choose the genes of one's offspring in the process. To argue for a constitutional right extending to genetic selection solely on the basis of such dicta would violate what Richard Posner has aptly described as "Lesson Number One in the study of law": that "general language . . . must not be ripped from its context to make a rule far broader than the factual circumstances which called forth the language."<sup>22</sup> The Supreme Court made a similar point in *Washington v. Glucksberg*: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."<sup>23</sup>

Of course, to say that precedent does not compel recognition of a right to engage in genetic selection is not to say it precludes it. Indeed, in some ways, both the logic and the language of the cases seem to invite courts to extend protection to new and emerging technologies in genetic selection. The rhetoric of the opinions is sweeping, and the right to choose the genes of one's offspring certainly shares important attributes in common with the intimate decisions the Court has already accorded constitutional protection. Like abortion, contraception, and intimate sexual association, decisions relating to genetic selection are deeply personal—in many cases, they are made in the context of marriage or another intimate relationship—and they will frequently affect an individual or couple's decision whether to reproduce at all.<sup>24</sup> Even where

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21. *Lawrence*, 539 U.S. at 574 (invalidating a criminal prohibition on homosexual sodomy); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (upholding the right of the Amish to withdraw their children from public schools); *Skinner*, 316 U.S. at 541–42 (invalidating a mandatory sterilization law that applied to chicken thieves but not embezzlers); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating a compulsory public education law as applied to students of Catholic parochial school); *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923) (invalidating a state law against teaching German to elementary students).

22. *Fed. Deposit Ins. Corp. v. O'Neil*, 809 F.2d 350, 354 (7th Cir. 1987). Compounding the uncertainty is a competing line of authority—competing, that is, with the *Griswold/Roe/Casey* line—that would deny recognition of any new liberty rights not firmly grounded in long-standing tradition. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion); *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986), *overruled by Lawrence*, 539 U.S. at 558.

23. 521 U.S. at 727.

24. To take an extreme example, imagine a couple deciding whether or not to have a third child where both prospective parents are known carriers of a devastating autosomal recessive disorder like Tay-Sachs disease. The resulting child would have a one-in-four chance of suffering from the disease. How many such couples would have another child without the option of some type of genetic screening? Surely a sizeable number would be unwilling to take the risk. Cf. John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 424–25 (1996) [hereinafter Robertson, *Genetic Selection*] (noting the potentially decisive impact of genetic-selection technologies on the decision whether to reproduce).



that is not the case, genetic-selection decisions are in many, if not all, respects comparable to the sort of important child-rearing decisions the Court has long accorded special protection. Choosing a child's genes, like teaching her German,<sup>25</sup> sending her to parochial school,<sup>26</sup> or giving her an Amish upbringing,<sup>27</sup> is one way for parents to shape her identity and future life course.<sup>28</sup>

The important question is thus the normative one: Not is there a constitutional right to engage in some or all forms of genetic selection, but should there be? Not surprisingly, a growing number of commentators have turned their attention to this question in recent years, offering a wide variety of answers.<sup>29</sup> Their general approach, however, is strikingly similar, and can be loosely described as Dworkinian.<sup>30</sup> Proponents of a broad right seek to identify a morally attractive rationale for the Court's past reproductive liberty decisions—for example, a broad vision of individual autonomy with regard to intimate, self-regarding reproductive decisions—that extends to most or all genetic-selection decisions.<sup>31</sup> Opponents of such a right, by contrast, attempt to explain the Court's past decisions narrowly, by virtue of some individual interest (commonly, bodily integrity or sexual equality) implicated by abortion and contraception but not by genetic-selection decisions, or, alternatively, by virtue of some government interest present in the genetic-selection context but absent from abortion and contraception decisions (such as anticommodification concerns or protecting the dignity of the disabled).<sup>32</sup> The argument is not that the existing right to procreative liberty could not be stretched to encompass genetic selection but rather that the best moral justification of the cases does not extend so far.<sup>33</sup>

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25. *Meyer*, 262 U.S. at 400.

26. *Pierce*, 268 U.S. at 515.

27. *Yoder v. Wisconsin*, 406 U.S. 205, 232 (1972).

28. See Robertson, *Genetic Selection*, *supra* note 24, at 436.

29. See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 157–60 (1994); Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 6 (2007); King, *supra* note 2, at 328–29; Rao, *supra* note 10, at 1460; Robertson, *Genetic Selection*, *supra* note 24, at 478–79; 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, 1520 (2008) [hereinafter Suter, *The Repugnance Lens*].

30. See, e.g., RONALD DWORKIN, LAW'S EMPIRE 413 (1986) ("Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future.").

31. See, e.g., John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1490 (2008) [hereinafter Robertson, *Assisting Reproduction*].

32. See, e.g., Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1101–07 (1998); Suter, *The Repugnance Lens*, *supra* note 29, at 1598.

33. See, e.g., Rao, *supra* note 24, at 1462–68 (acknowledging that procreative liberty decisions could be read as extending to genetic selection); Suter, *The Repugnance Lens*, *supra* note 29, at 1530–36 (same). Dworkin, of course, insists that the existing right to procreative liberty (or any other right)

## II. THE IMPORTANCE OF INSTITUTIONS

There is a core problem with this approach. In focusing exclusively on the balance of individual and government interests in genetic-selection decisions, its adherents confuse two questions. The first is when and whether it would be desirable for reproductive decisions to be protected in the abstract. The second is when and whether it would be desirable for courts, in particular, to protect them. Both are important questions and well worth addressing. But they raise sharply different issues and will often have different answers. A sound approach to normative constitutional analysis must attend to both and be careful to distinguish between them.

Consider the two leading positions on the constitutionality of regulating assisted reproductive technologies. The first, espoused most eloquently by John Robertson, I shall call the *libertarian* approach.<sup>34</sup> As the name suggests, libertarians favor broad (though not unlimited) constitutional protection for personal decisions connected to procreation. Robertson, for example, has variously argued for a presumptive right to procreative liberty extending to (1) decisions furthering “traditional reproductive goals,”<sup>35</sup> (2) decisions “most people view as central” to reproductive liberty,<sup>36</sup> (3) decisions implicating the values and interests that make reproduction a valued activity,<sup>37</sup> and (4) decisions essential to an individual or couple’s choice whether or not to reproduce.<sup>38</sup> In each of these cases, he suggests, regulation is permissible only if supported by an important or compelling state interest.<sup>39</sup> Although Robertson is not always explicit on the point, this view appears to rest on a combination of political morality and analogical reasoning from the Court’s prior decisions.

The second leading approach, of which Sonia Suter’s recent work is representative, we can call *communitarian*. Again, as the name suggests, communitarians attach greater importance to the potential social harms of unfettered reproductive liberty and less importance to the right of atomistically conceived individuals to do whatever they please in the

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is *defined* by the best moral justification of the cases and consequently requires whatever that justification requires. This is his famous “one right answer” thesis. *See, e.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1081–82 (1975). It is their deviation from this thesis that makes the leading arguments in the reproductive technologies literature only loosely Dworkinian.

34. I use the term in its original, small “l” sense, as in “one who approves of or advocates liberty.” OXFORD ENGLISH DICTIONARY 884 (2d ed. 1989). Robertson is not a libertarian in the sectarian political or strict philosophical sense.

35. Robertson, *Harm to Offspring*, *supra* note 1, at 32.

36. Robertson, *Genetic Selection*, *supra* note 24, at 431.

37. Robertson, *Assisting Reproduction*, *supra* note 31, at 1490.

38. John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 474 (2003) [hereinafter Robertson, *Era of Genomics*].

39. *See, e.g., id.* at 454; Robertson, *Genetic Selection*, *supra* note 24, at 428.

sphere of procreation without regard to its effects on others. In the context of genetic selection, for example, communitarians have been especially concerned about effects on family relationships resulting from the commodification of reproduction and the devaluation of disabled persons whose genes are selected against. In light of these concerns, communitarians favor a constitutional principle Suter calls relational autonomy, which “understands [reproductive] autonomy in terms of the relationships that define us” and balances the effects of reproductive decisions on individuals, families, and the community at large.<sup>40</sup> Like Robertson, Suter is less than explicit about the premises of this view but appears to base it on a moral reading of applicable Supreme Court case law.

For all their differences, the libertarian and communitarian positions share one important feature in common: They are both silent on the question of institutional choice. Both simply assume that courts should enforce the principles that they—the libertarians and communitarians, respectively—have identified as attractive in the abstract.<sup>41</sup> This takes for granted what is not at all obvious: that courts will perform well enough relative to other potential decisionmakers for this to be the most sensible course of action.

Consider what the libertarian position demands of courts. Under one of Robertson’s formulations, the class of regulations courts should subject to heightened scrutiny turns on “what most people view as central to reproductive meaning.”<sup>42</sup> Under another, courts would be charged with determining which decisions implicate the values and

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40. Suter, *The Repugnance Lens*, *supra* note 29, at 1598; *see also* Suter, *A Brave New World*, *supra* note 6, at 954.

41. It might be objected that this assumption is justified—perhaps even required—by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the well-settled place of judicial review in the American constitutional order. On this view, questions of comparative institutional competence have already been settled in favor of courts on a wholesale basis and therefore need not be reexamined retail. One could certainly imagine a system of constitutional review organized in this fashion. But in the system we have, neither *Marbury* nor the nominally settled practice of judicial review takes one very far. Nothing in either the case or the practice resolves the standard of review courts should apply to the constitutional decisions of political actors. Nor does either identify with any precision the class of decisions subject to review in the first place. It should not be terribly surprising, then, that courts refuse to subject the vast majority of political decisions to any meaningful degree of constitutional scrutiny. KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 13, at 232. Moreover, in determining which small fraction of decisions should receive such scrutiny, institutional considerations are pervasive. *See infra* Part III. To be clear, this not to say that all institutional questions are always up for grabs. In many instances, the answers are already baked into the pie of settled law. But in contexts like genetic selection, where existing law is unsettled, institutional questions are both open and analytically unavoidable. In some instances, these questions may be best resolved by extending some pre-existing division of institutional responsibility, but as the remainder of this Part illustrates, that must be demonstrated; it cannot be assumed.

42. Robertson, *Genetic Selection*, *supra* note 24, at 431.

interests that make reproduction a valued activity.<sup>43</sup> Under any formulation of the libertarian position, courts would be required to determine which state interests are compelling and how likely, as an empirical matter, they are to be threatened by the class of regulated activity.

In each of these tasks, it seems obvious that courts would make mistakes. To take just one example, judges are deliberately insulated from political pressures and also tend to be substantially older, wealthier, whiter, and better educated than the general population (not to mention predominantly male),<sup>44</sup> making them a curious choice to determine what most people view as central to reproductive liberty. Judges also seem unlikely as a group to possess any special competence for determining which values and interests give reproduction its profound significance or which state interests are sufficiently compelling to justify interfering with it. Perhaps more important, they lack any specialized expertise in social psychology, genetics, or sociology that might be expected to give them special insight into the empirical likelihood of social impacts like commodification of children or devaluation of the disabled in connection with complex and rapidly evolving reproductive technologies.

Of course, the relevant question is comparative. And the political branches of both the state and national governments, whose work product courts review in constitutional cases, have serious shortcomings of their own. They may possess greater resources for discerning popular views than courts, but they are frequently more responsive to small but well-organized interest groups than to the broad public.<sup>45</sup> Legislators and executive officials might, at an individual level, be at least as competent as judges to resolve difficult questions of political morality. They almost certainly have greater psychological and scientific expertise at their disposal, should they choose to call upon it. Perhaps most important, they also have the option of delegating regulatory authority to administrative agencies staffed with such expertise specifically in mind. On the other hand, their electoral accountability forces legislatures to give strong weight to public views that are often deeply ignorant and analytically confused.<sup>46</sup> This problem seems likely to be especially pronounced with respect to emerging technologies like genetic selection,

43. See Robertson, *Assisting Reproduction*, *supra* note 31, at 1490.

44. See, e.g., BUREAU OF INT'L INFO. PROGRAMS, U.S. DEP'T OF STATE, OUTLINE OF THE U.S. LEGAL SYSTEM 154-55 (2004).

45. This, of course, is a core tenet of public choice theory, on which the classic statement is made by George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGT. SCI. 3, 3 (1971).

46. See generally MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); ARTHUR LUPIA & MATTHEW D. McCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998); JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION (1992).

which are not only new but also the subject of fantastical science-fiction scenarios that seem to have greatly distorted public understandings.<sup>47</sup>

Whether these shortcomings are more or less serious than the shortcomings of courts in the particular context of procreative liberty is a difficult question. The answer might vary with the ethical and scientific complexity (as well as the public salience) of the particular use of genetic selection at issue.<sup>48</sup> But the question must be answered before we can say one way or another whether a strong, judicially enforceable constitutional right to procreative liberty is a sensible way to carry the libertarian vision into effect.

In this regard, it bears emphasis that judicial fallibility in discerning the precise boundaries of a libertarian right (or in striking the appropriate balance between that right and other competing interests) does not necessarily argue for weaker judicial enforcement. If courts are likely to systematically overestimate competing societal interests, the solution may be to jettison the compelling interest test in favor of an absolute right. Alternatively or in addition, courts might systematically underestimate the range of interests that make reproduction a valued activity. In that case, libertarians might favor a maximally broad conception of procreative liberty as a prophylactic. Of course, the opposite is also possible. If the political branches are likely to perform well and courts are likely to overprotect a libertarian right,<sup>49</sup> a rule of no constitutional protection might be best even on libertarian grounds.

The same point holds for the communitarian position, which asks courts to enforce a constitutional right of relational autonomy, balancing the effects of reproductive decisions on individuals, families, and the community at large. Here too it seems obvious that courts will make mistakes, and for many of the same reasons. Courts lack the fact-finding tools and the social science expertise to perfectly or even reliably assess the broad societal effects of particular reproductive decisions. And even if they could perform this aspect of their task well, judges lack any special philosophical training that would allow them to competently determine what moral weight to assign to different effects. Of course, the relevant question is again comparative, and again, legislatures and

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47. Cf. Cass R. Sunstein, *Is There a Constitutional Right to Clone?*, 53 HASTINGS L.J. 987, 996, 1005 (2002) (discussing the scientific misconceptions that appear to underlie public unease about reproductive cloning).

48. This explains why it is necessary to consider the institutional question even if we take as given the existing right of procreative liberty in coital reproduction. There is a very real possibility that the balance of institutional competence may shift as we move from issues near the core of a well-established and uncontroversial right of long historical standing to issues of greater moral (and attitudinal) uncertainty and greater technological complexity.

49. Such over-protection could take either of two forms: (1) invalidating regulation which is in fact justified by compelling societal interests, or (2) extending a right to activity outside the bounds of procreative liberty, properly understood.

executive bureaucracies have many shortcomings of their own. Whether courts would do worse or better from a communitarian perspective by recognizing a judicially enforceable right to relational autonomy is a difficult question but one that must be answered to assess the case for such a right.

An intriguing possibility is that both legislative and judicial decisionmakers would perform so poorly that courts would do better by recognizing a broad libertarian right to reproductive liberty. This would have the effect of allocating decisionmaking authority to private citizens—or, speaking in more institutional terms, the market. At first blush, the suggestion seems radically counterintuitive. The commodification and disability-rights problems that most concern communitarians are classic externalities that unregulated reproductive decisionmakers would have little incentive to factor in to their decision calculus. But the political process and the courts, too, might take insufficient account of these interests—indeed this seems likely, especially for disability rights—while simultaneously undervaluing individual and family interests, which communitarians also see as important. If the problem were sufficiently severe, a strong libertarian right to procreative liberty might better serve communitarian values than would a weaker, more flexible right to relational autonomy.<sup>50</sup>

The possibility of this kind of overlapping consensus between apparently competing normative views has greatly interested many institutionalists. If comparative institutional analysis can generate agreement on a single constitutional rule, they point out, we might be able to dispense with some divisive normative debates altogether. At the very least, we should be able to identify greater areas of overlap between opposing sides.<sup>51</sup> This is a powerful point, to which Part V will return at some length. It is important to note, however, that the dynamic can operate in both directions. If institutional analysis has the potential to bring competing normative views closer together, it also has the potential to drive them further apart.<sup>52</sup> An example is the possibility, noted above, that judicial fallibility might inspire libertarians to scrap the compelling interest test in favor of an absolute right to procreative liberty. On purely normative grounds, both libertarians and communitarians support

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50. It is easy to imagine the political process banning the use of genetic selection by deaf persons and achondroplastic dwarves to ensure the birth of children that share their disabilities, while permitting selection to avoid the birth of children with those and other disabilities. If imperfect courts would uphold such a ban under a communitarian rule of relational autonomy but strike it down under a strong libertarian right, disabled persons as a class might well be better off under the latter.

51. See, e.g., Cass R. 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.”).

52. As far as I can tell, this point has been completely overlooked in the literature.

regulations of procreative liberty necessary to serve compelling societal interests. But once we take account of the possibility that courts applying this test will uphold too much regulation (by libertarian lights), views on this point might well diverge. In such circumstances, institutional analysis makes the choice between normative goals more consequential, not less, though institutional analysis is still essential to determining how any particular goal would be realized most effectively in practice.

