Reconciling Liberty and Equality in the Debate over Preimplantation Genetic Diagnosis

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OVER PREIMPLANTATION GENETIC DIAGNOSIS

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ABSTRACT

This article draws on postmodern theory to develop a framework for analyzing situations in which liberty and equality appear to conflict. It uses the debate over non-therapeutic preimplantation genetic diagnosis (PGD) as an example. While PGD is, at present, almost entirely unregulated within the United States, there seems to be relative consensus that “therapeutic” or “medical” trait selection – e.g., selection against certain genetic and chromosomal disorders – should be permitted. There is, however, substantial disagreement as to whether “non-therapeutic” trait selection – e.g., selection based on parental preference for a particular sex, disability, eye color, hair color, or skin color – should be permitted. This article considers whether it would be constitutional to ban non-therapeutic trait selection. While some have argued that liberty requires giving prospective parents free reign to select the traits of their prospective children, others have argued that equality requires constraining such selections. Proponents of liberty typically worry that regulating trait selection will infringe on parental decisions about procreation and child-rearing, while proponents of equality typically worry that failing to regulate will result in a proliferation of non-disabled, blond-haired, blue-eyed, light-skinned male children, and effectively reinscribe existing identity hierarchies.

While these are the dominant arguments from liberty and equality, postmodern theory illustrates that they are not the only arguments. There are, in fact, liberty arguments in favor of banning non-therapeutic PGD and equality arguments in favor of allowing it. One might, for example, argue that liberty requires banning non-therapeutic PGD in the interest of allowing children to self-determine rather than live out the stereotypes associated with the traits their parents have selected. And one might argue that equality requires allowing non-therapeutic PGD in the interest of treating therapeutic and non-therapeutic selections similarly, since it can in some cases be difficult to definitively categorize a given selection as therapeutic or non-therapeutic. Additionally, one might argue that equality requires allowing non-therapeutic PGD in the interest of treating PGD users the same as sperm or ova bank users, who presently have broad discretion in selecting the traits of their prospective children. There are, in other words, liberty and equality arguments on both sides of the debate. And, inasmuch as the Fourteenth Amendment protects both liberty and equality, this article argues that we ought to avoid policy choices that privilege one right while subordinating the other. When presented with multiple interpretations of liberty and equality, we ought to select those that are most likely to further our constitutional commitment to democracy, which we can accomplish by interpreting both rights with the goal of promoting overall diversity. Applying this principle to the debate
over non-therapeutic trait selection, this article concludes that prospective parents should be given relatively broad latitude to make choices about their prospective children.

INTRODUCTION

Postmodern literary theory requires us to accept that textual meaning is never singular and never stable. Constitutional interpretation mindful of this insight allows us to understand that our commitments to liberty and equality have multiple and variable meanings. While, as a historical matter, liberty and equality have often been perceived as in tension and, at times, even mutually exclusive, as a constitutional matter, both receive protection from the same section of the same amendment. While history has, in other words, positioned the two rights as binary opposites, our Constitution positions them as partners. This article therefore argues that the conventional liberty/equality binary is constitutionally problematic, and uses postmodern literary theory to deconstruct it and thereby reconcile these two seemingly incompatible commitments. Once we understand that liberty and equality both have multiple meanings, and that some of those meanings are in fact compatible, we can begin to interpret the two rights congruently.

While postmodern literary theory reveals multiple compatible interpretations of liberty and equality, postmodern political theory guides us in the normative project of selecting among those interpretations. Just as literary theory can inform the process of constitutional interpretation, political theory can inform the substance of constitutional interpretation. To the extent that postmodern political theory can be described as promoting any singular substantive value, it is the value of diversity. By challenging entrenched power, resisting the myth of objectivity, and expressing “incredulity toward metanarratives,” postmodern political theory uncovers a reality full of incoherence, subjectivity, and fragmentation – in other words, a reality full of diversity. It is because of this ability to uncover a diverse array of identities (and ideologies) that postmodern political theory can serve a normative function in interpreting our Constitution. Diverse identities are valuable to democracy because

1 See, e.g., Alexander Hamilton, Remarks at the Constitutional Convention (June 2, 1787), PAPERS, IV 218 (1787) (“Inequality will exist as long as liberty exists.”).
2 U.S. CONST. amend. XIV, § 1 (“No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).
they promote robust debate, ensure accurate representation, and thus ensure the legitimacy of governmental power. This article accordingly argues that, in selecting among multiple compatible interpretations of liberty and equality, we ought to prefer those that uncover the diverse identities that always already populate our public forum and, in turn, strengthen our democracy.

While the deep flaws of the liberty/equality binary are evident across a variety of policy debates, they are particularly evident in debates surrounding new, and some might say “postmodern,” technologies. One debate that the liberty/equality binary is particularly ill-equipped to address – but which it has, nevertheless, dominated – involves assisted reproductive technology (ART) and, specifically, the “non-therapeutic” use of preimplantation genetic diagnosis (PGD). PGD occurs within the context of in vitro fertilization: After ova and sperm have been combined to create several pre-embryos, PGD can be used to determine the eye color, hair color, skin color, sex, and even “disabilities” associated with each pre-embryo. Prospective parents can then select which to transfer and carry to term. While a number of nations, including England, Germany, and Italy, have banned “non-therapeutic” uses of PGD, such uses (and, indeed, most ARTs) remain virtually unregulated within the United States.⁴ There is, thus, a growing body of scholarship dedicated to assessing the advisability and constitutionality of banning non-therapeutic PGD. Much of this scholarship is driven by the liberty/equality binary: Some articles argue that liberty rights prevent the government from banning non-therapeutic uses of PGD, while others argue that equality considerations require the government to ban such uses. This article critiques both arguments and suggests that, by positioning liberty and equality as binary opposites, where in any given case one must prevail and the other, yield, neither fulfills the promise of the Fourteenth Amendment.

Part I introduces the theoretical constructs of postmodernism, liberty, and equality. It begins by arguing that, when we interpret liberty and equality as binary opposites, we create a constitutional conundrum: It is inappropriate to select interpretations in which the two rights are mutually exclusive, when both receive protection from the same section of the same amendment. It proceeds by illustrating how postmodern theory can resolve this conundrum by “deconstructing” the binary opposition and allowing us to interpret liberty and equality as congruent rather than conflicting. Part II examines how the liberty/equality binary has driven (and arguably distorted) the debate over non-therapeutic PGD. It illustrates that the common arguments privilege one right while subordinating the

other, and thereby dishonor the Fourteenth Amendment. Part III applies
the postmodern theory set forth in Part I to the practical debate presented
in Part II. It deconstructs the liberty/equality binary as applied to the
debate over non-therapeutic PGD by explaining that, while the “dominant”
liberty and equality arguments may indeed be incompatible, there are
other (currently marginalized) liberty and equality arguments that are fully
compatible. The article concludes that, in selecting among multiple
compatible interpretations of liberty and equality, we ought to favor those
that reveal rather than obscure the diverse array of identities necessary to
robust debate, accurate representation, and successful democracy.

I. POSTMODERNISM, LIBERTY, AND EQUALITY

Part I(a) introduces postmodern literary and political theory.
Postmodern literary theory reveals the multiplicity of meanings that are
always already present in texts, while postmodern political theory reveals
the multiplicity of identities that are always already present in societies.
Postmodern literary theory can be useful in interpreting our Constitution,
and postmodern political theory can be similarly useful in improving our
democracy. Part I(b) introduces the liberty/equality binary and illustrates
how postmodern literary and political theory can be used to “deconstruct”
that binary, thereby reconciling our dual commitments. Postmodern
literary theory, by revealing that liberty and equality both have multiple
meanings – some of which are incompatible, and some of which are
entirely compatible – gives us the option of interpreting the Constitution
so as to simultaneously further both rights. Postmodern political theory, by
revealing the diverse identities that exist within our society, gives us the
ability to promote public forum debate, ensure accurate representation,
and ultimately improve our democracy. Part I, in sum, argues that in order
to fulfill our constitutional commitments and improve our democracy, we
ought to interpret liberty and equality with the goal of uncovering diverse
identities and ideologies.

I.a. Postmodern Theory

Postmodernism is both an era and a philosophy.5 It is enigmatically
indefinable, in that “the act of defining postmodernism is anti-

5 J.M. Balkin, What is a Postmodern Constitutionalism?, 90 Mich. L. Rev. 1966, 1967,
1969, 1971 (1992) (“First, postmodernism is the cultural era in which we live[; s]econd,
postmodernism is also the set of cultural products created during the era of
postmodernity[; third, p]ostmodernism is also a set of critical or theoretical claims[.]”).
Adam G. Todd, Painting a Moving Train: Adding “Postmodern” to the Taxonomy of
postmodern.\textsuperscript{6} While it is somewhat disingenuous to offer a definition under such circumstances, it is equally disingenuous to entirely reject the possibility of definition. As Professor Adam Todd has aptly observed, “[t]he act of defining postmodernism is itself a modernist act.”\textsuperscript{7} A (concededly imperfect) definition of postmodernism is, therefore, offered: As an era, postmodernism succeeds modernism. While the modern era began with the Enlightenment and continued at least through the Industrial Revolution,\textsuperscript{8} the postmodern era began in the latter half of the Twentieth Century and persists to the present. As a philosophy, postmodernism transcends modernism. While modern theorists reified coherence, objectivity, and metanarratives, postmodern theorists embrace the reality of incoherence, subjectivity, and micro-narratives.\textsuperscript{9} The remainder of this section is dedicated to introducing the specifics of postmodern literary and political theory. Postmodern literary theory will be used infra, in Part III(a), to reveal that our constitutional commitments to liberty and equality have multiple meanings. Postmodern political theory will be used infra, in Part III(b), to provide guidance in the normative project of selecting among those meanings.

\textit{I.a.i. Postmodern Literary Theory}

Postmodern literary theory illustrates that all texts have multiple and variable meanings.\textsuperscript{10} While a text generally has one “dominant”

\textsuperscript{6} Adam Todd, \textit{Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing}, 58 \textsc{Baylor L. Rev.} 893, 902 (2006) (hereinafter Todd, \textit{Neither Dead Nor Dangerous}) (“the act of defining postmodernism is anti-postmodern because it is a reductionist and modernist act”). Todd, \textit{Painting a Moving Train}, \textit{supra} note 5, at 109 (“Postmodernism is characterized by the idea that it is difficult, if not impossible, to come up with a clear definition for any term, including the term postmodernism[.]”).

