

FUTURE CHILDREN AS PROPERTY

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Between Skinner v. Oklahoma and the advent of modern substantive due process, procreation, at least in the eyes of many courts and commentators, became entrenched as a fundamental, if not absolute, right. And yet ironically, the establishment of this right, often taken as symbolic of personal liberty, has diminished autonomy for those persons inevitably caught on the other end of it – our future children. Expanding procreative autonomy has diminished public norms that might otherwise ensure that future children are born into circumstances that also expand their autonomy. Instead, the broad, modern, privacy-based version of the right to procreate leaves the matter exclusively and privately to the whims of prospective parents, allowing them to create any number of children in any manner of circumstances. This tends to institutionalize the classification of a group of persons, albeit future persons, who exist morally and legally though not yet physically, as property. It does so because it gives prospective parents exclusive and absolute power over members of the class; power to freely access them, use them, and determine their future relations, and to do so in exclusion of others' power, including the constructive power of the members themselves. This power over future children, which the privacy-based right to procreate vests in prospective parents, is the unmistakable hallmark of one class of persons treating another as property.

This article maintains that the most common notion of the right to procreate, the one seemingly derived from constitutional precedent and today taken as largely beyond question, tends to treat future children largely as a class of property, assigned as such to prospective parents. This article also traces the historical development of the right as part of the larger tradition of treating existing children as the property of those who create them. Throughout, this article suggests that the right to procreate so conceived is in tension with an embedded constitutional principle that prohibits one class of persons from treating another as property. This tension, which may be called the "property objection," demands that we change the way we think about the right to procreate.

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INTRODUCTION

Near the middle of the twentieth century, after the Supreme Court had decided both *Skinner v. Oklahoma*¹ and *Buck v. Bell*,² the nature of the right to procreate – at least as it was protected under the United States Constitution – was relatively undetermined. While *Skinner* overturned a statute that authorized the involuntary sterilization of convicted felons, it merely distinguished itself from *Buck*, which fifteen years earlier had upheld a similar statute for “mental defectives.”³ *Skinner* also made clear that the reason the sterilization statute was unconstitutional was because it, unlike the statute in *Buck*, conspicuously and arbitrarily exempted “‘offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses’”⁴ and because “strict scrutiny of the classification which a State makes in a sterilization law is essential.”⁵

At that time, with all of the questions *Skinner* and *Buck* left unanswered, there was still ample room for the Court to articulate in detail the contours of an unenumerated right to procreate.

Today, after decades filled with modern substantive due process jurisprudence establishing the fundamental right not to procreate, (e.g., the right to obtain and use contraception, or to terminate one’s pregnancy) it is largely accepted that the right to have or to not have children is part of a broad liberty or privacy-based right, or as Laurence Tribe put it, “*whether one person’s body shall be the source of another life must be left to that person and that person alone to decide.*”⁶ How did this shift, from the gap left by *Skinner* and *Buck* to the comprehensive modern broad notion of the right, come about?

This brief exploratory article starts by providing one account, describing how in 1961, with Justice Harlan’s dissent in *Poe v. Ullman*,⁷ the Court began to rewrite *Skinner* by tying its narrow holding to the broader notions of personal liberty and familial privacy that first appeared in cases decided decades before *Skinner*. If *Skinner* is the seminal precedent for modern substantive due process,⁸ it is only because it has been rewritten to serve that purpose, and fused with a longer line of precedent implicating a broad range of cherished values beyond the right to have children.

But, having established how the shift occurred, the point of this article is to make the following critique of the broad notion of the right Tribe and others

1. *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942) (invalidating a statute permitting involuntary sterilization of certain convicted felons on narrow equal protection grounds).

2. *Buck v. Bell*, 274 U.S. 200, 208 (1927) (upholding a statute permitting involuntary sterilization of institutionalized persons).

3. *Skinner*, 316 U.S. at 538, 542.

4. *Id.* at 537, 541-42. .

5. *Id.* at 541.

6. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1340 (2d ed. 1988) (citations omitted).

7. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J. dissenting)

8. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 66-67 (1990).

describe: that notion of the right, which treats the act of having a child as a matter of personal liberty or familial privacy, is problematic from a liberal perspective because it tends to treat a class of persons, prospective children, as property. It does so because it gives prospective parents exclusive and absolute power (in a Hohfeldian sense)⁹ over members of the class: power to freely access them, use them, and determine their future relations, and to do so in exclusion of others' power, including the constructive power of the members themselves. This notion of the right is also legally problematic because it is in tension with a constitutional principle that prohibits one class of persons from treating another as property.

In dealing with the right to procreate one could simply focus on policy prescriptions that maximize autonomy between parents and their future children (and of course it can be maximized for both, e.g., a law which funds a program to gently nudge teens not to become pregnant can enhance their autonomy and that of the class of their future children). However, this article does not take an express position on what laws a state should or should not pass with regard to procreation.

Rather, its thesis is that when particular laws are challenged as unconstitutional because they allegedly violate the right to procreate under *Skinner*, we ought not to construct the defensive right so as to give the prospective parent *exclusive power* to determine the circumstances in which he or she has a child because that reading of the right wrongly treats future children as the property of their prospective parents. We may call this claim the "property objection."

The objection might be applied in a variety of cases. For example, in the recent case of *In re Bobbijeane P.*,¹⁰ the New York Court of Appeals reviewed a family court case in which the lower court issued a temporary probation order which obligated the parents, who had been determined to be unfit and had lost custody of their children as a result, not to procreate further until they had re-obtained custody and care of Bobbijeane P as well as their other three children who were in foster care.¹¹ While the court declined to rule on the constitutionality of the order and instead determined that the lower court had exceeded its statutory authority,¹² the case falls into a line of cases throughout the country in which "no procreation" orders issued to criminally unfit parents whose future children would be seized by the state at birth because the parents are legally unfit to care for them have been challenged as violating the

9. Regarding power, and the other constituent elements of legal rights generally, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 23-24 (1913). For Hohfeld, a power is "an ability to cause, by an act of one's own, an alteration in a person's rights, either one's own rights or those of another person or persons, or both." JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 57 (1990).

10. *In re Bobbijeane*, 842 N.Y.S.2d 826, 828 (App. Div. 2007) ("[T]he court should have granted respondent's motion because it had no authority to impose the 'no pregnancy' condition.").

11. *Id.* at 827.

12. *Id.* at 828.

constitutional right to procreate.¹³ Courts have split on whether the orders violate the constitutional right, but the cases present an opportunity to examine whether the right should be read as to protect prospective parents' exclusive and absolute power over members of the class of their future children, so much so that they can create children into neglectful and abusive circumstances where the law literally forbids the future children to be. Is the exclusive power vested by the Constitution so great that it trumps the parental power, so that a prospective parent has a claim-right of noninterference to *have* a child, in the sense of procreating, but not to *have* a child, in the sense of retaining custody of it? In what sense does this give prospective parents a property-like right to use their prospective children, via an absolutely exclusive power to freely determine those children's future moral, legal, and proprietary relations?

Part I of this article begins with an analogous story of people treating other people as property, setting the stage with Barbara Bennett-Woodhouse's tale of how *Meyer v. Nebraska*¹⁴ and *Pierce v. Society of Sisters*,¹⁵ two "liberal icons" from the 1920s, established in constitutional jurisprudence the notion of a private familial realm. These cases are at the heart of the modern substantive due process law that allows parents broad control over their children and also which followed and entrenched in the Constitution a tradition of allowing fathers to treat their living children as property. This part then shows how the broad notion of the right to procreate was drawn from this tradition, when nineteen years after it was decided, the Court began to rewrite the holding in *Skinner*, weaving the case into the earlier *Meyer* and *Pierce* line, though the Court in *Skinner* never cited those cases and also made clear that the only reason the sterilization statute before it was unconstitutional was because it was arbitrarily discriminatory.

Part II argues that a broad, liberty and privacy-based notion of the right to procreate tends to treat prospective children, as a class, as the property of their prospective parents. Part II(A) begins with a description of the right and its Hohfeldian structure, and then turns in Part II(B) to a description of the class of persons I refer to as prospective children. Part II(C) explains what it means for one class of persons to have property in another, and Part II(D) describes the power prospective parents exercise over their prospective children in the act of procreating. Part II(E) then demonstrates how the broad notion of the right tends to treat prospective children as a class of property, by assigning them as such to their prospective parents. Finally, Part III, surveys alternative notions of the right which are less proprietary than the broad notion because they temper the power of prospective parents against public norms that protect prospective children, and base the right upon interests of prospective parents that are themselves intrinsically limited.

13. See generally Carter J. Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367, 388-97 (2009) (noting several other cases where criminally unfit parents challenged no-procreation orders as violations of their constitutional right to procreate).

14. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (finding unconstitutional a state ban on the instruction of children in certain foreign languages).

15. *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) (finding unconstitutional a state law eliminating parochial education in favor of mandatory public schooling).

Arguing that a broad procreative right mistakenly treats prospective children as property is not an entirely novel approach. In 1859 John Stuart Mill argued that you do not maximize human autonomy by extending liberty to family relations and treating the family as some autonomous province or realm.¹⁶ Today, writing in the context of regulating the use of assisted reproductive technologies (ARTs), legal scholars have at least asserted that applying a broad right to procreate risks treating children, as well as potential children, as property.¹⁷ Also, scholars like Joel Feinberg,¹⁸ and later Alicia Ouellette and Dena Davis,¹⁹ have argued that all children have the right to an “open future” which places a duty on prospective parents not to treat their prospective children as a non-consenting means to the parents’ end.

This of course has the flavor of a property objection. However, these arguments are debatably more Kantian than constitutional. And more generally, while some in the ART debates seem to question the right to procreate, it does not seem that they would carry their arguments beyond regulating the use of ART. The theorists instead seem to be concerned with whether ART use is simply to be treated differently.²⁰

This article’s approach is unique because it expands this discussion well beyond the context of ART, and applies a new variation of the property objection to the right to procreate in general. As such, this article’s claim regarding treating children as property diverges from the current debates substantially, but nevertheless adds to the literature that has developed around them.

First, the class of persons that I am concerned with is temporally removed from the pre-embryos and other sorts of physical things the ART debates often focus on. Prospective children, as I define them in Part II(B), exist somewhere between the remote future generations that seem to be of such interest to environmental law scholars, and conception (which I will assume, only for this argument’s sake, occurs somewhere between the production of specific gametes

16. JOHN STUART MILL, ON LIBERTY 103 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

17. See e.g., Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, HASTINGS CENTER REP., July-Aug. 1990. As is discussed below, this argument is distinct from the claim that a woman’s right to choose to abort a fetus gives the woman property rights over a prospective child.

18. See Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 309-10 (2008).

19.

The parent who seeks to add, delete, modify, or substitute a genetic trait in the potential child for their own social, aesthetic, or cultural reasons has treated the potential child as a property to be molded, or a tool by which they can advance their own conception of the good life. Treating a child, even a potential child, as a tool causes moral harm.

