

Donorsexuality After *Dobbs*

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For the better part of a century, the United States Supreme Court has issued a series of decisions, “the underlying premise of [which is] that the Constitution protects ‘the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.’”¹ The most controversial line of such decisions, protecting from “unwarranted governmental intrusion” an individual’s right to choose to terminate a pregnancy through abortion,² has been decisively overruled.³ The same conservative justices who have eliminated abortion rights have for the entirety of their legal careers expressed skepticism of or downright hostility to the entire line of cases in which their predecessors on the Court have protected sexual and reproductive rights.⁴

Now might therefore be a particularly opportune time to examine with lawyerly precision exactly what this line of cases can be read to actually protect, as well as to begin to consider how much of these protections may be vulnerable in the aftermath of the successful attack on abortion rights. This article will undertake such an examination from

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¹ *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687 (1977) (citations omitted).

² This line extends from *Roe v. Wade*, 410 U.S. 113 (1973) through *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) to *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

³ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overruling *Roe* and *Casey*, among other Supreme Court abortion precedents).

⁴ *See, e.g.*, Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 717 (2010) (describing, inter-alia, now Chief Justice John Roberts’s dismissive discussion of what Roberts called the “so-called right to privacy” in a 1981 memo he wrote as a junior lawyer in the Reagan Administration’s office of the Attorney General).

an unusual angle. It will focus on the motivations and behaviors, the resulting legal problems, and possible rights claims of men who make an unusual set of decisions to beget children; they offer their own fresh sperm on a non-commercial basis directly to significant numbers of women, often not personally well known to them, for purposes of DIY artificial insemination. Among the legal risks these high volume non-anonymous sperm donors run is the prospect that the Food and Drug Administration, as well as state regulatory authorities, can threaten them with fines and imprisonment if they continue to provide their sperm without either complying with the restrictive and expensive rules for commercial sperm banks or demonstrating that they are exempt from these rules because, notably, the person to whom they will transfer their fresh sperm for insemination purposes is “a sexually intimate partner” of the donor.⁵

The FDA regulations leave the term “sexually intimate partner” undefined, which itself raises interesting questions in light of the variety of sexual practices and attitudes manifested in connection with sperm donation. But even more remarkable from the perspective of doctrinal constitutional law is that the regulations, which have not successfully been challenged in court, explicitly privilege *sexual* intimacy. This, as will be discussed below, seems a poor fit with the regulations’ goal of protecting health and safety, but is a much better fit with the actual holdings in the line of modern substantive due process cases covering sexual and reproductive rights, which, if carefully analyzed, can be seen to more clearly, frequently, and unequivocally protect a right to sexual intimacy in the absence of procreative intent (or even procreative possibility) than they protect a right to procreate.

As I delve into the doctrine, I will also provide a more concrete sense of what is at stake by describing in some detail the situations of three actual high-volume providers of fresh sperm, each broadly representative of a type of donor that raises distinct legal issues with broader implications. The first is Trent Arsenault, the original, self-described Donorsexual, whose reproductive activities are tightly connected to sexual practices he himself sees as amounting to a sexual orientation.⁶ The second is Ari Nagel, best known by the sobriquet the Sperminator bestowed on him by the New York Post,⁷ but who calls himself, as I will

⁵ 21 C.F.R. § 1271.15(e) (2012). For further discussion see, e.g., Amber D. Abbasi, *The Curious Case of Trent Arsenault: Questioning FDA Regulatory Authority Over Private Sperm Donation*, 22 ANNALS HEALTH L. 1 (2013) (law review article by attorney who unsuccessfully challenged the application of these regulations to a donor whom the FDA had served a cease-and-desist order).

⁶ Benjamin Wallace, *The Virgin Father*, N.Y. MAG. (Feb. 03, 2012), <https://nymag.com/news/features/trent-arsenault-2012-2/> [<https://perma.cc/4EZ9-4C6C>].

⁷ Doree Lewak, *Women are Fighting to Get a Piece of the Sperminator*, N.Y. POST (Jun. 24, 2016), <https://nypost.com/2016/06/24/baby-crazy-women-are-begging-donor-dad-for-his-famous->

call him here, Super Dad,⁸ because of a commitment to be as much as possible an involved father in the lives of his more than 100 donor offspring.⁹ The third, who calls himself Joe Donor to conceal his identity, I shall use in passing as an example of those men whose announced goal is to maximize the number of their donor offspring in explicit quest of a world record, and who prefer to provide their sperm donation in the form, not of transfer in a sterile receptacle for artificial insemination (A.I.) by the recipient, but of so-called natural insemination (N.I.)—i.e. unprotected vaginal intercourse for the purpose of impregnation.¹⁰ I have selected these three for the purposes of illustrating the landscape of the law, not because I see them as in any way representative of the by now quite large and varied pool of free sperm donors who offer their services on a variety of internet sites and other venues.¹¹ Although free sperm donation is not only a worldwide but also a cross-border phenomenon, and although two of the men I discuss, Ari Nagel and Joe Donor, travel the world over to provide their sperm to persons of many nationalities in many foreign venues, my focus is on American law and the activities of the donors within the United States.

The doctrinal conclusion of my reflections on where the law with respect to these donors may stand after *Dobbs* will not be any of the now familiar modern substantive due process cases, but instead an older equal protection case, *Skinner v. Oklahoma*.¹² In 1942, *Skinner* vindicated more directly than any other case before or since the right to procreate. The Court held it to be a violation of convicted chicken thief Jack Skinner's fundamental right to procreate for the state of Oklahoma to order him to be sterilized when those convicted of equally serious crimes like embezzlement were not eligible for state-imposed sterilization.¹³ Although its age and the legal basis on which it rests shelter *Skinner's*

sperm/ [https://perma.cc/E3HX-FSUK].

⁸ Doree Lewak, *Israel Tries to Ban Mega-Donor from Having Any More Kids*, N.Y. POST (June 16, 2018), <https://nypost.com/2018/06/16/israel-tries-to-ban-sperm-mega-donor-from-having-any-more-kids/> [https://perma.cc/9NF9-47HR].

⁹ DoctorOz, *100 Kids and Counting from One Controversial Sperm Donor*, YOUTUBE (Sept. 30, 2021), <https://www.youtube.com/watch?v=UhgYsmiFwo> [https://perma.cc/W2YR-AUMY].

¹⁰ Jeff Schneider et al., *Meet the Men Having Sex with Strangers to Help Them Have Babies*, ABC NEWS (Nov. 13, 2014), <https://abcnews.go.com/Lifestyle/meet-men-sex-strangers-babies/story?id=26870643> [https://perma.cc/9Q2D-UEBX].

¹¹ See generally e.g. Jacqueline M. Acker, *The Case for an Unregulated Private Sperm Donation Market*, 20 UCLA WOMEN'S L.J. 1, 4–11 (2013); Nicole Bergen & Celine Delacroix, *Bypassing the Sperm Bank: Documenting the Experiences of Online Informal Sperm Donors*, 29 CRIT. PUB. HEALTH 1, 1–2 (2019); Tonya Russell, *The Sperm Donation is Free, But There's a Catch*, ATLANTIC (May 21, 2021), <https://www.theatlantic.com/family/archive/2021/05/free-sperm-donation-groups-facebook/618941/> [https://perma.cc/LCZ5-TGU6], for an overview of the landscape of online sperm donation.

¹² 316 U.S. 535 (1942).

¹³ *Id.* at 541–43.

holding from the full force of the destructive tornado unleashed by the *Dobbs* majority on other Supreme Court sexual and reproductive rights decisions, new questions inevitably will arise in a post-*Dobbs* world when applying strict scrutiny, as *Skinner* requires, to laws restricting for some and not for others what the opening sentences of the *Skinner* majority opinion called “a sensitive and important area of human rights . . . the right to have offspring.”¹⁴

I. THE DONORSEXUAL AND THE RIGHT TO FUCK¹⁵

When Trent Arsenault first came to the attention of the FDA and the national media a decade ago, he was in his mid-thirties, a computer engineer for Hewlett Packard in Silicon Valley, and the biological father of more than a dozen offspring conceived over a five year period with sperm he had delivered fresh in a cup to couples who contacted him on his website, or on other websites matching would-be donors of free sperm with potential recipients seeking it for purposes of impregnation. Arsenault was, he said, a virgin, and, more than that, a “donorsexual” who did not have, and never expected to have, any other sexual outlet than filling hundreds of cups with semen for immediate delivery to ovulating would-be parents. He had “committed 100 percent of [his] sexual energy for producing sperm for childless couples to have babies.”¹⁶ He claims to have known that “donorsexual” was his identity as young as ten years old but said he “really do[esn’t] know why” any more than others know “why they were born straight or gay.”¹⁷

Arsenault’s religious background clearly played a role in his sexual identity formation, however. He was raised in the Assemblies of God, the world’s largest Pentecostal church, of which his father, the Reverend Charles Arsenault, is a leading minister.¹⁸ His parents kept trying

¹⁴ *Id.* at 536.