\textsuperscript{7} Todd, \textit{Neither Dead Nor Dangerous}, \textit{supra} note 6, at 907 (2006) (explaining that “the antimodernist postmodernists who espouse a total rejection of modernism have arguably fallen into a modernist trap”).

\textsuperscript{8} Todd, \textit{Painting a Moving Train}, \textit{supra} note 5, at 109-110.

\textsuperscript{9} Balkin, \textit{supra} note 5, at 1971-72 (explaining that postmodernism attacks “‘totalizing’ theories or ‘master narratives’ that seek to explain all or substantially all of society, history, knowledge, the nature of femininity, or virtually anything else within a comprehensive and articulable theory”).

\textsuperscript{10} Todd, \textit{Neither Dead Nor Dangerous}, \textit{supra} note 6, at 907 (explaining that postmodernism “removes the necessity of privileging one position over another and can allow multiple positions and interpretations to exist simultaneously”). Stephen M. Feldman, \textit{Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the Teague Rule against New Rules in Habeas Corpus Cases)}, 8 \textsc{Nw. U. L. Rev.} 1046, 1048 (1994) (“According to postmodernists, the meaning of a text
meaning, it always has additional “marginalized” meanings.\textsuperscript{11} By revealing that a text’s dominant meaning in fact rests on highly subjective (yet often widely accepted) assumptions, postmodern literary theory can uncover a text’s marginalized meanings.\textsuperscript{12} Our constitutional commitment to liberty is, for example, dominantly understood to protect decisions about childrearing.\textsuperscript{13} This dominant meaning can, however, be subverted by revealing that it in fact rests on the highly subjective assumption that protecting such decisions unambiguously enhances liberty. While protecting decisions about childrearing may enhance parents’ liberty, it may diminish children’s liberty.\textsuperscript{14} Postmodern theory reminds us that liberty’s “dominant” meaning is simply one among many possible meanings.

Yet subverting a text’s dominant meaning is only the first step in the postmodern project, the aim of which is not merely to invert the hierarchy (thus rendering the initially marginalized meanings dominant), but rather to “deconstruct” the hierarchy and reveal that there is no authentic meaning.\textsuperscript{15} As Derrida explained, “deconstruction” accomplishes both “a reversal of the classical opposition and a general displacement of the system.”\textsuperscript{16} Professor Pauline Rosenau, elaborating on Derrida’s explanation, wrote, “Deconstruction tears a text apart, reveals its contradictions and assumptions; its intent, however, is not to improve, revise, or offer a better version of the text.”\textsuperscript{17} Its intent is, instead, to illustrate that, whenever one textual interpretation is expressed, others are inevitably repressed.\textsuperscript{18} Deconstruction is, as a technical matter,
accomplished by repeatedly re-inverting the initial hierarchy, such that the balance of power between the initially dominant and initially marginalized components becomes so uncertain that the concepts of “dominant” and “marginalized” themselves become irrelevant. It is not until the categories that initially populated the hierarchy (e.g., liberty and equality) have become irrelevant that the postmodern project is complete. Part III will deploy this theory to illustrate that deconstructing our constitutional commitments to liberty and equality entails not merely identifying their currently “dominant” and “marginalized” meanings, but also accepting the impossibility of identifying a single or stable set of authentic meanings.

I.a.ii. Postmodern Political Theory

While postmodern literary theory can be used to uncover previously marginalized textual meanings, postmodern political theory can be used to uncover previously marginalized identities – or, in other words, to uncover existing diversity. As Professor Joel Handler has explained, postmodernism illustrates that “every ‘identity’ necessarily suppresses an alternative identity.”19 The expression of one identity is, indeed, always tantamount to the repression of another.20 Postmodern political theory, paralleling postmodern literary theory, reveals that the dominance of certain identities (e.g., non-disabled white males) is, in fact, dependent on the marginalization of other identities (e.g., disabled minority women). By revealing such dependencies, postmodern political theory has the capacity to deconstruct identity-based hierarchies.21 Once a given hierarchy (e.g., abled/disabled, white/non-white, male/female) has been repeatedly inverted, the categories that initially populated it become politically irrelevant, and the diverse identities they once obscured are revealed.

Yet observable traits like race, sex, and (in some cases) ability are not sufficient descriptors of identity. Identity is the product of many influences,22 some of which are genetically determined and some of which are socially constructed. It is, therefore, dangerous to reify either genetic essentialism or social constructionism. Professor Belinda Bennett, addressing the debate over cloning, described the dangers of genetic essentialism – of “see[ing] people purely as the product of their genes[,]”23

19 Id.
20 Id.
21 Id. at 700 (explaining how postmodern theorists argue that “hegemony is never stable”).
22 Id. at 706 (“Identity is constructed by race, ethnicity, class, community, nation[.]”).
23 BELINDA BENNETT, HEALTH LAW’S KALEIDOSCOPE: HEALTH LAW RIGHTS IN A GLOBAL AGE 48 (2008). She later writes, “The idea that there are essential, immutable
– stating that “what is written in code is only the introduction. The rest of the story we write ourselves.”24 While skin color is genetically determined, racial groups are socially constructed; while anatomical sex is genetically determined, gender groups are socially constructed; and, while ability is genetically determined, ability groups (e.g., “deaf culture”) are socially constructed. Yet social constructionism is equally dangerous, because it deprives individuals of the ability to express their genetic predilections. Furthermore, neither our races, sexes, and abilities, nor our racial, gender, and ability groups can adequately account for our ideologies. Members of a single racial group can espouse different ideologies – they may be Republicans, Democrats, Socialists, Christians, Muslims, atheists, etc. Conversely, members of different racial groups can share common ideologies. Identity is, from the postmodern perspective, both genetic and social, both physical and ideological, and “both multiple and unstable.”25

Just as tangible hierarchies based on race, sex, or ability can be deconstructed to reveal the multiplicity of races, sexes, and abilities that always already exist within our society, intangible hierarchies based on ideology can be deconstructed to reveal the multiplicity of viewpoints that always already exist within our society. Professor Handler has noted that, from the postmodern theorists perspective, any form of “foundationalism or essentialism – whether liberal capitalism or Marxism – is a fundamental obstacle to the deepening and extension of democracy throughout civil society.”26 Privileging any one identity (whether based on race, sex, ability, ideology, or some other characteristic), is detrimental to democracy because it inevitably obscures other identities and, in doing so, obscures diversity. Recognizing the diverse identities that populate our public forum is beneficial to democracy, because it ensures robust debate and accurate representation. It ensures robust debate by preventing public forum debate from being captured by meta-narratives; it ensures accurate representation by recognizing naturally existing variation.27

human characteristics has been challenged by scholars from postmodernism, feminism and critical race theory.” Id. at 61.
24 Id. at 48. She later writes, “Our understandings of the self and the body have been cut free of their traditional anchors and have moved into a new arena where meanings are socially, culturally and historically constructed. While there is no doubt that in biological terms the genome itself has changed little in recent history, the same cannot be said of the genome’s social and cultural significance.” Id. at 61.
26 Id. at 700.
27 The Supreme Court has recognized the importance of diverse viewpoints, saying: “[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief
I.b. Using Postmodern Theory to Deconstruct the Liberty/Equality Binary

Part I(b) applies postmodern literary theory to the Constitution. First, Part I(b)(i) observes that the dominant meanings of liberty and equality often conflict, and that this conflict leads to viewing the two rights as binary opposites. It should be noted at the outset that the liberty/equality binary is not a typical binary, because one right is not always privileged, and the other is not always subordinated. In some cases, liberty is privileged and equality is subordinated; but in others, equality is privileged and liberty is subordinated. There is, of course, a third set of cases in which both liberty and equality are privileged – but these (easier) cases are not my focus. This article is dedicated to providing guidance in those cases where the dominant meanings of liberty and equality conflict, such that reaching a resolution seems to require that one be privileged and the other, subordinated.

Second, Part I(b)(ii) reveals that both liberty and equality in fact have additional marginalized meanings, and that uncovering these meanings gives us the option of interpreting the two rights congruently – which seems appropriate, in light of the fact that they are both protected by the same section of the same amendment. It suggests that, when faced with multiple compatible meanings of liberty and equality, we should select those that will promote diversity. We can, by doing so, use postmodern theory to deconstruct the liberty/equality binary and reconcile our two commitments.

I.b.i. The Liberty/Equality Binary

Since our nation’s inception, liberty and equality have been perceived as in tension and, at times, even mutually exclusive. At the Philadelphia Convention in 1787, Alexander Hamilton said, “Inequality will exist as long as liberty exists. It unavoidably results from that very liberty itself.” Early Americans did not, however, have to grapple directly with this perceived tension between liberty and equality – at least

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distinctions that sets us apart from totalitarian regimes.” Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

28 Consider, for example, Lawrence v. Texas, 529 U.S. 558 (2003), Loving v. Virginia, 388 U.S. 1 (1967), and other decisions that could have been justified on both due process and equal protection grounds.

not as a matter of constitutional interpretation – since the Pre-Civil War Constitution protected liberty but failed to mention equality.\textsuperscript{30} It was not until the Reconstruction Era that Americans made formal constitutional commitments to both liberty and equality. Through Section One of the Fourteenth Amendment, they barred the government not only from depriving any person of liberty without due process of law, but also from denying any person “equal protection” of the laws.\textsuperscript{31} Americans have therefore, since 1868, had to navigate the complex, and often tense, relationship between these two commitments.