### III. A SECOND LOOK AT THE CASES

The preceding discussion demonstrates that institutional choice is analytically central to sound normative analysis of constitutional decisionmaking. This Part shows that it is also necessary to provide a persuasive account of the Supreme Court's prior decisions concerning reproductive liberty. That is to say, even if we accept the quasi-Dworkinian approach of existing commentators, those commentators ignore the dimension of the Court's case law that is perhaps most relevant to explaining its implications for genetic selection: comparative institutional competence. This Part aims to cure the oversight. Part III.A takes a second look at the relevant decisions, reconstructing the implicit institutional analysis undergirding them. Part III.B then applies that analysis (without endorsing it) to assess the constitutionality of regulating genetic selection. In so doing, I hope to underscore the centrality of institutional analysis to actual constitutional practice and also to set the stage for Part IV, which critiques the Court's approach and explores the promise and limitations of the leading academic alternative.

#### A. THE COURT'S IMPLICIT INSTITUTIONAL ANALYSIS

Read carefully, the Court's decisions concerning reproductive liberty reveal a far greater sensitivity to institutional issues than academic commentators have displayed. At the most basic level, this sensitivity manifests itself in the quite narrow set of laws subject to heightened substantive scrutiny under the Due Process Clause. Of particular note, courts have left many other freedoms at least equal in importance to reproductive, sexual, and child-rearing liberty to the political process. The rights of terminally ill persons to access experimental drugs<sup>53</sup> and to control the circumstances of their own deaths<sup>54</sup> are among the most striking examples. What could be more

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53. *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 495 F.3d 695, 697 (D.C. Cir. 2007); *cf.* *United States v. Rutherford*, 442 U.S. 544, 558–59 (1979) (rejecting a terminally ill patient's claimed statutory right to access unapproved drugs).

54. *Vacco v. Quill*, 521 U.S. 793, 808–09 (1997) (upholding a state criminal prohibition against "assisting" a suicide); *Washington v. Glucksberg*, 521 U.S. 702, 735–36 (1997) (similar holding).

central to the “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”<sup>55</sup> than the decision whether to go gentle into that good night? And if we expand our field of vision to include positive rights, the right to a minimal level of economic welfare—in effect, the right to *feed* oneself and one’s offspring—seems at least comparable in importance to the right to choose whether to have offspring in the first place. Yet courts have consistently refused to recognize any of these rights as fundamental for purposes of due process analysis.

Why constitutionalize a right to procreative, sexual, and child-rearing liberty when so many other vital liberties go unprotected, at least by courts? For the reasons just mentioned, the answer cannot plausibly be that this right is more fundamental or more central to personal autonomy. Nor can it be that a right to procreative, sexual, and child-rearing liberty is more firmly grounded in the constitutional text or original understanding. It plainly is not. The most plausible principled explanation is that courts have felt institutionally better positioned to protect this right—at least in the context of forced sterilization, contraceptives, and abortion—than other normatively plausible candidates for constitutional protection. Why might this be the case? And would (or should) this institutional judgment extend to the right of parents to select the genes of their offspring, even assuming the Court saw this right as implicating the same liberty interests as contraception, abortion, intimate sexual association, and child rearing?

The cases provide few explicit answers, but they do offer some intriguing hints, especially if we look not just at the opinions of the Court but at the pattern of results. Four in particular stand out. Together, these four factors form a kind of implicit framework for institutional analysis. To be clear, I do not claim that the Justices always have such a framework in mind or that they ever conceive of it in exactly the way it is presented here. Nor do I claim that this framework represents an especially attractive or rigorous approach to institutional analysis. My claim is only that it offers the most plausible principled explanation for the Court’s decisions in this area. The discussion below substantiates this claim for each of the four factors that make up the framework.

### I. History

First, the Court has frequently emphasized established historical traditions both as a matter of rhetoric and as a matter of practice. Perhaps the most famous example is Justice Harlan’s statement in his *Poe v. Ullman* dissent that the balance struck by the Due Process Clause is “the balance struck by this country, having regard to what history

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55. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).



teaches are the traditions from which it developed as well as the traditions from which it broke.”<sup>56</sup> Harlan went on to cite the “utter [historical] novelty” of Connecticut’s criminal contraceptive ban as “conclusive” evidence against its constitutionality.<sup>57</sup> More recently, in *Washington v. Glucksberg*, a majority of the Court expressly placed historical traditions at the heart of the substantive due process analysis. “[T]he Due Process Clause,” Chief Justice Rehnquist wrote, “specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”<sup>58</sup> Concluding that “a consistent and almost universal tradition . . . has long rejected the asserted right” of competent terminally ill adults to assistance in ending their own lives, the Court refused to subject Washington’s ban on assisted suicide to heightened due process scrutiny.<sup>59</sup>

Of course, history might be relevant to the due process inquiry for any number of reasons. Perhaps the meaning of the Due Process Clause, properly understood, requires reference to history to determine the scope of its protection.<sup>60</sup> Call this the positive function of history in constitutional analysis.<sup>61</sup> Alternatively, or in addition, long-standing historical traditions might be thought to embody the accumulated wisdom of previous generations, which ought not to be disregarded absent very compelling reasons. Call this the epistemic function of history.<sup>62</sup> Each of these uses of history has enthusiastic judicial and academic proponents, but neither use is capable of capturing the full picture.

Indeed, in *Glucksberg* itself, the Court explains its reliance on historical tradition in interpreting the Due Process Clause primarily in institutional, rather than positive or epistemic, terms. In particular, the Court touts a historical approach to the scope of constitutionally protected liberty as serving two institutional functions: First, such an approach “tends to rein in the subjective elements that are necessarily present in due process judicial review.”<sup>63</sup> Second, “by establishing a threshold requirement . . . it avoids the need for complex balancing of

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56. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

57. *Id.* at 554.

58. *Glucksberg*, 521 U.S. at 720–21 (internal quotation marks omitted).

59. *Id.* at 723.

60. See generally Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008).

61. I have adapted this handle from Richard Primus. See Richard Primus, *The Necessity and Peril of Ethical History*, CONSTITUTION IN 2020 (Sept. 18, 2009, 10:09 AM), <http://www.constitution2020.org/node/82> (“History deployed as positive authority purports to settle the meaning of clauses or doctrines by reference to things that happened in the past.”).

62. See, e.g., Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1550 (2008) (noting the “epistemic credential” of historical traditions).

63. *Glucksberg*, 521 U.S. at 722.

competing interests in every case.”<sup>64</sup> Whether these arguments are ultimately persuasive is open to question. History, like the fundamental status of particular liberties, is often in the eye of the beholder.<sup>65</sup> Nor is it obvious that history represents the only, or the most substantively attractive, available constraint on judicial subjectivity.<sup>66</sup> And of course, serious historical inquiry carries its own substantial complexities to which courts are arguably quite ill suited. For present purposes, however, the important point is that the Court’s own explanation for relying on history plainly reflects concerns about the institutional capacity of courts rather than the true meaning of the Due Process Clause or the actual balance of individual and government interests.

## 2. *Public Consensus*

Second, the Court has very seldom recognized a new judicially enforced liberty right in the face of strong public opposition.<sup>67</sup> Undoubtedly, this is partly and perhaps primarily a by-product of the politics of the appointment and confirmation process. Justices appointed by elected presidents and found acceptable by a majority of elected senators (indeed, at some level, a supermajority, given the theoretical possibility of filibuster) are unlikely to be far outside the mainstream of national opinion. Still, in numerous contexts the Court explicitly takes note of the number of states that permit or prohibit particular practices, as a rough proxy for contemporary public attitudes. The most prominent of these is the Court’s Eighth Amendment jurisprudence, where in two recent decisions it struck down state death penalty laws after concluding that states on the whole were trending away from executing juvenile and mentally retarded offenders, respectively.<sup>68</sup> Another recent example of more direct relevance to procreative liberty is *Lawrence v. Texas*.<sup>69</sup> In striking down a Texas ban on same-sex sodomy, Justice Kennedy relied heavily on “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,” substantiated in part by the small number of states that continued, as of 2003, to criminally punish homosexual sodomy.<sup>70</sup> As Corinna Barrett Lain has recently shown, this sort of

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64. *Id.*

65. Compare *District of Columbia v. Heller*, 554 U.S. 570, 570 (2008), with *id.* at 636 (Stevens, J., dissenting) (offering competing historical accounts of the Second Amendment).

66. See Sunstein, *supra* note 62, at 1567–68 (raising doubts on both points).

67. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

68. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (the mentally retarded).

69. 539 U.S. 558 (2003).

70. *Id.* at 572–73.

polling of states is pervasive in the constitutional doctrine and particularly in the Court's fundamental rights decisions.<sup>71</sup>

Again, the pattern of state laws might be relevant to the due process inquiry in a number of ways. Perhaps the meaning of the Due Process Clause, properly understood, requires reference to contemporary moral consensus for which the pattern of state laws is a plausible proxy.<sup>72</sup> Alternatively, or in addition, the pattern of state laws might be thought to reflect a kind of Condorcetian collective wisdom as to which rights are actually fundamental in a moral-philosophical sense.<sup>73</sup> Obviously, these functions are closely analogous to the positive and epistemic functions of history in constitutional analysis. But as with history, neither captures the full picture. The positivist rationale cannot explain the Court's frequent insistence on exercising its own independent judgment even after identifying a consensus among the states.<sup>74</sup> The Condorcetian rationale also appears nowhere in the Court's opinions and, from a normative standpoint, is deeply problematic because a legal consensus among states will seldom satisfy the independence condition of Condorcet's jury theorem.<sup>75</sup>

A more plausible explanation, both descriptively and normatively, is that the Justices survey state laws as a kind of crude inoculation against the countermajoritarian difficulty. As the least democratically accountable branch of government, the Court may well feel compelled—by prudence, democratic values, or both—to confine its more textually free-wheeling exercises of judicial review to cases where a national majority supports (or is at least not strongly opposed to) the result.<sup>76</sup> One reasonably

71. Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 374–75 (2009) (“[T]he Court [has] polled the states in deciding the right to physician-assisted suicide for terminally ill competent adults, the right to refuse unwanted medical treatment, the right to parental recognition of a child born into another couple’s marriage, and the right of custodial parents to make visitation decisions regarding their children and natural grandparents.”).

72. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997) (“[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws.”) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989)).

73. In its simplest form, the Condorcet Jury Theorem holds as follows: Where each member of a group makes an independent judgment about a binary question, each of which is more than fifty percent likely to be correct, the chance that a majority of the group will be right approaches one hundred percent as the group gets larger. See, e.g., Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 4–6 (2009). At least one prominent commentator has suggested that this “wisdom of crowds” could explain the Court’s practice of counting states. See Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

74. See Andrew B. Coan, *Well Should They? A Response to If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 225 (2007).

75. See *id.* at 230 (noting the probable inapplicability of the Condorcet Jury Theorem to state penal laws).

76. Cf. Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 2 (2007) (“[T]he strongly held view of the public is sometimes an ingredient of the right answer to a constitutional question, just like text, precedent, history, structure, social science, and normative theory.”); Coan, *supra* note 74, at 233–39 (tentatively endorsing a similar argument).

reliable way of doing this is to refrain from invalidating practices endorsed and actively engaged in by a majority of states.<sup>77</sup> One may question the wisdom of this approach. Indeed, many have done so. Entrenching present practices against future political change might squelch valuable state-level experimentation.<sup>78</sup> Alternatively, keeping judicial review basically majoritarian might confine that power to the cases where it is least necessary.<sup>79</sup> But again, for present purposes, the important point is that this explanation—that public consensus functions as a safeguard against the countermajoritarian difficulty—reflects an institutional judgment quite separate from the constitutional merits, however defined.

### 3. Empirical Questions

Third, the Court (and lower courts as well) has been especially reluctant to recognize new constitutional rights where doing so would require it to make complex empirical assessments, especially about broad scientific or sociological questions. This is not to say that courts never make complicated empirical judgments. They plainly do.<sup>80</sup> But where some other government institution has already made such a judgment and especially where that institution has established a specialized process for doing so, courts have generally been quite reluctant to override that process on constitutional grounds.<sup>81</sup> A particularly pertinent recent example is the D.C. Circuit's refusal to recognize a substantive due process right of terminally ill persons to use experimental drugs that have passed Phase I clinical trials.<sup>82</sup> Because all other treatment options had been exhausted, the dissenting judges argued that FDA regulations limiting access to such drugs unconstitutionally denied the plaintiffs medical care necessary to preserve their lives.<sup>83</sup> But as the majority

77. See *Graham v. Florida*, 130 S. Ct. 2011, 2023–26 (2010) (invalidating juvenile life without parole for nonhomicide offenses based on a survey of state sentencing *practices* rather than state sentencing *laws*).

78. See, e.g., Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1091–92, 1106 (2006) (“Constitutionally enshrining the views of a majority of states robs the remaining states of their capacity to determine policy in a central area of constitutional law.”).

79. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 68–69 (1980) (“[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”).

80. See generally DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* (2008) (discussing the pervasiveness of legislative fact disputes in constitutional cases).

81. See *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (collecting cases giving “state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty”).

82. *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 495 F.3d 695, 697 (D.C. Cir. 2007).

83. *Id.* at 715, 719 (Rogers, J., dissenting).

pointed out, whether any given drug is necessary to the survival of terminally ill patients or would in fact subject them to horrible side effects with no therapeutic benefit is an empirical question to which it is impossible to know the answer before clinical testing is complete.<sup>84</sup> In the face of such uncertainty, the court deferred to the FDA's judgment that the risks of permitting broad early access outweighed the benefits.

This was not the only course available. The court could have attempted to assess the risks and benefits itself. But like most other courts facing similar situations, the D.C. Circuit concluded "that the democratic branches are better suited to decide the proper balance between the uncertain risks and benefits of medical technology, and are entitled to deference in doing so."<sup>85</sup> That this represents a judgment of comparative institutional capacities, rather than a balancing of interests or an interpretation of constitutional text, seems fairly clear. One might quibble that such deference is only appropriate where a court reads the Constitution as affirmatively requiring it, as the D.C. Circuit did here. But if the reason for reading the Constitution in this way is a judgment of comparative institutional competence (perhaps intermediated by an inference about how the Constitution must have meant to allocate interpretive authority in such circumstances), the qualification makes little difference. Either way, courts frequently view the (supposedly) inferior fact-finding capacities of courts as a compelling reason not to disturb the judgments of other institutions on complex empirical questions of broad social import.<sup>86</sup>

#### 4. *Politically Vulnerable Groups*

Fourth, virtually all of the Court's decisions recognizing new constitutional rights to sexual, reproductive, and child-rearing liberty can be explained as an effort to protect politically disadvantaged groups. Perhaps the most obvious example is the Court's protection of same-sex intimacy in *Lawrence v. Texas*, which invalidated a state law specifically targeting a historically despised subgroup for criminal punishment.<sup>87</sup>

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84. *Id.* at 708–09 n.15 (majority opinion).

85. *Id.* at 713. *Glucksberg's* refusal to recognize a constitutional right to physician-assisted suicide plausibly could be defended on similar grounds. Whether such a right would have enhanced or reduced the autonomy of terminally ill persons as a group is a close and contested empirical question, which legislatures and administrative agencies may well be better suited to decide than courts. See generally Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123 (1997) (arguing against a constitutional right to physician-assisted suicide on this ground).

86. For a helpful overview of this judicial practice and the complex comparative institutional judgments that underlie it, see Stephanie Tai, *Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty*, 11 U. PA. J. CONST. L. 671 (2009).

87. See 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("The Texas sodomy law 'raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."); *id.* at 574–75 (majority opinion) (describing O'Connor's argument as "tenable" but too

Similarly, the abortion regulations invalidated in *Roe v. Wade* and *Casey v. Planned Parenthood of Southeastern Pennsylvania* imposed a unique burden on women, one many commentators (and several Supreme Court Justices) view as fundamentally inconsistent with women's equal participation in civic and social life.<sup>88</sup>

Somewhat less obviously, the Court's most famous child-rearing liberty decisions can also be explained by a felt need to protect disfavored ethnic and religious minorities from a malfunctioning political process.<sup>89</sup> *Meyer v. Nebraska* involved the rights of German immigrant parents to transmit German culture to their children in the aftermath of World War I,<sup>90</sup> while *Pierce v. Society of Sisters*<sup>91</sup> and *Yoder v. Wisconsin*<sup>92</sup> involved the rights of persecuted or powerless religious minorities to provide their children a distinctively religious education. Finally, *Skinner v. Oklahoma* involved the right of criminals to be free from discriminatory forced sterilization.<sup>93</sup> Although often remembered as a substantive due process case, *Skinner* was actually decided explicitly on equal protection grounds. Indeed, in the context of the American eugenics movement, the Court apparently understood the mandatory sterilization law it invalidated as a form of genuine race discrimination, targeting a genetically disfavored and politically marginalized underclass of petty criminals.<sup>94</sup>

Equality, of course, is an important constitutional value as a matter of substance. And each of the decisions just discussed could be seen as an illustration of the equal citizenship or anticaste principle many commentators take as central to the meaning of the Equal Protection Clause.<sup>95</sup> Certainly, that is a significant dimension of these decisions. It would border on perverse, however, to ignore the leading explanation of

narrow).

88. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 319–28 (2007); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 276–77, 350, 371–79 (1992); see also *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

89. See, e.g., Rao, *supra* note 10, at 1466 (making this point). But see Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1566, 1569 (2004) (criticizing this “misinterpretation” of the child-rearing liberty decisions for obscuring their original foundations in the liberty of contract).

90. 262 U.S. 390 (1923).

91. 68 U.S. 510 (1925).

92. 406 U.S. 205 (1972). A similar but less famous example is *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating a federal law banning Japanese-language schools in the Hawaiian territory).

93. 316 U.S. 535, 541 (1942).

94. See VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS (2008) (recovering this forgotten history). *Griswold v. Connecticut*, 381 U.S. 479 (1965), may seem like an exception to this pattern. But of course, a ban on contraceptives, like the abortion laws struck down in *Roe v. Wade*, 410 U.S. 113 (1973), increases the risk of unwanted pregnancies, the burden of which is born predominantly by women.

95. See generally, e.g., Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

the Court's special concern for politically disadvantaged minorities: namely, that prejudice against such groups "may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>96</sup> This statement comes from the famous footnote four of *United States v. Carolene Products Co.*, which in fact cites both *Pierce v. Society of Sisters* and *Meyer v. Nebraska* as examples of the sort of political process failure that might trigger a "more searching judicial inquiry."<sup>97</sup>

Here again, the wisdom of the Court's approach may be disputed. Perhaps diffuse majorities, beset by collective action problems, are in greater need of judicial protection than concentrated minorities, whose small size and relative cohesion confer organizational advantages.<sup>98</sup> Or perhaps courts attempting to correct political malfunctions will fail even more spectacularly (albeit differently and for different reasons) than the institutions whose decisions they are reviewing.<sup>99</sup> The important point, for now, is that the Court's self-perceived comparative advantage in protecting politically disadvantaged groups has profoundly affected the scope of personal liberty protected under the Constitution's Due Process Clauses.

#### B. PUTTING IT ALL TOGETHER

The foregoing discussion shows that institutional analysis has played an important, though often implicit, role in the Court's past decisions on reproductive liberty and related issues. That analysis, as I have tried to emphasize, is hardly above criticism. Nevertheless, it supplies a useful starting point for approaching the question that academic commentators have thus far ignored: Given their strengths and weaknesses relative to other institutional decisionmakers, should courts in particular protect a constitutional right to select the genes of one's offspring in some or all cases?<sup>100</sup>

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96. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938); see also ELY, *supra* note 79, at 221.

97. 304 U.S. at 152–53 n.4. For an attempt to recover and rehabilitate a somewhat different institutional role for constitutional equality, see V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 965 (2009) ("The idea is not simply that the law has misclassified or used spurious generalizations (modern notions of equality); the idea is that general laws are superior to special ones because of what they do *within* the legislative process—they link representatives to those they represent.").

98. Cf. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–24 (1985) ("Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics.").

99. Indeed, severe political malfunctions can themselves make it substantially more difficult, and in some cases impossible, for courts to improve on the political process. See NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 76 (2001) [hereinafter KOMESAR, *LAW'S LIMITS*].

100. As a theoretical matter, different uses of genetic selection could implicate different

Applying the Court's analysis in *Glucksberg*, the answer would seem to be no. While the practice of genetic selection has been largely unregulated since its inception, the technologies involved have been in clinical use for a few decades at most.<sup>101</sup> Thus, a right to select the genes of one's offspring is not in any plausible sense "deeply rooted in this Nation's history and tradition."<sup>102</sup> To be sure, such a right might be analogized to the traditional right to choose one's spouse, which is a way of choosing the genes of one's offspring. It might also be analogized to the traditional right of parents to make important child-rearing decisions, to which genetic selection bears some similarities. But this sort of reasoning seems inconsistent with *Glucksberg*'s insistence on a "careful," which is to say narrow, description of the asserted liberty interest.<sup>103</sup> That insistence, of course, was crucial to the Court's express hope that historical tradition would constrain judicial policy making.

*Glucksberg* thus appears to argue against recognition of a constitutional right to select the genes of one's offspring, at least for the time being. But *Glucksberg* does not stand alone. As *Roe v. Wade* and *Lawrence v. Texas* demonstrate, the Court has not treated the absence of a deeply rooted historical tradition as a decisive objection to the protection of new liberty rights. Indeed, in both *Roe* and *Lawrence*, tradition was far more strongly on the side of regulation than is the case

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institutional considerations just as they implicate different individual and government interests. As a practical matter, however, this is generally not the case, at least under the Court's analysis. The few exceptions are noted specifically in the discussion below.

101. The one exception is amniocentesis, which has been used for prenatal screening for more than fifty years and is thoroughly embedded in American obstetric practice. Ruth Schwartz Cowan, *Women's Roles in the History of Amniocentesis and Chorionic Villi Sampling*, in *WOMEN AND PRENATAL TESTING: FACING THE CHALLENGES OF GENETIC TECHNOLOGY* 35, 36 (Karen H. Rothenberg & Elizabeth J. Thomson eds., 1994). Up to this point, I have tried to put the issue of prenatal testing to one side, due to its close entanglement with abortion. But it is not entirely possible to do so here. Amniocentesis has been in use long enough and widely enough without substantial regulation (at least separate from abortion) that one could plausibly argue that the right to use it is deeply rooted in history and tradition. Of course, for these same reasons, no state is likely to prohibit amniocentesis or similar forms of prenatal testing, so the issue is unlikely to come before the Court. Nevertheless, it might seem odd to permit regulation of genetic-selection techniques that do not require the destruction of a fetus (which is most of them) while techniques that do (all forms of prenatal testing) are in widespread and unchallenged use (and are perhaps constitutionally protected as part of the abortion right). The appearance is deceiving. Although there is certainly some overlap, abortion in conjunction with amniocentesis obviously involves different interests than other forms of genetic selection, most notably bodily integrity and gender equality. It is also used almost exclusively to avoid the birth of children with very serious heritable diseases and would be highly impractical for genetic enhancement uses. Any tradition of permitting it would therefore provide at most limited support for a constitutional right to engage in other forms of genetic selection.

102. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)); see also Sunstein, *supra* note 47, at 990 (making a similar point in connection with reproductive cloning).

103. 521 U.S. at 721.



for genetic selection,<sup>104</sup> where there is no deeply rooted tradition of any kind because the technology (and thus the liberty) in question is relatively new. In both *Roe* and *Lawrence*, however, other institutional factors favored recognition of a new constitutional right. To begin with, at least a plurality of the public supported the result in both cases, substantially diminishing, if not eliminating, the countermajoritarian difficulty.<sup>105</sup> Perhaps more important, in both *Roe* and *Lawrence* the Court's decision removed significant barriers to the equal participation of historically disadvantaged groups—barriers which themselves reflected the historical marginalization of these groups in the political process.<sup>106</sup> Finally, neither decision turned centrally on complex empirical judgments about broad social questions.<sup>107</sup> On each of these scores, the institutional case for a constitutional right to select the genes of one's

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104. This is not to suggest that the history in either case was uncomplicated or one-sidedly proregulation. As to abortion, see *Roe v. Wade*, 410 U.S. 113, 129 (1973) (“[R]estrictive criminal abortion laws . . . are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.”). As to same-sex intimacy, see *Lawrence v. Texas*, 539 U.S. 558, 569–72 (2003) (noting that laws specifically targeting same-sex sodomy are a relatively recent phenomenon in the United States); see also William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 643–65.

105. See Samantha Luks & Michael Salamone, *Abortion, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 80, 85–86 (Nathaniel Persily et al. eds., 2008) (documenting that there has been at least plurality support for *Roe v. Wade* since 1974); Frank Newport, *Six Out of 10 Americans Say Homosexual Relations Should be Recognized as Legal*, GALLUP NEWS SERVICE, May 15, 2003, <http://www.gallup.com/poll/8413/six-americans-say-homosexual-relations-should-recognized-legal.aspx> (reporting poll results demonstrating sixty percent support for decriminalizing same-sex sodomy).

106. See *supra* notes 88–89.

107. With respect to *Roe v. Wade*, this statement requires some qualification. While the basic conflict raised by abortion regulation—between fetal life and a woman's personal liberty—is empirically relatively uncomplicated, two aspects of the Court's decision in *Roe* have required courts to confront complex medical questions. The first is the need to fix the point of fetal viability, at which *Roe* and subsequent decisions have held that the state's interest in protecting fetal life supersedes a woman's liberty interest in terminating her pregnancy. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878–79 (1992); *Roe*, 410 U.S. at 164–65. The second is the need to determine the proper scope of the maternal health exception *Roe* and subsequent decisions have required even for postviability abortions. See, e.g., *Casey*, 505 U.S. at 878–79; *Roe*, 410 U.S. at 163–65. As to viability, the Court has mostly avoided the need to grapple with complicated medical questions itself by requiring that viability be determined by a physician case by case (though it has upheld some state regulation of this process, without getting into the science). See *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring). As to the maternal health exception, the Court has historically taken a similar (if less explicit) approach of delegating medical judgments to physicians. See *Roe*, 410 U.S. at 164–65. In *Stenberg v. Carhart*, however, the Court allowed itself to be drawn into a medical controversy over whether intact dilation and extraction (so-called “partial birth”) abortions are ever necessary to protect maternal health. 530 U.S. 914, 937–38 (2000). The Court backed off somewhat in *Gonzales v. Carhart*, reviewing congressional fact findings on this question “under a deferential standard” but also insisting on its obligation to render independent judgment. 550 U.S. 124, 165 (2007). These limited and equivocal interventions in complex empirical disputes suggest that the Court's commitment to correcting gender bias in the political process is strong enough to overcome its general deference on technical scientific matters, at least at times.

offspring compares unfavorably to the case for a woman's right to choose or any individual's right to engage in same-sex intimacy.

As to popular support, attitudes differ markedly depending on the form of genetic selection in question. Some—including, at a minimum, reproductive cloning and germ-line genetic engineering<sup>108</sup>—are the objects of widespread abhorrence.<sup>109</sup> Others, such as sex selection and genetic enhancement uses of preimplantation screening, provoke conflicted reactions at best.<sup>110</sup> Views on medical applications are substantially more sympathetic, especially where genetic selection is used to avoid the birth of children with catastrophic illness or disability.<sup>111</sup> But for courts to draw a constitutional line between medical and nonmedical uses would require them to grapple with complex empirical questions of the sort that they have generally preferred to leave to the political branches. Among others, these would include questions related to gene penetrance<sup>112</sup> and the differential susceptibility hypothesis, which holds that certain genes known to produce serious disorders in some environments can confer great advantages in others.<sup>113</sup> Courts would also need to consider the potential expressive impacts of such line drawing on existing persons living with the conditions that parents would be constitutionally entitled to select against.<sup>114</sup>

Still, holding all else equal, support for medical applications may be strong enough to weigh in favor of a limited constitutional right restricted

108. Recall that germ-line genetic engineering, which is a long way from technological feasibility, involves the manipulation of embryonic DNA to knock out undesirable genes or introduce desirable ones.

109. A variety of polls conducted between 1993 and 2003 showed widespread opposition to human cloning. See Matthew C. Nisbet, *Public Opinion About Stem Cell Research and Human Cloning*, 68 PUB. OPINION Q. 131, 150–53 (2004).

110. See, e.g., Kathy L. Hudson, *Preimplantation Genetic Diagnosis: Public Policy and Public Attitudes*, 85 FERTILITY & STERILITY 1638, 1641 (2006) (reporting forty-five percent male support and thirty-five percent female support for nonmedical sex selection).

111. *Id.* (reporting sixty-eight percent support for PGD to select embryos free from fatal childhood disease). Given this fact, a ban targeting medical genetic selection specifically seems unlikely. But a broader ban prohibiting all genetic selection, including selection for medical purposes, is within the realm of possibility, as are (in at least some states) regulations of in vitro fertilization that would functionally prevent medical screening. These are the cases where a constitutional right would most likely matter in practice.

112. Gene penetrance is the frequency with which genes linked to particular conditions or traits express themselves phenotypically (that is, physically). See King, *supra* note 2, at 287–88 n.19. The difficulties of measuring penetrance and of communicating complicated statistical concepts to patients have been suggested as possible reasons for regulating some types of medical selection.

113. See, e.g., Jay Belsky et al., *For Better and For Worse: Differential Susceptibility to Environmental Influences*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 300 (2007). For an elegant popular treatment, see generally David Dobbs, *Orchid Children*, ATLANTIC MONTHLY, Dec. 2009, at 50.

114. See Asch, *supra* note 9, at 337 (“If prenatal testing and embryo selection are not intended to give messages about which types of children the society will accept and welcome, proposals for ‘drawing lines’ about the types of tests to be offered or withheld must be . . . rejected.”).

to these uses.<sup>115</sup> It does not hurt that few states presently regulate genetic selection in any substantial way—a consideration the Court has often found to weigh in favor of constitutional protection. Of course, standing alone this fact does little to distinguish medical applications from other forms of genetic selection that the public strongly opposes, which are also largely unregulated.<sup>116</sup> Moreover, this sort of state polling seems likely to be a far less reliable safeguard against the countermajoritarian difficulty in the context of new technologies that are just emerging into widespread use and still evolving rapidly.<sup>117</sup> Some law, after all, must be the first to address a new problem. With respect to medical applications, however, there is more than just an absence of regulation. There is also the long-standing, widespread, and largely unregulated use of prenatal testing for basically similar purposes.<sup>118</sup> This may be enough to reassure judges that a limited constitutional right to engage in medical selection would not meet with strong public opposition.

When it comes to politically vulnerable groups, there is much less variation among different forms of genetic selection. The case for recognizing a constitutional right is weak across the board. To be sure, it is possible to construct an argument that regulation of medical selection would burden women who elect to reproduce later in life to avoid interrupting their careers. Women who become pregnant over the age of thirty-five face a steeply elevated risk of bearing children with Down Syndrome and other chromosomal abnormalities.<sup>119</sup> Preimplantation aneuploidy screening can detect these conditions, allowing for the implantation of an unaffected embryo.<sup>120</sup> Banning such screening (or limiting in vitro fertilization in ways that would make it practically impossible) might therefore force some women into a harsh, state-created dilemma, pitting career advancement against healthy offspring. More generally, women as a group shoulder a grossly disproportionate share of child-care responsibilities, an imbalance that seems likely to

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115. As the Court's abortion decisions suggest, other institutional factors can and sometimes do overcome its general hesitancy to confront complex empirical questions. *See supra* note 98.

116. The one exception is reproductive cloning, which is banned in thirteen states. *See Human Cloning Laws*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/IssuesResearch/Health/HumanCloningLaws/tabid/14284/Default.aspx> (last visited Oct. 31, 2011).

117. This explains why state polling, where it is invoked to invalidate legislation, is almost always wielded against fairly long-standing practices that have over time come to seem outmoded, unjust, or even barbaric. *Lawrence v. Texas*, 539 U.S. 558 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), are good examples.

118. *See supra* note 94.

119. *See* Devereux N. Saller, Jr. & Jacob A. Canick, *Current Methods of Prenatal Screening for Down Syndrome and Other Fetal Abnormalities*, 51 *CLINICAL OBSTETRICS & GYNECOLOGY* 24, 25 (2008).

120. Preimplantation aneuploidy screening is simply a form of preimplantation genetic diagnosis that screens for chromosomal abnormality, or aneuploidy, rather than specific genetic traits. *See* P. Donoso et al., *Current Value of Preimplantation Genetic Aneuploidy Screening in IVF*, 13 *HUMAN REPRODUCTION UPDATE* 15, 15 (2007).

grow even larger in families with severely disabled children. To the extent that genetic selection affords women an opportunity to avoid these differential responsibilities, banning it might be thought to reinforce (and to be reinforced by) traditional gender stereotypes of women as caregivers.<sup>121</sup>

In the scheme of things, however, these arguments are comparatively weak. Certainly, the regulation or even outright prohibition of genetic selection would not impose anything like the disproportionate burden on women that abortion bans did or that the criminalization of same-sex sodomy did on gays and lesbians. Nor are women the sole group that regulation of genetic selection would burden. Prospective fathers would be burdened, too, as would the burgeoning reproductive health industry.<sup>122</sup> Moreover, some of the most passionate arguments for regulating genetic selection have come from disabled persons and their advocates, a group with its own compelling claims to political vulnerability and underrepresentation.<sup>123</sup> Add to all of this the fact that most potential beneficiaries of genetic selection are comparatively well-educated and economically well-off, and the case for recognizing a constitutional right on the political process grounds implicit in the Court's past decisions seems decidedly unimpressive.<sup>124</sup>

Finally, recognizing a constitutional right to select the genes of one's offspring would require the Court to grapple with scientific and sociological questions of substantial complexity. The technology involved is both complicated and rapidly evolving. For courts to reliably assess the individual interests at stake, they would need to understand the benefits

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121. See, e.g., Dorothy C. Wertz & John C. Fletcher, *A Critique of Some Feminist Challenges to Prenatal Diagnosis*, 2 J. WOMEN'S HEALTH 173 (1993) (making a similar argument in the context of prenatal testing). But see Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, in PRENATAL TESTING AND DISABILITY RIGHTS 147, 156-57 (Erik Parens & Adrienne Asch eds., 2000) ("Selective abortion will not challenge the sexism of the family structure where women provide most of the care for children in general, for elderly parents, and for those disabled in accidents or from nongenetic diseases.").

