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## REGULATING EUGENICS

Commentators have recognized that the constitutional law pertaining to modern reproductive techniques is underdeveloped and undertheorized.<sup>1</sup> In many instances, the law lags well behind technological realities and possibilities.<sup>2</sup> Although we might expect and perhaps desire the *law* to be behind the state of the art, it is troubling that *legal thinking* has not offered thorough analysis of existing and near-future reproductive technology, particularly because such technologies have received considerable attention in political philosophy departments.

For example, respected liberal moral philosophers have recently argued in favor of “liberal eugenics.”<sup>3</sup> This term is somewhat of a misnomer, because liberal eugenics has almost nothing to do with the eugenics of the twentieth century. Liberal eugenicists reject coercive measures like state-sponsored sterilization. Instead, they typically assert that it is permissible (and perhaps praiseworthy) for individuals to voluntarily determine their children’s genetic endowment.<sup>4</sup>

The ethical debate surrounding liberal eugenics<sup>5</sup> tends to eclipse the legal debate over the constitutionality of regulating the voluntary use of new reproductive technologies, including genetic engineering.<sup>6</sup> This focus is shortsighted because even if society determines that liberal eugenics is pragmatically bad or morally wrong, constitutional law could easily frustrate attempts to regulate it. The focus is also unexpected because eugenics and reproductive freedom are not new ideas in the United States. Congress, the states, and the Supreme Court have dealt with eugenics and reproductive technologies before.

This Note explores the limits of the state’s power to regulate eugenics. There are two relevant and largely mutually exclusive legal doctrines: one emphasizing substantive due process concerns and the other

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<sup>1</sup> See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 557 (15th ed. 2004).

<sup>2</sup> See, e.g., Albert Gore, Jr. & Steve Owens, *The Challenge of Biotechnology*, 3 YALE L. & POL’Y REV. 336, 338 (1985).

<sup>3</sup> See, e.g., NICHOLAS AGAR, LIBERAL EUGENICS: IN DEFENCE OF HUMAN ENHANCEMENT (2004); ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE (2000); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 427–52 (2000).

<sup>4</sup> For a more precise formulation of what liberal eugenics entails, see Part II, pp. 1582–86.

<sup>5</sup> Compare the sources cited in note 3 with JÜRGEN HABERMAS, THE FUTURE OF HUMAN NATURE (William Rehg et al. trans., 2003) (arguing against liberal eugenics), and MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING (2007) (same).

<sup>6</sup> Rare efforts to analyze the legal questions surrounding liberal eugenics include John B. Atanasio, *The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide*, 53 U. CHI. L. REV. 1274 (1986); and Cass R. Sunstein, *Is There a Constitutional Right To Clone?*, 53 HASTINGS L.J. 987 (2002).

emphasizing the use of the police power to protect public welfare.<sup>7</sup> Analysis under the substantive due process doctrine would sharply limit the state's power to regulate eugenics, while a similar analysis under the police power doctrine would allow eugenics regulation largely as the state sees fit. Because the two doctrines offer conflicting conceptions of state involvement in eugenics, because constitutional precedent offers little or no guidance to decide which doctrine is more relevant, and because both doctrines are amorphous and heavily informed by moral reasoning (if not decided on moral instinct), this Note turns to political philosophy and ethics to help decide what the constitutional limits on state regulation of eugenics should be.<sup>8</sup> Part I offers a brief history of the eugenics movement, focusing on its legal regulation. Part II introduces the reader to the relevant ethics literature, emphasizing the arguments surrounding eugenics that come from the liberal tradition. Part III argues that liberal eugenics is best understood as a fundamental right; some techniques are already covered by substantive due process, and others are sufficiently analogous that they should be protected. Part IV explains why the use of the state's police power to regulate or ban liberal eugenics is fraught with the risk of state-mandated eugenics. Part V turns to moral argument to explain why constitutional law should not countenance state regulation of eugenics except in extremely narrow circumstances. The main reason is that state regulation of eugenics — whether restricting it or requiring it — is antithetical to basic postulates of liberal democracy. Part VI briefly concludes.

### I. THE HISTORY OF EUGENICS

Francis Galton, a cousin of Charles Darwin, coined the term “eugenics” in 1883, defining it as

the science of improving stock, which is by no means confined to questions of judicious mating, but which, especially in the case of man, takes cognisance of all influences that tend in however remote a degree to give to the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have had.<sup>9</sup>

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<sup>7</sup> While the cases emphasizing substantive due process do pay some attention to public safety concerns and vice versa, see B. Jessie Hill, *The Constitutional Right To Make Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 295 (2007), the Supreme Court has consistently placed heavy emphasis in a given case on one or the other, see *id.*, essentially deciding the case by categorization. This Note refers to these doctrines as the “substantive due process doctrine” and the “police power doctrine” for ease of reference.

<sup>8</sup> By “regulation,” this Note refers both to laws that restrict and to laws that promote eugenics practices.

<sup>9</sup> FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 24 n.1 (New York, MacMillan 1883). Though the word “eugenics” was coined in 1883, the concept of eugenics is far more venerable. See, e.g., 5 PLATO, *THE REPUBLIC* 459d–460c.

As Galton's definition suggests, the primary fear of eugenicists was that "inferior" people were reproducing so quickly that they threatened to infect all of society with their undesirable genes.<sup>10</sup> The eugenics movement quickly became popular, particularly in middle- and upper-middle-class America.<sup>11</sup> Eugenics, as a social program, garnered wide support, with advocates staging multiple exhibitions at the American Museum of Natural History in the early twentieth century.<sup>12</sup> "Fitter family" awards were handed out at state fairs to encourage the "best" to breed.<sup>13</sup> Prominent philanthropists such as John D. Rockefeller, Jr. and charities such as the Carnegie Institution funded eugenics research.<sup>14</sup> Even feminist pioneer and Planned Parenthood founder Margaret Sanger thoroughly supported eugenics.<sup>15</sup>

The eugenics movement of the early twentieth century encompassed not only positive eugenics (encouraging "fit" families to reproduce) but also negative eugenics (discouraging the "unfit" from procreating). Negative eugenics commonly took the form of compulsory sterilization laws in the United States. Starting with Indiana in 1907, twenty-nine states enacted compulsory sterilization laws, and a majority of states still had such laws as of 1956.<sup>16</sup> Eugenicists even wrote a model eugenic sterilization statute.<sup>17</sup> All told, states sterilized over 60,000 "unfit" Americans up through the 1970s.<sup>18</sup> Though some courts invalidated these sterilization statutes,<sup>19</sup> the Supreme Court upheld their constitutionality in the infamous case of *Buck v. Bell*.<sup>20</sup>

At issue in *Buck* was a Virginia statute that allowed the state to sterilize a prisoner when it deemed sterilization to be in the prisoner's

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<sup>10</sup> See BUCHANAN ET AL., *supra* note 3, at 40. This fear is alive and well today. See, e.g., *IDIOCRACY* (Twentieth Century Fox 2006).

<sup>11</sup> See NICOLE H. RAFTER, *WHITE TRASH: THE EUGENIC FAMILY STUDIES 1877-1919*, at 12-17 (1988).

<sup>12</sup> See BUCHANAN ET AL., *supra* note 3, at 31.