¹⁵ I use this crude term, not for its shock value, but for its comparative precision and lack of ambiguity. If there were another word that could as perfectly capture what I am discussing, I would have used it, but I am not willing to say something different from what I mean just to avoid the use of a word that has a long history of use in law reviews, including as the title of SSRNs most downloaded working paper, Christopher M. Fairman’s *Fuck* (2006), a word that was held by a majority of the US Supreme Court in *Cohen v. California*, 403 U.S. 15 (1971), to be neither obscene nor offensive when used in a context that was neither erotic nor insulting. Moreover, unlike Paul Robert Cohen and the bulk of the users described in Fairman’s article, I am using the word in accordance with its original meaning, not as a mere swear word.

¹⁶ David Moye, Trent Arsenault, “Donorsexual” Virgin Father of 14 Kids, *Answers Your Questions* (Video), HUFFPOST (Feb. 03, 2012), https://www.huffpost.com/entry/trent-arsenault-donor-sexual-sperm-donor-video_n_1251595 [<https://perma.cc/MV9G-Z36P>].

¹⁷ Caitlin Donohue, *Donorsexual: One Man Explains Why He Spreads His Sperm Around*, 48HILLS (Aug. 03, 2012), <https://sfbgarchive.48hills.org/sfbgarchive/2012/08/03/donorsexual-one-man-explains-why-he-spreads-his-sperm-around/> [<https://perma.cc/744W-ZNK5>].

¹⁸ *CBS Alumni Perspective: Charles Arsenault*, EVANGEL UNIV., <https://www.evangel.edu/cbc-alumni-perspective-charles-arsenault/> [<https://perma.cc/74HZ-7B2D>] (last visited Oct. 18, 2022).

long and unsuccessfully to help him meet a nice young woman to settle down with, but, at sixteen, “he and his best friend made a pact to devote their lives to science and never to marry.”¹⁹ Arsenault turns to a scripture verse, Matthew 19:11–12, to sum up his commitment to reproducing while avoiding partnered sex: “Jesus said, ‘Some people were born differently to be celibate, so accept the fact and use it to further God’s kingdom.’”²⁰

He remembers hearing prayers offered throughout his youth for women having fertility problems; he had “instilled in [him] to be a servant to others,” and, having begun with “the normal volunteer things (soup kitchens, missionary trips, building playgrounds),” he then sought a way to put his unusual sexuality to use helping others.²¹ The Assemblies of God doctrine Arsenault was raised with was that even infertile heterosexual married couples should limit themselves to adoption and avoid donor insemination; the church also discriminated against gays and lesbians. But Arsenault realized that this view “shuts out quite a large group of people wanting to have children” and asked, “[w]hat do you think Jesus would do?”²² Thinking it “wrong to discriminate,” he held onto the basic teachings of Christianity even as he “parted with the church’s ideas and hung up the hat on religion.”²³ He vowed to begin “helping the very group that my church discriminated against, which was gays and lesbians.”²⁴ The first recipients of his sperm donations were lesbian couples. He saw what he was doing as “an applied version of the part of Christianity that he likes best—compassion—achieved through an ascetic, personalized life-hack of the Silicon Valley variety.”²⁵ His parents, however, saw him as a “servant to sinners,”²⁶ perhaps all the more so once they learned that he had posted on porn sites many videos of himself masturbating into a donation cup,²⁷ videos that have earned millions of views and an appreciative, mostly gay male fan base.²⁸

¹⁹ Wallace, *supra* note 6. Those inclined to suspect that but for his religious upbringing, Arsenault might have happily settled down in a relationship with another man should consider that among the articles linked to on his facebook page are accounts by self-identified asexuals who express aversion to a physical sexual relationship with another human being and that he also identifies as a germophobe. Trent Arsenault, FACEBOOK (Jan. 31, 2013), <https://www.facebook.com/TrentDog> [<https://perma.cc/BA8L-GDFH>].

²⁰ Donohue, *supra* note 17.

²¹ Donohue, *supra* note 17.

²² Wallace, *supra* note 6.

²³ Donohue, *supra* note 17.

²⁴ Donohue, *supra* note 17.

²⁵ Wallace, *supra* note 6.

²⁶ Donohue, *supra* note 17.

²⁷ Wallace, *supra* note 6.

²⁸ Adrian Chen, *The Porny Pastimes of the World’s Most Famous Sperm Donor*, GAWKER (Dec.

The FDA saw Arsenault as an “establishment” or “firm” illegally engaged in the manufacture and distribution of semen without complying with all the applicable rules on registration, testing, recordkeeping, and storage.²⁹ The rules, designed for commercial sperm banks, required, among other things, testing for sexually transmitted diseases³⁰ (something Arsenault did do, but not as frequently as the rules required)³¹, and cryogenically quarantining the semen for six months before thawing for use³² (something both Arsenault and his recipients, who wanted to use fresh sperm because of evidence that it was more likely to be effective in producing pregnancy, wished to avoid).³³ The rules allowed an exemption for donor screening and testing for “[r]eproductive cells or tissue donated by a sexually intimate partner of the recipient for reproductive use.”³⁴ Through his lawyer, Arsenault offered to prove that he and his intended recipients did qualify as sexually intimate partners, but the FDA refused even to consider his evidence, finding that Arsenault could at most qualify as a “‘directed donor’ . . . who knows and is known by the recipient before donation” but still had to comply with stringent requirements.³⁵ One of his would-be recipients, a lesbian who had miscarried an earlier pregnancy achieved with Arsenault’s sperm and wanted to try again, then filed suit in federal court, represented by Arsenault’s lawyer, claiming, *inter alia*, that the FDA’s regulations were “unconstitutional to the extent that they operate to regulate noncommercial, sexually intimate choices and activity protected by the rights to privacy, bodily integrity and autonomy, liberty, life, due process, and equal protection guaranteed by the First, Fifth, Ninth, and Tenth Amendments to the United States Constitution.”³⁶ Her suit was dismissed on prudential standing grounds, with the district court finding that, because she was not the direct target of the FDA’s enforcement action, only Arsenault’s constitutional rights were directly at stake and he should have been the one to sue.³⁷

21, 2011), <https://www.gawker.com/5870134/the-porny-pastimes-of-the-worlds-most-famous-sperm-donor> [<https://perma.cc/JW99-Z3GJ>].

²⁹ Abbasi, *supra* note 5, at 21.

³⁰ 21 C.F.R. § 1271.45(b) (2012).

³¹ Abbasi, *supra* note 5, at 21.

³² 21 C.F.R. § 1271.60 (2012).

³³ Abbasi, *supra* note 5, at 18.

³⁴ 21 C.F.R. § 1271.3(l) (2012); *see also* 69 Fed. Reg. 29786, 29793 (May 25, 2004) (making clear there are three categories of reproductive donors, anonymous, directed, and sexually intimate).

³⁵ Abbasi, *supra* note 5, at 32.

³⁶ *Doe v. Hamburg*, No. C-12-3412 EMC, 2013 WL 3783749, at *1 (N.D. Cal. July 16, 2013).

³⁷ *Doe v. Hamburg*, No. C-12-3412 EMC, 2013 WL 3783749, at *8 (N.D. Cal. July 16, 2013).

The would-be recipient alleged in her complaint that she was in a long-term monogamous lesbian relationship and “does not engage in heterosexual intercourse.” Had she and Arsenault both been willing to let her masturbate him to orgasm rather than taking delivery of his sperm in a cup,³⁸ she might more credibly have been able to allege that their relationship was sexual,³⁹ but such a sex act, violating both participants’ commitments and sense of self, not only seems a bizarre price to have to pay for the opportunity to reproduce with the person of one’s choice but also might not qualify as intimate to the FDA.⁴⁰ And while the relationship between private, non-anonymous semen donors and their recipients might indeed be “an intimate exchange and an expression of personal trust,” as claimed by Arsenault’s lawyer in her law review article about the case,⁴¹ it would not therefore qualify as sexual. The FDA insisted it “cannot accept an expanded definition of the term ‘sexually intimate partner.’”⁴²

Among the questions the FDA’s classification scheme raises is not only what counts as “a sexually intimate partner[ship],”⁴³ but also why

³⁸ In 2016, when Ari Nagel received from the N.Y. State Department of Health a cease-and-desist letter similar to Arsenault’s, Nagel responded that this was “an infringement on reproductive rights” and asked, “what if [the prospective mothers] jerk me off and then they’re taking it so then technically I’m not doing anything illegal. You know it’s certainly legal if I come on their face and then they could take it and put it inside. . . . I mean obviously I’m not coming on their face, I’m coming in a cup. So is it the cup part that makes it illegal?” See Justin Snow et. al, *The Spermator* (2017), <https://vimeo.com/236936586> [<https://perma.cc/ECY3-JSB8>]. As will be discussed further below, the State of New York seems to have accepted Nagel’s argument that his activities should not be equated to those of an unlicensed sperm bank.