Alicia R. Ouellette, *Insult to Injury: A Disability-Sensitive Response to Smolensky’s Call for Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 397, 403-04 (2008); see also Dena S. Davis, *Genetic Dilemmas and the Child’s Right to an Open Future*, 28 RUTGERS L.J. 549, 567 (1997) (“I maintain that liberalism requires us to intervene to support the child’s future ability to make its own choices about which of the many diverse visions of life it wishes to embrace.”).

20. See e.g., Emily Jackson, *Conception and the Irrelevance of the Welfare Principle*, 65 MOD. L. REV. 176, 182 (2002) (premising her argument on values that she views as supporting a broad coital procreative right, and that should extend to ART-based procreation).

and fertilization). The scope of the class is defined by the temporal point of conception on one side and the advent of actual future people (as opposed to merely possible people) on the other.²¹ This then is before the point at which most ART debates begin.²² One area of the ART debates that seems to deal with prospective children involves the commodification of future children.²³ But the debate there inevitably shifts its focus towards living children (the execution of a surrogacy contract, for example) or the commodification of women's bodies, rather than dealing with the sale of prospective children per se.²⁴ For example, one commentator takes on the issue of parents intentionally having a child to use as an organ donor for the child's sibling.²⁵ But rather than asking whether doing so treats a member of the prospective-child class as property, her focus is on regulation of the organ donation once the prospective child is born. Instead of focusing on body parts or living children, this article has a temporal focus on the relationship between prospective children and prospective parents, under the traditional notion of the right to procreate.

Secondly, this article is primarily a critique of a particular reading of constitutional precedent, rather than a fully-theorized prescription for a specific legislative or regulatory regime or for modification of current tort or contract law, to regulate surrogacy or ARTs for example.²⁶

Thirdly, this article does not deal with market transactions directly, which are often the impetus behind the ART debates,²⁷ for example in Margaret Jane Radin's work on surrogacy.²⁸ The exclusion-based notion of property that I work with in the pages below is probably a necessary stick in the bundle that precedes salability. But this article challenges the right of prospective parents to exclude, and as such I never get to market transactions. The claim in this article, in contrast, might be raised by a state defending surrogacy regulation treating certain contracts as void *ab initio* against a constitutional privacy attack, on the grounds that deriving a privacy-based right to procreate from the constitution is

21. See, MELINDA A ROBERTS, *Child versus Childmaker: Future Persons and Present Duties in Ethics and the Law* 2 (1988) (distinguishing between classes of persons based on their degree of prospectivity).

22. See e.g., Note, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159 (2005).

23. See, e.g. I. Glenn Cohen, Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003) (neatly summarizing the sea of literature in this area).

24. See, e.g., Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-37 (1987); Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995).

25. See Teena-Ann V. Sankoorikal, *Using Scientific Advances to Conceive the "Perfect" Donor: The Pandora's Box of Creating Child Donors for the Purpose of Saving Ailing Family Members*, 32 SETON HALL L. REV. 583, 599-616 (2002).

26. See, e.g., I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347 (2008) (arguing that tort liability should not be banned where parents pre-select embryos to create disabled children); June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581 (1988) (outlining why contracts have not been used as models for family relationships, and the resulting difficulties involved in the enforcement of surrogacy contracts).

27. See Cohen, *supra* note 23.

28. See Radin, *supra* note 24.

impermissible because it treats future children as property. The property objection might also complicate areas in the related population debates, for example, with regard to the recent proposal for a population policy based on tradable procreation entitlements.²⁹

Regardless, the property objection will have consequences for the commodification debate. There are powerful political and economic interests, like the fertility and related industries in the U.S. and elsewhere, that profit from a privacy-based version of reproductive rights. Only when prospective parents believe they have exclusive and unfettered freedom of choice over the class of their future children can these industries manipulate that free choice and shape it into market preference so that prospective parents consume the products and services those industries sell. Often the real parties in interest behind the notion of broad procreative freedom are not the would-be parents at all, and we should always consider who actually benefits from the version of reproductive rights that leads to cases like that of Nadya Suleman,³⁰ the so-called “Octomom” who had octuplets after receiving fertility treatments, though she already had six other young children at home and was receiving public assistance.

Finally, this article is a legal critique based on one notion of the constitutional right to procreate, rather than the exclusively moral or ethical critique of various possible ART fact-patterns, or of actions that harm the environment, which often frame the discussions of future persons. As such the claim in this article is not subject to what has been called the non-identity problem,³¹ which refers to the difficulty of showing that we harm future persons in creating them, because had they not been created (in even objectionable circumstances) they would not have existed at all. First, the claim I make here refers to the class of future children, rather than individual future children, which are at the heart of the non-identity problem. Also, this claim is not contingent on showing harm to particular future children, but rather is an objection to *how* their fate is decided.

This article thus adds to the literature that exists regarding the right to procreate. The ART debate takes place within a larger and unquestioned moral and constitutional framework. We can back out of those debates to a relatively high level of abstraction to consider that framework, or how two fundamental constitutional principles – the notion of a personal or private realm free of state interference, and the obligation that we not treat others as property – conflict. I believe that rather than fitting ART into our current reproductive rights paradigm, we should use it as a reason to change that paradigm.

Moreover, we could easily fit the claim advanced in this article within the current ART debates. Kirsten Rabe Smolensky argues against tort liability for parents who intentionally select pre-embryos with disabling traits (like

29. See David De la Crois & Axel Gosseries, *Population Policy through Tradable Procreation Entitlements*, 2 (Université catholique de Louvain, Département des Sciences Economiques Working Paper 2007-62 2007), available at <http://www.ecineq.org/milano/WP/ECINEQ2007-62.pdf>.

30. Ellen Goodman, *The Ethical Failures of Fertility Treatment*, Boston Globe, February 6, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/02/06/the_ethical_failures_of_fertility_treatment/.

31. See Philip G. Peters, Jr., *Harming Future Persons: Obligations to the Children of Reproductive Technology*, 8 S. CAL. INTERDISC. L.J. 375, 381-83 (1999).

deafness), based primarily on the moral grounds of the non-identity problem, or what is also known as the problem of contingent future persons.³² She focuses on the lack of reasons to find the parents at fault and hence liable, after finding that there is no constitutional right – either of parental control or bodily integrity – barring such suits. This article will take the position that, while we might find parents morally at fault for intentionally selecting pre-embryos with disabling traits because doing so may treat members of a class of persons as property, it should also be recognized that the constitution should not be read as protecting such behavior as a matter of privacy for the very same reason.

Despite the alternative notions of the right to procreate surveyed in Part III, it will be vital to keep in mind that this article is more diagnostic and critical (describing a problematic logical consequence of one view of the right) than prescriptive. It is a critique of one reading of a constitutional right, rather than a prescription for an alternative right, or for a scheme of norms to regulate procreation. In that sense this article is more about process, and the question of who (other than the prospective parent) should determine the interests of future children, than the substance of what those interests should be.

This critique of the broad notion of the right to procreate (a notion which seems liberal) is based on the claim that this reading actually has illiberal consequences – consequences that put it in tension with the Constitution. Consider the extent to which the Reconstruction Era amendments confirmed what we might call a substantive maxim of constitutional interpretivism,³³ or a substantive constitutional “commitment,”³⁴ which forbids reading the Constitution (and most certainly *those* amendments) as granting a fundamental right to one class of persons to treat another class of persons (even temporally disadvantaged people like prospective children) as property.³⁵ Arguably, the Reconstruction Era amendments, particularly the Thirteenth, embedded in the Constitution a principle of moral repugnance for persons treating other persons as property, so that whatever notion of the right to procreate we wish to develop by looking back on cases developing the right to procreate, or forward towards what right is most justified, it cannot violate that principle. More

32. See Smolensky, *supra* note 18, at 331-36.

33. Regarding Dworkin’s interpretivism generally, see RONALD DWORKIN, *LAW’S EMPIRE* (1986). Dworkin has applied his method to the relationship between the Constitution and slavery, perhaps most eloquently in his condemnation of the Fugitive Slave Cases. See, e.g., Kenneth Eimar Himma, *Trouble in Law’s Empire: Rethinking Dworkin’s Third Theory of Law*, 23 O.J.L.S. 345, 350 (2003) (discussing Dworkin’s method of fit and justification in the context of slavery, and Dworkin’s view that “the general structure of the American Constitution presupposed a conception of individual freedom antagonistic to slavery”).

34. James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 233 (1993) (arguing that theorists like Laurence Tribe, Ronald Dworkin, Bruce Ackerman and Cass Sunstein point to constitutional provisions like the Thirteenth Amendment as evidence of substantive norms or “commitments” embedded in the Constitution).

35. Ronald Dworkin might also be read as endorsing a broad right to procreate, or the principle that he calls “the right of procreative autonomy.” See RONALD DWORKIN, *FREEDOM’S LAW* 102 (1996). However, in his discussion on this point, he is concerned with state limitations on the use of contraceptives and abortion, which are based on the state’s view of the intrinsic value of life. *Id.* at 101-10. However, procreation is not the prevention of conception, or an act of abortion, and the claim advanced in this article relies on the relative quality of the prospective child’s future life, rather than taking as a given the value of life per se.

conservatively, we could say that even if the amendments did not embed such a principle generally, their structure should prohibit us from reading those specific provisions – including the Fourteenth Amendment – so as to violate the principle. If we must derive the constitutional right to procreate from the Fourteenth Amendment, it would be bizarre, in light of the history of that amendment, to do it in a way that also created property rights in persons.

Read broadly, that principle of not treating others as property would mean that the broad notion of the right to procreate is not only illiberal, but also forbidden by the Constitution. As such, the property objection goes well beyond the many arguments that would have us simply doubt that the common, broad, privacy-based notion of the right can be derived from the Constitution. If the property objection holds true, that common notion of the right to have children is not only unsupportable, but morally problematic and constitutionally prohibited.

I. THE CONSTITUTION AND THE RIGHT TO PROCREATE

Before delving into the privacy or liberty-based approach to the right to procreate, it is helpful to understand Barbara Bennett Woodhouse's discussion of how parental rights tend to treat existing children as property.³⁶ There are more comprehensive sources for the proposition that children were historically treated as the property of their fathers,³⁷ and there is a persuasive body of commentary showing that the Supreme Court, in cases like *Troxel v. Granville*,³⁸ still views children as the property of their parents.³⁹

But Woodhouse's genius is to show that the law continues to treat children in this manner because this attitude towards children determined, in large part, how the foundational cases concerning parental rights — cases upon which modern substantive due process is built — were decided.