<sup>13</sup> ROBERT W. RYDELL, *WORLD OF FAIRS: THE CENTURY-OF-PROGRESS EXPOSITIONS* 53 (1993).

<sup>14</sup> SANDEL, *supra* note 5, at 64.

<sup>15</sup> DANIEL J. KEVLES, *IN THE NAME OF EUGENICS* 90 (1995).

<sup>16</sup> SANDEL, *supra* note 5, at 65; James B. O'Hara & T. Howland Sanks, Comment, *Eugenic Sterilization*, 45 *GEO. L.J.* 20, 34 (1956).

<sup>17</sup> MODEL EUGENICAL STERILIZATION LAW (1922), *reprinted in* HARRY HAMILTON LAUGHLIN, *EUGENICAL STERILIZATION IN THE UNITED STATES* 445, 445-52 (1922).

<sup>18</sup> SANDEL, *supra* note 5, at 66, 68.

<sup>19</sup> E.g., *Davis v. Berry*, 216 F. 413, 419 (S.D. Iowa 1914) (invalidating compulsory sterilization statute as a bill of attainder); *Haynes v. Lapeer*, 166 N.W. 938, 941 (Mich. 1918) (invalidating compulsory sterilization statute as violating equal protection); *Smith v. Bd. of Exam'rs of Feeble-Minded*, 88 A. 963, 966-67 (N.J. 1913) (same); *Osborn v. Thomson*, 169 N.Y.S. 638, 645 (Sup. Ct. 1918) (same), *aff'd*, 171 N.Y.S. 1094 (App. Div. 1918); *In re Hendrickson*, 123 P.2d 322, 325, 327 (Wash. 1942) (en banc) (invalidating compulsory sterilization statute as violating procedural due process).

<sup>20</sup> 274 U.S. 200 (1927).

and society's best interests.<sup>21</sup> Virginia alleged that Carrie Buck was a "feeble-minded" inmate, and that allowing her to reproduce would likely lead to epileptic, insane, or feeble-minded offspring. Therefore, sterilizing her was statutorily permissible. Justice Holmes, writing for the Court, analogized the sterilization statute to the draft and to compulsory vaccination laws, arguing that society has the right to demand sacrifices from its citizens to secure the common welfare. Without even addressing whether forced sterilization, as an exercise of the state's police power, violated Buck's substantive due process rights,<sup>22</sup> Justice Holmes upheld the statute. "Three generations of imbeciles are enough," he concluded.<sup>23</sup>

If the Supreme Court was in the eugenicists' camp, one could hardly have expected Congress to escape the eugenics movement. Indeed, Congress, pressured by eugenicists, passed the Immigration Act of 1924,<sup>24</sup> a law that drastically limited immigration from outside the western hemisphere<sup>25</sup> and banned Asian immigration outright.<sup>26</sup> Professor Stephen Jay Gould notes that the deeper purpose of the Act was to keep undesirable immigrants out of the United States, and that "undesirable" referred to those of "inferior" lineage.<sup>27</sup> The legislative history of the Act certainly supports its characterization as a eugenic measure.<sup>28</sup>

<sup>21</sup> *Id.* at 205. The Virginia statute was modeled on the MODEL EUGENICAL STERILIZATION LAW. Paul Lombardo, Eugenic Sterilization Laws, <http://www.eugenicsarchive.org/html/eugenics/essay8text.html> (last visited March 8, 2008).

<sup>22</sup> Buck clearly presented this issue to the Court. See Brief for Plaintiff in Error at 9–11, *Buck*, 274 U.S. 200 (No. 292), reprinted in 25 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 491, 500–02 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>23</sup> *Buck*, 274 U.S. at 207.

<sup>24</sup> Pub. L. No. 139, 68 Stat. 153.

<sup>25</sup> See *id.* § 11.

<sup>26</sup> See *id.* § 13(c); JOHN B. TREVOR, AN ANALYSIS OF THE AMERICAN IMMIGRATION ACT OF 1924, at 19 (1924); Letter from M. Hanihara, Japanese Amb. to the United States, to Charles E. Hughes, Sec'y of State (May 31, 1924), in TREVOR, *supra*, at 64, 65.

<sup>27</sup> STEPHEN JAY GOULD, THE Mismeasure of Man 187, 261–62 (rev. ed. 1996); see also Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 423 (1988).

<sup>28</sup> For example, Senator Ellison DuRant Smith had this to say about the Immigration Act of 1924:

I would like for the Members of the Senate to read that book just recently published by Madison Grant, *The Passing of a Great Race*. Thank God we have in America perhaps the largest percentage of any country in the world of the pure, unadulterated Anglo-Saxon stock; certainly the greatest of any nation in the Nordic breed. It is for the preservation of that splendid stock that has characterized us that I would make this not an asylum for the oppressed of all countries, but a country to assimilate and perfect that splendid type of manhood that has made America the foremost Nation in her progress and in her power . . . .

65 CONG. REC. 5960, 5961 (1924); see also GOULD, *supra* note 27, at 262.

The eugenics of the first half of the twentieth century is rightly considered abhorrent. Couched in faux scientific language, eugenics policies were at bottom motivated more by racism, classism, and colonial subjugation than by any real concern for genetic fitness.<sup>29</sup> The Nazis' justifications for the Holocaust are perhaps the apex of the horrors of the early eugenics movement. Still, eugenics, as a movement to improve the genotypes of future generations, need not entail bigotry and massive violations of human rights. Indeed, several liberal political philosophers renowned for their commitments to human rights and antidiscrimination norms believe that certain forms of voluntary eugenics are morally permissible and possibly laudatory. It is to these thinkers that this Note now turns.

## II. THE LIBERAL EUGENICS MOVEMENT

The twenty-first century has produced a form of eugenics markedly different from twentieth-century eugenics. The movement is called "liberal eugenics" because it advocates for genetic modification of humans on liberal political grounds. Genetic modification includes everything from screening for genes that cause serious disabilities, like Tay-Sachs disease, to genetically engineering smarter children. Liberal eugenics, proponents argue, is founded on traditional liberal values of pluralism, respect for personal autonomy, and egalitarianism.

Although different philosophers take "liberal eugenics" to mean somewhat different things, it is possible to offer a largely coherent picture of liberal eugenics. First, liberal eugenics is based solely on voluntary choices by parents. Second, it countenances the use of genetic techniques<sup>30</sup> to treat or remove disability or enhance ability in one's unborn children. Third, such interventions must be reasonably calculated to add to the possible set of life choices that the child will have or augment the child's ability to pursue her preferred life path.<sup>31</sup> For example, genetically engineering a child to be stupid but strong does not fall within liberal eugenics, but inserting a gene that will only improve strength does.

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<sup>29</sup> See BUCHANAN ET AL., *supra* note 3, at 44–45; Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 515 (1993) ("African-American women, along with Latina (especially Puerto Rican) and Native American women, were subjected to forced sterilization in appalling numbers up through the 1970s, a practice that continues in 'milder' forms today." (footnotes omitted)).

<sup>30</sup> This term includes everything from selective mating to genetic engineering.

<sup>31</sup> This requirement, in addition to ensuring that eugenic interventions enhance the child's autonomy, also ensures that the expected benefits of an intervention outweigh its risks, because an intervention that is more likely to harm the child than to benefit her cannot reasonably be calculated to promote her autonomy.