Professor Peter Westen has cataloged some of the perceived tensions between liberty and equality. He wrote, in a 1982 article titled \textit{The Empty Idea of Equality}:

Equality is commonly perceived to differ from rights and liberties. Rights are diverse; equality is singular. Rights are complicated; equality is simple. Rights are noncomparative in nature . . . ; equality is comparative . . . . Rights are concerned with absolute deprivation; equality is concerned with relative deprivation. Rights mean variety, creativity, differentiation; equality means uniformity. Rights are individualistic; equality is social.\textsuperscript{32}

When liberty and equality are thus perceived as binary opposites, a presumption arises that, in any given case, the two must be balanced to determine which should prevail and which should acquiesce. Under such an approach, Professor Westen observed, “Equality is sometimes said to be flourishing at the expense of rights, [and] rights are sometimes said to be flourishing at the expense of equality.”\textsuperscript{33} This article builds upon Professor Westen’s view that “this contrasting of rights and equality is fundamentally misconceived,”\textsuperscript{34} and argues that, when liberty and equality are balanced, both are diluted, and the promise of the Fourteenth Amendment remains unfulfilled.

\textit{I.b.ii. Deconstructing the Liberty/Equality Binary}

\textsuperscript{30} U.S. CONST. amend. V.
\textsuperscript{31} U.S. CONST. amend. XIV.
\textsuperscript{33} \textit{Id.} at 539.
\textsuperscript{34} \textit{Id. But see} Kenneth L. Karst, \textit{Why Equality Matters}, 17 GA. L. REV. 245, 249 (1983) (“[I]n American public life and constitutional law the idea of equality carries a meaning quite removed from the empty tautology that like cases should be treated alike. This meaning is not derived from dictionaries or deductive logic, but from centuries of American experience.”).
Postmodern literary theory illustrates that both liberty and equality have multiple meanings. Although, according to Aristotle, liberty meant that “every man should live as he likes,”35 philosopher Gerald MacCullum’s work suggests that liberty’s meaning is actually indeterminate unless and until the terms of a given debate have been specified.36 And although, according to Aristotle, equality meant that “things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness,”37 Professor Westen’s work illustrates that this traditional definition of equality is a tautology and that, actually, “Equality is an empty vessel with no substantive moral content of its own.”38 Professor Philip Kurland similarly recognized that the rhetoric of equality “is subject to use, if not capture, by anyone on any side of the question.”39 Both liberty and equality, then, must have a multitude of meanings beyond their “dominant” meanings.

Rather than accepting the conventional – and constitutionally problematic – perception that we protect liberty for one set of reasons and equality for another (conflicting) set of reasons, this article argues that we ought to protect liberty and equality for the same reasons. One reason that we might protect liberty and equality is that both promote the expression of diverse identities, because this will, in turn, promote democracy. Liberty promotes the expression of diverse identities by empowering individuals to self-determine according to their own predilections, which are inherently diverse.40 Equality promotes the expression of diverse identities by empowering individuals to self-determine according to their own predilections, which are inherently diverse.

35 ARISTOTLE, THE POLITICS OF ARISTOTLE, V.2, Book VI, cix (B. Jowett trans. 1885) (“[O]ne principle of liberty is that all should rule and be ruled in turn. . . . Another principle of liberty is non-interference –every man should live as he likes, if this is possible[].”)
36 Gerald MacCullum, Negative and Positive Freedom, 76 PHIL. REV. 312, 333 (1967) (“[D]iscussions of the freedom of agents can be fully intelligible and rationally assessed only after the specification of each term of this triadic relation has been made or at least understood.”), cited by Westen, supra note 32, who characterizes MacCullum as saying that “freedom, too, is a formal concept with no substantive content apart from the variables inserted to give it meaning.”
37 ARISTOTLE, ETHICA NICOMACHEA V.3.1131a-1131b (W. Ross trans. 1925).
38 Westen, supra note 32, at 547.
40 One can see an example of this phenomenon in the fact that, as social norms regarding the “ideal” family have weakened, a more diverse set of families have emerged. Just as self-determination promotes diversity, diversity, conversely, promotes self-determination. Armin von Bogdandy, The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship, 19 EUR. J. INT’L L. 241, 247 (2008) (describing the “postmodernism-inspired opinion [that] cultural diversity is central for the individual identity, since cultural diversity opens up concrete options used by the individual to design its identity”).
identities by assuring individuals that, when they do self-determine, their differences will not be grounds for illegitimate marginalization.\footnote{Expression of identity will not, in other words, be grounds for exclusion from or diminished power within the public forum.} Diverse identities are, indeed, beneficial to democracy because they improve public forum debate, ensure accurate representation and, in so doing, legitimate the exercise of government power.\footnote{The Supreme Court has recognized the promotion of diversity as a compelling interest – at least within the context of higher education. \textit{Parents Involved}, 551 U.S. at 722 (recognizing “diversity in higher education” as a “compelling” interest for purposes of strict scrutiny).} This article accordingly argues that, when presented with multiple meanings of liberty and equality, we ought to select those that are most likely to promote diversity.

II. THE DEBATE OVER NON-THERAPEUTIC PGD

While the liberty/equality binary influences many debates, it is particularly influential in debates surrounding ART and, specifically, the use of technology to select the traits of one’s prospective children. Part II(a) describes the current technology, as well as its use and regulation (or lack thereof). Part II(b) describes the debate surrounding this technology, and identifies the “dominant” arguments – some of which rest on our constitutional commitment to liberty and suggest that non-therapeutic trait-selection should be permitted, and some of which rest on our constitutional commitment to equality and suggest that non-therapeutic trait-selection should be prohibited.

\textit{II.a. Current Technology, Practice, and Regulation}

Throughout history, at least some prospective parents have wanted to select the attributes of their prospective children – sometimes, out of a desire to maximize social status and opportunity, and sometimes out of a desire to reproduce themselves.\footnote{Sigal Klipstein, \textit{Preimplantation genetic diagnosis: technological promise and ethical perils}, \textit{FERTILITY AND STERILITY}, Vol. 83, No.5, May 2005, 1347, 1347. Sex selection has been popular throughout history. As early as the fifth century BCE, the Greek philosopher Anaxagoras suggested that men tie off their left testicle prior to intercourse, because sperm from the right testicle was believed to produce males. Owen D. Jones, \textit{Sex Selection: Regulating Technology Enabling the Predetermination of a Child’s Gender}, 6 \textit{HARV. J.L. & TECH.}, 1, 4 (1992), citing Ronald J. Levin, \textit{Human Sex Pre-Selection}, 9 \textit{OXFORD REV. REPRODUCTIVE BIOLOGY}, 161, 162 (1987). This theory endured for millennia. \textit{Id.} (“French noblemen, for example, were still advised, more than 2200 years later, that removal of the left testicle guaranteed male heirs.”). Others promoted different methods of sex selection. Aristotle, for example, taught that vigorous intercourse would increase the chances of a male child. \textit{Id.}} Some prospective parents in patriarchal
societies have, for example, wanted male children; some in racially stratified societies have wanted blond-haired, blue-eyed, light-skinned children; and some in deaf communities have wanted deaf children. While prospective parents have always been able to make general choices about their children’s attributes through “eugenic dating,” they have not until recently been able to make specific choices about their children’s sex, eye color, hair color, skin color, or (dis)abilities. Since the 1970s, doctors have used chorionic villus sampling and amniocentesis to test the chromosomal characteristics of existing fetuses. Because these tests are available only during ongoing pregnancies, however – chorionic villus sampling being best performed at ten to fourteen weeks gestation, and amniocentesis even later – the sole remedy for “unsatisfactory” test results is abortion. Part II(a)(i) describes the technology that is currently

44 Cecelia L. W. Chan et al., Gender Selection in China: It’s Meanings and Implications, JOURNAL OF ASSISTED REPRODUCTION AND GENETICS, Vol. 19, No. 9, Sept. 2002 (“Gender selection is welcomed by many societies with gender-specific preference, especially those patriarchal societies such as Chinese communities.”).

45 Kari L. Karsjens, Boutique Egg Donations: A New Form of Racism and Patriarchy, 5 DEPAUL J. HEALTH CARE L. 57, 78 (2002) (“Wealthy couples, who utilize egg brokers or high profile advertisements, do not seek general traits. These couples are seeking a ‘perfect gene pool’ for their commodity--notice the highly sought after donor is a woman who has blonde hair [and] blue eyes, received a 1400 on her SAT, attends an Ivy League school, and who preferably has some additional talents[.]”). But see Leslie Bender, Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, and Law, 12 COLUM. J. GENDER & L. 1, 65 (2003) (discussing African-American prospective parents who used ART, in part, because they “wanted to reproduce themselves as African-Americans”).

46 Richard Gray, Couples Could Win Right to Select Deaf Baby, The Telegraph, April 13, 2008, available at http://www.telegraph.co.uk/news/uknews/1584948/Couples-could-win-right-to-select-deaf-baby.html (recounting the story of a deaf couple wishing to select for deafness). Professor Dena Davis has written on the issue of “disabled persons wishing to reproduce themselves in the form of a disabled child.” Dena S. Davis, Genetic Dilemmas and the Child’s Right to an Open Future, 28 RUTGERS L.J. 549, 569 (1997). While Professor Davis allows that deafness may be a culture rather than a disability, she maintains that “deliberately creating a deaf child . . . counts as a moral harm.” Id. at 575.

47 Note, Regulating Eugenics, 121 HARV. L. REV. 1578, 1586 (2008) (“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.”).

48 I use quotation marks to emphasize the subjective nature of the label “disability.”


50 Thomas M. Jenkins and Ronald J. Wapner, First Trimester Prenatal Diagnosis: Chorionic Villus Sampling, SEMINARS IN PERINATOLOGY, Vol. 23, No. 5, October 1999, 403, 403 (“When performed between 10 and 14 weeks gestation, chorionic villus sampling is both safe and effective in the diagnosis of fetal chromosomal, biochemical, and molecular disorders, with risks comparable to those of second trimester amniocentesis.”)

51 Jain, supra note 49, at 649.
available for trait selection; Part II(a)(ii) describes how that technology is currently being used in fertility clinics throughout the United States; and Part II(a)(iii) describes the virtually complete absence of legal regulation.