³⁹ Of course, masturbating another to orgasm to achieve purely reproductive aims rather than any sexual gratification does not necessarily qualify as a sex act in the law, as witness the exemptions in statutes criminalizing bestiality for farmers artificially stimulating their male farm animals to use the resulting ejaculate to artificially inseminate female animals. See e.g. Ariz. Rev. Stat. § 13-1411(C) (West 2021). Whether or not a donor’s deliberately producing ejaculate is necessarily sexual, clearly Arsenault eroticizes it. And, just as some who offer N.I. sometimes claim to approach the act clinically so, for example, lesbian couples can eroticize the act of insemination (and not just because an orgasm is thought to improve the odds of conception by helping move the sperm). There seems to be no available information on how many gay male couples producing ejaculate to fertilize a donor egg or provide to the surrogate who will bear their child masturbate one another to orgasm. In my contribution to the collective work *Pregnant Man*, I criticized Darren Rosenblum, who invited a group of legal scholars and his surrogate to reflect on the process by which he and his husband conceived a child, for erroneously assuming that for “bioparents” conception is necessarily a pleasurable, sexual, mutual process even as he unnecessarily shaped his own process to be more isolated and competitive than a “sexually intimate” act of partnership, given that he and his husband “each masturbated [alone] in a clinical room” filled with straight porn. See Darren Rosenblum, et al., *Pregnant Man?: A Conversation*, 22 YALE J. L. & FEMINISM 207, 213, 222–23 (2010).

⁴⁰ See, e.g., Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1655 (1993) (analyzing the distinction in judicial opinions between “sexually intimate” and “intimate sexual relationships”).

⁴¹ Abbasi, *supra* note 5, at 39.

⁴² CBER’s Mem. Supp. Mot. to Deny Hearing Req. & Summ. J. 15, Feb. 7, 2011.

⁴³ 21 C.F.R. § 1271.90(a)(2) (2012).

it has the privilege of exemption. The most mundane explanation may be that the FDA's rules dealt only with concern about communicable, not heritable, diseases.⁴⁴ The FDA may simply have assumed that the bodies and bodily fluids of those in a sexually intimate relationship were likely already to be in close enough contact to have spread any communicable diseases from one partner to the other, such that the precautions of further testing and quarantining would be superfluous.⁴⁵ This, of course, creates perverse incentives for those providing and using donated sperm. As Beth Gardner, founder of the Known Donor Registry,⁴⁶ a site that connects people interested in private donation, puts it, the regulations force donations underground, "putting desperate women at a greater risk of being coerced into sex or obtaining sperm from unscrupulous donors who have foregone screening."⁴⁷ "It's not the realm of government to decide who I'm allowed to have a baby with and how I'm going to make that happen. That's my business," Gardner insists.⁴⁸ Although a directed donor and especially the intended recipient may have preferred A.I. precisely because of its comparative safety, they can avoid trouble with the FDA by reverting instead to N.I., that is to say to unprotected penile-vaginal sexual intercourse, which is far riskier from a number of perspectives not limited to that of potentially communicable diseases. A regulatory scheme that leaves Arsenault at greater risk for fines and jail than the likes of Joe Donor, who makes clear his strong preference for N.I., and, by preserving his anonymity,

⁴⁴ Very recent legislative proposals, such as the proposed Steven's Law of 2022, H.R. 8307, 117th Cong. (2D Sess. 2022), would require donors to provide and have verified a host of additional medical information such as "all diagnosed medical conditions of the donor including genetic disorders, schizophrenia, mental disorders . . . and intellectual disorders." The comparatively onerous disclosure and monitoring requirements proposed in Steven's Law and in a similar bill introduced in the NY State legislature, S7602A, 2021-2022 Senate, Reg. Sess. (NY. 2022), the so-called "donor conceived person protection act," were motivated by horror stories of sperm banks failing to verify or to update information supplied by donors, with the result that serious and undisclosed illnesses and mental health conditions were passed on to the donors' offspring. See e.g. Grace Browne, *Egg and Sperm Donors Could be Required to Share Their Medical Records*, WIRED (Aug. 23, 2022), <https://www.wired.com/story/sharing-egg-sperm-donor-medical-history/> [<https://perma.cc/6CAZ-FJJU>]. The proposed bills do not use the term "sexually intimate partner," but they do exempt from the definition of "donor" subject to the bills' requirements a person providing sperm for insemination to that "person's regular sexual partner." See, e.g., Steven's Law § 369A(d)(1).

⁴⁵ Potentially bolstering this explanation is the language of the California Health and Safety Code, which allows a "recipient of sperm donated by a sexually intimate partner of the recipient for reproductive use" to "waive a second or repeat testing of that donor" with informed consent, and then includes in its definition of "sexually intimate partner . . . a known or designated donor to whose sperm the recipient has previously been exposed in a nonmedical setting in an attempt to conceive." See CAL. HEALTH AND SAFETY CODE § 1644.5 (4) (West 2018).

⁴⁶ *Welcome to KDR!*, KNOWN DONOR REGISTRY, <https://knowndonorregistry.com/> [<https://perma.cc/6P9A-PST5>] (last visited Aug. 10, 2022).

⁴⁷ Lauren Vogel, *Age, Sex, Location . . . Sperm Count?*, 184(7) CAN. MED. ASS'N J. 347, 348 (2012) (paraphrasing Gardner).

⁴⁸ *Id.* (quoting Gardner)

blocks other, non-bodily forms of intimate connection with his recipients, seems far from desirable. It has some of the same flaws judges a hundred years ago found in laws preventing couples from marrying in the absence of a health certification that the would-be husband was free of venereal disease, which also may have encouraged far more dangerous and undesirable activity than they prevented.⁴⁹

Considerations of constitutional law, as well as epidemiology, might have prompted the FDA to give special accommodations to sexually intimate partners, however. Even the *Dobbs* majority acknowledged “rights recognized in past decisions involving matters such as intimate sexual relations,” from which it sought to distinguish the abortion right it was extinguishing.⁵⁰ The Supreme Court had long acknowledged “that sexual intimacy is ‘a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality’”⁵¹ and had granted an increasingly broader swath of sexual intimacy constitutional protection, especially from criminal prosecution, in the progression of cases from *Griswold v. Connecticut*⁵² through *Lawrence v. Texas*.⁵³ What this line of cases ultimately protected was the sexual relations themselves, divorced from any necessary connection to procreation or family.

From my earliest days as a legal scholar, long before the Court extended constitutional protection to “private, consensual sexual intimacy between two adult persons of the same sex”⁵⁴ by overruling *Bowers*⁵⁵ in *Lawrence*, I have been arguing that the best (in the sense of most law-fully) way to understand *Griswold* and its progeny was as a “progression of . . . requests for the same legal right to couple.”⁵⁶ At the time I meant to encompass both “pair bonding and copulating”⁵⁷ under the term “coupling,” but in the context of this article I will focus even more

⁴⁹ See, e.g., *Peterson v. Vidule*, 157 Wis. 966, 973 (1914) (Timlin, J. concurring) (“All experience goes to show that laws making marriage expensive or difficult or subject to objectionable requirements tend to increase illegitimate sexual intercourse. The latter tends to promiscuousness, hence to the spread of venereal diseases”).

⁵⁰ *Dobbs*, 142 S. Ct. at 2243.

⁵¹ *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun dissenting) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

⁵² 381 U.S. 479 (1965) (holding unconstitutional criminal prohibitions on the use of contraceptives by a married couple).

⁵³ 539 U.S. 558 (2003) (holding unconstitutional the criminalization of private, adult, consensual, non-commercial homosexual sex).

⁵⁴ See *United States v. Windsor*, 570 U.S. 744, 769 (2013) (describing the holding of *Lawrence* in the context of striking down as unconstitutional the federal Defense of Marriage Act).

⁵⁵ *Bowers*, 478 U.S. at 196 (rejecting a constitutional challenge by a gay man to a Georgia law criminalizing oral and anal sex).

⁵⁶ Case, *supra* note 39, at 1653.