Professor John Rawls, the founder of modern liberal political philosophy, endorses liberal eugenics in *A Theory of Justice*.<sup>32</sup> Professor Rawls's argument is simple: a rational actor wants to ensure that her descendants have the capabilities to pursue their preferred plans of life. And because enhancing one's children's natural talents neither infringes on others' liberty nor makes anyone worse off, "society is to take steps at least to preserve the general level of natural abilities and to prevent the diffusion of serious defects."<sup>33</sup>

Professor Ronald Dworkin expands on Professor Rawls's point, creating an ethical individualist account of morality. First, "it is objectively important that any human life, once begun, succeed rather than fail."<sup>34</sup> Second, every person has the right to "define, for him, what a successful life would be."<sup>35</sup> Given these two precepts, society should have no qualms about enhancing the capabilities of its children so that they may have a greater choice of life paths and better odds at succeeding at whatever they choose to do. Indeed, morality requires that society do so.<sup>36</sup>

Professors Allen Buchanan, Dan W. Brock, Norman Daniels, and Daniel Wikler offer a more thorough and nuanced position in the Rawlsian vein: genetic enhancements are morally permissible and laudable, while genetic interventions to prevent disabilities are morally obligatory.<sup>37</sup> They begin by discerning that arguments against liberal eugenics often are misinformed by notions of genetic determinism. Noting that genes do not define destiny, but rather that an individual is made up of the interaction between genes and environment, they argue that providing a child with superior genes is no different than providing a child with a superior education.<sup>38</sup> They realize that what makes for the "best" life is a matter left for personal decision,<sup>39</sup> but insist that some "enhancements of capacities and abilities . . . are . . . plausibly a benefit from nearly any evaluative perspective" and corresponding losses of capacities and abilities are unquestionably harms.<sup>40</sup> Parents should be allowed to use eugenic methods to secure those enhancements and avoid those harms, they argue. Furthermore, they claim, justice requires genetic treatments for disabilities to ensure equal opportunity for all — it is not fair that some people have more

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<sup>32</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 92 (rev. ed. 1999).

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

<sup>34</sup> DWORKIN, *supra* note 3, at 448.

<sup>35</sup> *Id.* at 449.

<sup>36</sup> *Id.* at 452.

<sup>37</sup> BUCHANAN ET AL., *supra* note 3, at 302.

<sup>38</sup> *Id.* at 160.

<sup>39</sup> See *id.* at 170 (advocating a child's "right to an open future" (internal quotation marks omitted)).

<sup>40</sup> *Id.* at 168. Improved memory is one example of such an enhancement. *Id.*

life choices or easier lives simply because they won the genetic lottery.<sup>41</sup>

The three major scenarios in which liberal eugenics should not be permitted, according to Professors Buchanan, Brock, Daniels, and Wikler, are when liberal eugenics will “be collectively self-defeating and thus harmful or wasteful for everyone,” when it will be available only to the rich, and when its risks will outweigh its benefits.<sup>42</sup> Additionally, the authors acknowledge serious concerns about the possibility that liberal eugenics might exclude disabled citizens from society and propose hortatory requirements to ensure that eugenics policies avoid this result. Liberal eugenics, in the authors’ view, devalues disability, not the disabled.<sup>43</sup>

Professor Nicholas Agar’s conception of liberal eugenics is “primarily concerned with the protection and extension of reproductive freedom” to include “the choice of certain of your children’s characteristics.”<sup>44</sup> At the core of this vision is the state’s neutrality in determining what constitutes a good life and a corresponding commitment to pluralism;<sup>45</sup> the state has little business intruding into reproductive decisions. Professor Agar’s method is to analogize moral decisions involving biotechnology to moral decisions society has already made. For example, because society has accepted certain genetic arrangements in its citizens, “[i]f we are permitted to leave unchanged a given genetic arrangement in the genomes of our future children, we are also permitted to introduce it.”<sup>46</sup> This approval would apply to traits like eye color or intelligence. Furthermore, because genetic determinism is false and because modification of a child’s traits via environment is morally permissible, it is permissible to introduce a trait via biotechnology so long as it can also be introduced via environment.<sup>47</sup> The only limitation on these choices is that they not restrict the child’s “real freedom.”<sup>48</sup>

Theoretical worries aside, Professor Agar turns to practical objections to genetic technologies, particularly the argument that the risks of implementing such technologies are poorly understood and so monkeying with the human genome might prove catastrophic.<sup>49</sup> The answer to this argument is two-fold: first, nearly every technology that

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<sup>41</sup> See *id.* at 96.

<sup>42</sup> *Id.* at 181–82.

<sup>43</sup> *Id.* at 278.

<sup>44</sup> AGAR, *supra* note 3, at vi.

<sup>45</sup> *Id.* at 5–6.

<sup>46</sup> *Id.* at 99.

<sup>47</sup> *Id.* at 113.

<sup>48</sup> *Id.* at 104. This condition is similar to Professors Buchanan, Brock, Daniels, and Wikler’s dictum that a child has a right to an open future. See *supra* note 39.

<sup>49</sup> AGAR, *supra* note 3, at 159–60.

has had great positive impact on human life would have been thwarted by the kind of caution biotechnology opponents demand;<sup>50</sup> and second, the effects of genetic enhancements, compounded over several generations of application, will result in incalculable benefits to an indeterminate number of future humans.<sup>51</sup>

Not all liberal political philosophers agree that liberal eugenics is morally acceptable, much less required. Professor Jürgen Habermas, for example, believes that the very idea of eugenics is incompatible with liberal democracy's postulates of autonomy and equality. Eugenics, by giving the living power over the not-yet-born, may threaten the "ethical self-understanding of the species" shared by all moral persons — that we are self-determined and responsible beings — because the eugenically produced are forever in a relation of servitude to their parents.<sup>52</sup> Moreover, basic human respect in interpersonal relationships is founded upon self-authorship of one's life, an authorship the eugenically produced cannot claim.<sup>53</sup> Professor Habermas's argument for this point is cryptic: "[P]ractices of enhancing eugenics cannot be 'normalized' in a legitimate way, because the selection of desirable dispositions cannot be *a priori* dissociated from the prejudgment of specific life-projects."<sup>54</sup> He seems to be saying that the fact that a child's enhanced nature was chosen by her parents implies that she cannot live autonomously.

Similarly, Professor Michael Sandel argues that liberal eugenics is objectionable because it is an expression of humans' destructive, Promethean desire for mastery — in this case, mastery over their children. He takes particular aim at parents' desire to produce designer or enhanced children, seeing this desire as a symptom of the modern trend toward hyper-parenting, a trend he views as callow.<sup>55</sup> He believes that we should view children as gifts and be open to whatever form those gifts take, lest we risk losing the unconditional love parents have for their children.<sup>56</sup> The other problem with the drive to mastery is the "explosion . . . of responsibility": if we become "self-made men" via biotechnology, we can be held responsible for a host of things that heretofore were the product of chance.<sup>57</sup> As Professor Sandel puts it, "Today when a basketball player misses a rebound, his coach can blame him for being out of position. Tomorrow the coach may blame

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<sup>50</sup> *Id.* at 162.

<sup>51</sup> *Id.* at 163.

<sup>52</sup> HABERMAS, *supra* note 5, at 40–42.