122. The market for assisted reproductive technologies has been estimated at three billion dollars and growing. See Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 41, 42 (Michele Bratcher Goodwin ed., 2010).

123. See sources cited *supra* note 9. There is also a woman-protective argument for regulation, which holds that technology extending women's child-bearing years harmfully reinforces their traditional role as mothers and caretakers. On this view, the government demonstrates complicity in gender bias not by regulating genetic selection but by permitting it. See sources cited *supra* note 10.

124. A possible exception is the right of disabled persons to engage in so-called intentional diminishment in order to have children who share their condition. Deafness and dwarfism are the two most commonly discussed examples. See, e.g., I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347, 349 (2008). This is one form of genetic selection that it is easy to imagine the political process regulating to the detriment of a politically vulnerable group, arguably out of insufficient sensitivity to the distinctive culture and sense of identity associated with disabilities like deafness. As explored in the next Part, however, courts seem unlikely to be more sympathetic than the political process on this issue.

and limitations of the particular technique in question, which in turn would require a sound basic understanding of genomics. Courts would also need to be sensitive to the potential for these benefits and limitations to evolve over time and to keep up with those changes. On the state interest side of the balance, courts would need a similar willingness to study the actual mechanics of genetic-selection techniques, which are crucial to understanding the arguments for regulation. What is even more daunting, they would also need to assess the broad sociological impacts of these techniques on the treatment of disabled persons, the relationship between parents and children, socioeconomic stratification, and the psychological and social development of children conceived through genetic selection of various types. Standing alone, these difficult empirical issues may or may not be sufficient to doom a constitutional right to engage in genetic selection. But in conjunction with the other factors already canvassed, they would appear to tip the scales in that direction.

#### IV. A MORE SYSTEMATIC APPROACH

The Court's institutional analysis represents a large improvement over the prevailing scholarly silence. This should not be terribly surprising. Judges, unlike legal scholars, do not have the luxury of viewing constitutional questions as abstract philosophical problems, divorced from any real-world institutional context. Nevertheless, the Court's approach suffers from many significant shortcomings. The most important of these is its fundamentally unsystematic character. The Justices are clearly conscious of the importance of institutional choice but do not attend to it consistently or take its empirical dimensions seriously. With deep roots in the legal-process school, the qualitative comparisons they rely on are prone to idealization and abstraction of complicated real-world institutions; susceptible to fallacies of composition;<sup>125</sup> and, even at their best, frequently culminate in parades of incommensurable institutional shortcomings (or, more rarely, virtues) that frustrate comparative evaluation as much as they facilitate it. Too often the Court does not bother to compare competing institutional decisionmakers at all, instead treating the malfunction of one institution as sufficient reason to allocate responsibility to another, whose failings may be even greater.<sup>126</sup>

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125. Specifically, the Court is prone to fallaciously attributing the characteristics and motives of individual officials to institutions as a whole, as in the assumption that the judiciary will make rational, principled, or ideological decisions if individual judges are rational, principled, or ideological. Cf. Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 52 (2009) (discussing fallacies of composition and division in American public law).

126. See generally KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 13.

Despite these limitations, the Court's institutional analysis is an important starting point for any reformist project, which must explain how imperfect real-world courts can move from the status quo to a more sophisticated approach. With that end in mind, Part IV.A lays out the questions that an ideally rigorous and comprehensive institutional analysis would have to address, contrasting them with the Court's basically ad hoc approach. These questions are familiar to constitutional theorists, but as noted earlier, they have been largely overlooked in the constitutional literature on genetic selection, which makes it useful to review them here. Part IV.A does so. Part IV.B then turns to the most powerful and systematic tool for comparative institutional analysis developed by academics: namely, rational choice theory. Part IV.B conducts a basic rational choice analysis of genetic-selection regulation, drawing on Neil Komesar's stripped down, "participation-centered" approach to rational choice theory. This analysis conveys a rough sense of the institutional and interest group landscapes on genetic-selection issues and supports a few tentative conclusions for constitutional decisionmaking in this area. Its primary purpose, however, is to illustrate the broader strengths and challenges of using rational choice approaches as a basis for normative constitutional analysis. Several of these challenges, which have been largely overlooked in the existing literature, are discussed at length in Part V.

#### A. ASKING THE RIGHT QUESTIONS

First, and most basically, comparative institutional analysis involves an assessment of the likely error rates and costs of the various institutions that might be assigned decisionmaking authority over the issue in question. This means asking of each institution: How frequently is it likely to err? In what direction? And with what degree of severity?<sup>127</sup> When the Court asks these questions at all, it generally asks them at a high level of abstraction and of only one institution. For example, as seen in the previous Part, the Court is highly attuned to its own weaknesses with respect to broad scientific and sociological questions, but for purposes of institutional analysis it tends to treat all such questions as fungible. More important, it tends to ignore the serious pathologies that plague executive and legislative fact finding, especially on politically fraught questions.<sup>128</sup> When the interests of politically vulnerable groups are at stake, the Court tends to do the reverse, scrupulously attending to

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127. Of course, the ultimate question of interest is the weighted accuracy of the system as a whole. In some circumstances, that accuracy may be enhanced by the introduction of an additional veto point, such as judicial review, even if the second decisionmaker is more error prone than the first. *See* Vermeule, *supra* note 125, at 52.

128. *See, e.g.,* Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1174-75 (2007) ("Legislators *can* do serious investigations, but they rarely do.").

political malfunctions but ignoring the limited capacity of courts to address them without creating even greater problems. A sophisticated approach to institutional analysis would attend far more closely and consistently to the actual functioning of the relevant institutions in specific policy contexts and would be far more rigorously comparative in its assessment of error costs.<sup>129</sup>

Of course, the very notion of error rates and costs is meaningful only in connection with a normative theory attaching weights and values to particular errors. A libertarian theory, for example, would probably assign greater—perhaps much greater—significance to erroneous deprivations of individual liberty interests than to erroneous invalidations of justified government regulation. The reverse might well be true of a communitarian theory; at the very least, the differential would be smaller. Although it is possible to imagine scenarios in which the two approaches would nevertheless converge on the same constitutional rule,<sup>130</sup> no institutional analysis can be value neutral. Conversely, as Part II demonstrated, no interesting or controversial constitutional rule can be logically deduced from purely normative premises. Both normative and comparative institutional analysis are always required.

Another important point is that comparative institutional assessment of error costs (against the background of a particular normative theory) is likely to involve a large measure of uncertainty.<sup>131</sup> Once a normative scale is selected, the important questions for making such an assessment are empirical. But they will for the most part be both unanswered by the existing empirical literature and, in a great many cases, will be unanswerable, at least by quantitative methods. This fact goes a long way toward explaining—and partially excusing—the Court's empirical laxity on institutional matters. Nevertheless, such indifference is regrettable. It fosters complacency, creates a false sense of confidence, and obscures the truly important questions. If courts and constitutional theorists attended to those questions with greater care and rigor, it would often be possible to improve the quality of our guesswork in the face of uncertainty; to identify helpful theoretical models from positive political theory, economics, or decision theory; and in some cases, to frame questions for future quantitative or qualitative study.<sup>132</sup>

An approach that did only this much would be a significant improvement over the status quo, both academic and judicial. A comprehensive analysis, however, would also have to consider the decision costs, including opportunity costs, of adopting any particular

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129. See generally KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 13.

130. For an in-depth discussion of when and why this might be the case, see *infra* Part V.B.

131. See VERMEULE, *supra* note 13, at 3 (emphasizing empirical uncertainty).

132. *Cf. id.* (proposing a decision-theoretic response to the empirical uncertainties surrounding institutional premises of statutory interpretation).

constitutional rule. For example, even if courts perform marginally better than alternative decisionmakers on genetic-selection issues, a judicially enforceable constitutional right might nevertheless be ill-advised if it traded off with close judicial supervision of some other regulatory field, where the marginal advantage of courts was even greater.<sup>133</sup> Of course, a rule prohibiting most or all regulation of genetic-selection techniques could be expected to reduce legislative decision costs, wholly or partially compensating for the decision costs it would impose on courts.

Decision costs may also affect the relative attractiveness of different methods of judicial supervision. All else being equal, clear and hard-edged rules will fare better on this score because they can be more expeditiously applied to individual cases and they minimize the need for litigation by providing clear guidance to the relevant parties. For example, both a strong libertarian right and a rule of no judicially enforceable right at all would be likely to generate fewer decision costs (judicial, legislative, and private) than a right of relational autonomy that requires courts to balance individual and community interests case by case (and legislatures and private parties to anticipate and work around the balance struck by courts). Even if a more nuanced rule produced fewer or less serious errors relative to communitarian goals, the greater decision costs it would entail might tip the balance in favor of one bright-line rule or the other.<sup>134</sup>

Finally, any rigorous institutional analysis must consider the dynamic effects on other institutions of adopting any particular judicial approach. For example, might a rule of blanket judicial deference help to foster a sense of legislative responsibility on questions of individual liberty, with beneficial effects not only for reproductive freedom but for political engagement with individual rights across the board?<sup>135</sup> Alternatively, might such a rule encourage even greater legislative indifference to individual rights by eliminating even the prospect of judicial oversight for the severest abuses?<sup>136</sup> Still another possibility is

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133. The extent, and even the existence, of such tradeoffs depends on the overall capacity of the judiciary. For a variety of structural reasons, chiefly stemming from the hierarchical appellate structure of the adjudicative process, that capacity is likely to be starkly limited as compared to other decisionmaking institutions. See KOMESAR, *LAW'S LIMITS*, *supra* note 99, at 40–41. At any given time, of course, there may be a certain amount of slack in the system; the present caseload of the Supreme Court suggests as much. See David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 *CONST. COMMENT.* 151, 152 (2010) (describing the recent decline in the Court's plenary docket as "extraordinary"). But the question remains: of the innumerable social problems toward which that unused capacity might be directed, on which could courts make the most meaningful positive impact?

134. Which one would depend on the error rates and costs to be expected from an unrestrained marketplace and legislature, respectively.

135. See, e.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 81 (2008).

136. There are two additional possibilities. First, legislators may be so habituated to activist



that one rule or the other might upset a larger system-level allocation of authority between courts and legislatures that has the effect of reducing aggregate error costs. Of course, this discussion just scratches the surface. And of course, like error-cost assessment, analysis of decision costs and dynamic institutional effects will often involve a large measure of uncertainty. But grappling with these questions is an essential part of any comprehensive constitutional analysis.

#### B. A RATIONAL CHOICE ANALYSIS

We have already seen the limits of the Court's attempts to do so. Fortunately, its ad hoc qualitative approach is not the only one available. As is well known, economists, political scientists, and game theorists have developed more formal methods for modeling the performance of decisionmaking institutions, variously traveling under the banners of rational choice theory, the economic theory of politics, public choice theory, and positive political theory.<sup>137</sup> These approaches, too, have their limits as a basis for normative constitutional analysis, as we shall see. But the systematic framework they provide for predicting comparative institutional performance is, at a minimum, a valuable complement to more ad hoc qualitative approaches.

This Subpart makes a rough first attempt at applying one such framework to the regulation of genetic selection.<sup>138</sup> Building on the basic rational choice model, Komesar's "participation-centered approach" traces variations in institutional outputs to variations in the costs and benefits of efficacious participation—most centrally, the costs of information and organization and the per capita distribution of benefits—among various stakeholders.<sup>139</sup> It is these factors, Komesar suggests, that

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judicial review that only a very significant, across-the-board shift toward judicial deference could shock them into any greater sense of constitutional responsibility. If this were true, the marginal benefit of a deferential approach on genetic-selection issues would be zero, while such an approach would come at the cost of upholding the work product of a constitutionally oblivious legislature. Second, even if local judicial deference on genetic-selection issues produced a meaningful marginal increase in legislative constitutional responsibility (local or global), that increase might come only after a significant time lag, as legislators habituated to activist judicial review gradually adjusted to the new reality. If this were the case, the short-term costs of upholding constitutionally irresponsible legislation during the transition period might well outweigh the long-term benefits of increased legislative responsibility. See Vermeule, *supra* note 125, at 52.

137. See, e.g., Mathew D. McCubbins & Michael F. Thies, *Rationality and the Foundations of Positive Political Theory*, 19 LEVIATHAN 7 (1996).

138. In the nature of rough first cuts, the discussion that follows finesses (or outright suppresses) many complexities and relies on many tentative empirical assumptions. The goal is not to offer firm predictions about the functioning of the institutions examined. It is rather to venture reasonable guesses, while in the process demonstrating the analytic power and limitations of the rational choice approach as a basis for normative constitutional analysis.

139. See generally KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 13. I have selected Komesar's approach because it is relatively accessible and jargon-free and because Komesar has gone further than any other theorist in applying the basic rational choice model to problems of comparative

explain when and whether particular groups of stakeholders are able to overcome collective action problems to effectively influence decisionmaking institutions. To simplify greatly, small groups with high per capita stakes are likely to have stronger incentives to learn their own interests and lower costs of organizing to pursue those interests than large groups with low per capita stakes, even if the total stakes of the latter group are larger.<sup>140</sup> On the other hand, in certain recurrent circumstances that reduce their informational and organizational costs of participation, larger groups, with more diffuse interests, can be powerfully influential simply by virtue of their size.

For any given issue, these basic “dynamics of participation” will generally remain relatively constant across institutions. That is to say, if one institution is skewed toward a particular group of stakeholders, other institutions are likely to be similarly skewed, though the degree of skew may be different. The crucial issue for comparative institutional analysts, therefore, is how different levels and types of participation are rewarded by different decisionmaking institutions.<sup>141</sup>

With this brief summary in mind, we can proceed to apply the participation-centered approach to the regulation of genetic selection. It will be useful to organize our inquiry into three steps. The first is to identify the relevant stakeholders and their likely regulatory preferences. The second is to assess (in this case, roughly estimate) the sizes of each of these groups, the per capita distribution of stakes among their members, and other factors affecting their organization costs. The third is to assess the variation in these costs and benefits of participation among the

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institutional analysis.

140. This proposition has become something close to a truism in legal scholarship, but in fact, it is true only as a rough empirical generalization, as a moment’s reflection on successful mass movements (not to mention majoritarian oppression) should suffice to demonstrate. The basis for this generalization is not the logical, prisoners’ dilemma structure of collective action, which in one-shot situations should prevent cooperation by small groups as well as large, and in iterative games should in theory permit cooperation by large groups as well as small. Rather, it is the practical costs—mostly information costs—of communicating, coordinating on a joint course of action, and making credible commitments to cooperate (commitments that depend on the ability of the group to monitor individual actors), which are often, though not always, prohibitive for large groups. *See generally* STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2008); RUSSELL HARDIN, *COLLECTIVE ACTION* (1982).

141. Unlike many public choice theorists, Komesar does not assume that either officials or citizens are “narrowly rational” (that is, motivated purely by material self-interest). Rather, he assumes that individuals act instrumentally from an indeterminate mix of selfish, ideological, and altruistic motives. The content of this mix in any given context obviously has an effect on institutional outputs, but that effect is always mediated by the same dynamics of participation: individuals participate when the benefits to them (including altruistic and ideological benefits) exceed the costs (most significantly, the costs of effectively organizing group action). Officials, for their part, may act for partially or wholly altruistic reasons, but they will remain in office (and indeed obtain office in the first place) only if those reasons are sufficiently pleasing to the mobilized interest groups that fund campaigns and turn out voters. *See* KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 13, at 65.

different potential decisionmaking institutions. For present purposes, it will be sufficient to consider the market, the political process, and the courts, though along the way I will have a few observations to make about subsidiary institutions within these broadly drawn categories.

One last prefatory note is in order. Despite my best efforts, I expect the discussion that follows to strike some readers as off-puttingly technical and others as distractingly informal. This is a regrettable, though I think unavoidable, byproduct of writing for an audience spanning pure constitutional lawyers, lawyer-reproductive health experts, lawyer-social theorists, and lawyer-social scientists. An important theme of this Subpart, and especially Part V, is the need for greater dialogue among these groups. If I manage to annoy each of them enough to keep the others reading, without driving any away, I will count my efforts a success.

### I. Step One: Stakeholders

The list of important stakeholders with the potential to influence regulation of genetic-selection decisions is surprisingly long. At a minimum, it would have to include the following:

- Parents who would like to select the genes of their offspring and who will oppose regulation for self-interested reasons;<sup>142</sup>
- Fertility specialists and genetic-testing service providers, who will likely oppose regulation out of professional self-interest and perhaps ideological commitment;<sup>143</sup>
- Libertarian (as opposed to gender-egalitarian) factions of the pro-choice movement, which will oppose regulation on personal autonomy grounds and perhaps as a prophylactic against backdoor incursion on abortion rights;<sup>144</sup>
- Religious conservatives (including the pro-life movement) who will oppose genetic selection on moral grounds and perhaps as a backdoor route to restricting abortion rights;<sup>145</sup>

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142. At least one organization already exists to represent the interests of this group. See *Resolve*, NAT'L INFERTILITY ASS'N, [www.resolve.org](http://www.resolve.org) (last visited Oct. 31, 2011).