⁵⁷ Case, *supra* note 39, at 1644.

narrowly on the court's recognition of a right to fuck (privately, consensually, non-commercially, but not necessarily particularly intimately in other respects). The method I use to extract this right from the case law is one familiar in analysis of the development of the common law, which is thought to yield principles (whether to the judge, the scholar, or the lawyer) when one lines up a series of related cases and abstracts from them a rule of decision that accounts for them apart from their more particular facts, something one generally needs a line of cases to discern.⁵⁸

In the specific context of sexual and reproductive constitutional rights, one thing I am trying to get at with this method is the possibility that there is a midpoint between the extremes Justice Harlan posits in his famous *Poe v. Ullman*⁵⁹ dissent (later incorporated in full as his concurrence in *Griswold*).⁶⁰ Harlan wrote:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.⁶¹

The contrast here is between mere incorporation of the bill of rights and a much broader scope for substantive due process under the Fourteenth Amendment (the former warmly embraced and the latter harshly repudiated by the right on the present Supreme Court).⁶² I want

⁵⁸ The French call this *jurisprudence constant*, and the Germans *staendige Rechtsprechung*. Mary Anne Case, *The Very Stereotype the Law Condemns; Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1462 (1999).

⁵⁹ 367 U.S. 497 (1961).

⁶⁰ *Id.* at 522–55 (Harlan, J. dissenting) (arguing that a challenge by married persons to the Connecticut law criminalizing their use of contraceptives should be deemed justiciable and the law held unconstitutional).

⁶¹ *Id.* at 543.

⁶² Given that the right on the current Court has set its collective face against substantive due process but embraced incorporation with a vengeance, extending it to an unprecedented level in their recent cases protecting religion and guns under the incorporated First and Second Amendments, it is extraordinarily important to remind them and ourselves that, as Harlan and Scalia, two justices with generally recognized extraordinary legal skills, clearly recognized, all incorporation of the enumerated rights in the bill of rights is nothing more nor less than substantive due process. For further discussion, see Mary Anne Case, *Scalia as Procrustes for the Majority, Scalia as Cassandra in Dissent*, in JUSTICE SCALIA: RHETORIC AND THE RULE OF LAW 9, 14–16 (Brian Slocum & Francis Mootz eds., 2019) (analyzing Scalia's approach to this fact as a judge and as a scholar).

to suggest that one can, in addition, take the rights “pricked out” in the at first seemingly isolated holdings of the various cases in the area of sexual and reproductive rights and connect them, to see what shape of more general guarantee reveals itself when the more specific ones are lined up together. This is what Justice Scalia himself did in a series of dissents from Justice Kennedy’s various gay rights opinions, in each case connecting the dots and seeing what for him was a nightmare vision of what was to come (albeit a dream for theorists of sexual rights like me, who saw the same figure as Scalia when we, too, connected the dots).⁶³

Even though the term “common law constitutionalism”⁶⁴ was developed by those on the left, justices on the right of the court have both applied and described a common law method of analyzing constitutional cases.⁶⁵ It fits particularly well with the argument by some conservative scholars that only the judgment (that is to say narrowly the result) and not the opinion in a Supreme Court case is actually the law.⁶⁶ While far from identical to the present Court majority’s current emphasis on history and tradition, it more closely tracks an earlier version of the emphasis on history and tradition—Scalia’s insistence on looking for the narrowest possible specification of a right previously recognized by the Court to see whether it was available to a claimant in a case before the court.

Famously, in a lengthy footnote that attracted much attention but not a court majority, Justice Scalia declared that the correct level of generality at which to pose the question whether Michael H., who wanted to maintain contact with the daughter he had conceived in an adulterous relationship with another man’s wife, was entitled to a hearing on his parentage was not “whether parenthood is an interest that

⁶³ Thus, Scalia correctly predicted in his dissents that the result in *Romer v. Evans*, 517, U.S. 620 (1996), entailed the overruling of *Bowers*; that *Lawrence*, which did indeed overrule *Bowers*, entailed constitutional protection for same-sex marriage; and that *Windsor*, which struck down the federal Defense of Marriage Act, entailed that the states also had to recognize same-sex marriages. For further discussion see Case, *supra* note 62, at 10–13 (discussing Scalia’s prophetic and influential gay rights dissents); Mary Anne Case, *After Gender the Destruction of Man*, 31 PACE L. REV. 802 (2011) (discussing the extent to which both the Vatican and Scalia over the past several decades have connected the dots of developments in the law of sexual and reproductive rights and seen what for them is a nightmare figure, though for advocates of sexual and reproductive rights a dream).

⁶⁴ See, e.g., David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

⁶⁵ See, e.g., Case, *supra* note 58, at 1462 (analyzing Rehnquist’s use of this method in his U.S. v Virginia, 518 U.S. 515, 561 (1996) (Rehnquist, J., concurring); Case, *supra* note 62, at 14–20 (analyzing Scalia’s scholarly description and judicial application of this method).

⁶⁶ See, e.g., Edward A. Hartnett, *A Matter of Judgment, not a Matter of Opinion*, 74 N.Y.U L. REV. 123 (1999).

historically has received our attention and protection,” as Justice Brennan had argued,⁶⁷ but was instead whether the “natural father of a child adulterously conceived” had received such protection. Scalia asked:

Why should the relevant category not be even more general [than parenthood]—perhaps “family relationships”; or “personal relationships”; or even “emotional attachments in general”? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.⁶⁸

At the “most specific level at which a relevant tradition protecting . . . [an] asserted right [in the *Griswold* line of cases] can be identified,”⁶⁹ what emerges is the right to fuck, as generations of distinguished scholars, using much more polite language, have been arguing almost from the start. Let me cite just a few examples here. Richard Posner categorized the line of contraception and abortion cases beginning with *Griswold* together with *Stanley v. Georgia*,⁷⁰ a case protecting the right to possess obscene materials in the home, as “the sexual freedom cases.”⁷¹ (As Posner noted, *Eisenstadt v. Baird*⁷² cited *Stanley* as support for the extension of the right to obtain contraceptives to the unmarried⁷³). In 1986, the year *Bowers* was decided, Richard Mohr—unlike Posner an enthusiast for cases protecting sexual freedom—insisted that “though the Court has failed to acknowledge the logical conclusion to its privacy decisions, the privacy decisions protect the right to have sex”. The rationale for the right to purchase contraceptives and own pornography must be derived from the right to *use* them—to guide one’s sex life by one’s own lights compatible with a like ability on the part of others.”⁷⁴

⁶⁷ Michael H. v. Gerald D., 491 U.S. 110, 139 (1989) (Brennan, J. dissenting).

⁶⁸ *Id.* at 132 n.6.

⁶⁹ *Id.*

⁷⁰ 394 U.S. 557 (1969).

⁷¹ Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 214 (1979). Posner did not then approve of these cases. He wrote, “[n]othing in the language, legislative history, or background of the Constitution, the Bill of Rights, or the Fourteenth Amendment shows any evidence of an intent to limit state regulation of the family, save perhaps when the regulation is along racial or otherwise invidious lines Neither in the Fourth Amendment nor elsewhere in the Constitution is there reference to a policy of allowing people to engage in sexual activity without fear of giving birth.” *Id.* at 199. The argument Posner made in 1979 is, of course, precisely the one the *Dobbs* majority, egged on by Clarence Thomas in his *Dobbs* concurrence, may soon use to overrule the whole line of sexual freedom cases. But so long as these cases remain good law, they also remain guarantors of sexual freedom.

⁷² 405 U.S. 438 (1972).

⁷³ Posner, *supra* note 71, at 197 n.65 (citing *Eisenstadt*, 405 U.S. at 453).

⁷⁴ Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. R. L. REV. 43, 80–82 (1986).

A few years later, Nan Hunter stressed that the “same aim of the law [that underlay the New England Puritans’ anti-sodomy laws]—discouragement of nonprocreative sex—underlay the statutes prohibiting the use of birth control devices which were stricken as unconstitutional by the Supreme Court in the 1960s.”⁷⁵ Hunter pointed out the *Bowers*’s majority’s error in asserting “that a privacy claim on behalf of ‘homosexual sodomy’ bore no relationship” to the claims⁷⁶ in the *Griswold* line: “Michael Hardwick, as a person engaged in sodomy, had the same relationship to procreation as persons using birth control during heterosexual intercourse: none, which was precisely the point. The issue in *Hardwick* should have been controlled by *Griswold* and *Eisenstadt*.”⁷⁷ The Massachusetts law struck down in *Eisenstadt* provided support for Hunter’s argument, in that it prohibited alike the distribution of any “article intended to be used for self-abuse . . . the prevention of conception or for causing unlawful abortion.”⁷⁸ The Massachusetts legislature thus demonstrated that it viewed non-procreative masturbation, contraception, and abortion as equivalent evils.