<sup>53</sup> *See id.* at 54–55.

<sup>54</sup> *Id.* at 66.

<sup>55</sup> *See* SANDEL, *supra* note 5, at 82–83.

<sup>56</sup> *See id.* at 45. Professor Sandel calls this capacity "openness to the unbidden." *Id.*

<sup>57</sup> *Id.* at 87.

him for being too short.”<sup>58</sup> Analogizing to insurance markets, in which risk pooling is possible because individuals are blind to and cannot control their risk factors, Professor Sandel argues that the ability to choose all sorts of traits will make us less willing to throw in our lot with others, eroding social solidarity.<sup>59</sup> Of course, this argument assumes that social solidarity and openness to the unbidden are moral virtues; Professor Sandel ultimately admits that traditional categories of liberal political thought do not adequately capture the moral difficulties of liberal eugenics.<sup>60</sup>

### III. LIBERAL EUGENICS AS A FUNDAMENTAL RIGHT

Reproductive autonomy has long been a fundamental right, making restrictions on it subject to strict scrutiny.<sup>61</sup> Reproductive autonomy certainly includes whether and when a woman will bear a child;<sup>62</sup> the trickier question is whether it includes *what sort* of child she will bear. In some cases, the answer is clearly yes, but it is far from clear that a woman has unlimited discretion regarding her child’s traits. This Part explores which eugenics techniques are or should be protected by substantive due process and what sorts of eugenics regulations are constitutional.<sup>63</sup>

A variety of crude eugenics methods are protected by the Constitution. For example, it would almost certainly be unconstitutional for the state to prohibit citizens from dating eugenically. Eugenic dating is simply dating with the goal of finding a mate who will provide desirable genes for one’s offspring, whether such genes are for hair color or for intelligence. As the Supreme Court has recognized, substantive due process protects “personal decisions relating to marriage, procreation, . . . [and] family relationships.”<sup>64</sup> Dating — particularly dating

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<sup>58</sup> *Id.*

<sup>59</sup> *See id.* at 89–92.

<sup>60</sup> *See id.* at 96.

<sup>61</sup> *See, e.g.,* Stenberg v. Carhart, 530 U.S. 914, 920–21 (2000); Carey v. Population Servs. Int’l, 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

<sup>62</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); *see also* *Griswold*, 381 U.S. at 485–86.

<sup>63</sup> To reiterate an earlier point, “regulations” in this Note refers to both restrictions on the practice of eugenics as well as affirmative mandates to practice it. The analysis in this Part does not address regulations incidental to eugenics, like those setting standards for sanitary conditions where eugenic abortions are performed or requiring genetic counselors to have certain credentials. Of course, there may well be regulations ostensibly incidental to the practice of eugenics that nonetheless would prove fatal to the practice of liberal eugenics. Assuming a substantive due process right to practice liberal eugenics exists, such regulations would be unconstitutional if they constituted an undue burden on the exercise of the right to engage in liberal eugenic techniques. *Cf. Casey*, 505 U.S. at 874 (discussing such regulations in the context of abortion).

<sup>64</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citing *Casey*, 505 U.S. at 851).

undertaken with the intent of finding a mate — comfortably fits within this protection. Therefore, a statute purporting to restrict or ban dating decisions would have to survive strict scrutiny, to say nothing of intense political and popular opposition.

Eugenic abortions are also largely constitutionally protected. Consider a case where a woman realizes, probably through genetic testing, that her unborn child is afflicted with a serious genetic disease, like Tay-Sachs. In cases where the fetus is not yet viable, the woman has a constitutional right to abort the fetus.<sup>65</sup> The law does not question her motivations; it simply protects her abortion rights.

Similarly, prospective parents should have a substantive due process right to engage in preimplantation genetic diagnosis, which entails conceiving embryos via in vitro fertilization and then screening them for genetic abnormalities. The argument is that a parent's right to avoid reproducing for any reason implies that a parent has a right to avoid reproducing for a particular reason, including unwanted genes.<sup>66</sup> And, of course, for the parent to avail herself of this right, she needs to have access to genetic testing.<sup>67</sup> Alternatively, the right to preimplantation genetic diagnosis could rest on rights to perform in vitro fertilization and genetic screening. Though there has not been definitive recognition of these rights, many judges and scholars believe that prohibiting in vitro fertilization would be unconstitutional,<sup>68</sup> and one court has held that a woman has a substantive due process right to screen her fetus for genetic abnormalities.<sup>69</sup>

It is more difficult — but still possible — to find a right to genetically engineer one's child. In *Washington v. Glucksberg*,<sup>70</sup> the Supreme Court said that substantive due process rights must be “deeply rooted in this Nation's history and tradition”<sup>71</sup> and must be carefully described.<sup>72</sup> While the clear intent of *Glucksberg* was to slow down the recognition of substantive due process rights,<sup>73</sup> recognizing a right to genetic engineering does not require a court to recognize any new

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<sup>65</sup> *Casey*, 505 U.S. at 846.

<sup>66</sup> John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 427 (1996).

<sup>67</sup> See *id.* The right to utilize genetic screening is a negative right — the state has no obligation to fund or otherwise make available such screening. *Id.* at 427 n.26.

<sup>68</sup> E.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 523 (1989) (O'Connor, J., concurring); Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2793 (2005).

<sup>69</sup> *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1376–77 (N.D. Ill. 1990).

<sup>70</sup> 521 U.S. 702 (1997).

<sup>71</sup> *Id.* at 720–21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted).

<sup>72</sup> *Id.* at 721.

<sup>73</sup> See *id.* at 720.

right, because genetic engineering falls into existing substantive due process categories.

The decision whether to genetically modify an embryo implicates three deeply rooted rights already recognized by the Court: the “right of procreation without state interference”;<sup>74</sup> the right “to direct the upbringing and education” of one’s children,<sup>75</sup> including by providing them with advantages not available to all;<sup>76</sup> and the guarantee of marital privacy,<sup>77</sup> which extends “to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.”<sup>78</sup> The right of procreation does more than protect traditional sexual intercourse; it also encompasses access to new procreative technologies.<sup>79</sup> Regarding the right to educate one’s children, consider a parent who wants to provide his child with an extremely accelerated math curriculum. That education requires that the child possess a certain level of intelligence, and therefore the right to genetically engineer a math genius is required to ensure that the parent can avail himself of the more general right to educate his child as he sees fit.<sup>80</sup> And finally,

<sup>74</sup> *Maheer v. Roe*, 432 U.S. 464, 472 n.7 (1977) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

<sup>75</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *accord Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>76</sup> *Robertson*, *supra* note 66, at 424 n.12 (deriving such a right from *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972)).

<sup>77</sup> *Glucksberg*, 521 U.S. at 720 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

<sup>78</sup> *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (citations omitted); *see Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The rights to conceive and to raise one’s children have been deemed essential, basic civil rights of man, and rights far more precious than property rights.” (alterations omitted) (citations omitted) (internal quotation marks omitted)).