II.a.i. Current Technology

When the first successful use of preimplantation genetic diagnosis (PGD) was reported in 1990, prospective parents using in vitro fertilization (IVF) acquired the unique ability to determine the genetic and chromosomal characteristics of their embryos prior to pregnancy. Ova, extracted from the prospective mother using a transvaginal needle guided by ultrasound, were placed in vitro and inseminated. The first day after insemination, fertilization was confirmed; the third day after insemination, when the embryos had reached the six to eight cell (or “cleavage”) stage, one cell (or “blastomere”) was removed from each embryo and tested to determine its genetic and chromosomal characteristics. Prospective parents were then able to select which embryos they wished to transfer to the woman’s uterus and, hopefully, carry to term.

Today, PGD can be used to test for a vast array of characteristics. Although it is difficult (if not impossible) to come up with a perfect way of categorizing the various tests, some are considered “therapeutic,” while others are considered “non-therapeutic.” Therapeutic tests are commonly

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53 Zhuang, supra note 52, at 419.

54 Id. at 420.

55 Id. (“Fertilization is confirmed the day following insemination. On day 3 post insemination, the in vitro generated embryos should each have six to eight cells.”).

56 Id. (“Two types of diagnostic tests are most commonly performed in the biopsied cells: polymerase chain reaction (PCR) and fluorescent in situ hybridization (FISH). The former is used for the diagnosis of specific gene defects, and the latter for numerical or structural anomalies of the chromosomes.”). Susannah Baruch et al., Genetic Testing of Embryos: practices and perspectives of U.S. IVF clinics, FERTILITY AND STERILITY, ASRM (2006) (“Nearly all (99%) of the IVF-PGD clinics perform single blastomere biopsy in at least some cases, and all who do perform the biopsy three days after fertilization. One in four (26%) clinics perform two-blastomere analysis, and 16 percent of clinics perform polar body analysis.”).

57 Zhuang, supra note 52, at 420 (“At present, PGD can be performed, in principle, for any genetic condition for which there is sufficient sequence information.”).

58 I use quotation marks to emphasize the socially constructed – and, in some cases, highly controversial – nature of the labels “therapeutic” and “non-therapeutic.”
used to detect single gene disorders such as cystic fibrosis, Tay-Sachs, and sickle cell anemia, as well as chromosomal abnormalities such as Down syndrome and Turner syndrome. Non-therapeutic tests can be used to select for a particular sex, and sometimes even for a particular “disability,” such as Down syndrome or deafness. Non-therapeutic tests can also (at least theoretically) be used to select for a particular eye color, hair color, or skin color. And they may, in the future, be used to select for less tangible traits like intelligence and personality. It should be noted that some tests – e.g., those used to detect sex and “disabilities” – have both therapeutic and non-therapeutic relevance. Testing for sex has therapeutic relevance in that it can prevent X-linked diseases such as hemophilia, as well as non-therapeutic (social) relevance for prospective parents seeking to create a child with a given sex. Testing for “disabilities” has therapeutic relevance for prospective parents seeking to avoid creating a child with a given “disability,” and non-therapeutic (social) relevance for prospective parents seeking to create a child with a given “disability.” While therapeutic uses of PGD are relatively uncontroversial, non-therapeutic uses, which are the focus of this article, are highly controversial.

60 Gregory Katz and Stuart O. Schweitzer, reporting on PGD practice within the United Kingdom, write, “There has been a small number of cases in which deaf couples have used IVF and PGD to select embryos with the same genetic traits that they themselves have in order to share a common lifestyle with their offspring.” Gregory Katz & Stuart O. Schweitzer, Implications of Genetic Testing for Health Policy, 10 YALE J. HEALTH POL’Y, L. & ETHICS 90, 114 (2010). Professor Kirsten Smolensky writes, “[O]ne IVF doctor has reported that he ‘flatly refused a couple who asked him to identify an embryo with Down syndrome, so they could give their Down-affected child a similar sibling.’” Kirsten Rabe Smolensky, Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions, 60 HASTINGS L.J. 299, 305 (2008), citing Melissa Healy, Fertility’s New Frontier: Advanced Genetic Screening Could Help Lead to the Birth of a Healthy Baby, L.A. TIMES, July 21, 2003, §6 (Health), at 1.
61 Klipstein, supra note 43, at 1349 (“[The human genome project] may allow us to determine which genes lead to physical characteristics that we deem beautiful, whether these be facial structure, hair, or eye color.”).
62 Id. at 1348-49 (“PGD could theoretically allow for the selection of any trait whose genetic composition is known. These could range from sex, height, [athletic ability,] intelligence, and beauty, to even theoretically personality traits such as cheerful disposition.”).
63 Id. at 1349.
64 Andrea L Kalfoglou, Joan Scott, Kathy Hudson, PGD patients’ and providers’ attitudes to the use and regulation of preimplantation genetic diagnosis, REPRODUCTIVE BIOMEDICINE ONLINE, Vol 11. No 4. 2005 486–496, 486 (August 2005), www.rbmonline.com/Article/1818 (“Virtually all participants supported the use of PGD to avoid severe, life-threatening genetic illness or to select embryos that are a tissue match for a sick sibling, but their attitudes varied significantly over the appropriateness of using PGD to avoid adult-onset genetic disease, to select for sex, or to select for other non-medical characteristics.”). See also Klipstein, supra note 43, at 1349.
II.a.ii. Current Practice

PGD is not yet common, but as its accessibility increases its commonality is increasing. A 2006 study performed by Susannah Baruch of the Genetics and Public Policy Center at Johns Hopkins University reported that there are over 400 ART clinics in the United States and that, of the 186 that participated in the study, nearly three quarters (74%) offered PGD.65 Many of the clinics that did not offer PGD in 2006 predicted that they would offer it in the future.66 The study revealed that, in 2005, approximately 3,000 cycles of PGD were performed, and that (in all likelihood) between four and six percent of all IVF cycles included PGD.67 While PGD was most often performed for therapeutic reasons, 9% of the cycles performed in 2005 involved non-therapeutic sex selection.68 While Baruch’s study was not specific to non-therapeutic PGD, it can (in conjunction with other studies) be helpful in illuminating current practices. The remainder of this section surveys the availability and incidence of non-therapeutic selections for sex, disability, eye, hair, and skin color. It should be noted at the outset that all of these traits influence identity: Sex creates presumptions about gender identity; disability creates a range of presumptions linked with specific disabilities; and eye, hair, and skin color create presumptions about racial identity. While prospective parents cannot use PGD to select disabilities for which they are not carriers, or to select races entirely different from their own, they can use it to emphasize or deemphasize traditional markers of disability or race – e.g., by selecting a pre-embryo with slightly darker or lighter eye, hair, and skin color.

Many clinics allow prospective parents to engage in non-therapeutic sex selection. Of the clinics that participated in Baruch’s study, 137 offered PGD, and 42% of those 137 allowed prospective parents to engage in non-therapeutic sex selection.69 Of that 42%, almost half (47%) allowed prospective parents to select for sex under any circumstances; 41% allowed prospective parents to select for sex only if they already had one or more children (presumably, of the sex they were selecting against); and 7% allowed prospective parents to select for sex only if PGD was already being performed for an independent therapeutic reason.70

65 Baruch, supra note 65, at 2.
66 Id. at 1-2, 6, 8. The authors report, “We asked the 26 percent of IVF clinics who do not offer any PGD the reasons why they do not. The most common responses were lack of resources and inadequate market demand.” Id. at 6.
67 Id. at 2.
68 Id. at 3.
69 Id. at 5.
70 Id.
clinics that offered PGD but had never allowed non-therapeutic sex selection, over three-quarters reported that their decisions not to allow it were motivated by ethical concerns.\textsuperscript{71} Some, however, reported that they had never received any requests.\textsuperscript{72} While Baruch’s study did not reveal the percentage of patients who sought non-therapeutic sex selection, other studies have shown that it is substantial. Doctor Tarun Jain reported in 2005 that there was “significant demand for preimplantation sex selection for nonmedical reasons[].\textsuperscript{73} Doctor Richard Sharp found that those reasons ranged from a “desire for gender balance in the family” to an “interest in specific parenting experiences.”\textsuperscript{74} Despite the substantial demand, patients who engage in non-therapeutic sex selection recognize that their decisions are ethically complex: As Doctor Sharp reported, “even the most motivated of couples pursuing IVF/PGD for sex selection tend to express moral reservations.”\textsuperscript{75}

While many clinics allow prospective parents to engage in non-therapeutic sex selection, only a few allow non-therapeutic “disability” selection. While requests to select for a “disability” may be less common than requests to select for sex, they are far more controversial. In a 2005 study performed by Doctor Andrea Kalfoglou of Johns Hopkins’s Genetics and Public Policy Center, several PGD providers expressed discomfort with selecting for traits they felt would disadvantage children, such as phenylketonuria,\textsuperscript{76} achondroplasia,\textsuperscript{77} and deafness.\textsuperscript{78} Some

\textsuperscript{71} Id. See also Kalfoglou, supra note 64, at 487 (reporting that “88% of respondents to a survey of American Society for Reproductive Medicine (ASRM) members believed that PGD is an acceptable clinical procedure, but 69% did not think patients should be able to use it for non-medical sex selection”).
\textsuperscript{72} Baruch, supra note 65, at 5.
\textsuperscript{73} Jain, supra note 49, at 657 (adding that “a significant portion of this demand [came] from patients who do not have any children or have children all of one sex”). Doctor Jain reports, “Of 561 respondents, 229 (40.8%) wanted to select the sex of their next child for no added cost.” Id. at 651. See also Stacey A. Missmer & Taurun Jain, Preimplantation Sex Selection Demand and Preferences Among Infertility Patients in Midwestern United States, J. ASSIST. REPROD. GENET. (2007) 24:451–457. Missmer and Jain report, “Of respondents, 49% wanted to select the sex of their next child for no added cost.” Id. at 451.
\textsuperscript{74} Richard Sharp et al., Moral attitudes and beliefs among couples pursuing PGD for sex selection, REPRODUCTIVE BIO MEDICINE ONLINE (2010) 21, 838–847, 842.
\textsuperscript{75} Id. at 845. Doctor Sharp further reported that several couples expressed “anxiety about the prospect of telling their other children about their plans to use IVF/PGD for sex selection.” Id. at 844.
\textsuperscript{76} Phenylketonuria is a condition that prevents the breakdown of the amino acid phenylalanine. It is associated with light eye, hair, and skin color, as well as seizures and mental retardation. It can, however, be treated by a diet low in phenylalanine. See http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002150/.
\textsuperscript{77} Achondroplasia is a bone-growth disorder that causes dwarfism. See http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002150/.
prospective parents do, however, seek to select for such “disabilities,” and some clinics do accommodate their requests. Indeed, 3% of the PGD clinics surveyed in Baruch’s 2006 study reported that they had assisted parents in selecting for “disabilities.”