When *Bowers* gave way to *Lawrence*, Hunter noted that the *Lawrence* Court “modified the meaning” of *Griswold*, *Eisenstadt*, *Carey*, and *Roe* to focus less on “procreation and procreative decision-making” and “more on sexual conduct . . . with a greater acknowledgment that what had been before the Court was sexual activity, not simply decisions about whether to become a parent.”⁷⁹ Mohr and Hunter, as gay rights activists, welcomed *Lawrence*’s extension of protections to more forms of non-procreative sex. But, more recently, Kim Mutcherson, an advocate for reproductive justice, observed:

From a strictly legal standpoint, after *Skinner v. Oklahoma*, in which the Court articulated a fundamental right to procreate, courts have reinforced a liberty interest in sexual activity However, the Court’s endorsement of a right to sexual activity, especially as articulated based on the facts of *Lawrence*, has no connection to procreative liberty. In fact, it is much easier to find Supreme Court jurisprudence supporting the constitutional right to nonprocreative sex than to procreative sex.⁸⁰

⁷⁵ Nan Hunter, *Life After Hardwick*, 27 HARV. C.R. C.L. L. REV. 531, 536 (1992).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Eisenstadt v. Baird*, 405 U.S. 438, n.2 (1972); Such legislation descended from the infamous “anti-vice” crusades of Anthony Comstock, which led to the passage of the federal Comstock laws and similar criminal statutes in many states.

⁷⁹ Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1110 (2004).

⁸⁰ Kimberly Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22, 35–

As I have suggested above and will explain further below, Mutcherson's quite correct observation has completely different implications in the aftermath of *Dobbs*, because *Skinner*, a World War II era equal protection case, has a much better chance of surviving as a precedent than the sexual rights cases from the era of the Warren court to the present, even though the author of the *Skinner* majority opinion, Justice Douglas, also wrote the majority opinion in *Griswold*.

II. SUPER DAD AND THE RIGHT TO PROCREATE

Stanley v. Georgia, involving protection for obscene films used in the home as masturbatory aids, is an appropriate precedent in support of donorsexual Trent Arsenault, whose exercise of his right to beget children takes the form of acts of masturbation he records in pornographic videos that he makes freely available for consumption by others, just as he makes his sperm available. For Super Dad Ari Nagel, however, a more appropriate precedent may be *Stanley v. Illinois*,⁸¹ the 1972 Supreme Court case in which an unmarried father who had lived with his three biological children and their mother for decades before her death was held entitled not to be deprived upon her death of custody of the children absent evidence that he was unfit as a parent.⁸² This is because, despite being called the Sperminator by the press, despite also using as his principal procreative technique masturbation, with increasingly rare forays into ordinary non-reproductively motivated sexual intercourse (which led to the conception of his oldest child and Nagel's marriage to the mother) and N.I., (which produced about a dozen of his more than one hundred donor-conceived children) Nagel's activities, and his potential legal problems, are far more focused on the creation of unconventional families than on the expression of an unconventional sexuality.

It is worth noting that the majority in *Roe* cites only *Stanley v. Georgia*,⁸³ while in *Casey* both *Stanley* cases are cited (*Illinois* by the plurality,⁸⁴ the Blackmun concurrence,⁸⁵ and the Rehnquist dissent;⁸⁶ *Georgia* only by the Stevens concurrence⁸⁷). In *Dobbs*, only *Stanley v. Illinois* makes an appearance, and only in the dissent, where it is cited as "offering constitutional protection to untraditional 'family units'" as

36 (2015).

⁸¹ 405 U.S. 645 (1972).

⁸² *Id.* at 646–47, 658,

⁸³ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

⁸⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992).

⁸⁵ *Id.* at 941.

⁸⁶ *Id.* at 966.

⁸⁷ *Id.* at 915.

part of a string cite illustrating the proposition that “*Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation.”⁸⁸ The dissent insists the Court has “repeatedly said” “liberty requires” that these choices be made by “the individual and not the government,” even “when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community.”

Although the *Dobbs* dissenters directly mention “whom to have sex with” as among the “particular choices . . . cases safeguard,” the other choices on their list are all familial: “whom to marry . . . what family members to live with; how to raise children—and crucially, whether and when to have children.”⁸⁹ In the decade between the time the FDA first ordered Arsenault to cease and desist his sperm donations in 2009⁹⁰ and the Supreme Court of Israel ordered Ari Nagel to do likewise in 2019,⁹¹ the attention of the U.S. Supreme Court shifted away from sexual intimacy and toward family formation. There is a similar contrast between the FDA’s concern with Arsenault’s potentially spreading communicable diseases through too frequent donation and the state of Israel’s concern that Ari Nagel was spreading his capacity for serving as a father too thin by too frequent donation.

Although six women preparing for IVF already had frozen sperm from Nagel in readiness at Israeli storage facilities and others wanted him to provide them with fresh sperm on his next trip to the country, the Israeli Supreme Court, invoking “Israeli law requiring complete anonymity in gamete donation, except where two people plan to co-parent the resulting child” voiced “real and serious concern about the ability of the petitioner to actually serve as the father to over 38 children, both financially and in the essence of what a father’s rule [sic] is within the family.”⁹² Nagel thought the decision made no sense and “felt terrible for the women denied his sperm” who “ended up purchasing frozen

⁸⁸ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2329 (2022).

⁸⁹ *Id.*

⁹⁰ Abbasi *supra* note 5, at 20.

⁹¹ Jen Willows, *Israel’s High Court Rejects Prolific US Sperm Donor’s Petition*, PET (Feb. 18, 2019), <https://www.progress.org.uk/israels-high-court-rejects-prolific-us-sperm-donors-petition/> [https://perma.cc/4NGL-UUYX].

⁹² *Id.* The Israeli Department of Health told one of the women, “[c]onsidering the number of women whom Mr. Nagel impregnated with his sperm . . . it is our position that the claim of an intention to perform true joint parenthood with Mr. Nagel is not sincere or reasonable.” *Serial Sperm Donor’s Samples Reportedly Banned in Israel*, JERUSALEM POST (June 18, 2018) <https://www.jpost.com/israel-news/serial-sperm-donors-samples-reportedly-banned-in-israel-560226> [https://perma.cc/H9Y6-K4HL].

anonymous sperm. How are *they* going to be a father? But *that's* completely allowed and acceptable.”⁹³

Importantly, the clear lesson of the U.S. Supreme Court’s relevant constitutional rights cases in both substantive due process and equal protection frameworks for more than half a century is that there is no “essence” to a father’s role in the family. While it is essential that children are not abused or neglected, the division of labor between parents and the role each assumes in parenting is for the parents to shape for themselves. This was the paramount lesson not only of Ruth Bader Ginsburg’s life,⁹⁴ but also of the revolution she as an advocate brought about in constitutional sex discrimination law, exemplified by *Weinberger v Wiesenfeld*.⁹⁵ In that case, upon the death of a breadwinner mother in childbirth, the father, represented in the Supreme Court by Ginsburg, successfully sued for social security survivor’s benefits so he could stay home to care for his child.⁹⁶ This is also what lay behind the emphasis on the need to protect and validate a same-sex couple’s parenting in Kennedy’s same-sex marriage opinions.⁹⁷ Moreover, so long as a father is not willfully failing to provide for his existing children, the state may not curtail his ability to form new family bonds because he is too poor to support his family members adequately.⁹⁸ In a series of cases involving fathers not married to the mothers of their children, the Court did hold that such fathers had to “grasp the opportunity” biological paternity offered to them “to develop a relationship with his child” if they wanted to be recognized as fathers and not risk losing their rights, especially to another man willing to care for, provide for, and adopt the child, such as the mother’s new husband; however the Court pointed to a variety of options under state law for so doing.⁹⁹

⁹³ Amy Klein, *Whose Sperm Is This?*, TEL AVIV REV. BOOKS (Autumn 2020) (original emphasis), <https://www.tarb.co.il/powder-keg-of-israels-irresponsible-ivf/> [<https://perma.cc/96EH-6AF8>]. Compare Nagel’s argument here with Beth Gardner’s above—each has a cogent argument that the legal restrictions on sperm donation put those in need of sperm to conceive to a worse set of choices.

⁹⁴ Not only did her husband Marty do all the cooking for the household, Ruth also insisted that the school her son attended call the boy’s father at least as often as his mother when there was an issue concerning their son. Nina Totenberg, *Justice Ruth Bader Ginsburg Reflects on the #MeToo Movement: It’s About Time*, NPR (Jan. 22, 2018), <https://www.npr.org/2018/01/22/579595727/justice-ginsburg-shares-her-own-metoo-story-and-says-it-s-about-time> [<https://perma.cc/N386-9RBG>].

⁹⁵ 420 U.S. 636 (1975).

⁹⁶ *Id.*

⁹⁷ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015) (holding that a “basis for protecting the right to marry is that it safeguards children and families” in a case whose plaintiffs included a lesbian couple who had adopted children).

⁹⁸ *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding unconstitutional Wisconsin’s withholding of permission to marry from non-custodial parents who were not in compliance with their child support obligations).