<sup>79</sup> *See Griswold*, 381 U.S. at 485–86 (holding that the right to use contraceptives is protected by substantive due process); *see also Lifchez v. Hartigan*, 735 F. Supp. 1361, 1376–77 (N.D. Ill. 1990) (holding that the reproductive freedom granted by *Roe v. Wade* includes the right to use experimental procreative technologies). This right to use new procreative technologies can also be inferred from other Supreme Court precedent. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court held that “[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* at 453 (emphasis removed). That decision may well hinge on access to reproductive technologies, such as in vitro fertilization, caesarean sections, amniocentesis, and oral contraceptives. And when that is the case, the Court has found a substantive due process right to employ reproductive technologies. *See Griswold*, 381 U.S. at 485–86; *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 523 (1989) (O’Connor, J., concurring) (implying that prohibiting the use of in vitro fertilization would be unconstitutional); *Maheer*, 432 U.S. at 472 n.7 (“[T]he right of procreation without state interference has long been recognized as ‘one of the basic civil rights of man . . . .’” (quoting *Skinner*, 316 U.S. at 541)); *cf. J.R. v. Utah*, 261 F. Supp. 2d 1268, 1298 (D. Utah 2003) (holding unconstitutional a Utah statute that prevented the genetic parents of a child born to a surrogate mother from being recognized as the child’s legal parents).

<sup>80</sup> *See Laurence H. Tribe, Reflections on Unenumerated Rights*, 9 U. PA. J. CONST. L. 483, 489–90 (2007) (describing prophylactic rights as “rights recognized (or, in truth, boldly posited) . . .

the decision of whether to genetically engineer one's child surely is intimate enough to fall within the right to marital privacy.<sup>81</sup>

But in *Lawrence v. Texas*,<sup>82</sup> the Supreme Court recognized a substantive due process right to sexual privacy without even mentioning *Glucksberg* and seemingly rejected *Glucksberg's* holding that only deeply rooted rights were entitled to substantive due process protection.<sup>83</sup> Instead, the new mode of analysis seems to require balancing the state's regulatory interests against the individual's liberty interests.<sup>84</sup> Can a state articulate sufficiently compelling interests to overcome the individual liberty interests at stake, such as reproductive freedom, child rearing, and general privacy? First, the state may argue that liberal eugenics, or genetic engineering more generally, is unethical. But *Lawrence* emphatically rejected the argument that moral disapproval of a practice can be the sole justification for regulating that practice.<sup>85</sup> Second, the state may urge that protecting the health and safety of subject embryos and their mothers outweighs women's liberty interests. But were that true, then the state could also require women to submit to eugenic policies when and if it decides that eugenics is a good thing.<sup>86</sup>

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to prevent the 'specific rights' expressly identified and enumerated in constitutional texts from becoming 'less secure'). Furthermore, the Court wrote of the right to control one's children's upbringing in broad terms. Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934-35 (2004) ("[*Meyer* and *Pierce's*] language bespoke the authority of parents to make basic choices directing the upbringing of their children. Those judicial decisions did not describe what they were protecting merely as the personal activities of sending one's child to a religious school (*Pierce v. Society of Sisters*) or a private military academy (*Pierce v. Hill Military Academy*) or of hiring a teacher to educate one's child in the German language (*Meyer*).") (footnotes omitted).

<sup>81</sup> See *Eisenstadt*, 405 U.S. at 453; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n.76 (1973) ("[T]he right of procreation is among the rights of personal privacy protected under the Constitution." (citing *Roe*, 410 U.S. at 152)).

<sup>82</sup> 539 U.S. 558 (2003).

<sup>83</sup> See *id.* at 578-79 ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96 (2003) ("[*Lawrence*] simply shatters, with all the heartfelt urgency of deep conviction, the paralyzing carapace in which *Glucksberg* had sought to encase substantive due process.").

<sup>84</sup> Post, *supra* note 83, at 96; see also Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas, 2002-2003 CATO SUP. CT. REV.* 21, 36 (noting that *Lawrence* employed "a presumption of liberty that requires the government to justify its restriction on liberty, instead of requiring the citizen to establish that the liberty being exercised is somehow fundamental") (internal quotation marks omitted).

<sup>85</sup> *Lawrence*, 539 U.S. at 577-78 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

<sup>86</sup> See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (upholding compulsory eugenic sterilization statute).

The state interest that might be compelling enough, under *Lawrence* or traditional strict scrutiny, to justify regulation of liberal eugenics is combating discrimination against protected classes.<sup>87</sup> Congress is probably within its power to ban the genetic modification of a child's racial phenotype and might be within its power to outlaw sex selection. Congress's authority to ban the former stems from the Thirteenth Amendment, which grants Congress the power to pass laws to abolish the badges and incidents of slavery.<sup>88</sup> For example, Congress could rationally determine that a black couple's decision to spare their offspring the burdens of racial discrimination by engineering them to be white perpetuates the belief of black inferiority because, at the very least, choosing to have a white child promotes the belief that white children are more desirable than black children.<sup>89</sup> A state might have a similar power to regulate racial selection under the Fourteenth Amendment because it could assert a compelling interest in ending the racial discrimination that racial selection would promote.<sup>90</sup> With regard to sex selection, Congress (or a state legislature) could argue it has significant interests in seeking to end sex discrimination in society and prevent the grave social consequences of an unbalanced male/female ratio. The strength of these interests derives largely from the fact that the Supreme Court has held classifications based on sex to be semi-suspect.<sup>91</sup> Of course, these areas where regulation could be permissible are quite limited.

Assuming that the right to engage in liberal eugenics free from state interference exists, does the state have an obligation to fund eugenic procedures for indigent parents? Some, concerned that the availability of liberal eugenics would exacerbate inequalities between the rich and the poor, might support such an obligation.<sup>92</sup> But the Supreme Court's decisions in the context of abortion suggest otherwise. In a se-

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<sup>87</sup> This result accords with the account of Professors Buchanan, Brock, Daniels, and Wikler, which disdains biotechnological solutions to social problems like racism. See BUCHANAN ET AL., *supra* note 3, at 83–84, 283–84.

<sup>88</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440–43 (1968).

<sup>89</sup> Of course, if this is true, why could Congress not mandate that the children of black parents be genetically engineered to be white? That mandate, by eradicating race, would substantially lessen if not totally eradicate the badges and incidents of slavery. Of course, this possibility is deeply disturbing. See *infra* Part V, pp. 1595–99.

<sup>90</sup> *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“A compelling interest exists in avoiding racial isolation . . . . The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.”); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (finding a substantial state interest in promoting cross-racial understanding and breaking down racial stereotypes, and holding that these interests, coupled with other educational benefits, allowed a narrowly tailored affirmative action program to survive strict scrutiny).

<sup>91</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>92</sup> See, e.g., Attanasio, *supra* note 6, at 1342.

ries of 1977 cases, the Court upheld laws restricting funding for elective abortions to indigent women,<sup>93</sup> and it later held that the government could refuse to fund even medically necessary abortions.<sup>94</sup> As the Court made clear in *Harris v. McRae*,<sup>95</sup> reproductive freedom is a negative right, not a positive right to government entitlements to reproductive procedures.<sup>96</sup> Furthermore, parents have long had the right to provide their children with advantages not available to all, from private schooling to expensive health care.<sup>97</sup> By analogy, liberal eugenic procedures are elective procedures for which the state is under no compulsion to pay. Moreover, the argument for state funding for liberal eugenics is even weaker than that for state-funded abortions. At stake in the abortion context are the woman's compelling interests in her life, health, and safety.<sup>98</sup> However, the law does not recognize these interests in an embryo, because an embryo is not a legal person.<sup>99</sup> Put differently, the embryo has no constitutional right to be born free from genetic abnormalities or with genetic advantages, meaning that any right to state-funded liberal eugenics must rest solely on the mother's interest in having affirmative access to elective reproductive technologies. Because the mother has no such interest, the state may refuse to fund liberal eugenic technologies in all circumstances, however deplorable that may be.