Woodhouse offers a compelling revisionist history of *Meyer* and *Pierce*, two "liberal icons" which established the freedom to control one's children's education and which have become *sine qua non* for the proposition that there exists a constitutional sanctuary from state meddling populated by unenumerated rights, the best image of which is the family realm. She argues that these cases "announced a dangerous form of liberty, the right to control another human being,"⁴⁰ and that they were animated by

a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent's private property rights in his children and their labor. Along with protecting religious liberty and intellectual freedom, *Meyer* and *Pierce*

36. See Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer* and *Pierce* and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

37. See e.g., MARY ANN MASON, FROM FATHERS' PROPERTY TO CHILDREN'S RIGHTS (1996).

38. *Troxel v. Granville*, 530 U.S. 57, 55-58 (2000) (plurality concluding parents have a right to exercise broad parental authority over the lives of their minor children); see also Earl M. Maltz, *The Trouble with Troxel*, 32 RUTGERS L.J. 695 (2001).

39. One might simply argue that if, as a historical matter, existing children are viewed as property it certainly follows that future children – who might be harder to empathize with due to their temporal disadvantage – would be as well.

40. See Woodhouse, *supra* note 36 at 1001.

constitutionalized a narrow, tradition-bound vision of the child as essentially private property. This vision continues to distort our family law and national family policy, so that we fail as lawmakers to respect children and fail as a nation to recognize and legitimate all American children as our own.⁴¹

Although focused on the constitutional doctrine ensuring parental control of living children, Woodhouse's plea for an alternative to child-as-property thinking echoes Feinberg's argument that all children, including prospective children, deserve an open future. Woodhouse revealed the "dark side"⁴² of substantive due process, by exposing the links between "economic due process and family liberties [which] [b]oth grow from a Spencerian conviction that men should be free to deploy their properties as they wish."⁴³

Woodhouse's account is relevant to understanding how the law treats prospective children as property because, as discussed below, beginning in 1961 *Skinner's* holding was reconstructed and woven into the *Meyer* and *Pierce* line of reasoning. In this way, the right to procreate has been made a matter of personal or familial privacy. Just as *Meyer* and *Pierce* entrenched a proprietary relationship between parents and their children, *Skinner* entrenched a proprietary relationship between prospective parents and their prospective children.

A close examination of the *Skinner* decision reveals that the rather undefined right to procreate that it recognized in 1942 bears little resemblance to the broad right articulated by Tribe and others today. Of course, *Skinner* was not the first case to test the right, and in *Skinner* Justice Douglas merely distinguished *Buck*,⁴⁴ the only other Court case at the time dealing with the right. More importantly, the Court narrowed its holding significantly, stating that

[s]everal objections to the constitutionality of the Act have been pressed upon us We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is, its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment.⁴⁵

What was the nature of the right to procreate after *Skinner*? Was it that the mentally ill have no right to procreate while convicted felons do? Was it, under a close reading of the language in *Skinner*, that it was not a matter of rights so much as that limitations on the right to procreate must be distributed equally?⁴⁶ Was it that the goal of limiting the right to procreate is constitutionally valid,

41. Woodhouse, *supra* note 36 at 997.

42. *Id.* at 1000-01 (noting that *Meyer* and *Pierce* enabled children's "voicelessness, objectification, and isolation").

43. *Id.* at 1112.

44. *Skinner v. Nebraska*, 316 U.S. 535 at 542 (1947) (citing *Buck v. Bell*, 274 U.S. 200, 208 (1927)).

45. *Skinner*, 316 U.S. at 537-38. Does use of strict scrutiny mean that *Skinner* nonetheless assumed that procreation is a fundamental right? As the court stated, its reference to strict scrutiny merely explained how it would go about equal protection analysis and does not automatically indicate the existence of a fundamental right. *Id.* at 541.

46. See Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1466 (2008) (noting that *Skinner v. Oklahoma* protects the "constitutional right to be free from forced sterilization in large part because of fears regarding race and class-based inequalities").

though the means of doing so are subject to review, and sterilization as a means is never permissible? Was it that, in light of the fact that Carrie Buck had procreated and Jack Skinner had apparently not, that sterilization is permissible after one has procreated but not before?

These questions are never addressed by the Court because *Skinner* eventually became precedent for and integral to the notion of a private family realm. And though *Skinner* never cited *Meyer* or *Pierce*, nineteen years after it was decided the Court began to weave the three cases together as evidence of a broad realm of familial privacy, despite the *Skinner* Court's attempts to limit its holding to questions of equal protection and its preservation of *Buck*.

Among Supreme Court cases,⁴⁷ *Skinner* was cited exclusively in the equal protection context up until Justice Harlan's dissent in *Poe v. Ullman*⁴⁸ in 1961. *Poe* upheld a Connecticut statute prohibiting the use of contraceptives as applied to married couples.⁴⁹ Harlan dissented, finding that the contraception ban, though unenforced, threatened a protected liberty, and that the protections of the Fourteenth Amendment encompassed a range of unenumerated rights.⁵⁰ Harlan cited *Skinner* as recognizing "a rational continuum" of liberty,⁵¹ and for the proposition that the statute involved a "most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires the statute to be subjected to 'strict scrutiny.'" ⁵² He related this notion of the private home to *Meyer* and *Pierce* because "[c]ertainly the safeguarding of the home does not follow *merely* from the sanctity of property rights. The home derives its pre-eminence as the seat of family life."⁵³

After Harlan's dissent, the Court, in *Reynolds v. Sims* cited *Skinner* as an example of the Court protecting a basic human right,⁵⁴ and shortly thereafter, in *Griswold v. Connecticut*, the Court completely separated *Skinner* from its equal protection holding, using it as an example of a fundamental right, and the

47. The California Supreme Court, and Justice Traynor, may have been the first to begin to tie *Skinner* into the *Meyer* and *Pierce* realm. In *Perez v. Lippold*, a 1948 California Supreme Court case invalidating a ban on interracial marriage, the court found that marriage is as fundamental a right as the right to choose a child's school (at issue in *Meyer*), or the right "to have offspring." *Perez v. Lippold*, 32 Cal.2d 711, 714 (1948). "Indeed," Justice Traynor writes, quoting *Skinner*, "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 713 (quoting *Skinner*, 316 U.S. at 541). After *Griswold* was decided, the court in *People v. Belous* cited *Skinner*, along with *Meyer* and *Pierce*, as examples of its, and the U.S. Supreme Court's, "repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex" from which follows "[t]he fundamental right of the woman to choose whether to bear children." *People v. Belous*, 71 Cal.2d 954, 963 (1969).

48. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

49. *Id.* at 509.

50. *Id.* at 553-55.

51. *Id.*

52. *Id.* at 548-49. The literature at this time was also taking the approach of relating the right to bear children to *Meyer* and *Pierce*. See e.g., Note, *Connecticut's Birth Control Law: Reviewing a State Statute under the Fourteenth Amendment*, 70 YALE L.J. 322, 333 (1960).

53. *Id.* at 551 (emphasis added).

54. See *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (holding that the apportionment of representation in state legislatures must be based on population rather than geographical area).

foundation for the realm of familial privacy.⁵⁵ This is especially clear in Justice White's concurrence in which he cites *Meyer*, *Pierce*, and *Skinner* as the three opinions evidencing a "realm of family life which the state cannot enter" without substantial justification.⁵⁶

Griswold threaded the three opinions together, making it seem as though the right of married couples to use contraception was merely part of a longstanding and unbroken tradition of familial privacy going back to the beginning of the century — a tradition that undoubtedly included the right to procreate. If the notion of penumbral privacy was novel, it certainly seemed less so when based upon the settled line of authority *Meyer*, *Pierce*, and *Skinner* was said to establish. The Court and commentators, after *Griswold*, have continued to use this broad privacy-based notion of the right, relying on the *Meyer*, *Pierce* and *Skinner* line, despite *Skinner's* narrow holding.⁵⁷

The broad notion of the right as articulated by Tribe comes from this tradition.⁵⁸ Could the Court, rather than weaving it into the familial realm, instead have articulated a different right, unenumerated, but with detailed content regarding its scope, derivation, and relative weight? Contrast the right to procreate as the broad notion states it, with the rich and complex right to terminate one's pregnancy that the Court has developed in the past several decades.

Regardless of what might have happened, the broad notion of the right is problematic. While one could take a more retrospective view and argue that this broad notion of the right derives from property because it is based on the sanctity of one's home,⁵⁹ this article argues instead that—whatever its origins—

55. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a statute prohibiting the use of contraceptives was unconstitutional because it violated the right to privacy).

56. *Id.* at 495 (White, J., concurring) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

57. For cases that rely on *Meyer*, *Pierce* and *Skinner* in regards to the right to conceive and raise children, see, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972), *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 843-44 (1977); *Hodgson v. Minnesota*, 497 U.S. 417, 447-48 (1990). For a discussion of the right's evolution after *Griswold* see Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 15-20 (2007). Commentators followed suit, with little exception. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 931-32 n.79 (1973); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1422-23 (1974); G. Edward White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212, 1235 n.92 (1976); John A. Siliciano, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1216 n.6 (1977); Jan N. Holladay, Note, *Due Process Limitations on Parental Rights to Commit Children to Mental Health Institutions: Bartley v. Kremens*, 48 U. COLO. L. REV. 235, 249 n. 82 (1977); Elizabeth S. MacMillan, *Birth-Defective Infants: A Standard for Non-treatment Decisions*, 30 STAN. L. REV. 599, 611 n.63 (1978); Randy A. Hertz, *Retarded Parents in Neglect Proceedings: The Erroneous Assumption of Parental Inadequacy*, 31 STAN. L. REV. 785, 793-94 (1979); but see Bruce Kafan, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy--Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 528-30 (1983).

58. Tribe implies this in articulating his view of privacy more generally. See TRIBE, *supra* note 6, at 1414-15.

59. Kate Fletcher, who provided research and commentary in helping to develop this article, suggests this possibility: that having and raising children is protected because it falls within the sanctity of the home, and the sanctity of the home was derived from the concept of private property. For example, *Meyer* refers to the right "to marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). But *Meyer* was not the first case to read the Fourteenth

the broad notion has the consequence of acting like a property right by treating prospective children as a class of property, assigned to their prospective parents as such.

II. THE CLAIM: THE BROAD NOTION OF THE RIGHT TO PROCREATE TENDS TO TREAT PROSPECTIVE CHILDREN AS PROPERTY IN VIOLATION OF FUNDAMENTAL CONSTITUTIONAL PRINCIPLES.

The success of the claim - that the broad notion of the right to procreate tends to treat prospective children as property because it excludes others' power over members of that class and allows prospective parents free use of its members - is contingent upon the plausibility of four initial premises: the broad notion of the right to procreate,⁶⁰ the existence of prospective children as a class, a plausible description of what it means to treat persons as property, and an understanding of the power (in a Hohfeldian sense) that having children entails.