143. This group is represented by two professional organizations: the Society for Assisted Reproductive Technology and the American Society for Reproductive Medicine. See *Vision of ASRM*, AM. SOC'Y FOR REPROD. MEDICINE, <http://www.asrm.org/detail.aspx?id=35> (last visited Oct. 31, 2011); *Mission Statement*, SOC'Y FOR ASSISTED REPROD. TECH., <http://www.sart.org/detail.aspx?id=4283> (last visited Oct. 31, 2011).

144. On the divide between libertarian and egalitarian factions, see, for example, Carol Mason, *Who's Afraid of Virginia Dare? Confronting Anti-Abortion Terrorism After 9/11*, 6 U. PA. J. CONST. L. 796, 801–02 (2004); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1574–76, 1588, 1591 (1991).

145. One prominent example, among hundreds, is Operation Rescue. See *Who We Are*, OPERATION RESCUE, <http://www.operationrescue.org/about-us/who-we-are/> (last visited Oct. 31, 2011).

- Disability-rights groups, concerned that selection against children with disabilities will reduce respect for existing persons with disabilities;<sup>146</sup>
- Some feminist groups, concerned that women will be pressured by their male partners and doctors into undergoing physically and emotionally burdensome medical procedures against their own best interests;<sup>147</sup> and
- Communitarian groups, concerned about the potential of new genetic technologies to exacerbate social inequalities and to commodify the reproductive process.<sup>148</sup>

## 2. *Step Two: Costs and Benefits of Participation*

Of these groups, prospective parents who wish to select the genes of their offspring likely have the highest per capita stake. At a minimum, each member of this group is willing to contemplate spending tens of thousands of dollars on genetic selection and the attendant medical procedures.<sup>149</sup> For many, the interests at stake would be so significant as to defy quantification in monetary terms. Members of this group are also likely to be relatively well-off financially<sup>150</sup> and relatively few in number<sup>151</sup> and thus likely to have the easiest time mobilizing to influence any

146. See, e.g., Stainton, *supra* note 9; David Ruebain, *What Is Prejudice as It Relates to Disability Anti-Discrimination Law?*, DISABILITY RTS. EDUC. & DEF. FUND, [http://www.dredf.org/international/paper\\_ruebain.html](http://www.dredf.org/international/paper_ruebain.html) (last visited Oct. 31, 2011) (“The inescapable consequence of [genetic selection] is that disabled people, as a distinct group, are specifically targeted before they can even be born.”). It is important to emphasize that not all members of the disability-rights community share these concerns or agree on the appropriate governmental response to them. See, e.g., Asch, *supra* note 9.

147. See, e.g., FEMINIST INT’L NETWORK OF RESISTANCE TO REPROD. & GENETIC ENGINEERING, <http://www.finrrage.org> (last visited Oct. 31, 2011). As with the disability-rights community, it is important to emphasize that not all feminists or feminist groups share these concerns. See *supra* note 145.

148. See, e.g., *CGS: About Us*, CTR. FOR GENETICS & SOC’Y, <http://www.geneticsandsociety.org/article.php?list=type&type=10> (last visited Oct. 31, 2011); *History*, COUNCIL FOR RESPONSIBLE GENETICS, <http://www.councilforresponsiblegenetics.org/Help/History.aspx> (last visited Oct. 31, 2011).

149. See Lynn B. Davis et al., *A Cost-Benefit Analysis of Preimplantation Genetic Diagnosis for Carrier Couples of Cystic Fibrosis*, 93 FERTILITY & STERILITY 1793, 1793 (2010) (“In vitro fertilization costs \$10,000 or more, and intracytoplasmic sperm injection (ICSI), embryo biopsy, and PGD add costs of approximately \$1,500–\$2,500 each. . . . [M]ore than one cycle is usually necessary to achieve a live birth.”).

150. Of course, infertility, susceptibility to serious genetic disease, and the desire for genetically exceptional children are hardly the exclusive province of the wealthy. But genetic-selection techniques are expensive and seldom covered by insurance. Access to them therefore remains—and for the foreseeable future seems likely to remain—available only to the financially privileged few. See, e.g., King, *supra* note 2, at 296–97, 313.

151. To date, preimplantation genetic screening has been used in fewer than 10,000 in vitro fertilization cycles annually. See *id.* at 291 n.28. That number is likely to climb as genetic-testing technologies and knowledge of the human genome improve, but in raw numbers, this group will remain tiny relative to ideological opponents of genetic selection. Moreover, even as it grows, the per capita stakes of its members will remain much higher than those of genetic-selection opponents.

institution that exercises decisionmaking authority with respect to genetic selection. Fertility specialists, genetic-testing professionals, and other service providers will also have a relatively high per capita stake and similar advantages of coordination (perhaps even greater, owing to their stable professional interest in the issue and preexisting professional organizations<sup>152</sup>). These groups will likely enjoy the support of a diffuse but potentially sizeable fraction of the pro-choice movement, which might partly compensate for its relatively low per capita stakes with a sizable existing organizational structure.<sup>153</sup>

Opponents of genetic selection seem likely to have a substantially lower per capita stake than parents and medical professionals.<sup>154</sup> Few of them are likely to benefit from regulation in a direct personal sense, material or otherwise. For those who might benefit directly (most plausibly, the disabled), any benefits are likely to be small, incremental, and causally attenuated. Most opponents, however, will be motivated by ideology or, more broadly, by moral concerns. Such concerns are nothing to sneeze at; they can be powerful motivators. Some especially passionate members of this group might even have higher stakes than individual parents or medical professionals. Nevertheless, the *per capita* stakes of the latter groups seem almost certain to be higher than those of genetic-selection opponents as a whole.

On the other hand, opponents of genetic selection seem likely to be more numerous than proponents, including as they do religious conservatives, the disability-rights community, leftist communitarians, and some feminists.<sup>155</sup> This is significant because, as Komesar demonstrates, numbers can and frequently do trump intensity when the per capita stakes of the larger group are high enough relative to the costs of participation, even if they are lower than the per capita stakes of a smaller opposing group.<sup>156</sup> The reason for this is simple: Once these

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152. Such organizations may create what public choice theorists call “selective effects”—in other words, private benefits that make membership worthwhile to individual members quite apart from the collective benefits conferred by efficacious group action. Examples in the medical context would include intragroup referrals, advertising, and professional development. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 137–38 (2nd prt. 1971).

153. This sort of organizational “piggybacking” can substantially reduce the costs of participation. See, e.g., HARDIN, *supra* note 140, at 43.

154. Some especially passionate members of this group might have higher stakes than individual parents or medical professionals, but the *per capita* stakes of those groups are likely to be higher.

155. For present purposes, this last group should be understood to include ordinary citizens for whom the notions of cloning and genetic enhancement are repellent for nonreligious reasons, potentially quite a substantial number.

156. See KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 13, at 224–25. The numbers advantage of genetic-selection opponents is likely to be enhanced in practical terms by the fact that many persons who may wish to use genetic-selection techniques in the future will be unaware of this fact until the need arises. On the other hand, many individuals who will never use such techniques may place value—and potentially quite significant value—on preserving their option to do so.

groups cross the threshold intensity required to justify the costs of organization, their greater size gives them substantial power in most relevant decisionmaking institutions.<sup>157</sup> Such may well be true in the context of genetic selection, where a substantial subset of genetic-selection opponents is very strongly motivated<sup>158</sup> and the ready availability of highly salient religious and cultural tropes may reduce the costs of mobilizing broad support (chiefly, the costs of informing and motivating other low-intensity members—or potential members—of a coalition).<sup>159</sup> Moreover, proregulation interests can likely draw on substantial preexisting organizational infrastructure in the form of pro-life groups and even churches themselves, further reducing their costs of participation.

On the other hand, many salient and culturally powerful tropes are also available to genetic-selection proponents—among them, the privacy and personal liberty discourses of the pro-choice movement.<sup>160</sup> Furthermore, although a small minority in numerical terms, prospective parents wishing to engage in genetic selection are neither discrete nor insular.<sup>161</sup> Many voters with no direct stake in the issue will have friends or family members in this group. Even those who do not may be able to imagine themselves, or those they care about, in a similar position. This would presumably complicate the task of mobilizing broad support for regulation.<sup>162</sup>

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157. Think of the aggregate power of racist white consumers to induce business owners in the Jim Crow South to turn away black customers (or employees) whom it would otherwise have been in their economic self-interest to serve (or hire). The same goes for the power of racist whites to maintain segregated schools and other forms of public racial subjugation over the opposition of blacks with much higher per capita stakes.

158. See, e.g., Kass, *supra* note 7, at 687.

159. Think only of the terms “playing god,” “designer babies,” and “neoeugenics,” all of which provide cheap and potentially effective tools for raising awareness and opposition to genetic selection among low-information voters, consumers, etc.

160. The fear that religious conservatives might use genetic-selection regulation as a stalking horse for restricting abortion rights (perhaps through increased legal protection for embryos) seems likely to increase the political potency of such a linkage. Cf. Tara Kole & Laura Kadetsky, *Recent Developments: The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 216 (2002) (expressing similar concerns about the Unborn Victims of Violence Act as an incremental assault on abortion rights).

161. See KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 13, at 225 (“Insularity and discreteness make the minority a safe target and often increase the possibility of majority activity by making the presence of simple symbols more likely.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

162. An important complication, glossed over here, is that neither proponents nor opponents of genetic selection are likely to be monolithically opposed to (or in favor of) all regulations. Their commonalities of interest might enable them to form political alliances, as I have been assuming, but their differences might also enable opposing forces to employ variations on the strategy of divide and conquer. Genetic-selection opponents, for example, might peel off or weaken the opposition of proponents by promising (explicitly or implicitly) to restrict regulation to genetic-enhancement uses.

### 3. *Step Three: Comparing Institutions*

The picture just painted is murky, to say the least. Standing alone, the high per capita stakes of parents and fertility professionals would seem likely to secure legislative forbearance at least as to those genetic-selection decisions most people would recognize as central to procreative liberty and perhaps more.<sup>163</sup> The concentrated interest of parents and doctors would also make it unlikely that diffuse costs to the dignity of disabled persons or traditional religious views about the propriety of choosing the traits of future children would be reflected in the outcomes of an unregulated market. The prospect of such dispersed groups organizing to pay parents and doctors to forsake genetic selection borders on fanciful.<sup>164</sup> Nevertheless, the greater numbers of genetic-selection opponents provide reason for pause, especially in combination with the intensity of religious feeling; the extensive pro-life organizational apparatus; and the ready availability of simple and highly salient religious and cultural symbols for portraying genetic selection in a negative light. This could well be enough to put genetic selection on the regulatory agenda, at least in particular states where these interests are likely to be concentrated<sup>165</sup> and especially for more controversial uses like genetic enhancement, intentional diminishment,<sup>166</sup> and sex selection.<sup>167</sup>

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163. The exact mechanisms by which concentrated interest groups exert political influence are somewhat vaguely specified, both by Komesar and public choice theorists, especially in the context of federal administrative agencies. *See generally* CROLEY, *supra* note 140 (noting the conceptual and empirical shortcomings in the public choice claim that a special-interest beholden Congress dominates such agencies). Nevertheless, the list plausibly includes campaign donations for or against incumbent office holders; voter mobilization efforts; the supply of slanted information to busy, data-starved legislators; and more remotely, bribes (or their functional equivalent) and the prospect of postgovernment employment. Crucially, none of these but the last two depends on official venality for its efficacy. All the others are consistent with an evolutionary view in which only those officials whose view of the public interest conforms to (or comes to conform to) that of mobilized interest groups are elected or appointed to public office. *See* KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 13, at 63–64.

164. *But cf. History*, OPERATION RESCUE, <http://www.operationrescue.org/about-us/history/> (last visited Oct. 31, 2011). This pro-life organization claims to have purchased and closed a women's health clinic where abortions were provided.

165. The strength of religious conservatives in the Deep South makes it seem like particularly fertile ground. Indeed, the Georgia State Senate recently considered legislation that, by requiring the implantation of all embryos created in a given in vitro fertilization cycle, would effectively have banned preimplantation genetic screening (which by definition involves discarding embryos). Though the bill appears to have died in committee, it produced an intense legislative fight, which shaped up much as the analysis of this Article would have predicted, with religious conservatives (and pro-life groups in particular) mobilizing in support of the bill and fertility specialist and patient advocacy groups (successfully) mobilizing against it. *See* William Saletan, *The IVF Battlefield*, SLATE (Mar. 8, 2009, 11:22 AM), <http://www.slate.com/blogs/blogs/humannature/archive/2009/03/08/the-ivf-battlefield.aspx>.

166. Intentional diminishment, recall, refers to the deliberate selection of genetic traits that society at large would consider disabilities. *See supra* note 124.

167. Roughly similar coalitions have succeeded in obtaining very strong regulations in Germany and Italy and somewhat weaker regulations in the United Kingdom, though the political and cultural contexts are obviously quite different from the United States. *See* John A. Robertson, *Reproductive*

Depending on the intensity and distribution of public discomfort, genetic-selection opponents may even be able to mobilize sufficiently broad support to achieve total prohibition, though this seems distinctly unlikely.

Even if genetic-selection decisions are left to an officially unregulated market, these factors might allow genetic-selection opponents to bring enough pressure to bear on service providers to induce professional self-regulation or clinic closings that would accomplish many, though probably not all, of their goals. Such pressure might take the form of a public shaming campaign; social ostracism of individual service providers; boycotts of hospitals, clinics, and insurance companies offering genetic-selection services; or threats of political mobilization, to name just a few possibilities.<sup>168</sup> At first blush, these forms of mass action would seem unusually difficult to organize in the health care context, where the choices of most consumers are highly constrained by insurance networks and where so many other important interests are at stake in choosing providers. But the extremely limited availability of abortion services in many states where pro-life sentiment runs high is evidence that active majorities can exert a powerful influence even in this atypical market.<sup>169</sup>

The political process and the market may thus be expected to run reasonably closely together. The same factors that predict success in one arena predict success in the other. Nevertheless, it seems safe to say that genetic-selection opponents would prefer to compete in the political arena (where the tools at their disposal are stronger) and genetic-selection proponents in the market (where the tools of their opponents are weaker).<sup>170</sup> Whether and to what extent either group gets its way will depend on the constitutional rule adopted by courts. In this sense, the

*Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. TRANSNAT'L L. 188, 205 (2004) [hereinafter Robertson, *Reproductive Technology*].

168. That we have not yet seen these forms of pressure (or, for that matter, meaningful regulation) is some evidence that the numbers advantage of genetic-selection opponents is at present insufficient to overcome the higher per capita stakes of proponents. Of course, this may well change as genetic selection becomes more common (and thus more salient) and is used in new (and more controversial) ways. Even then, the geographic distribution of strong opposition to genetic selection may limit the scale on which these forms of market pressure can succeed. If that distribution is uneven, as it is for abortion, the market for genetic selection may continue to flourish in some states even while vanishing in others. To the extent that the agenda of opponents demands a uniform national rule, this would increase the attractiveness of the political process for them and decrease its attractiveness for genetic selection proponents.

169. See JENNIFER BAUMGARDNER, *ABORTION & LIFE* 16 (2008). Social ostracism of abortion providers (and seekers) is probably the most important mechanism for this influence.

170. Note that this runs contrary to the basic normative tenet of public choice theory: that the political influence of concentrated interest groups justifies leaving most issues to the market. One of Komesar's most enduring insights is that concentrated interests will enjoy outsized influence in both the political process and the market, and that indeed, that influence may be even greater in the market. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 43, 46 (1991) (making a similar point).



decision whether to recognize a constitutional right to engage in any particular form of genetic selection is an institutional choice about how to divide decisionmaking authority between the market and the political process. More precisely, it is a choice governing which institution will do this dividing. This point is fundamental. A strong constitutional right makes courts the primary decisionmaker about when, if ever, the political process will be permitted to play a regulatory role. A rule of no constitutional right, by contrast, leaves determinations about the scope of that regulatory role to the political process itself.<sup>171</sup>

Because there is essentially no chance that American courts will affirmatively require regulation of genetic selection,<sup>172</sup> only proponents of genetic selection have something to gain through the recognition of a judicially enforceable right. What precisely that is (and what opponents of genetic selection have to lose) turns on the costs and benefits of efficacious participation in the judicial process. Interest groups mobilize to influence the judiciary in two ways—through adjudication and through the appointments process—each of which carries different costs and benefits. In the event that regulations are adopted and challenged in court, the threshold costs of bringing a serious constitutional challenge to those regulations is high in comparison to the costs of voting or writing letters to one's congressperson or submitting comments on an agency rulemaking. But once that threshold is cleared, as it certainly would be in the context of genetic selection, the marginal impact of additional litigation expenditures almost certainly declines much more quickly than the marginal impact of additional political efforts.<sup>173</sup> There is a huge difference between a one-million and a ten-million dollar political ad campaign or campaign donation. There is a much smaller difference between a one-million and a ten-million dollar litigation effort, especially

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171. See KOMESAR, *LAW'S LIMITS*, *supra* note 99, at 161 (“Strong rights in constitutional law—such as old-fashioned (and always fatal) strict scrutiny under equal protection law or the absolutist position on free speech—allocate significant responsibility away from political processes to informal processes. . . . With weak rights, the sweeping allocation is to the political process rather than the informal process (markets, communities, individuals).”).