Finally, to what extent can the state pursue a pro-liberal eugenics public policy? Under the Supreme Court's reproductive rights cases, only to the extent of advocacy; the state probably cannot require women to submit their embryos and fetuses to genetic testing or genetic engineering. The Court has strongly intimated a right to refuse unwanted lifesaving medical treatment,<sup>100</sup> and it would be odd if this right did not extend to treatments that were not lifesaving. Furthermore, the Court's controlling opinion in *Casey* said that it was permissible for a state, in furtherance of a pro-life policy on abortion and procreation, to fully inform a woman of the potential risks and downsides of abortion *so long as* she was able to make the "ultimate" deci-

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<sup>93</sup> *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

<sup>94</sup> *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>95</sup> *Id.*

<sup>96</sup> *See id.* at 316.

<sup>97</sup> Robertson, *supra* note 66, at 424 n.12.

<sup>98</sup> *See Harris*, 448 U.S. at 316 ("[A] woman's interest in protecting her health was an important theme in [*Roe v. Wade*.]"); *cf. Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (forbidding post-viability regulation of abortion when "it is necessary . . . for the preservation of the life or health of the mother" (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992)) (internal quotation marks omitted)).

<sup>99</sup> *Roe v. Wade*, 410 U.S. 113, 158 (1973).

<sup>100</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990)).

sion, because doing so would not substantially burden the woman's right to abort.<sup>101</sup> Applying the same reasoning, even if the right to choose or reject liberal eugenics is fundamental, the state could tout the benefits of genetic screening and engineering to future mothers.<sup>102</sup> But forcing a woman to submit to genetic screening or genetic engineering constitutes a substantial burden on her right to decide whether to engage in liberal eugenics, both because of the techniques' invasiveness<sup>103</sup> and because doing so would unduly influence the woman's decision.<sup>104</sup> However, there is another line of cases, defining the state's power to ensure the public welfare, that suggests that the state does have authority to regulate eugenic modifications to embryos.

#### IV. REGULATING EUGENICS VIA THE POLICE POWER

Though the substantive due process doctrine seems to protect liberal eugenics from state regulation, analysis under the police power doctrine cuts the other way. The police power is the state's ability to ensure the public health and protect the public safety. The landmark case of *Jacobson v. Massachusetts*<sup>105</sup> held that a state's action to preserve the public welfare is a valid exercise of its police power subject only to rational basis judicial review. At issue in *Jacobson* was a state statute requiring smallpox vaccinations; Jacobson contended that such vaccinations were not proven to be medically effective and could have serious risks including death.<sup>106</sup> The Court rejected these arguments, concluding that the state's determinations of the risks and benefits of compulsory vaccination were definitive unless they could be shown to be arbitrary or oppressive.<sup>107</sup> Because there was at least some medical evidence supporting the state, the Court held that the compulsory vac-

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<sup>101</sup> See *Casey*, 505 U.S. at 877-78.

<sup>102</sup> Similarly, the state could likely tout the dangers and disadvantages if it wished to oppose eugenics.

<sup>103</sup> To genetically screen or engineer a naturally conceived embryo, a DNA sample would have to be taken from the embryo, requiring some sort of penetration of the woman's body. Furthermore, there is substantial psychic invasiveness in forcing a woman to confront her child's genotype.

<sup>104</sup> A law requiring genetic screening would resemble laws that require a woman to view a sonogram of her fetus before aborting it. The trouble with sonogram requirements is that some women are unable to abort after seeing a sonogram, see Neela Banerjee, *Church Groups Turn to Sonogram To Turn Women from Abortions*, N.Y. TIMES, Feb. 2, 2005, at A1, which arguably makes sonogram requirements substantial (and hence unconstitutional) burdens. The only court to have addressed such a statute struck it down, but the decision predated *Casey*. See Margaret S. v. Treen, 597 F. Supp. 636, 650 (E.D. La. 1984), *aff'd sub nom.* Margaret S. v. Edwards, 794 F.2d 994 (5th Cir. 1986).

<sup>105</sup> 197 U.S. 11 (1905).

<sup>106</sup> *Id.* at 36.

<sup>107</sup> See *id.* at 38.

ination program did not violate the Fourteenth Amendment.<sup>108</sup> In the decades since *Jacobson*, the Court has repeatedly deferred to legislative judgments about the risks and benefits of public health laws when the science has been uncertain.<sup>109</sup> Eugenics seems no different. If the state determines that liberal eugenics is a threat to the public, then it can use its police power to ban or restrict liberal eugenics.

But *Jacobson* may prove too much: if the police power extends to prohibiting liberal eugenics to protect the public health, then it also extends to *mandating* eugenics to protect the public health.<sup>110</sup> Indeed, the analogy between protective vaccination and eliminating genes in embryos linked to diseases is strong. At the physical level, both methods of disease prevention are fundamentally about manipulating the production of proteins in the subject. A vaccine works by inducing the body to produce certain proteins, called antibodies; genetic engineering works by changing the molecules that code for proteins. At the legal level, the reason the state can mandate vaccination is to “protect society from the dangers of . . . communicable disease.”<sup>111</sup> That same justification applies to various genetic diseases — like Tay-Sachs — communicable not via the air or bodily fluids but via the germ-line.

For that matter, why could the state not mandate genetic interventions that would result in stronger immune systems? Such interventions would certainly protect society against communicable diseases, including those that we currently vaccinate against, by improving the public’s general immunity. And just like vaccination, a genetic technique that improves immunity is most effective when everybody (or nearly everybody) is treated; state action here creates a network effect.

In addition to ensuring the public health, the police power allows the state to protect the public safety, or, as the Supreme Court has described it, “to protect society from the dangers of significant antisocial acts.”<sup>112</sup> Protecting the public is such a strong interest that the Court

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<sup>108</sup> *Id.* at 27–31.

<sup>109</sup> See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1636 (2007) (“The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”).

<sup>110</sup> Recall *Buck v. Bell*, 274 U.S. 200, 207 (1927), in which the Supreme Court upheld eugenic sterilization laws by analogy to *Jacobson*. Nearly a century ago, the New Jersey Supreme Court realized that allowing the state to use its police powers to pursue eugenic ends allowed power without limit. See *Smith v. Bd. of Exam’rs of Feeble-Minded*, 88 A. 963, 966 (N.J. 1913) (“If the enforced sterility of [the feeble-minded and epileptics] be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open to which it would be difficult to assign a legal limit.”). *Buck* theoretically remains good law. See *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001).

<sup>111</sup> *O’Connor v. Donaldson*, 422 U.S. 563, 583 (1975).

<sup>112</sup> *Id.*

has often held that it trumps personal liberty.<sup>113</sup> Suppose scientists determine that certain genes predispose a person to violence or other “significant antisocial acts.”<sup>114</sup> Would not the state be within its power to compel pregnant women to screen their fetuses for these genes, and, if they are found, to require that they be replaced?<sup>115</sup> This intervention could reasonably be expected to save lives or at least reduce injuries, placing it squarely within the state’s duty to safeguard the public.