Even PGD providers with ethical reservations about selecting for such traits may, in some cases, be persuaded by persistent patients. Professor Kirsten Smolensky recounts an anecdote about a couple with achondroplasia, who “told their physician that if he refused to help them select a child with achondroplasia, they would go to another IVF clinic, refuse PGD testing, get pregnant, have the fetus tested via amniocentesis for achondroplasia, and abort any child not carrying the gene.”

The physician, “[n]ot wanting to be the cause of an unnecessary abortion and recognizing that the end result would be the same with or without his assistance (a child with achondroplasia), . . . agreed to help the parents utilize PGD to select for a child with achondroplasia.”

While many clinics allow sex selection, and at least a few allow “disability” selection, none currently allow eye-, hair-, or skin-color selection. When the Fertility Institutes (a Los Angeles based ART clinic) briefly advertised such a service in 2009, there was an outpouring of opposition. The clinic’s director, Doctor Jeff Feinberg, who was part of the team that had reported the first successful use of IVF in 1978, initially said that he was willing to live with the opposition, and that several prospective parents had already inquired about the service. He noted that new technology is often controversial – in 1978, someone had left a note

78 Kalfoglou, supra note 64, at 493.
79 Deaf parents have periodically sought to use PGD to select for deafness. See supra note 46. Parents may seek to select for a variety of “disabilities” beyond those listed above.
80 Baruch, supra note 65, at 5 (“Some prospective parents have sought PGD to select an embryo for the presence of a particular disease or disability, such as deafness, in order that the child would share that characteristic with the parents. Three percent of IVF-PGD clinics report having provided PGD to couples who seek to use PGD in this manner.”).
81 Smolensky, supra note 60, at 305 (2008) (describing “[o]ff-the-record conversations with reproductive endocrinologists[, which] suggest that patients may be ‘strong-arming’ physicians into agreement”).
82 Id.
83 The Center for Genetics and Society, however, reports that “Some clinics have even offered [PGD] for purely cosmetic traits including eye color, hair color, and skin complexion.” http://www.geneticsandsociety.org/section.php?id=82
85 Id. (reporting that Dr. Feinberg had “received ‘five or six’ requests from couples for the new service[.]”).
on his windshield saying “test tube babies have no soul[,]” yet IVF is now widely accepted.86 Other doctors, however, expressed disapproval. Doctor William Kearns, whose work helped to enable trait selection, said “Steinberg has jumped on my research but I’m totally against this. My goal is to screen embryos to help couples have healthy babies free of genetic diseases. Traits are not diseases.”87 Similarly, Doctor Mark Hughes, who was part of the team that reported the first successful use of PGD in 1990, condemned trait selection as “ridiculous and irresponsible.”88 The Fertility Institutes’ advertisement, which had initially appeared in February of 2009, was withdrawn in early March with a statement that “[i]n response to feedback[,] an internal, self regulatory decision has been made to proceed no further with this project.”89

II.a.iii. Current Regulation

At present, PGD clinics in the United States are governed by very little beyond internal self-regulatory decisions. While a number of countries have banned non-therapeutic use of PGD entirely,90 the United States has allowed PGD – and, indeed, IVF and ART more generally – to remain almost entirely unregulated.91 Neither Congress nor any of the federal agencies that could ostensibly regulate PGD has provided any guidance. While the Centers for Disease Control and Prevention do require IVF clinics to report certain data, including pregnancy success rates, they do not ask them to report what tests (such as PGD) are being performed.92 And, inasmuch as the only penalty for not reporting is a “noncompliance” listing on the CDC’s website, even this regulation is far from robust.93 While the Food and Drug Administration does regulate some of the drugs, devices, and substances (e.g., reproductive tissues) used in IVF and PGD, “there is no uniform system to assure test accuracy or validity.”94 Furthermore, while the Centers for Medicare and Medicaid

86 Id.
87 Id.
88 Id.
89 Id., citing Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 (1938). Medical Devices; Classification/ Reclassification; Restricted Devices; Analyte Specific Reagents, 21 C.F.R. §§ 809.10(e), 809.30, 864.4010(a), 864.4020 (2005)). Human Tissue Intended
Services regulate clinical laboratories, they have taken the position that PGD “is an assessment of a product and therefore falls under FDA’s oversight of reproductive tissue,” which means that they do not regulate laboratories that perform PGD. Finally, while some states oversee the genetic tests associated with PGD, none regulate PGD directly.

Despite the lack of formal legal regulation, clinics are not completely without guidance. Several professional organizations – most notably, the American Society for Reproductive Medicine (“ASRM”) – have issued policy statements. The ASRM’s position has, however, changed over time, particularly with respect to the use of non-therapeutic sex selection. In 1994, the ASRM’s Ethics Committee stated, “[W]hereas preimplantation sex selection is appropriate to avoid the birth of children with genetic disorders, it is not acceptable when used solely for nonmedical reasons.” Ten years later, in 2004, the Committee retained its position on therapeutic sex selection but took a somewhat more equivocal view of non-therapeutic sex selection. With respect to patients who were already undergoing IVF for therapeutic reasons, the Committee said non-therapeutic sex selection “should not be

96 Id.
encouraged.”\textsuperscript{101} With respect to patients wishing to initiate IVF in order to engage in non-therapeutic sex selection, however, the Committee said non-therapeutic sex selection “should be discouraged.”\textsuperscript{102} While expressing concerns that non-therapeutic sex selection could lead to sex discrimination, individual and social harm, and the inappropriate use of medical resources, the Committee emphasized that it did not see sufficiently certain “grave wrongs or sufficiently predictable grave negative consequences” to warrant legal prohibition.\textsuperscript{103}

\textit{II.b. The Perceived Liberty/Equality Binary}

As IVF and non-therapeutic PGD have become more accessible, the debate over their legal regulation has intensified. Scholars have made a variety of arguments against and in favor of legal regulation, many of which can be understood as manifestations of the perceived liberty/equality binary discussed in Part II.\textsuperscript{104} Liberty is generally cited as a reason for allowing non-therapeutic PGD,\textsuperscript{105} whereas equality is generally cited as a justification for banning non-therapeutic PGD.\textsuperscript{106} This section reviews the most common liberty and equality arguments, and illustrates how they have driven the debate over non-therapeutic PGD.

\textit{II.b.i. Liberty Arguments against Banning PGD}

Liberty arguments against banning PGD arise from the Due Process Clauses of the Fifth and Fourteenth Amendments, which collectively prevent the federal and state governments from depriving any person of “liberty . . . without due process of law.”\textsuperscript{107} The Supreme Court has interpreted the “liberty” protected by the Due Process Clauses broadly, such that it encompasses not only physical but also decisional autonomy. Its protection of decisional autonomy extends to decisions about procreation such as “whether to bear or beget a child”\textsuperscript{108} as well as to decisions about childrearing such as how to “direct the upbringing and

\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} This article focuses on the arguments from liberty and equality, but it should be noted that these are not the only arguments in the literature. Others include: using child as means to end; etc.
\textsuperscript{105} See Part II(b)(i).
\textsuperscript{106} See Part II(b)(ii).
\textsuperscript{107} U.S. CONST. amends. V & XIV.
education of [one’s] children[.]” While the Court has not had occasion to consider whether “liberty” specifically protects the use of ART, one could argue that, since decisions about procreation and child-rearing are protected, decisions about ART (and, by extension, non-therapeutic PGD) should similarly be protected. This section examines arguments that the “liberty” protected by the Due Process Clauses is broad enough to protect non-therapeutic PGD based on its association with decisions about either procreation or child-rearing.

The right to make decisions about procreation – or, in the Court’s words, about “whether to bear or beget a child” – was articulated in dicta in the 1972 decision of *Eisenstadt v. Baird*, which invalidated a state ban on distributing contraceptives to unmarried persons as violating the Equal Protection Clause. It was subsequently reaffirmed in the 1973 decision of *Roe v. Wade*, as well as the 1992 decision of *Planned Parenthood v. Casey*, both of which involved the invalidation of state abortion regulations. While the right was referenced in the 2003 decision of *Lawrence v. Texas* (which provides the most recent evidence of its existence), it was called into question by the 2007 decision of *Gonzales v. Carhart*, where the Court upheld highly restrictive federal abortion regulations. Assuming that, despite *Gonzales*, some species of the right still exists, there is some evidence that it applies not only to plaintiffs wishing to avoid procreation (as in *Eisenstadt* and its progeny), but also to plaintiffs wishing to procreate as in the Court’s 1942 decision of *Skinner v. Oklahoma*. In *Skinner*, in invalidating a state policy of sterilizing certain habitual criminals, the Court described procreation as a “basic civil right” that is “fundamental to the very existence and survival of the race.” While *Skinner* was decided on equal protection rather than due process grounds, it nevertheless suggests that the Constitution protects both decisions not to procreate and decisions to procreate.

Professor John Robertson has been one of the primary proponents of the argument that the liberty protected by the Due Process Clauses is broad enough to encompass the use of ART and, specifically, the use of

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109 Meyer, Pierce, Troxel.
115 Although one can read *Gonzales* as calling the right to abortion into question, there is as yet little evidence that it called the right to contraception into question.
117 *Id.*
PGD.\textsuperscript{118} He wrote, in a 1996 article, “[T]he main support for a right to engage in prebirth selection rests on the close connection between the expected characteristics of offspring and the decision whether or not to reproduce.”\textsuperscript{119} Relying on cases like \textit{Skinner} and \textit{Eisenstadt}, Professor Robertson explained:

If reproductive decisions are fundamental, then access to information material to the decision to reproduce should be equally fundamental. If a person would choose not to reproduce if she knew that the child would have a disability or some other undesired characteristic, then she should be entitled to have that information and to act on it. Her right to avoid reproduction for any reason would entitle her to avoid reproduction for a particular reason. Similarly, her right to have offspring generally should entitle her to have offspring only if she thinks that offspring will have particular characteristics.\textsuperscript{120}

On this reasoning, prospective parents would have a right to use PGD to select for any trait that is so “material to [their] reproductive decision [that it] determines whether reproduction will occur.”\textsuperscript{121} This could potentially include both therapeutic and non-therapeutic uses of PGD.\textsuperscript{122} Part II(b), above, illustrates that there may be prospective parents for whom sex and disabilities (e.g., achondroplasia) are but-for conditions of reproduction.