⁹⁹ *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

If the cases best supporting Arsenault's rights are *Stanley v. Georgia* and the line from *Griswold* to *Lawrence*, those best supporting Nagel's rights, in addition to the above-mentioned cases involving the role of a father, are *Moore v. City of East Cleveland*,¹⁰⁰ giving the multi-generational household of a matriarch the right to continue to reside together in a neighborhood zoned for single-family occupancy despite an ordinance more restrictively defining "family" for zoning purposes, and *Obergefell*.¹⁰¹ Nagel is creating an alternative family structure, but one not lacking in long historical precedent. Precedents include not only extended multi-generational families such as the one in *Moore* but the polygamists that the dissenters in *Obergefell* correctly say can use Kennedy's majority opinion to ground a claim to legal recognition (or at least an end to legal prosecution) with far more support in millennia of history and tradition than the same-sex couples to whom Kennedy extends recognition.¹⁰² Indeed, some critics have suggested men like Nagel are "estranged patriarchs,"¹⁰³ and that they are reinforcing heterosexist traditions rather than breaking with them or improving on them.

That Mrs. Moore and her descendants are in the line of claimants whose victories support Nagel's right to continue to beget children suggests a different, more progressive way structurally to analyze Nagel's familial choices than as patriarchal. In her scholarship, including *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, feminist legal theorist Martha Fineman has long argued that for American law to see the sexual couple rather than a mother¹⁰⁴ and child as the foundation of the family was a mistake that would help entrench patriarchy.¹⁰⁵ She argued that state recognition of marriage should be abolished and sexual partners' relationships governed by ordinary criminal and civil laws, including contract.¹⁰⁶ The result would

¹⁰⁰ 431 U.S. 494 (1977).

¹⁰¹ *Obergefell*, 576 U.S. at 644.

¹⁰² See, e.g., *id.* at 704 (Roberts, C.J., dissenting) (noting "how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage" which has "deep roots in some cultures around the world").

¹⁰³ The term comes from the work of Nicole Bergen, who describes the six informal online sperm donors she interviewed as all altruistic but also "rarely in fulfilling relationships themselves" and sometimes "attracted to the idea of having as many biological offspring as possible, to create a kind of clan amongst the various families." Tony Russell, *The Sperm Donation Is Free, but There's a Catch*, ATLANTIC (May 21, 2021), <https://www.theatlantic.com/family/archive/2021/05/free-sperm-donation-groups-facebook/618941/> [<https://perma.cc/7XJP-JYCP>]; see also Nicole Bergen & Céline Delacroix, *Bypassing the Sperm Bank: Documenting the Experiences of Online Informal Sperm Donors*, 29 CRIT. PUB. HEALTH 1 (2019).

¹⁰⁴ "Mother" for Fineman is a capacious category, covering all persons of any sex who care for the inevitably dependent and as a result are likely to become derivatively dependent.

¹⁰⁵ See generally MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

¹⁰⁶ *Id.* at 228–30.

be that fathers would get such access to their children as they were able to contract with mothers to obtain, on such terms as the mother was prepared to agree to. In response to the objection that fathers might then not contribute, especially financially, to raising their children to the extent they are obligated to under current law, Fineman made clear her approach was premised on robust state support for parenting and other forms of caring for those inevitably or derivatively dependent.¹⁰⁷

Fineman may not see Nagel as her paradigmatic father of the future, but I will argue that he comes fascinatingly close to fulfilling her conditions concerning fathers contracting with the mothers of their children. He will give his sperm free of charge to literally anyone who asks for it, seeking only that he be reimbursed for travel expenses.¹⁰⁸ He will do so in the recipient's preferred manner, fresh in a cup in an informal setting, in a clinic, through a medical intermediary, or, at least in the early days, through sexual intercourse.¹⁰⁹ His first two successful donations, were, he says, to a partnered lesbian with whom he had penetrative sex and to a straight single woman for IVF in a clinic.¹¹⁰

Nagel does not discriminate, and he asks few questions of those who approach him for donations.¹¹¹ Many of those he impregnates seem to be poor; one of those he impregnated was an eighteen-year-old living in a homeless shelter, in a lesbian relationship with a partner living in another shelter.¹¹² He feels his faith in this decision was vindicated: she had spent much of her young life acting as a de facto parent for a sister half her age, seemed mature, and is now a high school graduate, employed, married, and the mother of a second child with Nagel.¹¹³ In another case, however, psychological problems he might have learned about before insemination had he inquired or investigated caused such

¹⁰⁷ See, e.g., *id.* at 8 (defining inevitable and derivative dependency); *id.* at 231 (arguing that the “caring family” composed of “inevitable dependents along with their caregivers” should be “entitled to special, preferred treatment by the state”).

¹⁰⁸ Doree Lewak, *The Spermator's 50th Baby Mama is a Homeless 18-Year-Old from Harlem*, N.Y. POST (June 15, 2019), <https://nypost.com/2019/06/15/the-sperminators-50th-baby-mama-is-a-homeless-18-year-old-from-the-bronx/> [<https://perma.cc/R5W9-MNVH>].

¹⁰⁹ Sandy Rashty, *Meet the American Jew with Almost as Many Children as Abraham*, JEWISH NEWS (Dec. 9, 2021), <https://www.jewishnews.co.uk/meet-the-israeli-with-almost-as-many-children-as-abraham/> [<https://perma.cc/K3F6-NDBH>]; TheMauryShowOfficial, *Meet The Spermator . . . He Has 29 Kids With 24 Women And Claims Them All!*, YOUTUBE (Oct. 24, 2017), https://www.youtube.com/watch?v=TJSXi_3qtWs [<https://perma.cc/2HAT-5DXY>].

¹¹⁰ Doree Lewak, *Professor Who Donates Sperm in City Bathrooms Has Sired 22 Kids*, N.Y. POST (June 12, 2016), <https://nypost.com/2016/06/12/professor-who-donates-sperm-in-city-bathrooms-has-sired-22-kids/> [<https://perma.cc/3WKB-NFDP>].

¹¹¹ Lewak, *supra* note 7.

¹¹² Lewak, *supra* note 108.

¹¹³ DoctorOz, *Meet the Controversial Donor Giving It Away—77 Babies and Counting!*, YOUTUBE (May 5, 2021), <https://www.youtube.com/watch?v=129KjFHpgtM> [<https://perma.cc/794G-KQAD>].

a crisis after the birth of the child that Nagel had to step up to assume temporary fulltime custody until an alternative permanent placement could be found; but step up he did.¹¹⁴ He is also paying a sizeable chunk of his limited income as a math professor in child support to five of the mothers for nine of his donor-conceived children, who sued him despite their having agreed not to in agreements he knew in advance would be legally unenforceable. He appears to pay the child support cheerfully and it has not deterred him from continuing to donate.¹¹⁵

If Arsenault's claims sound in reproductive rights, Nagel's sound more in reproductive justice. "I have seventy-seven children, that's true, but then you look at the three women that we just saw on the screen and they don't have seventy-seven children," Nagel told Dr. Oz on Fox News in 2021.¹¹⁶ "For them, it's about them having their first child or their second child. So it's not so much don't focus on me, [as] more focus on them . . . who just want to have a family."¹¹⁷ Most of his recipients appear to be women of color,¹¹⁸ many name the prohibitive cost of paying for sperm as one of the reasons to turn to him.¹¹⁹ The many dozens of children he has helped women of color conceive and give birth to makes Super Dad's version of reproductive justice a possible counterpoint to the claim, long propounded by Justice Thomas and discussed in the *Dobbs* majority opinion, that some "proponents of liberal access

¹¹⁴ Jason Ingber, *Most Prolific Sperm Donor in the USA*, YOUTUBE (Apr. 10, 2022), <https://www.youtube.com/watch?v=-FvwyBsU1MY> [<https://perma.cc/BC6Z-KTDD>].

¹¹⁵ Rachel Monroe, *Have Sperm, Will Travel*, ESQUIRE (Oct. 20, 2021), <https://www.esquire.com/news-politics/a37982793/sperm-donor-shortage-facebook-groups/> [<https://perma.cc/E2FA-FETZ>].

¹¹⁶ DoctorOz, *supra* note 113.

¹¹⁷ Cortney Moore, 'Sperminator' who's close to fathering 100 children says 'don't focus on me', FOX NEWS (May 04, 2021), <https://www.foxnews.com/lifestyle/sperminator-close-fathering-100-children-speak-dr-oz> [<https://perma.cc/YZR8-5ERR>].

¹¹⁸ If any of the women of color to whom he donates sperm have reasons to turn to him specifically because of the color of his skin, from desires concerning their child's skin color or aversive reactions to men of color based on experience or stereotyping, these have not often been reported. But poor women, whether of color or not, may see a donor like Nagel as a good way out of the dilemma sociologist Kathryn Edin reports many poor women face—they do not want to tie themselves to men who would drag them down financially and be inclined to behave more patriarchally the closer the tie. *See, e.g.*, Kathryn Edin, *A Few Good Men: Why Poor Mothers Don't Marry or Remarry*, 11(4) AMERICAN PROSPECT 26–31 (Jan. 3, 2000) (describing such concerns on the part of many poor women, who, though they value marriage, elect not to marry the fathers of their children).