Last, but not least, a state could use its police power paternalistically, deciding that children are better off having undergone genetic screening and, if necessary, genetic treatments — regardless of whether their parents agree. The state interest here is in protecting particular future citizens from being harmed, specifically from being born with debilitating conditions like Tay-Sachs disease or Edwards syndrome.<sup>116</sup> States already have authority to act in a child’s best interest when the parents cannot or when they fail to do so, such as in divorce cases or in cases of child abuse or neglect.<sup>117</sup> And the Supreme Court has long held that restrictions on parental freedoms aimed at promoting children’s interests are permissible exercises of the police power, even in the face of countervailing First Amendment interests.<sup>118</sup> Indeed, current federal and state child abuse laws will arguably make failing to screen for and correct serious genetic diseases illegal when such diseases become treatable.<sup>119</sup> Once a parent has “abused” her child by

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<sup>113</sup> *E.g.*, *Kelley v. Johnson*, 425 U.S. 238, 247–48 (1976) (upholding a state’s regulation of police officer hair length because the state’s police power trumped the officers’ Fourteenth Amendment liberty interests); *Compagnie Française de Navigation à Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 393 (1902) (dismissing a Fourteenth Amendment challenge to a state quarantine law).

<sup>114</sup> Current research suggests this may be the case. *See* Essi Viding & Uta Frith, *Genes for Susceptibility to Violence Lurk in the Brain*, 103 *PROC. NAT’L ACAD. SCI.* 6085, 6085 (2006), available at <http://www.pnas.org/cgi/reprint/103/16> (discussing research on the monoamine oxidase A gene).

<sup>115</sup> Professors Buchanan, Brock, Daniels, and Wikler suggest the answer is “yes.” *BUCHANAN ET AL.*, *supra* note 3, at 173.

<sup>116</sup> If the state has an interest in protecting merely potential human life from harm, *see* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992), then a fortiori it has an interest in protecting life that is slated to be born from harm.

<sup>117</sup> *See, e.g.*, *Wilkins v. Ferguson*, 928 A.2d 655, 667 (D.C. 2007) (noting, in a dispute over the visitation rights of an abusive father, that “the court must act as *parens patriae* in the child’s interest, and must not expose her to serious risk of harm” (quoting *In re S.L.E.*, 677 A.2d 514, 519 (D.C. 1996) (alteration omitted))).

<sup>118</sup> *See* *Prince v. Massachusetts*, 321 U.S. 158, 169–70 (1944) (upholding a child labor law against a free exercise challenge).

<sup>119</sup> The Child Abuse Prevention and Treatment Act, codified as amended at 42 U.S.C. §§ 5101–5116i (2000), defines “child abuse and neglect” as “at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.” *Id.* § 5106g(2). Thirty-six states define abuse to include “acts or circumstances that threaten the child with harm or create a substantial risk of harm to the child’s health or welfare.” *CHILD WELFARE INFO. GATEWAY*, U.S. DEP’T OF HEALTH AND HUMAN SERVS., DEFINI-

failing to treat serious genetic diseases, the state may have the power to terminate parental rights and take the child in as a ward of the state.<sup>120</sup> What this means for an unborn child is not settled, but it is certainly plausible that courts will conclude that the state has the power (if not the duty) to treat serious genetic diseases *in utero* if the parents cannot or will not. In the future, even failing to genetically enhance a child might be seen as contrary to the child's best interests and hence worthy of state intervention.

In short, giving the state the authority to regulate eugenics via the police power is fraught with danger and unwanted consequences. For this reason, courts would be wise to analyze eugenics regulations not under the police power doctrine, but under the substantive due process doctrine. At the very least, when substantive due process and the police power conflict, substantive due process should trump.

#### V. WHAT'S REALLY WRONG WITH EUGENICS?

Forcing parents to engage in simple procedures to prevent Tay-Sachs may strike few as troubling because parents who would allow their children to be born with Tay-Sachs when that result could have been easily avoided seem derelict. Moral intuition suggests that the case for tinkering with genes is much stronger when we seek to protect individual children than when we seek to "better" society. This distinction differs from the distinction made by advocates of liberal eugenics. Despite what these advocates claim, the voluntariness of the eugenic intervention is not the key to determining whether the intervention is ethically permissible (or laudable or obligatory); the key factor is the goal of the intervention. If the intervention aims to improve an individual's quality of life, it is permissible (or perhaps mandatory in the cases of avoiding extreme harm, like being born with Tay-Sachs). But if the intervention is intended to improve the collective — humanity, society, or the gene pool — then it is impermissible.

Consider four categories of eugenic interventions: (1) voluntary interventions by individuals aimed at improving the quality of life of another individual, typically one's child; (2) interventions by either the

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TIONS OF CHILD ABUSE AND NEGLECT: SUMMARY OF STATE LAWS 2 (2007), available at [www.childwelfare.gov/systemwide/laws\\_policies/statutes/define.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf); see also BUCHANAN ET AL., *supra* note 3, at 240–41 (arguing that the greater the risk of the child being born with a serious genetic defect, the greater the moral wrong in not testing for and correcting that defect).

<sup>120</sup> State standards vary, but the typical statute allows for termination of parental rights when the parent seriously injures the child by conduct or neglect; some statutes allow for termination of parental rights for exposing the child to a substantial risk of harm. See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: SUMMARY OF STATE LAWS 5–54 (2004), available at [www.childwelfare.gov/systemwide/laws\\_policies/statutes/groundtermin.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf).

government or private groups to encourage the improvement of society's stock; (3) coercive interventions by the government aimed at improving the quality of life of an individual; (4) coercive interventions by the government aimed at improving society's stock. Interventions in category one, such as sperm shopping or splicing a few choice genes into one's child, are the least morally problematic — only nonliberal and religious objections attach to such interventions.<sup>121</sup> Interventions in category four, by contrast, are universally condemned — the Holocaust and U.S. states' compulsory sterilization statutes are examples. Interventions in category three should not be too troubling, because they are only objectionable insofar as paternalistic laws are objectionable.<sup>122</sup> Finally, interventions in category two are morally suspicious. Examples of category two interventions include the "fitter family" fairs of the 1920s, the Nazis' propaganda encouraging Aryans to reproduce, and offers of material inducements for "desirable" members of society to reproduce.<sup>123</sup> These are not activities the government should be endorsing, much less planning and subsidizing.

The real trouble with eugenics is not that it can be coercive; it is that the state can use it to create the citizens it wants to govern. This idea is deeply offensive to democracy and liberalism, which posit that the state exists to serve the needs of its members — that is, individual humans — not vice versa. It is axiomatic to liberal democracy that the governed should choose the government, not vice versa. Professor Habermas is correct in asking whether eugenics threatens the very assumptions of liberal democracy.<sup>124</sup>

Consider Aldous Huxley's exposition of this scenario in *Brave New World*<sup>125</sup>: the state manufactures citizens, controlling their development from conception so that they turn out suitable for the roles that the state needs filled. The society in *Brave New World* offers many advantages: social stability, the complete satisfaction of citizens' desires, and economic sufficiency for all. Yet regardless of the advantages of the society in *Brave New World* — and they are compelling — its government is abhorrent.