Even if the right to use non-therapeutic PGD is not protected by virtue of its association with decisions about procreation, it may be protected by virtue of its association with decisions about childrearing. The right to make decisions about childrearing was first articulated in the 1923 decision of \textit{Meyer v. Nebraska}, where the Court invalidated a statute barring young children from learning foreign languages, in part, because it burdened parents’ rights “to control the education of their own.”\textsuperscript{123} The right was subsequently reaffirmed in the 1925 decision of \textit{Pierce v. Society}

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\begin{itemize}
\item \textsuperscript{119} Id. at 424-25.
\item \textsuperscript{120} Id. at 427.
\item \textsuperscript{121} Id. at 429 (stating that the court must determine whether “the characteristic in question is one that is central or material to a reproductive decision--whether the characteristic determines whether reproduction will occur[, and if so, the law must give this choice the same respect and weight it gives to other decisions about whether or not to reproduce.
\item \textsuperscript{122} See, e.g., the achondroplastic parents discussed in Part II(a)(ii), supra.
\item \textsuperscript{123} Meyer v. Nebraska, 262 U.S. 390, 401 (1923). The Court also stated that liberty encompasses the right to “marry, establish a home and bring up children.” \textit{Id.} at 399.
\end{itemize}
\end{flushright}
of Sisters, where the Court invalidated a statute requiring children to attend public schools, in part, because it burdened parents’ rights “to direct the upbringing and education of children under their control.”\footnote{Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).} While many rights recognized during the early Twentieth Century did not survive the New Deal, parental rights were an important exception.\footnote{Modern cases in which parental rights were recognized – even if they did not always prevail – include, among others: Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents[,]”); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (mentioning the “the interest of a parent in the companionship, care, custody, and management of his or her children”); Parham v. J. R., 442 U.S. 584, 602 (1979) (noting that “the family [is generally viewed] as a unit with broad parental authority over minor children”); and Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting that parents have a “fundamental liberty interest . . . in the care, custody, and management of their child”).} They were protected – albeit in conjunction with religious rights – by the 1972 decision of Wisconsin v. Yoder, where the Court exempted Amish parents from a law requiring children to attend either public or private school until the age of sixteen.\footnote{Wisconsin v. Yoder, 406 U.S. 205, 234 (1972). It should be noted that the result would likely have differed, had the claim not sounded in both parental and religious freedom. The Court stated, “[I]t cannot . . . be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”\footnote{Troxel v. Granville, 530 U.S. 57, (2000) (holding that a Washington statute, which allowed any person to petition for visitation with a child at any time and did not require courts to give any deference to parental wishes, unconstitutionally burdened the parental rights of the plaintiff mother).} The Court held that the Amish parents had a fundamental right to direct the “religious upbringing of their children,” and that the state’s interest in education was not sufficiently compelling to justify infringing that right.\footnote{Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). The Court emphasized that the case did not present the question of what might happen if a child wished to continue her schooling and her parent wished to withdraw her for religious reasons. The Court explained, “Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State[.]” Id. at 231.} Parental rights were most recently recognized in the 2000 decision of Troxel v. Granville, where the Court stated, “[I]t cannot . . . be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”\footnote{Troxel v. Granville, 530 U.S. 57, (2000) (holding that a Washington statute, which allowed any person to petition for visitation with a child at any time and did not require courts to give any deference to parental wishes, unconstitutionally burdened the parental rights of the plaintiff mother).}

Professor Robertson has argued that, although the “main support” for a right to PGD arises from its association with decisions about procreation, secondary support arises from its association with decisions...
about childrearing.\textsuperscript{129} He and others, including Professor Maxwell Mehlman, have observed that, but for the fact that shaping through PGD occurs \textit{before} birth and shaping through decisions about healthcare, education, and socialization occur \textit{after} birth, they are quite similar.\textsuperscript{130} Professor Mehlman has emphasized the breadth of the liberty that parents currently enjoy in directing their children’s healthcare, education, and socialization. With respect to healthcare, he notes that “[p]arents have been allowed to withhold consent to corrective surgery for a child’s heart defect; refuse to consent to chemotherapy; . . . and donate a child’s kidney to a sibling.”\textsuperscript{131} While parental discretion over healthcare is not entirely unlimited,\textsuperscript{132} it is certainly substantial. With respect to education and socialization, Professor Mehlman notes that “parents routinely choose or change their children’s futures [by] picking their . . . schools and selecting their extra-curricular activities.”\textsuperscript{133} Because the law gives parents such substantial control over their \textit{existing} children, one can make the argument that it should give them similar control over their \textit{prospective} children.\textsuperscript{134}

Not everyone, however, is willing to accept the argument that the liberty protected by the Due Process Clauses protects the use of non-therapeutic PGD. Professor Radhika Rao, for example, has written that, although such an argument is “plausible,” it cannot ultimately succeed.\textsuperscript{135} Applying the traditional test for determining whether a given right is fundamental – i.e., whether it is deeply rooted in our nation’s history and tradition\textsuperscript{136} – Professor Rao concludes that there is no fundamental right to ART. She reaches this conclusion, in part, because ART has “been in existence for too short a time for there to have developed any tradition of

\textsuperscript{129}Robertson, supra note 118, at 424-25.

\textsuperscript{130}Id. at 424, n.12 (mentioning “tutors, camps, orthodontia, rhinoplasty, or human growth hormone” as examples of post-birth shaping). Maxwell Mehlman, \textit{Will Directed Evolution Destroy Humanity, and If So, What Can We Do About It?}, 3 ST. LOUIS U. J. HEALTH L. & POL’Y 93, 109 (2009).

\textsuperscript{131}Mehlman, supra note 130, at 111-12.

\textsuperscript{132}Id. (“[C]ourts have intervened when parents failed to obtain treatment for a five-week-old infant with two broken arms; when a mother exposed a child to secondhand cigarette smoke during visitations; [etc.].”).

\textsuperscript{133}Id. at 109. Professor Mehlman further observes, “Parents also place their children at risk when they permit them to play dangerous sports.” \textit{Id.} at 111-12.

\textsuperscript{134}One could even make the argument that, if a parent is going to be permitted to require his or her child to practice the piano for five hours every day, it is in the child’s interest to have a genetic predisposition to musicality.

\textsuperscript{135}Radhika Rao, \textit{Equal Liberty: Assisted Reproductive Technology and Reproductive Equality}, 76 GEO. WASH. L. REV. 1457, 1462 (2008) ([T]he ‘liberty’ protected under the Due Process Clause of the Fourteenth Amendment doesn’t appear to include a fundamental right to use ARTs.”).

legal protection”\textsuperscript{137} and, in part, because “such an expansive reading of the privacy cases is unwarranted.”\textsuperscript{138} Professor Rao explains the latter point by stating that “the Constitution does not guarantee reproductive autonomy all by itself, disentangled from concerns about bodily integrity and inequality.”\textsuperscript{139} Her article, which illustrates the weaknesses of the dominant liberty arguments, is one of the few attempts to reconcile our dual commitments to liberty and equality.

\textit{II.b.ii. Equality Arguments in Favor of Banning PGD}

Even assuming that the liberty of the Due Process Clauses protects a fundamental right to non-therapeutic PGD, that right could be burdened by a law “narrowly tailored” to a “compelling” governmental interest.\textsuperscript{140} While the government may have a variety of interests in banning non-therapeutic PGD,\textsuperscript{141} some of the most “compelling” relate to equality. Our constitutional commitment to equality is reflected in a number of provisions,\textsuperscript{142} but most notably in the Fourteenth Amendment’s Equal Protection Clause,\textsuperscript{143} which has been used to curtail discrimination based on (among other traits) race, sex, and disability.\textsuperscript{144} Notwithstanding the fact that courts scrutinize race discrimination more rigorously than sex discrimination, and sex discrimination more rigorously than disability discrimination, purely animus-based discrimination is always

\textsuperscript{137} Rao, \textit{supra} note 135, at 1462 (“IVF itself has been around for only thirty years, [FN36] while PGD has been practiced for less than two decades”).

\textsuperscript{138} \textit{Id.} at 1464.

\textsuperscript{139} \textit{Id.} at 1464.

\textsuperscript{140} Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (“[T]he Fourteenth Amendment forbids the government to infringe . . . ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”), citing Reno v. Flores, 507 U.S. 292, 302 (1993).

\textsuperscript{141} Professor Robertson enumerates the following interests: “destruction of embryos and fetuses, harm to offspring, instrumentalizing or commodifying human life, discrimination on the basis of gender or disability, and easing the way to nonmedical enhancement.” Robertson, \textit{Genetic Selection} at 429.

\textsuperscript{142} See, e.g., U.S. CONST. amends. XIII (abolishing slavery), XIV (guaranteeing, among other things, equal protection of the laws), XV (preventing race discrimination in voting), XIX (preventing sex discrimination in voting). Citizenship Clause (cite Amar).