A. The Broad Notion of the Right

Perhaps the best articulation of this notion, as well as evidence of its widespread acceptance as a constitutional norm, is Tribe's statement above, which appears in his leading treatise *American Constitutional Law*. There, Tribe argues that *Skinner* established the Constitution's guarantee that "*whether one person's body shall be the source of another life must be left to that person and that person alone to decide.*"⁶¹ And while this notion of the right differs from the articulation in *Skinner*, it echoes the language of subsequent Court opinions that reinterpreted and cited it as a foundation for and part of the modern fundamental rights doctrine.⁶²

The right so conceived is part of and justifies a realm that is walled off from state intervention, and defends within its borders the individual's or couple's

Amendment as relating the sanctity of the home to broader familial privacy interests. The link between family and private property can be found earlier in *Boyd v. United States*, 116 U.S. 616 (1885), which dealt with unreasonable search and seizure. In that case, the Court relied largely on *Entick v. Carrington and Three Other King's Messengers*, 19 St. Tr. 1029 (1765),

The principles laid down in [the *Entick*] opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property."

Boyd v. United States, 116 U.S. at 630 (citing *Entick*, 19 St. Tr. at 1029).

60. For the purposes of this article, an act of procreation refers to any voluntary act taken by an individual that is either one of the two most proximate causes of the conception of a future person or persons, with such person or persons eventually being born. Note that Tribe's notion of the right bundles the right to procreate with the right not to procreate, conflating the two as part of a broader notion. TRIBE, *supra* note 6, §§ 15-10, 15-20, 15-21.

61. See TRIBE, *supra* note 6. Tribe however argues that *Skinner* would not bar narrow and nondiscriminatory measures (presumably subject to strict scrutiny), like those designed to prevent overpopulation. *Id.*

62. See CARL WELLMAN, *MEDICAL LAW AND MORAL RIGHTS* 125-34 (2005).

choice to procreate, or not procreate,⁶³ as well as to engage in the other behaviors at the core of modern substantive due process, like using contraception and obtaining an abortion. Dorothy Roberts, relying heavily on Tribe, finds that

[c]onsiderable support exists for the conclusion that the decision to procreate is part of the right of privacy. The decision to bear children is universally acknowledged in the privacy cases as being “at the very heart” of these constitutionally protected choices. . . . The right of privacy protects equally the choice to bear children and the choice to refrain from bearing them.⁶⁴

Woven into the fabric of modern substantive due process, the right to procreate is not just a matter of privacy, but also a matter of liberty because, as John Robertson argues,

[r]eproductive decisions have such great significance for personal identity and happiness that an important area of freedom and human dignity would be lost if one lacked self-determination in procreation. Indeed, to deny the importance of procreative liberty would be to grant the state repressive power over our intimate lives in a most fundamental way, as recent experiences in China and Romania have shown.⁶⁵

And, if we consider the relative absence of state interference with procreation in the United States, that is, not just the theoretical line drawn onto the Constitution that the state cannot cross but also the absence of legal reasons not to procreate, this realm of privacy and liberty seems an apt notion of the right. It is broad in terms of the behavior it protects and, absent unusual situations like being incarcerated, it seems almost to guarantee a place to which we can retreat to make others like us, free from the state’s gaze and influence. Some have argued that the broad right should include the right to have as many children as one wants,⁶⁶ to have another child after the state has seized its

63. See, e.g. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1467 (1991) (“Burdening both the right to terminate a pregnancy and the right to give birth to a child violates a woman’s personhood by denying her autonomy over the self-defining decision of whether she will bring another being into the world.”); but see I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1141 (2008) (“American constitutional jurisprudence appears to treat the right to be and not to be a gestational parent (still in the non-interference sense) as conjoined. But this bundling is not inherent.” (footnote omitted)). Elsewhere I critique the foundation of this way of thinking about the right, arguing that it is a serious conceptual error to think of procreation as a private or personal act because its necessary and sufficient condition is the creation of a third person. It is thus thoroughly and unavoidably interpersonal. Along these lines of thought, one could argue that procreation is more akin to an act of speech or expression than it is to abortion. Grouping it in with the latter might be mere associative thinking.

64. Roberts, *supra* note 63, at 1465-66 (footnotes omitted).

65. John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to my Critics*, 52 WASH. & LEE L. REV. 233, 236 (1995).

66. See, e.g., Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1041 (1996) (“[M]any advocates of coercive family planning see merit in the personal right to decide freely how many children to have.”); cf. *State v. Oakley*, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting) (“Men and women in America are free to have children, as many as they desire. They may do so

siblings to protect them, to clone oneself, or to genetically select for disabling traits in the children we will have.

It is also a weighty right, which according to some should enjoy primacy when conflicts with other rights or interests arise⁶⁷ because, arguably, “[f]ew decisions that people make are more personal than these, in the sense that what is the best choice depends on people’s own personal aims and values, or more far-reaching in their impact on people’s lives.”⁶⁸ The Supreme Court, in dicta spun from the *Meyer*, *Pierce*, and *Skinner* line, has reinforced this notion, guaranteeing, as it did in *Carey v. Population Services International*, that “decisions whether to accomplish or to prevent conception are among the most private.”⁶⁹

While no constitutional right is absolute, under this notion the right to procreate – protected as it is within the privacy or liberty-based realm – has no evident limits. As one dissenting justice said regarding a case involving a father of nine who refused to pay child support, and who was ordered not to have more children until he was no longer in arrears, “[m]en and women in America are free to have children, as many as they desire. They may do so without the means to support the children and may later suffer legal consequences as a result of the inability to provide support.”⁷⁰

In Hohfeld’s terms,⁷¹ this bundled “right” to procreate generally represents for the procreator a cluster of more elemental rights: a liberty to have children (or a lack of a duty not to procreate), a claim-right to the constitutional duty the state owes not to interfere with having children, as well as a constitutional immunity from the state’s altering the liberty or claim-right. Together, these elements define the essential legal relations between the would-be parent and the state. However, the right also entails a host of other relations, such as the special liabilities of co-procreators, existing family members, and other persons who will legally associate with the child when born. There are many more relations that could be mentioned here, but most importantly the right involves a unique form of power-right (or “power”) over the would-be parents’ prospective children, which is discussed in Part II(D) and is the focus of this article.

As one might imagine, there are those who today challenge this broad conception of the right, and whether it can be thought of as synonymous with privacy.⁷² But it may have been J.S. Mill who first realized the contradiction

without the means to support the children and may later suffer legal consequences as a result of the inability to provide support.”).

67. See, e.g., ROBERTSON, *supra* note 65, at 24 (“Procreative liberty should enjoy presumptive primacy when conflicts about its exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one’s life.”).

68. See WELLMAN, *supra* note 62, at 141 (quoting D.W. Brock, *Reproductive freedom: It’s nature, basis, and limits*, in HEALTH CARE ETHICS: CRITICAL ISSUES FOR PROFESSIONALS 49 (D. Thomasma and J. Monagle eds., (1994)).

69. *Carey v. Population Services Int’l*, 431 U.S. 678, 685 (1977).

70. *State v. Oakley*, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting).

71. See HOHFELD, *supra* note 9.

72. See, e.g., Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1116 (1998) (“If the relationships between people with respect to an activity are entirely consensual, privacy may protect them . . . [but] the right to privacy breaks down when it is applied to situations involving conflicts within the association.”).

inherent in the notion of a realm of liberty free from state influence, where some of the people trapped within that realm have less power than others:

The State, while it respects the liberty of each in what specifically regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over others. This obligation is almost entirely disregarded in the case of the family relations – a case, in its direct influence on human happiness, *more important* than all others taken together.⁷³

And while Mill seems at first focused on parents and children in the here and now,⁷⁴ much like Woodhouse, he quickly turns his attention to procreation, and the prospective children it involves.

It still remains unrecognized that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind is a moral crime, both against the unfortunate offspring and against society. . . . It is not in the matter of education only that misplaced notions of liberty prevent moral obligations on the part of parents from being recognized, and legal obligations from being imposed, where there are the strongest grounds for the former always, and in many cases for the latter also. The fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility – to bestow a life which may be either a curse or a blessing – unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being.⁷⁵

But the point here is not to challenge the broad notion of the right to procreate by critiquing its footing on constitutional precedent or its moral implications, but to accept it at least for purposes of the claim.

Though as an aside, I imagine it is the notion of the right most people in the United States would have in mind were they to think about their constitutional right and any possible state interference with it. And while it is well beyond the scope of this project, we can speculate how this broad notion of the constitutional right – which is merely a legal bulwark against state action, may have influenced the people's moral view of their liberty to procreate, that is, the potential absence of any moral duties regarding having children. It seems possible to imagine that in negating the notion of duties to future children, the common notion of the constitutional right has simply encouraged what, from an objective perspective, might be considered irresponsible procreation (i.e., procreation in disregard of the interests of future children and those with whom they will interact).

73. JOHN STUART MILL, ON LIBERTY 103 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) (emphasis added).

74.

One would almost think that a man's children were supposed to be literally, and not metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them, more jealous than of almost any interference with his own freedom of action: so much less do the generality of mankind value liberty than power.

Id. at 103-04.

75. *Id.* at 104-06. Mill later refers to the value of social stigma, even in the absence of legal punishment, for what we must assume he would consider wrongful acts of procreation. *Id.* at 107.

B. The Class of Prospective Children

The most important and unfamiliar element to the claim is the class I term prospective children, who exist temporally somewhere between remote future generations that will exist, and the more proximate production of specific gametes for the next generation of children that will be born. The scope of the class is thus defined by the advent of actual future people (as opposed to merely possible people)⁷⁶ on one side, and conception on the other. It includes those morally, and as will be shown *legally*, extant persons who will come to exist physically in the next generations. The temporal focus here will be on what might be called the family-planning stage, or the anticipation of having children.⁷⁷ The concept may seem abstract, but the law often recognizes temporal classes of persons, be they the dead, elderly, minors, infants, fetuses, etc. This classification simply goes one step further back (or forward, depending on one's perspective) from conception.

The point here will simply be to establish that future persons exist as a class, both morally and legally, before they exist physically, and that prospective children make up a logical sub-class of future persons. It will be difficult but important, for purposes of this analysis, to maintain focus on prospective children rather than slipping into thinking about living children. Though the former will eventually become the latter, the classes are distinct.

Before proceeding further with this claim, we should also distinguish it from the claim that the privacy or liberty-based right to abort one's fetus also treats prospective children as property, and is in tension with the Constitution as such. I will not pursue the issue further here, but will simply say that one claim does not necessarily lead to the other⁷⁸ – primarily because it is not clear that a fetus and prospective abortee is a person, morally and legally, in the same

76. See ROBERTS, *supra* note 21.

77. For example, ethicists have focused on this temporal stage in the process of having children. See, e.g., James Woodward, *The Non-Identity Problem*, 96 ETHICS 804, 815-16 (1986) (arguing that in the example of Alma, a fourteen-year-old girl considering having a child, "duties and obligations constitute[] an important reason . . . for Alma *not* to have a child"). There is a vast body of literature examining the rights and wrongs of choosing to have a child which often focuses on what has been called the non-identity or contingent future persons problem, but my claim is distinguishable and is based on a legal rather than exclusively moral principle.