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<sup>121</sup> See SANDEL, *supra* note 5, at 96.

<sup>122</sup> A variety of paternalistic laws are widely accepted, from seat belt laws to compulsory education laws, but there is admittedly heightened concern when the state seeks to make a paternalistic decision regarding a very personal subject, such as childbearing. Still, this is not a problem with eugenics as such, but rather with invasive paternalism.

<sup>123</sup> Singapore experimented with this approach in an attempt to boost national IQ. It offered university graduates tax breaks for having children, while giving poor and uneducated women \$5,000 toward buying an apartment if they agreed to be sterilized. See Sharon M. Lee et al., *Fertility Decline and Pronatalist Policy in Singapore*, 17 INT'L FAM. PLAN. PERSP. 65, 67 (1991).

<sup>124</sup> See HABERMAS, *supra* note 5, at 40–41; see also AGAR, *supra* note 3, at 132.

<sup>125</sup> ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

Why is this the case? In the liberal tradition, the legitimacy of the government depends on the consent of the governed. Liberalism assumes that the citizens exist prior to the state, whether in fact or by hypothesis, and that they create the state to advance their own interests. No moral agent would enter into a social contract that would reduce him to a means to further the state's ends — it would simply be irrational to do so because it would involve subordinating one's own interests to the state's. The *Brave New World* scenario, which flips the liberal account on its head, is so deeply disturbing because it shows humans reduced to mere means. Eugenics need not rise to *Brave New World* levels to be troubling; there is still something disturbing about a government seeking to mold — rather than manufacture — the next generation. Any attempt to directly influence the composition of future generations amounts to the state's choosing the governed, and that is not acceptable in a liberal democracy.

Because eugenics that is aimed to serve the state's interest is fundamentally incompatible with liberal democracy, improving society's stock should not be considered a legitimate state interest, and therefore it should be beyond the state's power to enact such eugenic policies. The problem, so far as the law is concerned, is that it is exceedingly difficult to determine the state's intent behind a given policy.<sup>126</sup> For nearly every eugenic policy the state wants enacted for collective ends (categories two and four), it could offer a paternalistic justification, turning impermissible policies into seemingly permissible category-three interventions. As a prophylactic measure, then, constitutional law should forbid the state from pursuing eugenic policies, except in cases where the state's interest in protecting an individual is so strong that it cannot be dismissed as a smokescreen for an impermissible purpose — protecting babies from Tay-Sachs and similarly debilitating genetic disabilities might be the only such cases. Otherwise, only category-one eugenics — which is free from state involvement — and category-two eugenic interventions that are not state-sponsored<sup>127</sup> should be permitted.

Aside from offending liberal democratic principles, what makes category three and category four eugenics different from standard public health measures like water fluorination or vaccination? There are three distinctions. First, public health measures are aimed at the good of individuals, with collective benefits being incidental. And though eugenics policies also may be aimed at promoting individuals' welfare,

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<sup>126</sup> Cf. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (noting the difficulty in establishing a state's discriminatory intent with respect to racial discrimination).

<sup>127</sup> For example, a private Aryan supremacy group advocating for Aryan-Aryan marriages would be permissible under this analysis.

there is too great a risk that the state will couch impermissible collective eugenic ends in public health rationales, especially considering that past eugenics movements were directed at just such impermissible ends.<sup>128</sup> This leads to the second distinction: the repulsive history of the eugenics movement warrants extreme skepticism toward state-sponsored eugenics; no genocides have ever occurred in the name of water fluorination. The third distinction between public health measures and eugenic measures lies in their respective results. Public health measures, at least as traditionally conceived, do not allow the state to create the citizens it wishes to govern.

Yet there is a sphere in which we think it acceptable and even laudable for the state to mold the citizens it will govern: compulsory education. In part, compulsory education is for the benefit of society, in that citizens need to be educated for society to function. This purpose is troubling insofar as it sets compulsory education as an activity that we think is good despite the fact that it serves a collective end, because via compulsory education the state does, in a real sense, mold the future citizens it will govern. If such molding is acceptable via education, why is it unacceptable via eugenics?

One possible rejoinder is that eugenic interventions are more effective at molding (or can mold people more) than education. Though the nature/nurture debate is far from resolved, behavioral genetics research suggests that shared environment does not account for variations in personality, but genes do.<sup>129</sup> Because compulsory education by definition would be an environmental factor shared by all citizens, it follows that genes are more important than education in determining personality.

The deeper objection is that, although we accept a certain amount of molding as necessary for society to function, we accept only that amount that is necessary; any further molding is a gratuitous infringement on individual autonomy.<sup>130</sup> Some forms of compulsory education are indeed objectionable, like compulsory education that trains students to acquiesce unthinkingly to the government or that indoctrinates students into a particular faith.<sup>131</sup> Such teachings are not necessary for a working democracy. Professor Rawls's first and most

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<sup>128</sup> See *supra* Part I, pp. 1579–82.

<sup>129</sup> Steven Pinker, *Why Nature & Nurture Won't Go Away*, DÆDALUS, Fall 2004, at 5, 14–15. But see BUCHANAN ET AL., *supra* note 3, at 160.

<sup>130</sup> The standard liberal argument for the social necessity of education is the instruction of values that underpin liberal society, such as autonomy and justice. See, e.g., RAWLS, *supra* note 32, at 450–52; see also 2 PLATO, THE REPUBLIC 376c–376d (agreeing that education is strongly related to basic social values like justice and implying that proper education is required to create a just society).

<sup>131</sup> Cf. *Engel v. Vitale*, 370 U.S. 421 (1962) (holding compelled prayer in public schools unconstitutional).

important principle of liberal justice is that everyone is entitled to the most extensive scheme of equal basic liberties compatible with a similar scheme for all.<sup>132</sup> A corollary to this principle is that only infringements on liberty that are necessary for the orderly functioning of society are just. Therefore, basic education can be made compulsory in a way that eugenics cannot.

## VI. CONCLUSION

Liberal political thought can muster little opposition to eugenics, save where the state seeks to control the population (present and future) with it, and in many cases liberalism supports the use of certain eugenics techniques. The substantive due process doctrine, in the form of reproductive rights, largely protects parents' choices to employ or not employ eugenic techniques, with rare paternalistic exceptions for choices that pose deadly risks to the child. But substantive due process does not do enough, because if a case is instead analyzed under the police power doctrine, the state will be free to employ category two and category four eugenics to choose the future polis. Courts must be wary of the dangers of extending the police power to include eugenics and must resist government efforts to exert control over the human gene pool. Although there may indeed be potential public health benefits to regulating eugenics, and although paternalistic eugenics is theoretically permissible, the history of the eugenics movement strongly suggests that eugenic state action will be misguided and will have hidden impermissible motives. Eugenics regulations should therefore largely be prohibited, for as every legal thinker knows, the life of the law is not logic, but experience.<sup>133</sup> State involvement in the genetic future of humanity has proven unwise, misguided, and iniquitous before, and courts should be wary of it today.

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<sup>132</sup> RAWLS, *supra* note 32, at 266.

<sup>133</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Transaction Publishers 2005) (1881). There is delicious irony in deploying Holmes, the legal thinker, against Justice Holmes, the author of *Buck v. Bell*.