¹¹⁹ If processed through a sperm bank, the cup of ejaculate Nagel offers for free would be divided into three to four vials of semen, for each of which a bank would likely charge more than \$1000. Purchasing four or five vials per desired child is recommended, since successfully becoming pregnant can take multiple months of trying. *See e.g.* Nellie Bowles, *The Sperm Kings Have a Problem: Too Much Demand*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/business/sperm-donors-facebook-groups.html> [<https://perma.cc/9K8V-9GG9>]; Sharan Shetty, *Could One Man Really Father 533 Children?*, SLATE (Jul. 9, 2013), <https://slate.com/culture/2013/07/delivery-man-fact-checked-how-much-sperm-would-you-have-to-donate-to-father-533-children.html> [<https://perma.cc/FD6C-9NT7>].

to abortion . . . have been motivated by a desire to suppress the size of the African-American population.”¹²⁰

Nagel’s relationship with any resulting child is as much in the mother’s control as all the other aspects of his process. He will be present at the birth if asked or never have contact again after the handover of his sperm if not desired. Some mothers list him on a birth certificate or give the child his last name; others give the child his first name or a variant thereof.¹²¹ Nagel says he married a small number of the religiously observant single women to whom he has donated, so the children would not be born bastards, soon followed by an agreed upon divorce.¹²² Some of the mothers list their partner or spouse as the second parent and others list no second parent. He explains that some of the children call him dad, some donor dad, some Ari, and “some never call.”¹²³ He is willing to be made known to and to have contact with the children if, when, and to the extent the mother wishes.¹²⁴ Nagel says that he keeps in touch with his offspring as much as the moms allow.¹²⁵ A disproportionate amount of the contact appears to be at celebratory occasions like birthday parties and gatherings of groups of his offspring and their mothers; he clearly experiences the joys of parenting more than the hard work, as he freely acknowledges.¹²⁶ But he is also so public about his many other children and his interactions with them and their mothers that recent mothers (unlike the mother of his first, unplanned child, who was reportedly not pleased to learn he was donating sperm)¹²⁷ can know exactly what they themselves can expect, including the unavoidable constraints on his time, geographic mobility,¹²⁸ and financial resources. This knowledge may give would-be mothers of

¹²⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2256 n.41 (2022).

¹²¹ Monroe, *supra* note 115.

¹²² Rashty, *supra* note 109.

¹²³ DoctorOz, *supra* note 9.

¹²⁴ This willingness to be known and contacted at any point in the child’s life distinguishes Nagel from most of what U.S. sperm banks call “open identity donors,” who typically agree to provide non-identifying information early in the process, but to be identified by name and to enable contact by the children conceived with their sperm only once the children turn 18. *See, e.g.*, Joanna E. Sheib et al., *Who Requests their Sperm Donor’s Identity? The First Ten Years of Information Releases to Adults with Open-Identity Donors*, 107 FERTILITY & STERILITY 483 (2017).

¹²⁵ Klein, *supra* note 93.

¹²⁶ Lewak, *supra* note 110.

¹²⁷ Doree Lewak, *Sperm Donor Who Sired 22 Kids Has a Wife—And She’s Not Happy*, N.Y. POST (June 19, 2016), <https://nypost.com/2016/06/19/sperm-donor-that-sired-22-kids-has-a-wife-and-shes-not-happy/> [<https://perma.cc/R8XE-Z2FD>].

¹²⁸ For example, Nagel seems willing to do some babysitting for his offspring, but that is usually only possible in the New York area, where he is based, or in places like Florida where he spends substantial time. His offspring, meanwhile, span the globe. *See* Doree Lewak, *Not Even a Pandemic Can Stop the Sperminator from Spreading His Seed*, N.Y. POST (May 16, 2020) (referencing him babysitting his daughters in New Jersey), <https://nypost.com/2020/05/16/not-even-a-pandemic-can-stop-the-sperminator-from-spreading-his-seed/> [<https://perma.cc/FS6W-MYK8>].

Nagel's children a degree of predictability and control that mothers who conceive in marriage or a heterosexual relationship can never be sure of having, while offering advantages anonymous sperm from a sperm bank does not, among them more information about the donor than sperm banks now typically provide and a lower risk of accidental incest between his offspring, who can know of each other's existence more readily than those conceived with sperm from an anonymous donor. The openly available knowledge about so many other mothers and children also affords those who choose it the opportunity to connect with one another, whether for rare events and distanced contacts or frequently and intimately enough to think of each other as family. They can even bring would-be parents among their existing circle of friends and family into the fold of recipients for Nagel's sperm.

These are in large part families existing apart from the law; like polyamorous (although perhaps not like polygamous) relationships, the relationships between and among Ari Nagel, his children, and those who on occasion call themselves his baby mamas¹²⁹ can be productive without being legally recognized or enforced. What they are asking of the law is in large part "to be let alone," to "be free from all substantial arbitrary impositions and purposeless restraints"¹³⁰ in forming and maintaining their families, whether of a single mother and her child conceived with Nagel's sperm or of a broad network of mothers whose children know one another, know Nagel, and know the biological ties that connect them.

By and large up to now, in the shadow of constitutional rights at least as much as in the shadow of other law, Nagel and those who have chosen his sperm in the U.S. have indeed managed to be left alone. Nagel claims even the New York Department of Health, which served him with a cease-and-desist order similar to the one Trent Arsenault received from the FDA, backed down. "In the end," he said, "I think when I clarified what I'm actually doing, it's ultimately an infringement on every man's right, I think, to have a child [T]hey said they reserve the right to pursue legal action in the future, but for now, I can continue doing what I'm doing, because of course, I'm not operating a licensed sperm bank."¹³¹ To the extent being left alone depends for donors like Nagel on the norms of modern constitutional law in the area

¹²⁹ Monroe, *supra* note 115.

¹³⁰ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992).

¹³¹ 'Sperminator': Prolific Sperm Donor Ari Nagel Speaks Out, NZ HERALD (May 5, 2021), <https://www.nzherald.co.nz/entertainment/sperminator-prolific-sperm-donor-ari-nagel-speaks-out/R3YZGF25HQVBPP7ORS4BPYHEYA/> [https://perma.cc/29BN-5Z93].

of sexual, reproductive, and familial rights largely grounded in substantive due process precedents, their continued ability to be free of substantial legal impositions may well not survive *Dobbs*, however.

III. SKINNER'S EQUAL PROTECTION HOLDING AND THE POST-*DOBBS* QUEST FOR SEXUAL AND REPRODUCTIVE COMPARATORS

Like all other scholars of U.S. constitutional law, whatever their normative views, I am coming to terms with the prospect that the very near future could see the complete undoing of all of what had been the settled constitutional case law of sexual and reproductive rights stretching back from the beginning of this decade to the early 1970s, a decade after Justice Harlan first outlined the rights-protective terrain to come in his *Poe v. Ullman* opinion.¹³² It is literally difficult to imagine what will become of so many expectations far more settled than those of the likes of high-volume non-commercial donors of fresh sperm and those eager to receive their sperm for insemination if *Griswold* and all its progeny, along with all the cases that depended more indirectly on *Griswold*, disappear as good law. Let me end this article by suggesting that there is a precedent directly on point for reproductive, as well as sexual and familial rights, that has several advantages in the imminent fight for survival as law that *Griswold* and its progeny lack: its result was unanimous; its holding is grounded in the equal protection clause, not substantive due process; and it dates from 1942, well before the era of the Warren Court so disliked by conservatives and the early Burger court, with its perhaps surprisingly rights-friendly case law in matters of sex and reproduction.

Skinner v. Oklahoma is an equal protection case and, whatever the current conservative Court majority may think of any particular equal protection case, the conservatives do not view equal protection as a *per se* illegitimate or suspect basis for a holding, in the way they seem to view substantive due process. In fact, the current court has been moving in the direction of an almost obsessive focus on equality in many areas of constitutional law, including free exercise and free speech.¹³³

It is true that *Skinner's* author is Justice Douglas, who also authored the majority opinion in *Griswold*. But *Griswold's* result was not unanimous, as *Skinner's* was.¹³⁴ It is also true that *Skinner* evidences

¹³² *Poe v. Ullman*, 367 U.S. 497, 539–55 (1961).

¹³³ *See, e.g., Tandon v. Newsom* 141 S. Ct. 1294, 1296 (2021) (holding that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise”).