78. There are three initial difficulties with making the latter claim that one does not encounter with the former. The first is that it is not clear that the class of future persons I refer to as prospective children includes fetuses when they are considered as prospective abortees, because at that point they lack the necessary condition that they will exist in the future. The whole question of aborting the fetus cuts off the presumption that allows one to consider the future person it would otherwise become. At that point they are more possible than prospective. As will be discussed, FDA regulations meant to avoid birth defects are premised on the child being born, not aborted. Secondly, one of the reasons the broad notion tends to treat people as property, as discussed below, is that it allows the prospective parent to exclude others' control in determining the future legal, moral, and proprietary relations of prospective children. In contrast, abortion negates the future relations the fetus would have otherwise had. Thirdly, unlike the broad notion of the right to procreate, the constitutional right to terminate one's pregnancy seems much more narrow, with the woman's privacy or liberty-based right balanced against competing interests and defined by considerations such as viability and undue burdens. It may be that, ignoring for a moment the first two difficulties, the right to terminate one's pregnancy has been tailored to avoid the property objection.

way that a future person (who will be born and live in the future) is. To succeed in using the property objection against the right to terminate one's pregnancy, we would have to equate the two. Also, assuming for the sake of argument that the right to abort one's fetus were objectionable because it means treating prospective children as property, perhaps this would explain why abortion jurisprudence balances the right to abort one's fetus against the state interest in the fetus itself.⁷⁹ But if that were the case, it would be odd to treat the right to terminate one's pregnancy as qualified, but the right to procreate as relatively absolute; doing so would mean that the state is attending more to the interests of fetuses than the interests of prospective children.

Ironically, it seems likely that many supporters of a broad right to terminate one's pregnancy might also, out of a commitment to a liberal perspective of sorts, oppose the "no procreation" probation order discussed above. In one sense this is a very "pro life" perspective in that the argument seems to be that the mere production of human life – regardless of the circumstances in which it is begun – is desirable. However, this issue is well beyond the scope of this article.

These issues aside, one obvious counter to the claim that the broad interpretation of the right treats prospective children as a class of property would be to challenge whether members of that class are moral or legal agents, and to argue that if they are not, treating "them" as property would not be objectionable at all. This is commonly done by those justifying the classification of animals as property. However, the fact that prospective persons do not exist physically does not mean that they do not exist morally or legally. In the case of prospective children, both moral and legal authorities not only presume their existence but go a step further, recognizing norms that would protect them as legal and moral agents from people who are alive today.

Aaron Bruhl uses the example of setting a bomb to detonate long into the future to demonstrate this point:

[W]hat if I instead set the bomb to detonate a couple of hundred years hence, enough time to ensure that the future victims of my mischief are currently non-existent? Despite their current anonymity and non-existence, it is nonetheless living, breathing, interest-bearing persons who stand to suffer from my actions. Whether the bomb maims people tomorrow or the next century, do we not explain the wrongness of my act in exactly the same way? In both cases, we would say that it is for the potential victims' sake that I ought not plant the bomb, and it is their due that I refrain.⁸⁰

The point here is to note the moral and legal duty one would have not to plant the bomb, which correlates to the rights of future persons not to be harmed by one bombing them. But there is no need to rely on legal thought-experiments because the law provides ample evidence of legal duties to future persons and prospective children. Bruhl uses the example from products liability law of a

79. See e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869-73 (1992) (holding that states can regulate abortion at the point where the state gains a significant interest in protecting the life of the fetus).

80. Aaron-Andrew P. Bruhl, Note, *Justice Unconceived: How Posterity Has Rights*, 14 YALE J.L. & HUMAN. 393, 414 (2002).

car that was manufactured prior to the conception of a child and had flaws that resulted in the child's death.⁸¹ There is no reason to think that the manufacturer would not be liable, and that the liability would not be premised on the duty the manufacturer owed at the time the car was manufactured to future persons, whether or not they physically exist. The manufacturer owes a duty now to those who do not yet physically exist – and if he or she did not there would be no tort liability in the future when the victim is actually harmed. If he or she owes no duty to the potential victim at the time the car was manufactured, how could one eventually be liable to them?

These examples rely on traditional notions of harm where the victims are made worse off than either they were before, or than they otherwise would have been. But we can also understand harm in terms of putting persons into particular states of affairs that fall below a certain threshold, or the idea that we harm people by causing them “to be worse off than they should be.”⁸² The argument here would be that prospective parents should not have exclusive control and use over members of the class of future children, thereby having the power to assign them to sub-threshold circumstances, e.g. legally unfit parentage, foster-care, state institutions, etc. But again, as will be discussed below, one of the merits of the property objection is that it does not have to rely on the substance of competing notions of harm at all, because the property objection is more procedural, and regards *who* determines the future interests of the class. It objects to exclusive dominion, dominion which negates the interests of members of the future child class, being given to prospective parents for their use.

Regardless, there are various other examples of the law protecting classes of future persons, consistent with the notion of threshold-harm. These include the FDA's preventative regulation of drugs or devices that cause birth defects, the prohibition of incest, the regulation of surrogacy contracts, trust law protecting unconceived beneficiaries, recent preemptive no-procreation and no-custody probation orders issued against abusive and neglectful parents as in the case of *Bobbijean P*, etc.⁸³ Whether it regulates our use of pharmaceuticals, prohibits certain consanguineous relationships in order to avoid disabilities in future generations, provides legal instruments to protect the assets of future children, or prohibits parents likely to abuse and neglect future children from having access to them, our law seems to presume that a class of future legal and moral agents exists – and that we have duties to its members well before they physically exist.

Consider for example laws that regulate adoption.⁸⁴ The prospective adoptive parents are subject to rigorous examination by the state in the interests of protecting the child they will have, often *before* that child is born. The law

81. *Id.* at 414-15.

82. See Lukas Meyer, *Intergenerational Justice*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.1 (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/entries/justice-intergenerational/>; Jeff McMahan, *Wrongful Life: Paradoxes in the Morality of Causing People to Exist*, in RATIONAL COMMITMENT AND SOCIAL JUSTICE: ESSAYS FOR GREGORY KAVKA 209 (Jules L. Coleman and Christopher W. Morris eds., 1998).

83. See Dillard, *supra* note 13, at 388-97.

84. *Id.* at 388-89.

here recognizes the interests of the prospective child and protects those interests by assuring that the adoptive parents meet the relevant statutory standard.

If civil or common law presumes the class of prospective children exists morally and legally, is it possible that the Constitution excludes the class from consideration in substantive due process analysis? Perhaps the best evidence that it does not is the Court's decision in *Buck*, cited with approval in *Roe v. Wade*,⁸⁵ which explicitly recognized and based its decision in part on the interests of Carrie Buck's future children.⁸⁶ Whatever went wrong with the final decision in *Buck* after that does not change the legal recognition of the class, which is key to its holding.

Why are prospective children considered as a class, rather than as individuals? While we know that parents are likely to have children with sufficient characteristics to give them moral and legal personhood (sentience, reason, etc.), we cannot conceive of what a particular future person or prospective child is like. And as one commentator put it, "[b]ecause conventional analysis [like that employed in wrongful life cases] looks only for individual victims, it ignores the harm that can be inflicted on future children as a class when irresponsible reproductive choices are made."⁸⁷ But not being able to conceive of particular persons does not matter for our purposes of conceiving of the class, morally or legally. "One fact about future people is that we do not know who exactly they will be. But surely this is not the problem. . . . Standard duties to take reasonable care correlate with rights even though the identity of the right-holder might be unknown at the time of acting."⁸⁸

In terms of moral argument, it is safe to say that the academy has moved past the fact that prospective children do not physically exist, and now focuses on how to characterize the wrongs we can do to them.⁸⁹ Characterizations of wrongness aside, the ontology of the class is not really debated by philosophers nor, as shown above, by the law. Moreover, while there is moral and legal

85. *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that a statute prohibiting abortion was a violation of due process rights); see also *In re Cavitt*, 157 N.W.2d 171, 176 (Neb. 1968) (citing *Buck* in upholding a compulsory sterilization statute for institutionalized mental patients), appeal dismissed sub nom. *Cavitt v. Nebraska*, 396 U.S. 996 (1970); *In re Sterilization of Moore*, 221 S.E.2d 307, 313 (N.C. 1976) (citing *Buck* in upholding a statute authorizing compulsory sterilization of the mentally ill).

86. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding a statute which required compulsory sterilization of inmates of state institutions who suffer from insanity or mental defects).

87. Philip G. Peters, Jr., *Harming Future Persons: Obligations to the Children of Reproductive Technology*, 8 S. CAL. INTERDISC. L.J. 375, 376 (1999); see also Michael Bayles, *Harm to the Unconceived*, 5 PHIL. & PUB. AFF. 292, 300 (1976).

88. Bruhl, *supra* note 80, at 413.

89. See, e.g., Lukas Meyer, *Intergenerational Justice*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 6 (Edward N. Zalta ed., 2008), available at <http://plato.stanford.edu/archives/spr2007/entries/justice-intergenerational> (concluding that rights should be attributed to future persons with corresponding duties owed by present generations). Meyer states that "considerations based upon the rights of future people can guide prospective parents in deciding whether they should revise their decision to conceive out of regard for the children they would otherwise have." *Id.* See Joel Feinberg, *The Rights of Animals and Unborn Generations*, in PHILOSOPHICAL AND ENVIRONMENTAL CRISIS 43, 63, 65 (1974) (quoting Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth"; and commenting "Why then deny that the human beings of the future have rights which can be claimed against us now in their behalf?").

authority presuming the existence of prospective children, we can also deduce their existence logically. If we feel a moral resistance to intentionally taking a drug that will cause birth defects in any children we have, or to having a child when we lack any means to support it, what is *presently* causing that resistance? These persons, and prospective children, do not physically exist, yet morality, and in some cases the law, constrains our current behavior in protecting their interests.

C. Notions of Property

1. Traditional notion of property

One traditional notion of property (or rather private property) seems to entail this at its core: the excluding of others (or the individualizing of control) to allow use of the thing one has property in.⁹⁰ Property, and this notion of it, is not a binary concept. There are degrees to which one can assert, and the law can enforce, the exclusion of others from control of property. One can imagine a spectrum of exclusion that corresponds directly to one's property interest. Of course, at some point others may participate in the control of use to such a degree that it no longer makes sense to refer to the object, or class of objects, as belonging to the original proprietor.

This notion of property – with its singular focus on the owner and the object – may seem too simplistic when compared to the more familiar image of a complex bundle of rights or “sticks,” which represent the owner's relations to others regarding the object, and which all must be considered (including excludability) in sum to determine whether one has property in something or not.⁹¹ However, there are three reasons, for purposes of this article, to focus on property as the exclusion of others to allow use.