\textsuperscript{143} U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

\textsuperscript{144} It was used to curtail race discrimination in \textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967) (applying strict scrutiny to race-based classifications); sex discrimination in \textit{United States v. Virginia}, 518 U.S. 515, 533-34 (1996) (applying intermediate or skeptical scrutiny to gender-based classifications) and disability discrimination in \textit{Cleburne v. Cleburne Living Center}, 473 U.S. 432 (1985) (applying only rational basis review to disability-based classifications, but invalidating discrimination against individuals with disabilities on the basis that it was irrational).
unconstitutional. While the Equal Protection Clause itself applies only to government discrimination, Section Five of the Fourteenth Amendment, which gives Congress power to enforce the Equal Protection Clause, has (in conjunction with the Commerce Clause) been used as a ground for banning private discrimination based on race, sex, and disability. One could, therefore, argue that preventing discrimination on these bases ought to be accepted as the type of “compelling” governmental interest that could justify infringement on a fundamental right, such as the arguably fundamental right to non-therapeutic PGD. While the Court has not always accepted creating social equality as a “compelling” interest, one could certainly argue that it should. The remainder of this section explores three of the most common arguments from equality, all of which would view banning non-therapeutic PGD as a narrowly tailored means of achieving a compelling interest in ensuring social equality.

The first argument arises from concerns about marginalization. If non-therapeutic PGD were consistently used to select against traits associated with currently marginalized populations, those populations

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145 Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); Romer v. Evans, 517 U.S. 620, 632 (1996) (stating that “the amendment [at issue] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests”).

146 The Civil Rights Cases, 109 U.S. 3, 10-11 (1883) (“Individual invasion of individual rights is not the subject-matter of the [Equal Protection Clause].”).

147 U.S. CONST. art. I, § 8, Cl. 3.


149 See, e.g., Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); See also Osamudia R. James, Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education, 85 IND. L.J. 851, 881 & 881, n.249 (2010) (explaining that “the [Parents Involved] Court implicitly reaffirmed earlier pronouncements that attempts to address the manifestations of societal discrimination are not compelling interests that justify affirmative action” and that, ultimately, “the Court failed to clearly address the legitimacy of social equality as a compelling interest”).

might be further marginalized. Specifically, if non-therapeutic PGD were consistently used to select against dark eyes, dark hair, and dark skin, racial minorities might be further marginalized; if it were consistently used to select against females, women might be further marginalized. Beyond marginalization, selecting against females could also create a problematic sex-imbalance in the overall population.

Concerns that non-therapeutic PGD might further marginalize racial minorities are rarely voiced, except in conjunction with concerns about unequal access to ARTs, where the argument that minorities are disproportionately unable to afford the high costs of IVF and PGD is common (see infra for further discussion of this argument). Yet minorities could potentially be further marginalized by PGD for reasons entirely unrelated to their socio-economic status. If ART clinics began allowing prospective parents to select for eye, hair, and skin color, prospective parents would be able to emphasize or deemphasize important racial markers. While, as previously mentioned, prospective parents could not select prospective children with races entirely different from their own, they could by selecting slightly lighter eyes, hair, and skin potentially affect the apparent racial makeup of the overall population.151

Concerns that non-therapeutic PGD would marginalize women are, in contrast, regularly voiced. Professor Amartya Sen has warned that sex selection produces “natality inequality,” a phenomenon that is particularly pronounced in male-dominated nations such as China, South Korea, and India.152 The President’s Council on Bioethics, in its 2003 report, Beyond Therapy: Biotechnology and the Pursuit of Happiness, expressed similar concerns about sex selection.153 It explained that, if the practice is allowed, “the private choices made by individuals, once aggregated, could produce major changes in a society’s sex ratio[.].”154 It elaborated, “Over the past several decades, disturbing evidence has accumulated of the widespread use of various medical technologies to choose the sex of one’s child, with a strong preference for the male sex.”155 While the Council acknowledged that this preference for males does not exist within the United States, where the overall sex ratio remains at 104.8 (very close to the natural sex

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151 See supra Part II(b)(ii).
154 Id. at 58.
155 Id.
It worried about rising sex ratios among certain groups—specifically, Chinese and Japanese Americans. If prospective parents consistently selected for males, they could indeed alter the sex-balance of the population—and, in doing so, cause substantial harm.

The second equality-based argument in favor of banning non-therapeutic PGD arises from concerns about stereotyping. If prospective parents were allowed to engage in trait selection, they might force their children to conform to (or defy) the social stereotypes associated with the traits they have selected. Prospective parents who select males may, for example, expect conventionally “masculine” behavior. Policymakers, scientists, and academics from across the globe have voiced such concerns. As the President’s Council on Bioethics stated, “[A] host of powerful expectations go into the selection of a boy or a girl[, and, in] choosing one sex over the other, we are necessarily making a statement about what we expect of that child[.]”

Doctor David King, Director of Human Genetics Alert (a London-based watchdog group), similarly stated that children who have been selected from multiple embryos “are likely to feel that the essence of themselves, in an important sense no longer belongs solely to them, [and that they are merely expressions of] their parents’ aspirations, desires and whims.”

Doctor Ruth Zafran, a law lecturer in Israel, wrote that “the more the parents’ preferences for a child’s genetic makeup are met through active, external, and calculated intervention, the greater their expectation will be for that child to fulfill the ‘genetic promise,’ namely to lead a life consistent with what the genes are supposedly intended to achieve.” Concerns about stereotyping, indeed, merit substantial consideration.

The third equality-based argument in favor of banning non-therapeutic PGD arises from concerns about unequal access. Unless and until non-therapeutic PGD becomes more affordable, only the wealthy will realistically have access. At present, IVF alone costs between $10,000 and

156 Id. at 58 (“The natural sex ratio at birth is 105 baby boys born for every 100 baby girls.”) and 61 (“the sex ratio in the United States has remained stable at 104.8”).
157 Id. at 61 (“In 1984 the sex ratio for Chinese-Americans was 104.6 and for Japanese Americans 102.6; in 2000, these ratios had risen respectively to 107.7 and 106.4.”).
158 President’s Council on Bioethics, supra note 153, at 70 (“As fathers, we may want a son to go fishing with; or as mothers, we may want a daughter to dress for the prom. The problem goes deeper than sexual stereotyping, however. For it could also be the case that we may want a daughter who will become president to show that women are the equal of men.”).
159 Human Genetics Alert “is a secular, independent public interest watchdog group, based in London, UK[,]” http://www.hgalert.org/aboutUs/.
160 See Zafran, supra note 4, at 204 (2008) (“This may cover both physical characteristics and personality traits.”). Doctor Ruth Zafran is a lecturer at the Radzyner School of Law in Israel.
$12,000 per cycle, and PGD adds an additional $2,500 to $7,000.\textsuperscript{161} When interviewed about the expected cost of eye-, hair-, and skin-color selection, Doctor Jeff Feinberg of the Fertility Institutes (discussed supra, in Part II(a)(ii)) estimated that it would be approximately $18,000.\textsuperscript{162} Since IVF is generally not covered by insurance (except in a handful of states that mandate coverage),\textsuperscript{163} most patients pay out-of-pocket for the procedures. Those who use IVF and PGD, thus, tend to be affluent and, in many cases, well-educated and politically powerful.\textsuperscript{164} The American Medical Association’s Council on Ethical and Judicial Affairs has spoken about unequal access to genetic enhancement – which, while different from genetic selection, raises similar concerns.\textsuperscript{165} Genetic enhancement is, according to the Council’s 1994 report, “permissible only in severely restricted situations,” and not unless all prospective parents have “equal access . . . irrespective of [their] income or other socioeconomic characteristics.”\textsuperscript{166}

Scholars, cognizant of the rough correlation between socioeconomic status and race, have observed that the high costs of IVF and PGD tend to perpetuate existing privilege by “allowing wealthy white women to reproduce themselves.”\textsuperscript{167} Professor Dorothy Roberts, who has written extensively on these issues, observes that new reproductive technologies such as PGD are used “almost exclusively by white people” and are avoided disproportionately by African Americans.\textsuperscript{168}

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\textsuperscript{162} Sherwell, supra note 84.

\textsuperscript{163} King, supra note 161, at 296-97 (“While a handful of states require insurance companies to cover all or a portion of the costs associated with IVF, a substantial percentage of IVF patients remain uncovered by insurance and are forced to pay for the procedure out of pocket.”). See also June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 Wm. & Mary Bill Rts. J. 1015, 1036, n.137 (2010), citing Infertility Coverage in Your State, Resolve: The National Infertility Association, http://www.resolve.org/site/PageServer?pagename=lrn_ic_stintro (last visited Apr. 17, 2010) (noting that fifteen states have laws requiring insurance coverage for infertility treatment).

\textsuperscript{164} Carbone & Cahn, at 1018 (2010).


\textsuperscript{166} Id. at 640-41.


Roberts has observed a “harsh dichotomy,” in which “policies punish poor black women for bearing children but advanced technologies assist mainly affluent white women not only to have genetically-related children, but to have children with preferred genetic qualities.”

Concerns about socio-economic inequality are, thus, problematic not only in their own right but also in their overlap with concerns about racial marginalization.

These dominant arguments from equality, which suggest that a ban on non-therapeutic PGD would be fully justified, are in direct conflict with the dominant arguments from liberty, which suggest that such a ban would be unconstitutional. While there is no easy answer to this dilemma, Part III will illustrate that the dominant arguments discussed above do not necessarily represent the full spectrum of plausible liberty and equality arguments.

III. DECONSTRUCTING THE LIBERTY/EQUALITY BINARY

The arguments discussed in Part II suggest that, in assessing the constitutionality of a ban on non-therapeutic PGD, one must make a choice between protecting either liberty or equality. They suggest that protecting liberty requires destroying equality, while protecting equality requires destroying liberty. Part III begins from the premise that this is a false – and, indeed, constitutionally problematic – choice, inasmuch as Section One of the Fourteenth Amendment protects both liberty and equality. Part III(a), drawing on the postmodern literary theory discussed in Part I(a), illustrates that the arguments set forth in Part II do not represent the full spectrum of plausible arguments from liberty and equality. Part III(b), drawing on the postmodern political theory discussed in Part I(b), suggests that, when faced with multiple plausible arguments from liberty and equality, we should choose those that are most conducive to revealing the diverse identities that currently populate our public forum. The article concludes by arguing that, in so doing, we will promote robust debate, accurate representation, and democracy.