172. This is a simple corollary of the strong—though conceptually suspect—American commitment to a constitution of negative, rather than positive, liberties. *Cf.* *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 204 (1988). In Germany, which has a strong constitutional tradition of positive liberties, courts have affirmatively required regulation of in vitro fertilization (and by extension, genetic selection) to protect the dignity of human embryos. See Robertson, *Reproductive Technology*, *supra* note 167. *But see* Bundesgerichtshof [BGH] [Federal Court of Justice] July 6, 2010 (holding that German law permits preimplantation testing to screen for serious genetic diseases). U.S. courts could logically reach a similar result by reading the word “person” in the Equal Protection Clause to include embryos, but for now at least, such a result is jurisprudentially unthinkable. *Cf.* Michael Stokes Paulsen, *Michael Stokes Paulsen (dissenting)*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 196 (Jack M. Balkin ed., 2005) (arguing that the Fourteenth Amendment obligates state governments to accord fetuses equal protection of the laws).

173. See Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 *LAW & SOC. INQUIRY* 959, 968 (1997) (making this point).

given the willingness of many top-notch lawyers to donate (or discount) their services for altruistic or ideological reasons. Consequently, to the extent that effective advocacy influences outcomes, courts are likely to be *relatively* friendly terrain for political losers seeking to overturn burdensome regulations—in this case, parents, doctors, and other genetic-selection proponents.<sup>174</sup>

Of course, it is not only—or even primarily—effective advocacy that influences judicial outcomes. The composition of the judiciary, and in particular the Supreme Court, matters greatly. And that composition in turn is a product of the politics of the appointment and confirmation processes. However committed individual judges may be to politically impartial decisionmaking and however much life tenure may free them from ongoing dependency on the political branches, the legal philosophies, life experiences, and psychological dispositions with which they approach cases will be ones that the vector sum of political forces in the presidency and the Senate found acceptable at the time of their appointments. To this extent, the large proportion of judicial outcomes in close constitutional cases that are a product of judicial ideology will tend to favor the same interests favored by the political process.<sup>175</sup>

This tendency, however, is subject to several important qualifications. First, given the long tenure of most federal judges, and in particular Supreme Court Justices,<sup>176</sup> it is not uncommon for courts to face controversial constitutional questions that were not even on the political radar screen at the time some (or even a majority) of the sitting judges or Justices were appointed. Second, the vector sum of political forces can fluctuate substantially during the tenure of a given judge or Justice (or group of judges or Justices). Third, at least historically, both judicial appointments and confirmations have frequently been made on the basis of rather limited information about individual nominees' ideological views.<sup>177</sup> Moreover, even where a nominee's views are a matter of extensive public record (or reliable private assurance), those views can and occasionally do evolve substantially over the fifteen, twenty, or even

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174. This is not to suggest that genetic-selection proponents are likely to lose in the political process. As the preceding discussion demonstrates, the odds are probably slightly against it, though this is very difficult to predict. The point is merely that, if they were to lose in the political process, genetic-selection proponents would have a modest hope of reversing that loss in the courts. In the opposite situation, opponents of genetic selection would have no such hope.

175. Cf. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); FRIEDMAN, *supra* note 67.

176. See, e.g., Justin Crowe & Christopher F. Karpowitz, *Where Have You Gone, Sherman Minton? The Decline of the Short-Term Supreme Court Justice* 1 (Princeton Law & Pub. Affairs Working Paper Series, Paper No. 06-014, 2006), available at <http://ssrn.com/abstract=948813> (finding that the mean tenure of Supreme Court Justices has reached twenty-five years).

177. See Norman Dorsen, *The Selection of U.S. Supreme Court Justices*, 4 INT'L J. CONST. L. 652, 662–63 (2006) (noting the ideological unpredictability of many twentieth-century Supreme Court appointments).

thirty-year period she spends on the bench. Fourth, the political forces that determine federal judicial appointments are national, whereas many challenged regulations (and the vast majority of invalidated regulations) are the product of state and local political processes, where the balance of interests may be quite different. The combined effect of these qualifications is to produce a greater divergence between the federal courts and the political process than the political dynamics of participation in judicial appointments and confirmation might otherwise suggest.<sup>178</sup> This divergence might be even larger but for the institutional dependence of the courts on the other branches, in particular the executive branch, to carry their decisions into effect.

#### 4. Takeaways

What should constitutional analysts take away from all of this? First, in the event that opponents of genetic selection succeed in procuring regulations through the political process, a participation-centered analysis offers proponents some relatively modest hope of obtaining a more favorable outcome through the courts. At a minimum, the courts give proponents, but not opponents, of genetic selection a second bite at the apple, on what should be a more even playing field.<sup>179</sup> If courts were to adopt a strong constitutional right to engage in genetic selection, the balance would tip even further in favor of regulation proponents, though of course the stability of that balance would be subject to the ongoing dynamics of participation.

Second, the capacity of the rational choice approach to generate reliable conclusions depends heavily on the quality of a broad array of empirical inputs. These range from the likely demand for different types of genetic-selection services to the strength of the pro-life organizational infrastructure to the nature and depth of the divide between personal autonomy and egalitarian pro-choice activists. In the first-cut analysis offered here, I have been content simply to make plausible assumptions

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178. Occasionally that divergence can be quite extreme, as in decisions like *Hammer v. Dagenhart*, 247 U.S. 251, 251 (1918) (invalidating a federal ban on interstate shipment of goods produced through child labor), *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that recitation of an official school prayer violates the Establishment Clause), and *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (striking down federal limits on corporate campaign expenditures). On the unpopularity of these decisions, see Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 62 (Nathaniel Persily et al. eds. 2008) (in regards to *Engel*); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 775 (1991) (in regards to *Hammer*); Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html> (last visited Oct. 31, 2011) (in regards to *Citizens United*).

179. Of course, the occasion for a constitutional challenge will arise only if the political process turns out to favor pro-regulation forces at some point in time.

on these issues. But a rigorous rational choice analysis is possible only with reliable and relatively precise information about each of them.

This is the first of several reasons that greater dialogue is needed between institutionalists and other scholars. Even if rational choice theory were the alpha and the omega of institutional analysis, it could generate actionable conclusions only with substantial assistance from reproductive health experts. On the other hand, to provide such assistance, scholars like Robertson and Suter will have to talk to rational choice theorists and think in more institutionally sensitive terms. The challenges of institutional choice discussed in the next Part only make such dialogue more important.

## V. THE CHALLENGES OF INSTITUTIONAL CHOICE

Rational choice theories have, of course, been subject to intense and sustained criticism.<sup>180</sup> By relaxing the assumption of narrow rationality, Komesar's participation-centered approach sidesteps some of that criticism but not all of it. For obvious reasons, however, I cannot wade into this large and long-running debate here. Fortunately, neither the soundness of the standard criticisms of rational choice nor their applicability to the participation-centered approach affects the point I want to make in this Part. Even if we take the participation-centered approach on its own terms, any attempt to employ it as a basis for institutional choice faces a number of formidable challenges. This Part uses genetic selection as a case study to explore several of them.

My object in doing so is not to criticize the participation-centered approach or Komesar's many imaginative applications of it. To the contrary, I believe it is the best and most systematic approach to comparative institutional analysis available.<sup>181</sup> But no approach to any problem is without limits or difficulties. And, in the complex arena of institutional analysis, no approach is without many serious ones. Komesar is well aware of this fact and has frequently supplemented the participation-centered approach with other modes of analysis to illuminating effect. This Part attempts to push one step further and provide a general account of which questions the participation-centered

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180. See generally CROLEY, *supra* note 140; DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994).

181. I am hardly the only one to hold this view. See, e.g., Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case*, 41 N.Y.U. J. INT'L L. & POL. 1, 1 (2008) (describing Komesar's work on comparative institutional analysis as "path-breaking"); see also Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J. LAW & TECH. 569, 575 (2001) (same); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 697 (2007) (same).

approach can and cannot answer, to what degree, and in which circumstances.

Some of the challenges this Part explores highlight the importance of greater dialogue between institutionalists and substantive policy experts. Others highlight the potential benefits of supplementing the participation-centered approach with complementary approaches to institutional analysis. Still others highlight the impressive versatility of the participation-centered approach. A cross-cutting theme is the inherent complexity of institutional choice and the difficulties it creates for any rigorous analytical approach. Whether or not we can improve on the participation-centered approach in any given situation, a deeper understanding of these difficulties should enable us to apply it more intelligently. Given the starring role it justly continues to play in comparative institutional analysis, that is no small thing.

#### A. THE NORMATIVE GAP

The most obvious and important challenge facing the participation-centered approach is the imperfect match between the likely fortunes of different interest groups (what the approach predicts) and most plausible normative goals (what institutional choice seeks to maximize). This is a general point, but it is well illustrated in the context of genetic selection. Consider again the libertarian position introduced in Part II. Given their commitment to a broad right of procreative liberty, libertarians are likely to be generally sympathetic to interest groups opposed to regulation of genetic selection. If the participation-centered approach revealed that such groups would be seriously and systematically disadvantaged in the political process while faring relatively well in the market, that would provide a powerful reason for libertarians to embrace a strong judicially enforceable constitutional right.<sup>182</sup> But absent such a stark imbalance, not just between interest groups but between institutions, the implications are much less clear.

While libertarians generally favor a broad constitutional right, they recognize that procreative liberty has limits. It extends only to those genetic-selection decisions that implicate the interests that make reproduction a valued activity (or perhaps only those that most people are prepared to recognize as central to procreative liberty).<sup>183</sup> Libertarians also recognize that the right to procreative liberty may be overridden when it conflicts with sufficiently important government interests. Given these commitments, libertarians are compelled to ask: Might courts applying these principles systematically overprotect

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<sup>182</sup> The effect of such a right, of course, would be to allocate decisions about the use of genetic selection to the unregulated marketplace.

<sup>183</sup> See *supra* note 36–37 and accompanying text.

genetic-selection decisions that fall outside the legitimate scope of reproductive liberty? Or might they systematically invalidate justified regulations that legitimately implicate the right but are necessary to protect a compelling state interest? If so, would these error costs be greater or smaller than the benefits of a strong constitutional right (in terms of regulations correctly invalidated or deterred from adoption in the first place)?

The participation-centered approach certainly sheds some light on these questions. For instance, it gives us reason to believe that courts are most likely to err on the side of overprotection when they are staffed with judges sympathetic to pro-genetic-selection interests. That in turn is most likely when such interests are politically strong enough to secure the appointment of jurisprudential allies to the courts. These are rough generalizations, of course. But to the extent they hold, the participation-centered approach suggests that overprotection is most likely when protection itself is least necessary. That *might* be a persuasive argument against recognizing a constitutional right, even to libertarians,<sup>184</sup> if we could be confident that genetic-selection proponents would be politically dominant.

Since we cannot be confident of this result, however, we are again left to consider the indeterminate case in which interest groups whose goals partially overlap with the libertarian vision are likely to be at least partially successful in the political process and perhaps modestly more successful in the courts. If these groups achieve enough success in the political process—and success of the right kind—to secure the goals they share in common with libertarians, courts can do little good by recognizing a strong constitutional right. Indeed, such a right might well do positive harm, invalidating only (or mostly) those regulations that libertarians would regard as justified. If the reverse is true, however, and the regulations that make it through the political process are mostly unjustified, a constitutional right might be the only hope of preventing what libertarians would regard as serious and disturbing invasions of procreative liberty.

How should libertarians respond to these possibilities? The participation-centered approach, unfortunately, provides little guidance. The point goes well beyond the familiar Dworkinian critique of legal-process theories: that any conception of political or process malfunction must be defended on substantive grounds.<sup>185</sup> Rather, even taking such grounds as given, a participation-centered analysis can often provide

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184. This would depend, in part, on the relative weight attached to Type I and Type II errors—in this context, erroneous invalidations of regulations necessary to protect a compelling state interest and erroneous validations of regulations that violate procreative liberty, properly understood.

185. See Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 510 (1981) (advancing this critique of John Hart Ely's representation-reinforcement theory of judicial review).

only crude information about which allocation of institutional authority will most reliably give them practical effect. It may tell us which allocation is best for genetic-selection proponents and other interest groups, but not which is best for libertarians (or most other normative views). I shall call this problem *the normative gap*. The existence of such a gap is a serious challenge for institutional choice, so it is worth considering what determines the existence and the extent of this gap in any given case and how, if at all, the gap might be closed.

### I. *Measuring the Gap*

The existence and extent of the normative gap are a function of three factors. The first is the nature of the normative goal or goals in question. All else being equal, the more closely a goal coincides with the success of a particular interest group (or with the breadth of participation by interest groups generally), the smaller the normative gap. The reason should be obvious. These are the aspects of institutional performance the participation-centered approach sets out to explain; unless it fails completely in that task, it is natural that the approach would be most helpful when these aspects are most relevant.<sup>186</sup>

The second factor is the degree of divergence among institutions: the greater the divergence, the smaller the gap. The reason here is a little more complicated. Even where the normative goal in question does not align perfectly with the agenda of any interest group, it will generally correlate more strongly with some than others.<sup>187</sup> Where these groups would fare substantially better in one institution than in the plausible alternatives, the mere correlation between their agendas and the relevant goal may be sufficient to justify the allocation of authority to that institution.

The third and final factor is the degree of precision with which the participation-centered approach is able to predict the specific successes and failures of each interest group: the greater the precision, the smaller the gap.<sup>188</sup> In the limiting case, if the approach were able to predict

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186. This is not to say that the approach is capable of transcending conflict between normative goals in these circumstances (though it may be in others). To the contrary, where such goals closely align with the success of interest groups on different sides of a political struggle, success for one is almost by definition defeat for the other. From *within* any given normative perspective, however, it is in these circumstances that the participation-centered approach most clearly dictates a single institutional choice—even if it dictates exactly the opposite choice for adherents of another normative view.

187. The partial overlap between the goals of libertarians and genetic-selection proponents is an example.

188. It is important to distinguish precision—which might also be called granularity—from confidence. The participation-centered approach might predict with one hundred percent confidence that genetic-selection proponents will succeed in blocking seventy percent of genetic-selection regulation in the political process and a further twenty percent if courts recognized a strong

outcomes in each institution on every issue and sub-issue across the policy spectrum, the normative gap would be nonexistent. Institutional choice would simply be a matter of applying the relevant goal or goals to predicted outcomes and allocating institutional authority accordingly.<sup>189</sup>

Unfortunately, the participation-centered approach will not be able to achieve anything like this degree of precision in the usual case. Nor will the divergence between institutions typically be sufficient to eliminate the normative gap; as we have already seen, the same factors that predict success in one institutional arena frequently predict success in the others. There are, to be sure, some normative goals, in particular allocative efficiency, that correlate highly with levels of participation, and some, including certain conceptions of democracy, that are actually defined by them. But unless one of these goals is in play, a nontrivial normative gap is likely to persist, which is to say that a participation-centered analysis will be consistent with multiple competing institutional choices.

## 2. *Closing the Gap*

How, if at all, this gap might be closed is a difficult question. The basic challenge is to figure out which aspects of institutional decisionmaking might tip outcomes in normatively consequential directions when the participation-centered analysis runs out of steam. One tempting response to this challenge would simply be to apply the Court's qualitative approach, albeit more systematically. Such an approach is superficially attractive because it appears to focus directly on the issue of interest: the capacities of different institutions to advance a specific normative goal. It might, for example, ask which institution is best suited to identify the interests that make reproduction a valued activity or to make a sound empirical judgment about the likelihood that different forms of genetic selection would negatively affect the disabled. To answer these questions, however, requires a theory about the factors driving institutional performance, which the Court's qualitative approach does not supply. To the extent that performance is a product of the dynamics of participation that a participation-centered analysis was simply not fine grained enough to pick out (hence the gap), we are right back where we started.

Two other possible approaches may be more promising. The first would focus on past institutional performance in contexts with comparable

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constitutional right. But without knowing precisely which regulations would be blocked in each institution, it is difficult to know whether such a right would make things better or worse. The normative gap would be smaller if the approach could predict the fate of specific regulations with only ninety percent confidence.

189. This elides the possibility of uncertainty about which regulations are in fact desirable. I take up this important issue, which has both normative and empirical dimensions, in Part V.C.



dynamics of participation. The idea here would be to identify situations that are institutionally and substantively similar to the one under consideration and, through the power of hindsight, to glean useful insights about the capacities of different institutions to advance specific normative goals. A second possible approach would focus on determinants of institutional performance not captured (at least not fully) in a participation-centered analysis—things like official competence, institutional norms and culture, and available resources—with particular reference to their implications for a given goal or goals.<sup>190</sup> The idea here would be that, if the participation-centered approach generates a normative gap, the considerations necessary to close it must be ones outside its ken.