First, it is very possible that exclusion is a necessary condition and sine qua non of any concept of property,⁹² or at the very least is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”⁹³

90. See, e.g., Gregory C. Alexander, et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743-44 (2009) (describing the “common conception of property as protection of individual control over valuable resources . . . [s]ometimes the expression of this idea focuses on the right to exclude others and sometimes on the free use of what one owns.”); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 988 (2009) (describing the core of property as exclusion); Jeremy Waldron, *Property*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 1 (Edward N. Zalta, ed., 2008), available at <http://plato.stanford.edu/entries/property/#1> (describing private property as entailing exclusive control, so that “[i]n general the right of a proprietor to decide as she pleases about the resource that she owns applies whether or not others are affected by her decision”).

91. See *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (holding that deprivation of one aspect of one's property right does not itself constitute a taking).

92. Thomas W. Merrill, *Property and the Right To Exclude*, 77 Neb. L. Rev. 730, 752 (1998); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (the right to exclude is “universally held to be a fundamental element of the property right”).

93. See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (citing *Kaiser Aetna*, 444 U.S. at 176); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (citing *Kaiser Aetna*, 444 U.S. at 176); see also Sankoorikal, *supra* note 25 at 589 (under “the ‘bundle of rights’ framework, the hallmarks of a property right include the ability to control something and the ability to prevent others from interfering with that control”).

As the Court said recently, the “hallmark of a protected property interest is the right to exclude others.”⁹⁴ For example, if we say that property is really about market-alienability, it may be that the concept of market-alienability presupposes my right to exclude others from also simultaneously selling the res, the bridge for example, that I am trying to sell. It is hard to think of a property right that does not first require our excluding others from controlling and using that which we claim property in.

Secondly, if we divide the Constitution into various sections where the concept of property is at issue, it may be that exclusion is the defining element when looking at property in the context of substantive due process. Thomas Merrill has examined the various notions of property used by the Court in its constitutional jurisprudence, and while Merrill has advocated for using a concept (or “patterning definition”) of property-as-wealth in this context, he finds that the Supreme Court has held that “property for purposes of the Due Process Clause includes as an essential element the right to exclude others.”⁹⁵ In the context of interpreting Reconstruction Era amendments, it may make sense to at least focus on that element of property that is not only fundamental to the constitutional definition but appropriate, in the Court’s eyes, to this particular context.

Thirdly, and most importantly, when looking at the concept of property as it relates to one class of persons owning another, perhaps we *should* use a concept of property that focuses less on the complex relations with other persons that the bundled property right entails, and more on the exclusion – or exercise of dominion – that the owner exercises not just with regard to others, but specifically with regard to what are the objectified persons in whom he or she has property. This point was made eloquently by Jeanne Schroeder in her critique of a particular historiography of legal literature regarding slavery, and without analogizing prospective children to slaves because I believe it would be morally questionable and inaccurate to do so, Schroeder’s point helps clarify not just the concept of property, but of property in persons.

2. People as property

In 1996 Thomas Russell wrote a revisionist history of slavery, applying Hohfeld’s property theory, in lieu of William Blackstone’s, to the institution of slavery in the antebellum South. In essence, Russell argued that Blackstone’s theory leads one to erroneously focus on the relationship between slave-owner

94. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999).

95. See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 970 (2000); see also *id.* at 983, 985-86.

College Savings Bank holds that a statutory cause of action for false advertising by a competitor does not implicate any substantive due process property. Justice Scalia explained that this is because such a cause of action does not itself entail any right to exclude others, nor does the underlying activity protected by the cause of action—the right to compete for future customers and revenues—entail a right to exclude others.

Id. at 985 (footnotes omitted) (that case involved the question of whether a due process right was implicated, and as such, whether the Eleventh Amendment immunity applied to protect the state from a federal false advertising cause of action).

and slave as one of absolute dominion by one person over an inanimate object, or res. Russell argued that instead, the relationship should be thought of as a bundle of rights, shared by various persons, who each have a share, or interest, that regards the slave.⁹⁶ He argued that Hohfeld's theory of multiple interests, or the familiar "bundle of sticks," accurately describes the historical property interests that existed in the institution of slavery.

Russell was critiqued by Jeanne Schroeder, who rejects Hohfeld's property theory, though not his classification of non-property rights.⁹⁷ Without doing justice to the argument, Schroeder claimed that Blackstone properly accounted for the fact that property rights are relations between subjects with regard to an object (or res). Further she argued that Hohfeld's approach fails by not doing so, for at least two reasons. Schroeder claimed that Hohfeld started from the "naive, but common, assumption that only tangible, physical things can be 'objects.' . . . [H]e thought that the object of property relations could only be Blackacre [the standard reference for theoretical real estate] itself, and not the estates in Blackacre. In Lacanian terminology, this is an Imaginary conflation of the Symbolic with the Real—a basic psychoanalytic tendency."⁹⁸

Secondly, "Hohfeld thought that the only way to reconcile the fact that the law recognizes property rights [e.g., patents and copyrights] with his assumptions that only tangible things could be objects, was to deny that property claims involved objects at all."⁹⁹ Schroeder rejected Hohfeld's failure to recognize property in a slave, because property in another person can be thought of simply as their legal reconstruction as an object or res, which destroys that person's subjectivity. To Schroeder, using Hohfeld's view of property means the slave did not legally exist at all (or became a "ghost," as she put it), whereas Blackstone's view accurately captured what it meant to have property in another. "The Blackstonian lawyer at least confronts the slave as an object to which she does not have a relationship. The Hohfeldian lawyer never has to confront the existence of the slave at all because she disappears even as an object."¹⁰⁰

Using the basic notion of property described above, Hohfeld's classification of rights, and Schroeder's point about what it means to have property in others, we can say that property *in* others (even intangible others, like prospective children), which can be a matter of degree, is the excluding of others' control (or

96. See Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of the Law in Slave Sales and a Conceptual Reevaluation of the Nature of Slave Property*, 18 CARDOZO L. REV. 473, 520 (1996).

97. See Jeanne L. Schroeder, *Hegel's Slaves, Blackstone's Objects, and Hohfeld's Ghosts: A Comment on Thomas Russell's Imagery of Slave Auctions*, 18 CARDOZO L. REV. 525, 528 (1996).

98. *Id.* at 529 (citations omitted). "For example, when I eat an apple, my sensuous experience of holding, chewing, and digesting the apple does not make it the object of a property right—it only becomes an object or res through the application of law when I assert the right to possess, enjoy, and alienate the apple." *Id.* at 530.

99. *Id.* Schroeder proposes instead what she calls a Lacanian-Hegelian approach. She explains Hegel's philosophy in which persons desperately seek to be recognized as subjects by one another by using neutral objects, such as property, to mediate their relationships. *Id.* at 531-33. This has real implications for the claim in this article, in terms of the role prospective children play in relationships, which will not be pursued here.

100. *Id.* at 528.

“power” in Hohfeld’s terminology) in favor of one’s own power to allow use, and furthermore that it is a legal reconstruction of the person as an object or res so as to destroy the person’s subjectivity. As such, property rights do not tend to exclude only power by others around the object but also power (or self-use) by the object itself. This power allows the proprietor (or class of proprietors) to give himself liberties that correlate with a lack of duties to others regarding the object as well as a lack of duties to the object (or class of objects) itself, as well as the claim-rights to prevent others or the object from interfering with the excluding use. It also allows the proprietor to determine which liberties and claim-rights the object enjoys with regard to others, as well the object’s own proprietary relations – determining in what the object can and cannot have property.

D. The Power of Procreating

Power-rights (or power) in the Hohfeldian scheme of rights involve the “right” to determine another’s future liberties, duties, claim-rights, etc. For example, we can imagine the power a ship’s captain may have in the future to deny a sailor the liberty to go ashore, by creating a duty for him or her to stay aboard. The key is the ability to create future liberties, duties, claim-rights, etc. for others. For Hohfeld, a power is “an ability to cause, by an act of one’s own, an alteration in a person’s rights, either one’s own rights or those of another person or persons, or both.”¹⁰¹ Consistent with this definition, the very act of procreating allows prospective parents to determine future legal and moral relations, including relations in property, for members of the class of prospective children. That is, each person born into a particular state of legal, moral, and proprietary relations was once a member of the prospective child class.

For example, in the United States, if a pregnant woman chooses to conceive and bear a child while taking thalidomide, and that child is born disabled, he or she will have certain disability-related legal liberties, claim-rights, powers, etc. under a variety of state and federal laws. However, had the pregnant woman chosen instead to conceive and bear a child at some other point in time, while not taking thalidomide, and her child was not born disabled, these liberties and rights would of course not be owed to the non-disabled child. Before procreation, no member of the class of her prospective children was in either of the two specific legal positions, though all are members of a class that we know exists because we owe them some moral and legal obligations as described above. But by procreating, the prospective parent creates legal relations for what was, in the past, one member of the class. The prospective parent literally plucks a member of the prospective child class out of the world of a number of potential relations and actualizes that former member of the class in a world of relatively fixed relations.

These then are the legal incidents of procreation: creating legal relations with others, legal relations in property, and of course, moral relations, for a class of morally and legally relevant persons. The thalidomide example may seem a bit far-fetched, but every prospective parent, in the act of having a child, moves

101. THOMSON, *supra* note 9.

a member of the prospective child class from a world of many potential relations into a world of relatively fixed relations. If you were to choose to have a child in circumstances A, say a community that owed the legal duty (through constitution or statute) of a high-level of education to children in its jurisdiction, as opposed to circumstances B where no such duty existed, or the level of education owed was very low, you will have taken a child out of the class of prospective children and given them a particular legal claim (that which exists in A) that the alternative child would not have had (were they born into B). By procreating you determine and fix the future legal relations of members of the class.

Of course, procreating also determines the moral relations of members of the class. You might choose to have a child in a community or extended family that feels a moral duty to help care for and raise all of its young, in a community that largely ignores them, or in a place where at least some of the others around you feel themselves at liberty to prey on the child.

The point is simple but not obvious. By procreating we determine the initial full quantum of legal and moral relations for a member of a class of persons. We take members of that class from a neutral baseline and define their initial state of affairs. We may be able to make them exist where there are little or no resources to ensure the child's development, make them exist in an abusive home, make them exist in a place where we ourselves wished we were not, or make them exist in a loving home full of relative opportunity. The members of the class are called from it, and actualized by us at will.

E. Prospective Children as Property

With these concepts of the broad right to procreate, the class of prospective children, and property in others in mind, as well as the premise that procreating allows prospective parents to create future relations for prospective children, we can assess whether under the broad right these children are treated as property.