¹³⁴ Justice Stone concurred only in the result in *Skinner*, opining that due process, not equal protection, was the correct doctrinal framework for the case and that although *Skinner* had been “given a hearing to ascertain whether sterilization would be detrimental to his health, he was

the same lack of concern for doctrinal niceties that scholars have long seen as the hallmark of Douglas's approach to judging. As Ted White cogently put it, a "significant feature of [Douglas's] opinions was their espousal of positions that were doctrinally novel without extensive justification of the innovation or more than cursory recognition of its novelty."¹³⁵ But, while the reasoning and language of *Griswold* (the idea that there are emanations from penumbras of the various Amendments in the Bill of Rights, for example¹³⁶) have consistently attracted scorn and have never been taken up in later cases, the reasoning and language of *Skinner* have become staples of U.S. constitutional law. *Skinner* was the first case to introduce the term "strict scrutiny" to constitutional law.¹³⁷ Moreover, it applied this scrutiny to a right explicitly called "fundamental," the right of "marriage and procreation."¹³⁸ By holding it an equal protection violation for the state of Oklahoma to sterilize those convicted of some crimes and not others, *Skinner* is not only the first but also, to date, the only Supreme Court case explicitly and directly protecting an individual's right to procreate. Douglas pointed out that the power to decide who may not reproduce, in addition to depriving the individual "of one of the basic civil rights of man," also risked "invidious discriminations . . . against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."¹³⁹

given none to discover whether his criminal tendencies are of an inheritable type," although these would have been "the only facts which could justify so drastic a measure." *Skinner v. Oklahoma*, 316 U.S. 535, 543-45 (1942) (Stone, J., concurring).

¹³⁵ G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 403 (EXPANDED ED. 1988). As White observed: "Two paradigmatic Douglas majority opinions can be found in *Skinner v. Oklahoma* and *Griswold v. Connecticut*, decided twenty-three years apart. The *Skinner* and *Griswold* cases, not often linked by constitutional commentators, are remarkably similar in several respects. Both were doctrinally audacious opinions whose innovativeness was cryptically, even assertively presented; both involved end runs around apparently insurmountable analytical barriers; and both touched upon a theme—the decision to procreate and thus to pass on one's legacy of individuality to one's progeny and hence to posterity—that touched deep currents in Douglas's life." G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 66 (Feb. 1988).

¹³⁶ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹³⁷ *Skinner*, 316 U.S. at 541. *Korematsu v. United States*, 323 U.S. 214 (1944), the Japanese internment case generally credited with establishing strict scrutiny as the test for racial classifications, came two years later and, in any event, never used the term, speaking instead of the need for "the most rigid scrutiny" *Id.* at 215.

¹³⁸ *Skinner*, 316 U.S. at 541.

¹³⁹ *Id.* When Douglas held in *Skinner* that to select with insufficient justification those convicted of some crimes and not others for sterilization was to commit "as invidious a discrimination as . . . select[ing] a particular race or nationality for oppressive treatment," he was not only writing against the background of Nazi oppression of Jews and Roma, but most likely with the knowledge that the discrimination on the face of the Oklahoma statute, which called for thieves to be sterilized, but exempted from sterilization those convicted "of violation of the prohibitory laws, revenue acts, embezzlement, or political offenses," was a discrimination that would have a disparate negative impact on persons of color, and was likely intended to do so. *Id.* at 537, 541.

Especially because the actual discrimination in *Skinner* (between chicken thieves like Skinner, who were eligible for sterilization and embezzlers, who, although equally felonious and not demonstrably less likely to produce criminal offspring,¹⁴⁰ were ineligible) was not a classically invidious one, applying *Skinner* in the context of sexual and procreative rights post-*Dobbs* opens up a host of possible comparators for both donorsexuals and super dads. Should any of these comparators be given more rights to procreate with insufficient justification for the difference in rights, donorsexuals and super dads could potentially make out an equal protection violation. In the case of Trent Arsenault, who has consistently articulated an underlying religious motivation for his choices of how and to whom to donate,¹⁴¹ a claim under the free exercise clause or federal RFRA (Religious Freedom Restoration Act)¹⁴² could also potentially be made out, as equality has become increasingly central to the Court's conservative majority's free exercise jurisprudence.¹⁴³ To even begin to consider in any detail the potential comparators that could ground an equal protection claim for high-volume non-commercial donors of fresh sperm would require an article several times the length of this one. A small sample of the many possible comparators includes sperm banks and those who donate through them, fertile promiscuous men who have unprotected sex with many women, and perhaps most

¹⁴⁰ Some have argued that the level of scrutiny applied in *Skinner* is not actually strict, but only rationality with bite, because the state acknowledged having no basis for its assumption that chicken thievery was likely to be more heritable than embezzlement (perhaps especially since the legislatively chosen category was crimes of moral turpitude rather than of, for example, violence). See, e.g., Stephen A. Siegel, *The Origin of the Compelling Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359 (2006).

¹⁴¹ Ari Nagel, like Arsenault, was brought up in a devoutly religious household, in Nagel's case as an observant Jew in the famously observant community of Monsey, New Jersey. Though both have moved away from the particulars of the faith in which they were brought up, Nagel, like Arsenault, has referenced his religious upbringing in describing his felt need to "to be fruitful and multiply" as his parents, siblings, and former neighbors had done. Renee Ghert-Zand, *'Sperminator' Ari Nagel Spreads More Seed On Recent Israel Visit*, TIMES ISRAEL (July 6, 2017), <https://www.timesofisrael.com/sperminator-ari-nagel-spreads-more-seed-on-recent-israel-visit/> [<https://perma.cc/JB6B-Q6JW>].

¹⁴² Religious Freedom Restoration Act, 42 U.S.C. 21B (2000).

¹⁴³ See, e.g., *Tandon v. Newsom* 141 S. Ct. 1294, 1296 (2021); *Carson v. Makin*, 142 S. Ct. 1987 (2022) (holding it a free exercise violation for Maine to treat sectarian and non-sectarian private schools differently in its funding scheme).

intriguing of all, those motivated to procreate to the maximum biological extent possible within marriage, such as television's infamous Duggar family¹⁴⁴ or participants in the Quiverfull movement.¹⁴⁵

Let me end with an observation that might frighten even those eager to see substantive due process sexual and reproductive rights taken away from those such as the gays, lesbians, bisexuals, and unmarried heterosexuals who currently enjoy them: A significant feature of equal protection violations is that they can generally be cured by ratcheting either up or down, either by expanding the rights of those unequally deprived or contracting the rights of those unequally privileged. Without existing substantive due process based sexual and reproductive rights as a backstop, an application of *Skinner* just as much within the power of a court as extending the privileges to reproduce now granted by law to married heterosexuals, to donorsexuals, and super dads is the possibility that even married heterosexuals can have their affirmative reproductive freedom curtailed. Little more than incest prohibitions on marriage now seems to remain from the notion that we should prevent the unfit from reproducing. But, as defenders of *Roe v. Wade* often reminded opponents, a lack of constitutional protection for decisions on whether to bear or beget a child can cut both ways. There are no longer the barriers there were pre-*Dobbs* to a democratic decision to adopt a one child policy, ban all access to reproductive technologies, or require that those seeking to reproduce biologically—even with no technological intervention and even when married—undergo the same rigorous scrutiny of their qualifications as those seeking to adopt now do. At least as much as with respect to fetal life, views on who should be licensed to reproduce are likely to vary drastically between states, just as they now do with respect to which books and concepts should be banned from the school curriculum. While Texas might refuse a license to any prospective parents who would allow their minor child to begin gender transition, other states might see parents who would categorically refuse to allow their child to come out as gay or gender non-conforming as unfit

¹⁴⁴ The fundamentalist Christian Duggar family, including 19 home-schooled children conceived by parents who abjured birth control and stressed traditional gender roles, were stars on TLC until the network canceled them in the wake of the eldest son's sex abuse scandals. See, e.g., Tanya Pai, *The Duggar Family's 19 Kids and Counting Cancelled Over Sexual Abuse Scandal*, VOX (Aug. 26, 2015), <https://www.vox.com/2015/5/27/8662907/josh-duggar-abuse> [<https://perma.cc/G5BE-QQZD>].

¹⁴⁵ See generally Barbara Bradley Hagerty, *In Quiverfull Movement, Birth Control is Shunned*, NPR (Mar. 25, 2009), <https://www.npr.org/2009/03/25/102005062/in-quiverfull-movement-birth-control-is-shunned> [<https://perma.cc/G8FE-QNQC>]; Kathryn Joyce, 'Arrows for the War', NATION (Nov. 9, 2006) <https://www.thenation.com/article/archive/arrows-war/> [<https://perma.cc/RRB3-3B6S>] (Members of the Christian Quiverfull movement, deriving their beliefs from Psalm 127 of the Bible, believe that children are "quivers" in the army of God and married couples should have "as many as God gives them").

and deny them a parenting license. The post-*Dobbs* world is potentially one of less reproductive freedom for everyone.