Neither approach is without significant limitations. The first is useful only to the extent it is possible to identify past situations with genuinely similar dynamics of participation, which seems likely to be quite difficult in most instances. Even when two situations appear similar in all significant respects, the quality of institutional performance in either might be traceable to differences of participation too subtle to detect. If such differences are correlated to observable differences, the approach may still be helpful, but it is difficult to know how often that will be the case. The second approach, for its part, is useful only to the extent that factors other than participation exert an independent influence on institutional performance. That extent is almost certainly not zero, and it may be larger at the margin, in cases where the participation-centered approach has run out. But in many cases the approach will run out not because the crucial institutional factors are outside its ken but simply because it is impossible to predict the dynamics of participation with the necessary precision.

Nevertheless, where a normative gap persists, these supplementary approaches are all an institutional analyst has got. If they can close the gap even a little, that is something. If not, application of the participation-centered approach should still benefit from greater sensitivity to the existence of the gap, to the factors that determine its extent in any given case, and to the limits it implies in the capacity of the approach to justify a single institutional choice among the plausible alternatives. Although the emptiness of institutional analysis without normative analysis is generally acknowledged,<sup>191</sup> the intricacy of this

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190. Komesar supplements the participation-centered approach in much this way, especially in his discussions of the adjudicative process. *See, e.g.*, KOMESAR, *LAW'S LIMITS*, *supra* note 99, at 38–39 (comparing judicial and juror competence); *id.* at 39–40 (analyzing constraints on the growth adjudicative process imposed by its hierarchical structure). A better understanding of the normative gap and its causes should help to identify other opportunities for supplementation.

191. *See* KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 13, at 5; VERMEULE, *supra* note 13, at 6–7.

interplay between the two has been largely overlooked in the existing literature.

#### B. DISENTANGLING NORMATIVE AND INSTITUTIONAL CONSIDERATIONS

The interplay is made even more intricate by the fact that many normative goals are best understood as resting in part on unarticulated institutional assumptions. This represents both a challenge and an opportunity for the participation-centered approach. It is a challenge because, like any approach to institutional analysis, the participation-centered approach can serve as a basis for normative analysis only if it is clear which goals are relevant to assessing institutional performance. It is an opportunity because disagreements that first appear to be normative may on closer inspection turn out to be institutional and thus susceptible to resolution, at least in part, through a participation-centered analysis.

Again, the libertarian and communitarian perspectives on genetic selection are good examples. On the surface, both appear to be concerned purely with normative goals. Libertarians are committed to a broad ideal of procreative liberty that may be overridden only *in extremis*, while communitarians favor a weaker principle that would give way to a broader range of competing considerations. As a theoretical matter, these commitments could be purely, irreducibly normative. But in that case, the natural next step would be for each group to ask which institutional arrangement would best serve its respective commitments. That both groups jump past this step—proceeding confidently from putatively normative premises to conclusions about how particular institutions should act—suggests that more is going on beneath the surface.

More specifically, it suggests that both groups are relying heavily on unarticulated institutional assumptions. While libertarians probably do place a higher ultimate value on procreative liberty than do communitarians, they also seem intuitively to place greater faith in courts and the market than in the political process to strike the right balance between this liberty and other competing interests.<sup>192</sup> Similarly, while communitarians probably do place a higher ultimate value on avoiding broad social harms, they also seem intuitively to place greater faith in the

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192. That this must be so is underscored by the willingness of libertarians to permit interference with most other forms of personal liberty whenever a minimally rational basis can be offered for doing so. See, e.g., Robertson, *Era of Genomics*, *supra* note 38, at 472–73. As a first-best normative position, this would be truly bizarre. To normatively justify interference with personal liberty—on any plausible view—requires an *adequate* justification, not merely a conceivably rational one. But on institutional grounds, it is perfectly defensible for courts to apply the rational-basis rule to less important liberties or liberties the political process is better suited to protect. Indeed, given the judiciary's sharply constrained time and material resources, this is practically inevitable, though which liberty interests fall into each of these categories is subject to debate.

political process than in courts or the market. Otherwise, neither group could move so confidently from normative premises to conclusions about how particular institutions should act.

If this is correct, the putatively normative goals espoused by the libertarian and communitarian approaches rest on institutional as well as normative foundations. Unlike their normative foundations, however, these institutional foundations are largely unexamined and undefended, even unconscious. As a consequence, any institutional analysis that uncritically takes a libertarian or communitarian vision as its starting point is akin to the proverbial house built on sand. However unimpeachable the subsequent reasoning, its conclusions will be no firmer than the institutional assumptions embedded in the normative vision it began by taking as given.

To avoid falling into this trap, institutionalists need to figure out which aspects of the libertarian and communitarian visions are normative and which are institutional. There are two basic ways to approach this inquiry. The first is through conventional normative analysis, which can be helpful in this context whether or not normative disagreements are generally susceptible to illumination by analysis.<sup>193</sup> The basic idea is to abstract the purely normative commitments of different groups from their implicitly assumed institutional context through a series of hypotheticals. For example, if libertarians are really, unequivocally committed to the goal of procreative liberty in the absence of extraordinary countervailing interests, they should be willing to defend it as a desirable end even at the expense of interests they themselves would recognize as very substantial. If, instead, they embrace this goal based on an implicit assumption that the political process will place too little weight on procreative liberty, they should, in the abstract, be willing to acknowledge situations where substantial but non-extraordinary interests might prevail.

A second possible approach would start with the institutional, rather than the normative, side of the entanglement issue. The basic idea here would be to use the response of libertarians and communitarians to various distributions of institutional competence to flush the implicit institutional assumptions of each group out into the open. This could be done either through institutional hypotheticals or simply by gauging the reactions of the two groups to the results of a participation-centered analysis. Imagine, for example, that such an analysis strongly predicted that the political process would regulate genetic selection only where libertarians would recognize the societal interests at stake as genuinely

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193. Compare RONALD DWORKIN, *JUSTICE IN ROBES* 75–104 (2006) (arguing in the affirmative), with RICHARD A. POSNER, *1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1668–75 (1998) (arguing in the negative).

substantial. How might libertarians respond to this hypothetical? One possibility is that they would abandon their support for judicial strict scrutiny. If so, that would suggest that their putatively normative commitment to a virtually absolute ideal of procreative liberty was actually borne of an instinctive distrust for the political process.

All of this may sound straightforward, but the practical application of both approaches would generate real challenges. Start with conventional normative analysis. In theory, it should be able to probe the normative commitments of different groups in an institutional vacuum: Assume  $X$  quantum of procreative liberty can be had only at the expense of  $Y$  quantum of societal interest  $Z$ . Which should we prefer? Nothing in the question logically depends on comparative institutional competence. In practice, however, any answer is likely to be infected to some degree with unconscious assumptions about how the conflict between these hypothetical interests would be resolved in the real world. If one assumes societal interest  $Z$  would be protected through regulation while procreative liberty would be protected by courts, then one's intuitive views about these institutions cannot help but shape one's response to the hypothetical.<sup>194</sup>

The institutional approach faces a similar challenge. In theory, it should be able to dislodge the unconscious institutional assumptions of different groups by explicitly replacing them with different assumptions: Assume a political process with competence bundle  $X$ , a judiciary with competence bundle  $Y$ , and a market with competence bundle  $Z$ .<sup>195</sup> Which should we prefer? Logically, this question rules out the assumption of a political process with competence bundle  $Q$ ,  $R$ , or  $S$ . In practice, however, any answer is likely to turn to some degree on the answerer's internalized understanding of her own normative commitments. If she understands herself as committed to goal  $A$ , partly based on an implicit assumption of a political process with competence bundle  $R$ , that assumption is likely to infect her response to at least some degree.

Given the seriousness of these challenges, it seems wise to apply the two approaches in concert, using each as a check on the reliability of the other. This will by no means resolve all difficulties, but if institutionalists and normative theorists really talk to one another, it should be possible to make significant progress. Much hangs on this possibility. Failure means that even the most rigorous institutional analysis will rest on highly questionable and largely unexamined institutional assumptions

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194. This is a specific instance of a more general problem that psychologists refer to as "biased assimilation." See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979).

195. By "competence bundle," I simply mean an institution's competencies on the range of relevant issues, considered collectively.

embedded in the normative goals it proceeds from. Success, at the very least, means avoiding this fate. At best, it means reducing or even eliminating disagreement between normative views that appear superficially to conflict but in reality diverge more in their implicit institutional assumptions than in their normative ideals.

Return again to the libertarian and communitarian perspectives on genetic selection. Despite their many differences, both recognize procreative liberty as important but not absolute. Given this basic agreement, it seems barely possible that the two perspectives not only rest on unarticulated institutional assumptions but also that, when those assumptions are stripped away, they in fact share the same essential normative commitment. Call it proper respect for procreative liberty tempered by proper respect for societal interests.<sup>196</sup> If this is true and both sides come to recognize that fact, it would enable both libertarians and communitarians to confront the actual, institutional basis of their disagreement more productively. Even if some normative disagreement persists, as seems likely, disentangling it from institutional considerations may reveal greater overlap in the two groups' goals than had previously been apparent.<sup>197</sup> This, in turn, would increase the chances of bringing them to an overlapping consensus on a single constitutional rule.<sup>198</sup>

These are tantalizing possibilities, which further underscore the importance of institutions in constitutional analysis. But even in the best-case scenario, in which libertarians and communitarians converge on a single goal, there is still the problem of the normative gap. That puts us back where we started: searching for a method to assess which allocation of institutional authority will most effectively promote whatever goal the two groups agree upon. For reasons already discussed, the participation-centered approach can be helpful in addressing this question, but often the information it provides will be consistent with multiple answers. There is no *a priori* reason that this challenge should be any less severe in the context of relative normative consensus than in the context of heated normative disagreement. In principle, the conditions for the normative gap—mismatch between the relevant goal and patterns of participation, relatively small divergence among institutions, and imprecision in the participation-centered analysis—can exist in either case.

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196. "Proper," of course, would need to be understood in the same way by both groups.

197. As noted earlier, the opposite is also possible: disentangling normative and institutional issues might drive the two groups further apart than they previously appeared. *See supra* note 52 and accompanying text. For ease of exposition, I bracket this possibility here.

198. The odds of achieving such consensus are higher where the two sides' agreements are more important than their disagreements and where there is enough difference among institutions in the area of agreement to make one institution obviously preferable.

In practice, however, it seems distinctly possible that disentangling normative and institutional considerations will reduce the mismatch problem, shrinking or even eliminating the normative gap. Consider the goal on which libertarians and communitarians might be thought, at bottom, to agree: proper respect for procreative liberty tempered by proper respect for societal interests. At first blush, this goal seems no more obviously correlated with the success of genetic-selection proponents or opponents than are the goals libertarians and communitarians presently espouse. If anything, the correlation would seem to be even weaker. Libertarians share many, though not all, the concerns of genetic-selection proponents and communitarians share many, though not all, the concerns of genetic-selection opponents. A properly tempered respect for procreative liberty, by contrast, does not obviously tip in either direction. On closer examination, however, proper respect in this context seems likely to translate into something like equal respect for the interests of all affected persons. For libertarians and communitarians to come to any kind of agreement, it would almost have to. Equal respect, in turn, should correlate highly with equality of efficacious participation in whatever institution exercises decisionmaking authority over genetic selection.

Where this is true, resolving the normative-institutional entanglement problem represents an additional and quite promising approach to narrowing the normative gap. If it is true generally—that is to say, if disentangling normative and institutional considerations can generally be expected to produce normative convergence on goals that correlate highly with patterns of participation—making progress on the entanglement problem could greatly augment the power of the participation-centered approach. Whether this is in fact generally the case is a deeper question than I can take on here. For now, I merely note the importance of this possibility.

### C. UNCERTAINTY AND THE PROBLEM OF PERSPECTIVE

Yet another challenge, this one without an apparent silver lining, is the important and underappreciated role of uncertainty in institutional analysis. The point is not just that empirical uncertainty—about error costs, decision costs, and dynamic institutional effects—is a serious obstacle facing real-world officials struggling to make intelligent institutional choices.<sup>199</sup> That is true and important but does little to distinguish institutional choice from many other complex questions. The deeper and more distinctive point is that institutional choices themselves are often strategies for responding to uncertainty (of various kinds) and thus must be sensitive to changes in uncertainty levels in a special way.

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199. See generally VERMEULE, *supra* note 13.

Consider once again the libertarian position on procreative liberty. Application of that position to the regulation of genetic selection might result in several types of uncertainty. On the individual interest side of the balance, it might be normatively uncertain which values and interests account for the special importance of procreative liberty. It might also be empirically uncertain which if any forms of genetic selection actually implicate those values and interests, whatever they are. Similarly, on the state-interest side of the scale, it might be normatively uncertain whether the societal interests offered to support regulation could ever be sufficiently compelling to override the right to procreative liberty. It might also be empirically uncertain whether any form of genetic selection actually conflicts with these societal interests to an extent sufficient to justify regulation, whatever extent that is.

The logical response is to assign decisionmaking authority to the institution most capable of reliably resolving such uncertainties. But this dynamic complicates institutional analysis in several ways. First and most obviously, which institution seems most reliable will often change— independently of institutional competence—as relative uncertainties change. Imagine, for example, that the political process is more reliable than courts or the market in determining whether genetic selection conflicts with compelling societal interests. In the face of substantial uncertainty on this issue, the political process would seem more attractive than the courts or the market, which in turn would cut against recognition of a constitutional right, holding all else equal.

On the other hand, if it were both empirically and normatively certain that genetic selection (or some specific form of it) burdened no compelling interest, the greater reliability of the political process on this issue would then drop out of the calculus. If the judiciary or the market were better suited to determining whether genetic selection implicates procreative liberty, this shift in uncertainty levels would make the case for constitutional protection substantially stronger. Indeed, in the limiting case, if it were certain that all forms of genetic selection implicated procreative liberty and also that they burdened no compelling interests, the libertarian case for broad constitutional protection would be something close to a slam dunk.<sup>200</sup>

The upshot is that institutional analysis must be sensitive not only to normative goals but also to levels of uncertainty about how those goals apply to particular circumstances. This poses a greater challenge for the

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200. I say “close to” because the courts could still in theory invalidate justified regulations by mistake, perhaps confusing other medical practices with genetic selection or erroneously concluding that safety and efficacy regulations infringed the right. Decision costs (especially opportunity costs) or dynamic institutional effects could also potentially tip the balance against constitutional protection, especially if genetic-selection opponents exercised enough sway in the market that a constitutional right would do its intended beneficiaries little good.

participation-centered approach than might first appear. As we saw in Part IV.B, that approach supplies a wealth of information about the likely outcomes of different institutional processes. In the absence of empirical and normative uncertainties about the desirability of a libertarian right, such information would seem to be extremely useful in deciding how to allocate authority among the relevant institutions. As we have just seen, however, the more certain we are about the desirability of particular outcomes, the easier institutional choices become, quite apart from the dynamics of participation. On the other hand, if we are greatly uncertain about when and whether genetic selection ought to be protected, the information provided by the participation-centered approach will be of much less use. It is little help to know which institutions will produce which outcomes if we do not know which outcomes are normatively desirable. In short, the role of uncertainty in institutional analysis means that the participation-centered approach is most helpful when institutional choice is easiest and least helpful when institutional choice is most difficult.<sup>201</sup>

Of course, this dynamic in no way diminishes the necessity of institutional choice. Moreover, it seems likely to affect any approach to institutional analysis in some fashion or another. It therefore provides no argument for abandoning or even necessarily supplementing the participation-centered approach. But it is clearly an issue that analysts employing the approach would do well to be sensitive to.

One last complication is worthy of note. Up to this point, I have discussed uncertainty in the abstract, but of course in reality, it is particular persons who are uncertain. Who are the relevant persons in this context? Since our focus has been whether courts should recognize a constitutional right to engage in genetic selection, the answer might seem self-evidently to be judges. They, after all, are the persons who will ultimately decide whether to recognize such a right (albeit as part of a complex institutional process). But the uncertainty of interest concerns not how judges should make this decision but whether judges are the right officials (or courts the right institution) to make it in the first place. The question cannot, therefore, be answered from the internal perspective

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201. The point does not hold universally. As we saw in Part V.B, there are some normative goals that correlate highly with levels of participation. With respect to such goals, uncertainty about comparative institutional competence (that is, participation differentials among various institutions) and uncertainty about mixed questions of fact and political morality (which rule best realizes a normative goal that is closely tied to participation) essentially amount to the same thing. In such cases, uncertainty can still be a real obstacle in applying the participation-centered approach. But to whatever extent that obstacle is overcome, the conclusions yielded by the approach will be of value to normative constitutional analysis. Obviously, this enhances the importance of the possibility that disentangling institutional and normative considerations can generally be expected to produce convergence on goals that correlate highly with patterns of participation. If it can, the challenge uncertainty poses for institutional analysis becomes much more tractable.



of a judge. Rather, it must be considered from the perspective of an institutional designer—that is to say, a person assessing how authority ought to be parceled out among institutions from a position outside those institutions. It is by now a commonplace that this perspective, which is basically that of the normative constitutional theorist, cannot be neutral on matters of political morality. It must embrace one set of normative goals or another. Less frequently recognized is that it cannot be neutral on—that is, it must either take a position on or admit a degree of uncertainty about—questions of empirical fact or the application of political morality to particular factual circumstances.<sup>202</sup>

Obviously, no institutional designer can hope to resolve all uncertainty surrounding these questions, normative or empirical. In many instances, it will therefore be necessary to delegate the resolution of uncertainty to appropriate decisionmaking institutions. Indeed, as we have seen, this is an important function of institutional design. But since uncertainty does not exist in the abstract, the nature and degree of uncertainty motivating any given institutional choice can only be assessed from the perspective of a particular institutional designer. To the extent that institutional designers differ in their assessments of the uncertainty, those disagreements will often lead them to different conclusions about institutional choice. Neither the participation-centered approach nor any other approach to institutional analysis can resolve these disagreements, which turn on scientific, sociological, and philosophical, rather than institutional, issues. As such, these disagreements must be confronted head on, drawing on the expertise of specialists in the relevant fields. This is another way in which greater dialogue between institutional theorists and other scholars, who have in general paid little attention to institutional issues, could improve the quality of institutional analysis.