Recall Tribe's broad notion of the right: "*whether one person's body shall be the source of another life must be left to that person and that person alone to decide.*"¹⁰² Per Roberts, Robertson, and many others, procreation is part of the right to (or realm of) privacy, walled off from the state. It is an act of self-determination that should be informed only by one's free will. It is the realm that in Hohfeld's terms represents for the procreator a liberty to have children (or a lack of duty not to procreate), a claim-right to the constitutional duty the state owes not to interfere with our having children, as well as a constitutional immunity from the state altering the liberty or claim-right. Because procreation is self-determining, our free will to procreate takes primacy when conflicts with other rights or interests arise, irrespective of the method for having children, the circumstances in which we have them, and the number we wish to have.

But is there something odd about this notion of the right? When the *Eisenstadt* Court refers to the right to be free from unwarranted intrusion into matters "so fundamentally affecting a person as the decision whether to bear or

102. TRIBE, *supra* note 6, at 1340.

beget a child,"¹⁰³ who is the *person* it refers to? It is in fact considering the prospective *parent's* interests in non-interference, and not those of the person *most* affected, the prospective child. Although, the prospective child is implicit in "the decision whether to bear or beget a child," it is nevertheless invisible (or ghost-like to use Schroeder's analogy), which is perhaps because while it exists morally and legally, it does not yet exist physically. Perhaps the Court does not see it because it is subsumed by the prospective parents' subjectivity.

As discussed above, the prospective child does exist morally and legally, but without physical form the Court has not seen it, so that it is left trapped within the realm of procreative rights, made liable to the power the Court gives parents along with the liberty, claim-right, and immunity to procreate at will and to determine its future relations.¹⁰⁴

This notion of the right to procreate treats prospective children as property because it excludes others' power over members of that class, including any constructive power members might have over themselves, and allows parents free use of the class. Like a property owner, or one who owns property in another, a prospective parent is given relatively absolute and undivided power to determine the legal and moral relations that a member of the prospective child class will come to have. By deciding where and when to pluck them out of the class by procreating, the prospective parent or parents alone will decide – in the process of excluding others and the constructive interests of members of that class – what these persons shall have as their initial birthrights. There is thus a direct relationship between the degree of privacy the right assures and the degree of property interest it awards – this is the core of the property objection.

The privacy-right objectifies members of the prospective child class, substituting the prospective parents' subjectivity for that of the class. Who here represents their interests? No one, because as objects members of the class have no interests to represent – at least none that are not fully accounted for by the prospective parents' subjectivity.

In this version of the right, no objective standards represent the interests of the class of future children. As in the case of *In re. Bobbijeane P.*,¹⁰⁵ the prospective parents are guaranteed the right to pull as many children from the class and to place them in any circumstances they wish because the children are determined to have no interests – are left as objects – until they take physical form. At that point the state will seize them, but not before the parents have determined at least their initial legal and moral relations, and indentured them in foster care or an institution as wards of the state.

If we were to leave the future interests of living children exclusively to the will of their parents we would have no problem in seeing that they are treated as property. But our laws prevent this, and qualify parental rights with public

103. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding unconstitutional a statute prohibiting the distribution of contraceptives to unmarried persons).

104. This discussion focuses on the power over prospective children that is incident to the right, but note the liberties, claim-rights, and powers the right entails for others as well. Prospective parents have the power to create legal duties in others with regard to the child, the right to claim those persons duty not to interfere in the process, and the lack of any duty to not do so.

105. 842 N.Y.S.2d 826, 828 (App. Div. 2007).

objective standards that limit their use of children and that represent the children's future interests. Doing so "frees" the child. But we have no comparable public objective standards that seem to represent the interests of the class of future children today.

Moreover, the point of making procreation private is not exclusion for its own sake (whatever pleasure one might find in simply keeping others away and nothing more), but to allow prospective parents the benefit of free use of members of the class. The private realm of the right prevents others from interfering with our free access to and use of these children, to actualize them at will, because, for example, we may at that time want a child of a certain gender, or a certain number of children, or because we want them to have a certain genotype, or because our parents wish us to have children sooner than later, or because we think having children may save a failing marriage, or so that we may have an infant to dote upon, or to benefit from his or her eventual labor, or because we wish to express our virility, or because we wish to genetically design our offspring, or because we want the numbers of our race or nation to grow. All of these are protected uses under the broad notion of the right.

But does the broad notion of the right really meet Schroeder's final criteria, of destroying prospective children's subjectivity, excluding not just the control of others, but excluding power and control (or self-use) by prospective children themselves? Can they – who do not physically exist – have subjectivity, or self-use, in any meaningful way? Is there any way of constructing an alternative right concerning the unique act of creating another that does not have the same result? Must all prospective children have a *guardian ad litem* to give the child's constructive or representative consent to being born? Again, this article is primarily a critique of the broad notion rather than a prescription for an alternative view of the right. But as these questions suggest, an alternative right would need to account for many things that the broad notion neatly ignores.

Perhaps we can at least say that the opposite of a private realm protecting the exclusive use and control of other persons is a right based on public norms, or what might be called a public right – not in the sense of a collective or group right – but in the sense of a right the scope of which is limited by public (or objective) norms rather than private (or subjective) ones. These norms might constructively represent the interests of the prospective child class, because while we cannot directly survey its members to determine their interests, we may be able to divine the norms from the interests of persons alive today. And we may also at least say that the opposite of free use of prospective children is the application of norms which prohibit free use. Again, such norms might not only represent the power of existing persons (other than the prospective parents) over the class of prospective children, but also be representative of the interests of the class itself, its members being part of the public morally and legally, if not physically.

Such a new notion of the right, defined by such norms, would be less proprietary to the extent that it de-objectifies prospective children and provides them with constructive subjectivity – changing them from the ghosts they seem to be in the *Eisenstadt* notion into persons with interests. We "free" members of the class by imbuing them with some constructive interests that limit our use of them.

And this would bring us full-circle back to Mill's rather utilitarian point, that it is not inconsistent with liberty, but is in fact autonomy-maximizing, for the state to maintain "vigilant control over his exercise of any power which it allows [one] to possess over others." His point, like Woodhouse's, is that extending zones of liberty in some cases – as in a family – can act much like a see-saw, ensuring that freedom within that zone rises for some while it falls for others. Or as I have argued here, because of the unique nature of the act of procreating, the liberty and privacy-based right we extend to prospective parents is converted into a property right in members of the class of their prospective children. Any less proprietary right to procreate would have to at least mitigate this result.

III. ALTERNATIVE NOTIONS OF THE RIGHT TO PROCREATE

This Part is only a brief and incomplete survey of some of the alternative ways of conceiving of the right to procreate. This article has instead focused on critiquing the broad notion because, logically, one would need to show that the accepted version of the right should be rejected *before* coming up with a different notion. But it might be worth closing that discussion by showing that some alternative notions at least exist, which are both externally and internally more limited than the broad notion,¹⁰⁶ though the work here seems to be done primarily by moral rather than legal theorists. These notions differ from the broad notion articulated by Tribe and others in that they tend to treat prospective children less as property because they mitigate prospective parents' power over members of that class, tempering it against norms that influence the future legal and moral relations of prospective children.

For example, Carl Wellman has analyzed the development of the constitutional right to procreate from *Meyer* through its transformation into a privacy or liberty right in the modern substantive due process cases.¹⁰⁷ Wellman, like Tribe and others, argues that the right ought to be conceived of as a broad privacy-based right, but would limit it by pegging it to specific legal and social traditions from which the Court first derived the right, and which would ensure *some* boundaries on the scope that the right would not otherwise have.¹⁰⁸ For example, he would limit the right to procreate to "permit and protect the liberty of married individuals to make and act on any and all procreational decisions under normal circumstances," with such right being overridden when necessary for some compelling state interest.¹⁰⁹

Thus the right Wellman proposes is limited to married couples (which was a qualification on the right the *Skinner* court had implied as well),¹¹⁰ confined as such to a tradition and institution that Wellman argues was historically designed in part to protect children's interests (i.e. by ensuring inheritance,

106. This article will not discuss the issue of when external limits define a liberty interest or fundamental right per se, and when they simply appear on the other side of the scale, counted only towards a state's legitimate or compelling interests.

107. See WELLMAN, *supra* note 62, at 120-35.

108. *Id.* at 120-23, 134.

109. *Id.* at 145-46.

110. *Skinner*, 316 U.S. at 537, 541.

preventing incest, creating family stability, etc.); the right to marry would thus determine the contours of the right to procreate, limiting the right for persons who are too young to marry, married to another, lacking sufficient reason to enter the marriage contract, persons related by blood, etc. By pegging procreation to marriage, Wellman offers a different right from the broad notion discussed above, that is, a right of limited access to the prospective child class. Under it, prospective parents cannot fully exclude others' power (including norms that might represent the constructive power of members of the class itself) to determine the future relations of members of the class, because the prospective parent has no liberty, claim-right, or immunity absent the necessary condition of marriage.

Maura Ryan offers a different notion of the right.¹¹¹ In Ryan's model, "[i]ndividual rights, therefore, are relative (modified by commitments to the common life) and reciprocal (they *arise* in a social field involving correlative duties and counterclaims)."¹¹² For Ryan, "'having children' is phenomenologically equivalent to 'being a parent,' much as having true friends is experienced as being a friend, or having a lover involves loving."¹¹³ Ryan argues, that "Robertson's account illustrates what is wrong with the liberal conception of reproductive rights."¹¹⁴ "The concepts of right and entitlement used by Robertson correspond to the values preserved in traditional notions of patriarchal fathering—that is, proprietary control and ownership over wives and children—rather than those of care and responsibility associated with mothering."¹¹⁵ For Ryan, ¹¹⁶ "[r]eproduction is inherently relational, 'other-regarding,' not just in a physical sense but a moral sense."¹¹⁷ This relational account of rights might mean that, rather than Tribe's argument that it be left to the prospective parent alone to decide the circumstances in which to procreate, instead some minimum threshold requirement might be read into the right to represent the interests of the prospective child class and make it other-regarding vis-à-vis their interests.

Reinterpreting the *Meyer* line of authority, Elizabeth S. Scott has argued that the right to procreate protected by the Constitution is "the right to produce one's own children to rear."¹¹⁸ "The right presumes and indeed requires an intention as well as an ability to assume the role of parent."¹¹⁹ For Scott, any individual who lacks the capability to care for a child has no fundamental right to procreate.¹²⁰

This less exclusive and less proprietary notion of the right, in which some threshold of intent and ability to rear is a necessary condition for the right to

111. MAURA A. RYAN, *THE ETHICS AND ECONOMICS OF ASSISTED REPRODUCTION* 91-121 (2001).

112. *Id.* at 109.

113. *Id.* at 96-97.

114. *Id.* at 93.

115. *Id.* at 100.

116. *Id.* at 104.

117. *Id.* at 111.

118. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 829 (1986).