An example will help to make the point more concrete. Imagine that the dispositive issue in determining whether courts should recognize a broad right to procreative liberty is the magnitude of genetic selection's impact on disabled persons and the relationship between parents and children. Imagine further that, in the face of uncertainty on this issue, there are good reasons to trust the judgments of legislatures and administrative agencies over the judgments of courts. Should courts recognize a broad constitutional right? The answer does not turn on whether judges are uncertain about the impacts of genetic selection. If the institutional designer asking the question is certain those impacts will be minimal (perhaps because the need to use in vitro fertilization will

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202. *But cf.* Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1231–32 (1998) (making a similar point in the course of defending value incommensurability as a potentially useful heuristic for administrative decisionmaking).

dramatically limit the use of genetic-selection techniques), it may well be desirable for judges to recognize a strong right regardless of any uncertainty they personally feel on the subject. Either way, this question must be asked from a perspective external to the judiciary.

Of course, in practice, decisions allocating institutional authority (or influencing the allocation of such authority) are not made by idealized institutional designers deciding once and for all from a position apart from and above the fray. They are made by many different fallible persons in a wide variety of institutional settings, on an ongoing and often quite dynamic basis. In the genetic-selection context, such persons include judges deciding cases; presidents and senators deciding what sort of judges to appoint and confirm;<sup>203</sup> all manner of political officials, state and federal, deciding whether to resist judicial recognition of a constitutional right; and, finally, academics and other commentators seeking to inform and influence the decisions made by these actors.

To the extent any of these persons wishes in good faith to determine whether courts should recognize a constitutional right to engage in genetic selection, she will have to stand outside her particular institutional position and confront the relevant empirical questions herself. Quite likely she will be uncertain about many of them, in which case the question will become whether the judiciary or some other institution (including her own) is most sensibly entrusted with resolving those uncertainties. Even in the rare instances where she is certain—say, that genetic selection will have minimal adverse social impacts—she will have to ask whether her own certainty (and the institutional choice following from it) ought to be trusted over the contrary judgments of other potential decisionmakers. This question will often give rise to its own second-order uncertainties, and so on ad infinitum. Ultimately, however, any person in a position to influence the allocation of institutional authority must make her own judgment, even if that judgment is to defer first-order, second-order, or *n*th-order questions to other individuals or institutions, as it often should be.<sup>204</sup>

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203. Of course, the proper allocation of institutional authority over genetic selection will be only one tiny component of the appointment and confirmation calculus.

204. Sometimes, as noted, the person making this call will be a judge. In such cases, her empirical or philosophical uncertainty as a judge will overlap perfectly with her uncertainty as an institutional designer. But the perspective of the institutional designer will still be distinct. How she would decide the case, if given the power to decide, is a different question than whether courts should, in fact, be given that power. Where a judge is in a position to influence the allocation of institutional authority, as she generally will be in difficult constitutional cases, she ought to ask the second question first. Cf. Schauer, *supra* note 202, at 1231 n.43 (“[I]n circumstances under which I am designing institutions or dispositions to constrain my future behavior, I exist in the role of institutional designer, even if I am designing an institution solely for myself.”). The possibility that judges are comparatively bad at institutional analysis may well influence her answer or cause her to adopt a simple categorical approach across all cases. But it can be no objection to asking or deciding the question. Where a judge has the power to influence the allocation of institutional authority, she has no choice.

#### D. BEYOND ERROR COSTS

One of the most challenging aspects of institutional analysis is the sheer number of variables in play. This challenge is well illustrated by the rough participation-centered analysis of Part IV, which has many moving parts but paints only a static picture of the dynamics of participation at a given point in time. To the extent that participation differentials correlate with normative goals, such a picture can help to identify the relative error costs of allocating decisionmaking authority to one institution or another. But it sheds no obvious light on the marginal decision costs of courts relative to other potential decisionmakers or the opportunity costs of allocating judicial resources to one issue rather than another (or the opportunity benefits of freeing up another institution's resources). Perhaps more important, it also sheds no light on what we might call the dynamic costs of a decision that any given institution imposes on other institutions and individuals, who must shape their conduct accordingly. The same goes for dynamic interactions among institutions, which may be either salutary or pernicious but will often be quite important.

To account for decision costs and dynamic effects satisfactorily, any institutional analysis would have to be substantially more complex than the one I attempted in Part IV. To actually conduct such an analysis is more than I can attempt here. Instead, I want to use the challenge of doing so to highlight the remarkable versatility of the participation-centered approach. Along the way, I shall also note a few limitations inherent in its bottom-up approach to institutional analysis.<sup>205</sup> Once again, these are general points but they are well illustrated in the genetic-selection context.

##### *I. Decision Costs*

As to decision costs, recognizing a constitutional right to engage in genetic selection would require courts to duplicate much of the scientific and sociological investigation already performed by legislatures and administrative agencies responsible for the regulations such a right would invalidate. Depending on how broadly and how clearly the right is cast, it could also generate substantial litigation, as well as costly uncertainty among government and private actors about the scope of their legal authority and legal rights, respectively. Finally, whatever resources courts expend recognizing and enforcing such a right would represent foregone opportunities to protect other, perhaps worthier, social goals. Of course, some of these costs would also attend judicial refusal to

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205. See KOMESAR, *LAW'S LIMITS*, *supra* note 99, at 30 (explaining the participation-centered approach's "bottom-up" focus on participants in institutional decisionmaking processes in contrast to a "top-down" focus on official decisionmakers).

recognize a constitutional right, though probably to a lesser degree. The net decision costs of recognizing a right would thus be the difference in total costs of decision relative to a rule of no constitutional protection.

Of the various decision costs just canvassed, the participation-centered approach has the potential to shed very substantial light on two. The most obvious is the volume of litigation a new right would generate. If the participation-centered approach is sound, that volume should be in large part a function of the costs and benefits of participation in the adjudicative process (and the distribution of those costs and benefits among stakeholders) under whatever constitutional rule the Court adopts. These costs and benefits, of course, already occupy center stage in a participation-centered analysis. To predict the volume of litigation would merely require shifting the focus of that analysis from the likely legal outcomes of different levels of participation to the levels of participation themselves. The same is true for the costs of judicial fact-finding. To the very substantial extent that those costs include the parties' costs of participation—hiring lawyers and experts and the like—they are already part of the participation-centered calculus. Accounting for them as part of a comparative institutional analysis merely requires a slight shift of focus from outcomes to process.

With respect to other decision costs, the participation-centered approach also has the potential to be quite helpful, but it omits a few important aspects of the picture. The costs of judicial fact finding, for example, include not only costs to the parties but also costs to the broader public in the form of scarce judicial time and material resources. Such costs are in part a function of levels of participation, which can both supply courts with needed information and inundate them with confusing, contradictory, and misleading information, with important effects on the efficiency and reliability of judicial fact finding. Participation, however, is not the only important factor. The complexity of the factual issues involved and the costs of judicial efforts to master that complexity also matter greatly. These costs in turn are a function of the competence and training of judicial decisionmakers and the internal organization, resources, and staffing of the courts. To assess them requires a top-down examination of the judicial system, rather than the bottom-up perspective of the participation-centered approach.

The same basic point holds for the opportunity costs of recognizing a new constitutional right. Setting normative questions aside, these costs turn chiefly on three factors: (1) the demands that recognition and enforcement of a new constitutional right would place on limited judicial resources, (2) the competing demands on those resources, and (3) the total resources available. We have already seen that the costs and benefits of participation in the adjudicative process could, with a slight shift of focus, help to predict the volume of litigation that a new

constitutional right would generate. With a similarly slight shift of focus, the costs and benefits of participation in the political process could help to predict the degree of resistance such a right would provoke from other government actors. Together, these predictions might shed significant light on the quantum of resources courts would have to expend to protect a given quantum of procreative liberty. The same analysis could be applied to other, competing demands on judicial resources to determine what the Court would be sacrificing by recognizing a new constitutional right. Whether and to what extent such sacrifice is necessary, however, is determined by the total resources available to courts (and the flexibility of the constraints on those resources). Those resources are not a function of participation but rather of the hierarchical structure and budgets—the top, rather than the bottom—of the judicial system. A participation-centered analysis can therefore shed little light on this important determinant of opportunity costs.

## 2. *Dynamic Institutional Effects*

As to dynamic institutional effects, the picture is very similar. An imaginative and thorough application of the participation-centered approach has the potential to shed significant light on many of these effects, but there are a few important aspects of the picture it would miss. Judicial recognition of a right to engage in genetic selection could have an important marginal impact (positive or negative) on legislative and administrative consciousness about constitutional liberties. It might also further habituate judges to taking sides on contentious social issues.<sup>206</sup> At the same time, it might further raise the salience of those issues in the judicial appointment and confirmation processes, with important effects on the future composition of the judiciary. Finally, and perhaps most important, it seems quite likely to stifle experimentation in regulation of genetic-selection techniques (and derivatively, information gathering about them), depriving policy makers and courts of useful information about the range of possible regulatory responses and their social impacts.

Of these effects, the participation-centered approach has the potential to shed substantial *predictive* light on only one: the extent to which a new constitutional right would stifle regulatory experimentation. If the participation-centered approach is sound, the volume of such experimentation should be in significant part a function of the costs and benefits of participation in the political process under whatever rule the Court adopts. Obviously, these costs and benefits are already of central

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206. See, e.g., David McGowan, *(So) What If It's All Just Rhetoric?*, 21 CONST. COMMENT. 861, 885–86 (2004) (reviewing EUGENE GARVER, *FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF* (2004)) (“As the country accepts creative decisions, they become more accustomed to such decisions, making creativity less costly in the future, and therefore more likely.”).

concern to any participation-centered analysis. To predict the effect of a new constitutional right on regulatory experimentation would merely require another slight shift in focus—in this case from an *ex ante* perspective that analyzes the dynamics of political participation in the absence of robust constitutional review to an *ex post* perspective that analyzes those dynamics in light of such review. This is the same shift required to predict political resistance to a new right. Indeed, regulatory experimentation in many contexts will simply be political resistance by another name.<sup>207</sup>

With respect to other dynamic institutional effects, the participation-centered approach seems likely to have less predictive power. The reason is fairly simple. The incidence of these effects turns chiefly on the psychology, social norms, and group dynamics of official decisionmakers at the top of major decisionmaking institutions, rather than the mass of participants at the bottom. This is certainly true of the effects of aggressive judicial supervision on legislative and administrative consciousness about individual liberties. It is equally true of the possibility that a new constitutional right would habituate judges to taking sides on controversial social issues. It is less true of the possibility that a new constitutional right would raise the salience of social issues in the judicial appointments process, which depends at least as much on its reception by the public as its reception by political officials. But even so, the participation-centered approach has few resources to predict this reception. The empirical literature on the relationship of the courts and public opinion seems like a more promising starting point.<sup>208</sup>

Notwithstanding these limitations on its predictive power, the participation-centered approach has the potential to be extremely helpful in assessing the practical significance of many dynamic institutional effects. For example, one plausible reason to care about the constitutional consciousness of legislators and administrators is that such consciousness reduces the costs of efficacious political participation for proponents of individual liberties. The same point holds for judicial habituation to activism on social issues. The costs and benefits of participation might also provide a valuable lens for assessing the increased salience of social issues in the judicial appointments process, though the story here is a bit more complicated.<sup>209</sup> High public salience seems likely to reduce the costs of organization (and hence participation)

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207. In counting the stifling of regulatory experimentation as a cost, I am assuming that the knowledge such experimentation would produce has positive social value. That may or may not be true in any particular case.

208. *See generally* JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009); *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* (Nathaniel Persily et al. eds. 2008).

209. The point could be extended to the political process as a whole.

for all groups with a strong stake in such issues. If these costs drop proportionally more for some groups than others, as they almost certainly would, the participation-centered approach could provide valuable information about which groups this dynamic would benefit. Perhaps more important, the heightened salience of social issues seems likely to increase the costs of participation in the appointments process by interest groups with other concerns, which as a result would be more difficult to place on the appointments agenda. These effects, too, would presumably be greater for some groups than others, with potentially significant implications for the future composition of the judiciary.<sup>210</sup>

In focusing on the potential of a more ambitious participation-centered analysis without actually conducting one, this Subpart has necessarily been somewhat sketchy and speculative. But the important point should be clear. While assessing decision costs and dynamic institutional effects presents complex challenges, the participation-centered approach is a remarkably versatile tool for meeting them. At the same time, that approach (like any other) does have important limitations. A rigorous institutional analysis needs to take account of both.

#### CONCLUSION

The future of reproductive freedom is upon us. Constitutional analysts have been anticipating this development for nearly two decades, but until now, their focus has been almost exclusively on the balance of individual and government interests at stake. This is a vital question and necessary to the intelligent selection of social goals. But in constitutional law, goal choice is always only half the battle—if that. The practically relevant question is not just when and whether it would be desirable for genetic-selection decisions to be protected in the abstract but when and whether it would be desirable for courts (or some other institution) to protect them. To answer the latter requires careful comparative analysis of error rates and costs, dynamic institutional interactions, and decision costs, none of which is meaningful without a background normative theory assigning weights and measures to the relevant variables.

This is a daunting task and one that it will be difficult for judges to undertake profitably or comprehensively on their own. That would be true even if a simple participation-centered approach along the lines described in Part IV were sufficient. It is doubly true in light of the

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210. As an example, consider the possibility that the high public salience of social issues like abortion and gay marriage—at least partially a byproduct of *Roe v. Wade*, 410 U.S. 113, 113–14 (1973), and *Lawrence v. Texas*, 539 U.S. 558, 558–59 (2003)—made it easier for President George W. Bush to appoint justices hostile to federal regulatory power. Better yet, consider the possibility that the salience of these issues made it easier for Bush to get elected in the first place. See Coan, *supra* note 74, at 236–37.

challenges elaborated in Part V. Indeed, for now, it is possible that judges may do best by sticking to the framework for institutional analysis implicit in the Court's prior decisions, while attempting to apply it more self-consciously, more systematically, and above all, more comparatively.

For all the shortcomings of that framework, it has three undeniable virtues: First, it is simple enough for judges with limited time, limited resources, and limited expertise to administer responsibly (though, of course, imperfectly). Second, it recognizes that whether to extend the right to procreative liberty to genetic selection has as much to do with comparative institutional competence as normative goals. Third, government officials and practicing constitutional lawyers are deeply familiar with it.<sup>211</sup> In the face of massive uncertainty on most other relevant questions (and starkly limited judicial capacity to resolve it), the existing approach may be the best judges can manage without greater guidance from those outside the judiciary with the time and tools to study the relevant institutional questions rigorously.<sup>212</sup>

Constitutional analysts, for their part, should be devoting at least as much time and effort to the institutional dimensions of procreative liberty as they have to the normative ones, while remaining mindful of the intricate interplay between the two. Rational choice methods like the participation-centered approach provide a powerful starting point, but no approach is by itself adequate to all of the complex challenges posed by institutional choice. A diverse toolkit of theoretical and empirical approaches is therefore necessary, though all will have their limitations and in many cases none will be sufficient. Perhaps even more important is for reproductive health experts to engage with institutionally minded constitutional theorists and vice versa. All of this makes for difficult and painstaking work; translating across disciplinary boundaries is a major challenge and productively integrating the insights and methodologies of various disciplines is perhaps an even greater one. But this work is essential to meaningful constitutional analysis.

I hope others will join me in taking up the gauntlet. With luck and concerted effort, we may yet produce meaningful guidance for judges and other officials in time to beneficially shape, as well as witness, the future of reproductive freedom.

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211. See KOMESAR, *LAW'S LIMITS*, *supra* note 99, at 163 (discussing the benefits of stability in institutional choice and the costs of cycling from one highly problematic regime to another).

212. I do not mean to foreclose other possibilities. And the best course may ultimately depend on one's normative perspective. But it seems exceedingly unlikely that courts would produce better institutional judgments at acceptable cost by attempting the sort of complex analysis offered in this Article.



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