119. *Id.*

120. *Id.* at 831.

obtain, has been proposed in many forms, by theorists such as Michael Bayles, Onora O'Neill, and David Archard.¹²¹ All would force prospective parents to share their power over the class, limiting their exclusive use of the class. Under these notions of the right they would not hold an exclusive power to pluck prospective children out of their potentiality.

Are these narrower notions of the right limited to moral theory or do they exist in positive law? One area of the law where the broad notion of the right seems increasingly less accurate involves temporary "no procreation" probation orders which are issued, and upheld against constitutional challenge in some cases, when parents have been adjudged criminally unfit to parent (because of a prior finding of abuse or neglect), and would otherwise have any new children placed in state custody as such.¹²² The concept here is simple: if parents are under a legal duty to be fit in order to have custody of children, absent acceptable alternative custody arrangements, there is no principled argument for not finding prospective parents to be under the same duty.¹²³ The latter is simply the same rule applied *ex ante* rather than *ex post*. Could the same approach apply in international law as well? In light of the internal logic of the Children's Rights Convention, and its goal of preventing children from living in certain sub-standard conditions, there are reasons to think so.¹²⁴

These forms of the right – setting a minimum threshold before prospective parents may procreate or tying the right to the constructive interests of the prospective child – can be thought of as externally limiting. The forms reflect public norms (i.e. norms based on interests other than those of the prospective parent) regarding what prospective children deserve, and through those norms narrow, from the outside in, the realm in which prospective parents can exclude others in determining the fate of prospective children.

But there are also ways of thinking about the right that seem to limit it from the inside out, that is, narrow the right based upon the limited interests of the right-holders, the prospective parents themselves.¹²⁵ There are at least three specific and integral presumptions on which the broad notion of the right to

121. See Onora O'Neill, *Begetting, Bearing, and Rearing*, in *HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD* 25, 25-26 (Onora O'Neill & William Ruddick eds., 1979) ("The right to beget or bear is not unrestricted, but contingent upon begetters and bearers having or making some feasible plan for their child to be adequately reared by themselves or by willing others."); Bayles, *supra* note 87, at 302 ("There is a good reason for legislation to prevent the birth of persons who would lack substantial capacity to achieve or take advantage of a quality of life of level *n* or whose existence would decrease the number of people who might live with a quality of life at that level."); David Archard, *Wrongful Life*, 79 *PHILOSOPHY* 403, 420 (2004) ("[T]he minimum threshold entitlement of any child is the secure enjoyment of a good number of those rights that are listed in the United Nations Convention on the Rights of the Child. This is every child's birthright.")

122. See generally Dillard, *supra* note 57.

123. *Id.*

124. See generally Carter Dillard, *Prospective Parents and the Children's Rights Convention*, 25 *AM. U. INT. L. REV.* (forthcoming, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1421566.

125. Robertson has discussed limiting the scope of activity which procreative liberty protects, a limitation he calls an "internal constraint," to the production of genetically related offspring in the next generation. See John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 *AM. J.L. & MED.* 7, 21 nn.66-67 (2004).

procreate rests, and internal limits to the right seem to appear as we question those presumptions.

First, the broad notion of the right to procreate or not procreate is not simply a creation of modern substantive due process, but is also an application of the choice or will-based rights model, a historic and controversial basic understanding of rights that is often contrasted with the interest-based method of deriving specific rights. The choice theory holds that moral rights analysis begins with the “idea of the individual’s sovereignty within the relevant section of his moral world.”¹²⁶ Under this model, the core interest is autonomy in choosing the way to behave, irrespective of the particular conduct at issue. In contrast, the interest-based view holds that “a person may be said to have a right if and only if some aspect of her well-being (some interest of hers) is sufficiently important in itself to justify holding some other person or persons to be under a duty.”¹²⁷ The former view assumes that freedom of choice is the core value, e.g. whether or not to have a child, and leaves it to others to justify interfering with that choice; the latter places the onus on the right-claimant to justify non-interference based on the nature of the conduct he or she wishes to engage in. If we eschew the choice-based theory of rights underlying the broad notion in favor of the interest-based approach, the broad notion begins to make little sense. How can a woman simultaneously have an interest, and have her well-being served, by both having and not having a child?

Secondly, the broad notion seems desirable because it appears to maximize freedom or autonomy by letting prospective parents do whatever they wish or prefer to do. But that buys into a version of autonomy that may not be supportable. Joseph Raz has argued that “[a]utonomy is valuable only if exercised in pursuit of the good,”¹²⁸ and his richly complex version of perfectionist liberalism (in which freedom is the presence of objectively valuable opportunities in life)¹²⁹ leads to doubts about the value of a right to procreate which permits one to use prospective children for any purpose imaginable. For example, a criminally unfit prospective parent may reduce their own autonomy

126. Michael P. Zuckert, *Do Natural Rights Derive From Natural Law*, 20 HARV. J. L. & PUB. POL’Y 695, 699 (1997) (quoting RICHARD TUCK, *NATURAL RIGHTS THEORIES* 6-7 (1973)). Further, “[i]t will also tend as a consequence to stress the importance of the individual’s own capacity to make moral choices, that is to say, his *liberty*. If active [or choice-based] rights are paradigmatic, then to attribute rights to someone *is* to attribute some kind of liberty to them.” *Id.* at 699.

The moral justification [for the right] does not arise from the *character* of the particular action to the performance of which the claimant has a right; what justifies the claim is simply—there being no special relation between him and those who are threatening to interfere to justify that interference—that this is a particular exemplification of the equal right to be free.

H.L.A. Hart, *Are There Any Natural Rights?*, in JEREMY WALDRON, *Introduction, THEORIES OF RIGHTS* 87-88 (Jeremy Waldron ed., 1984).

127. Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 504 (1989) (footnote omitted); *see also* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 181 (1986) (“Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties”).

128. RAZ, *supra* note 127, at 381; *see also* Leslie Green, *Un-American Liberalism: Raz’s ‘Morality of Freedom,’* 38 U. TORONTO L.J. 317, 324 (1988) (“The autonomous life attains significance in the context of moral pluralism.”).

129. For a thorough discussion and critique of Raz’s theory *see* Jeremy Waldron, *Autonomy and Perfectionism in Raz’s Morality of Freedom*, 62 S. CAL. L. REV. 1097 (1989).

by having children they cannot care for, because as parents they may be punished for neglecting their children. Furthermore, prospective children who will be born into a neglectful state of affairs, and moved into state custody as such, are destined for a world that is not particularly free and full of objectively valuable opportunities.

Thirdly, the broad notion seems to ignore (perhaps because of its choice-based premises) an internal limit that may be inherent in the very interest we as humans have in procreating. When, if at all, does the value of procreating become sated?¹³⁰ Legal and moral theorists focused on the right to procreate admit that the particular interests at issue are satiable (or diminishing),¹³¹ but the broad notion ignores this, protecting each act anew and disregarding that the right-holder's interests may have already been sated. It not only guarantees prospective parents excluding control over the future of their prospective children, it permits prospective parents to pluck as many children out of the class as they wish. It is beyond the scope of this critique of the broad notion of the right, but it may be that the only logical and non-arbitrary point at which to claim the interest is when one has procreated, and moved from the position of one who has not self-replaced to the position of one who has.¹³² This particular approach to the right would have implications for substantive due process analysis, leading courts to shift from a fundamental rights test to the less burdensome protected liberty test depending on the number of children the parents had already had.

Considering all of these alternatives to Tribe's approach, we may begin to see a unified alternative notion of the right to procreate that might replace the common liberty and privacy-based notion as primarily defined, or hemmed in, by the concepts of threshold and satiability. Note that the concepts of threshold and satiability are themselves somewhat related, as the resources available to children for their well-being, including material resources like food, clothing, and shelter, as well as time, affection, and instruction, are divided by the number of children that compete for them. But it is crucial to see that these alternative notions of the right, whether narrower than the broad right because of external norms or internal limits, are all much less proprietary than the broad conception because they mitigate the power or control of prospective parents to allow use of members of the prospective child class, in some cases balancing the power against norms that represent the interests of prospective children themselves.

130. For a discussion of satiable interests and goods, see IAN CARTER, *A MEASURE OF FREEDOM* 75 (1999) (finding that a satiable good is "a good the conditions for the existence of which can be wholly satisfied. The most obvious examples are physiological needs, such as the relief of hunger.").

131. See ROBERTSON, *supra* note 65, at 31, 70 (noting that overpopulation, unfit parents, and high medical or social costs may sate the value of reproduction); Dan W. Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377, 380 (2005); Daniel Statman, *The Right to Parenthood: An Argument for a Narrow Interpretation*, 10 ETHICAL PERSP. 224, 225-26 (2003) (arguing that the desire to have children can be sated by adoption and ART, and that a parent's general interest in reproduction is often diminished after having two or three offspring).

132. See Carter Dillard, *Valuing Having Children*, 12 J.L. & FAM. STUD. (forthcoming, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1421552.

How might a state begin to replace the broad privacy-based notion of the right with more nuanced versions like these? Again, this is beyond the scope of this piece, but in light of the culturally and politically entrenched nature of the privacy-right, a “soft law” approach might be preferable.¹³³ Were the state to simply begin to express a more nuanced version of the right with, for example, a “no procreation” order with no attendant enforcement mechanisms (but the stigma that order might increasingly begin to carry) or through a reordering of tax benefits and costs, all done as a reasonable appeal to protecting the interests of future children, the state might start to shift the norm.

CONCLUSION

This brief and exploratory article has mostly been an exposition of the broad notion of the right to procreate, the privacy or liberty right, which left without further definition has the rather illiberal consequence of tending to treat a class of persons, albeit future persons, as property. The broad notion of the right is thus unsound, drawing curtains of liberty and privacy around prospective parents and procreators to be, as if a third person were not trapped between and made subject to them.

This notion leads its proponents into the pitfalls Mill tried to point out when he wrote *On Liberty* some one-hundred and fifty years ago. There are of course alternative notions of the right to procreate, notions which the Court after *Skinner* and *Buck* might have turned to in order to define the fundamental constitutional right, instead of deriving it from, and making it part of, a broader realm of family privacy and personal liberty that was itself drawn from a tradition of fathers treating existing children as property. But despite the intervening years of substantive due process protecting the right not to procreate, faced with an optimal case the Court still has room to temper the broad notion of the right to procreate, and to craft a right that incorporates internal and external limits which reflect norms protective of the many interests that procreation involves, and that would be less in tension with a principle deeply embedded in the Constitution and integral to any concept of liberalism.

133. See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607–08 (2000) (“My concern in this Article is with the ‘sticky norms problem.’ This problem occurs when the prevalence of a social norm makes decision makers reluctant to carry out a law intended to change that norm. . . . Some might conclude from the ‘sticky norms problem’ that the law is a relatively ineffective instrument for changing norms. . . . In short, norms stick when lawmakers try to change them with ‘hard shoves’ but yield when lawmakers apply ‘gentle nudges.’”).