III.a. Multiple Arguments from Liberty and Equality

Part III(a) draws on the postmodern literary theory introduced in Part I(a) to illustrate that the dominant liberty and equality arguments set forth in Part II(d) are not the only plausible liberty or equality arguments. In addition to the dominant liberty arguments, which oppose banning non-

170 See supra Part II(d)(i).
therapeutic PGD, there are other currently marginalized liberty arguments that favor banning non-therapeutic PGD. Similarly, in addition to the dominant equality arguments, which favor banning PGD, there are other currently marginalized equality arguments that oppose banning non-therapeutic PGD. While the dominant arguments set forth in Part II position liberty and equality as binary opposites, the arguments set forth in Part III(a) deconstruct the binary opposition and give us the option of repositioning the two rights as fully compatible partners.

III.a.i. Liberty arguments in Favor of Banning PGD

Liberty, as discussed in Part I(a), is susceptible to multiple interpretations. While the dominant liberty arguments discussed in Part II(d)(i) focus on the rights of prospective parents to make decisions about procreation and child-rearing – and, accordingly, protect the use of non-therapeutic PGD – other currently marginalized liberty arguments focus on the rights of prospective children to construct their own identities – and, accordingly, condemn the use of non-therapeutic PGD. These marginalized arguments might be framed as asserting that, even if a ban on non-therapeutic PGD did burden the liberty of prospective parents, the burden would be justified because the ban would be narrowly tailored to achieve the compelling interest in protecting the liberty of prospective children.171

While the Supreme Court has never directly held that children (or, for that matter, adults) have a right to fully autonomous identity-construction, several of its decisions have suggested such a right. The 2003 decision of Lawrence v. Texas, for example, established that adults have a right “to define [their] own concept of existence, of meaning, of the universe, and of the mystery of human life[,]”172 and that the “liberty” protected by the Due Process Clauses “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”173 While the Lawrence Court was careful to note that the facts before it did not involve minors,174 the 1979 decision of Bellotti v. Baird shows that minors do enjoy at least limited constitutional rights, such as the right to make decisions about procreation.175 The rights of minors are,

171 Proponents of such arguments would, however, likely begin by arguing that a ban on non-therapeutic PGD would not burden any fundamental liberty of prospective parents.
173 Id. at 562.
174 Id. at 578 (“The present case does not involve minors.”).
175 Bellotti v. Baird, 443 U.S. 622, 632 (1979) (explaining that parental consent laws are constitutionally permissible so long as they are accompanied by sufficient judicial bypass
however, far weaker than – and often superseded by – the rights of their parents.\textsuperscript{176} The \textit{Bellotti} Court stated that “the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors.”\textsuperscript{177} Yet it nevertheless held that minors seeking abortions are entitled to judicially bypass parental consent requirements.\textsuperscript{178} Based on decisions like \textit{Lawrence} and \textit{Bellotti}, one could argue that minors have a right to construct their own identities, but that the right is limited (at least under existing doctrine and dominant understandings) by the superior rights of parents to make decisions about their children’s upbringing.

Professor Dena Davis’s work has been instrumental in revealing previously marginalized liberty arguments that protect children’s rights to construct their own identities. Her seminal article, \textit{Genetic Dilemmas and the Child’s Right to an Open Future}, shifts the focus from the liberty of prospective parents to the liberty of prospective children – which she (following Professor Joel Feinberg) refers to as the child’s “right to an open future.”\textsuperscript{179} Professor Davis argues that prospective parents who use non-therapeutic PGD inevitably deprive their children of liberty by forcing them to live out (or, in some cases, deliberately defy) the stereotypes associated with their selected traits.\textsuperscript{180} Professor Davis writes, “Parents whose preferences for one sex or the other are compelling enough for them to take active steps to control the outcome must, logically, be committed to certain strong gender-role expectations of the children they will raise.”\textsuperscript{181} This often marginalized liberty argument is quite consistent with the dominant equality argument that parents who engage in non-therapeutic trait selection will force their children to conform to the social stereotypes associated with their selected traits.\textsuperscript{182} Professor Davis’s article, by re-framing a dominant equality argument as a previously

\begin{footnotesize}
\begin{enumerate}
\item[176] See \textit{id.} at 633-34.
\item[177] \textit{id.} at 633-34. The Court cited \textit{Pierce v. Society of Sisters} and \textit{Wisconsin v. Yoder}, both of which are discussed supra, in Part II(b)(i). The \textit{Bellotti} Court “recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.” \textit{id.} at 634. It stated that “the tradition of parental authority is not inconsistent with our tradition of individual liberty.” \textit{id.} at 638.
\item[178] \textit{id.} at 643.
\item[179] Davis, \textit{supra} note 46, at 551.
\item[180] \textit{id.} at 587-91.
\item[181] \textit{id.} at 587. She continues, “If they want a girl \textit{that} badly, whether they are hoping for a Miss American or the next Catherine MacKinnon, they are likely to make it difficult for the actual child to resist their expectations and follow her own bent.” \textit{id.}
\item[182] See \textit{supra} Part II(b)(ii). It should be noted that framing the argument as a liberty argument rather than an equality argument may have implications for abortion politics.
\end{enumerate}
\end{footnotesize}
unarticulated liberty argument, helps to deconstruct the liberty/equality binary.

**III.a.ii. Equality Arguments against Banning PGD**

Equality, like liberty, is susceptible to multiple interpretations. Equality arguments can, therefore, weigh both in favor of and against bans on non-therapeutic PGD. While the dominant equality arguments discussed in Part II(d)(ii) weigh in favor of bans on non-therapeutic PGD, there are at least two currently marginalized equality arguments that weigh against such bans: The first attacks discrimination between those who wish to make non-therapeutic trait selections and those who wish to make therapeutic trait selections, and the second attacks discrimination between those who wish to make non-therapeutic trait selections and those who wish to use donor sperm or ova. While such discrimination triggers only rational basis review under the Equal Protection Clause, this section asserts that it cannot survive even that lowest level of scrutiny. After elaborating on these two marginalized arguments, this section concludes by offering a rebuttal to one of the dominant equality arguments – the argument that non-therapeutic PGD should be banned because it is inaccessible to the poor and thereby exacerbates existing socio-economic discrimination.

The first marginalized equality argument, which attacks discrimination between those who wish to make non-therapeutic trait selections and those who wish to make therapeutic trait selections, proceeds by arguing that such discrimination is irrational due to the moral judgment and inherent instability of the therapeutic/non-therapeutic binary. Inasmuch as it is, without moral judgment, difficult if not impossible to definitively characterize a given trait selection as therapeutic or non-therapeutic – particularly when racial markers, sex, or disabilities are involved – a ban that targeted non-therapeutic PGD but allowed therapeutic PGD could not survive rational basis review.183

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183 While many would say that therapeutic selections are made for medical reasons and non-therapeutic selections are made for non-medical reasons, defining the terms therapeutic and non-therapeutic is difficult. Indeed, as Professor Brigham Fordham has observed, the terms “have meaning only by reference to some subjective standard for what makes a person whole.” Brigham A. Fordham, *Disability and Designer Babies*, 45 VAL. U. L. REV. 1473, 1517 (2011). Professor Leonardo De Castro has defined therapeutic experiments as those in which “the benefits are intended to accrue directly to the subjects,” and non-therapeutic experiments as those in which “the benefits are expected to be enjoyed by others.” Leonardo D. De Castro, *Ethical Issues in Human Experimentation*, in *A COMPANION TO BIOETHICS* 380 (Helga Kuhse & Peter Singer eds., 2001). He has, however, recognized that “[o]ne and the same procedure may be therapeutic to some subjects but non-therapeutic to others.” *Id.*
The therapeutic/non-therapeutic binary is, in many ways, similar to "the therapy versus enhancement distinction" discussed in the report of the President’s Council on Bioethics. The report defined "therapy" as "the use of biotechnical power to treat individuals with known diseases, disabilities, or impairments, in an attempt to restore them to a normal state of health and fitness;" it defined "enhancement" as the "use of biotechnical power to alter . . . the ‘normal’ workings of the human body and psyche, to augment or improve their native capacities and performances." Yet the report immediately recognized the limitations of the distinction, noting that "‘therapy’ and ‘enhancement’ are overlapping categories,” both of which are “bound up with . . . the inherently complicated idea of health and the always-controversial idea of normality.” It explained, “While in some cases – for instance, a chronic disease or a serious injury – it is fairly easy to point to a departure from the standard of health, other cases defy simple classification – in part, because most human capacities fall along a continuum.” The report therefore asked, “Is it therapy to give growth hormone to a genetic dwarf, but not to a short fellow who is just unhappy to be short?” This question has broad implications, inasmuch as many trait selections could potentially have both therapeutic and non-therapeutic aspects.

Prospective parents might, for example, select darker or lighter skin for either therapeutic or non-therapeutic reasons. Selecting darker skin to reduce the risk of skin cancer, or lighter skin to facilitate the synthesis of vitamin D, could arguably be viewed as therapeutic. In contrast, selecting darker or lighter skin to create a particular social status

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184 President’s Council on Bioethics, Beyond Therapy, supra note 153.
185 Id.
186 Id.
187 Id.
188 Id.
189 Id. (“And if the short are brought up to the average, the average, now having become short, will have precedent for a claim to growth hormone injections.”). The therapy/enhancement distinction has also been critiqued by scholars, some of whom have viewed it as “unsustainable.” Isabel Karpin & Roxanne Mykitiuk, Going Out on a Limb: Prosthetics, Normalcy, and Disputing the Therapy/Enhancement Distinction, 16 MED. L. REV. 413, 436 (2008).
191 Nina G. Jablonski & George Chaplin, The evolution of human skin coloration, JOURNAL OF HUMAN EVOLUTION 39 (1): 57–106, 58 (2000) (“The more lightly pigmented skins of peoples inhabiting latitudes nearer the Arctic have been explained as adaptations to the lower UV radiation regimes of those regions and the importance of maintaining UV-induced biosynthesis of vitamin D3 in the skin.”) (internal citations omitted).
would conventionally be viewed as non-therapeutic. Yet one can challenge this conventional view. As Rabbi Mark Popovsky has observed, having a certain skin color may, in certain social contexts, confer such significant “advantages that [it] could potentially affect someone’s overall health and well-being far more than the presence or absence of one specific genetic disease.”\(^{192}\) If this is true, then selecting a certain skin color to create a particular social status could be characterized as at least partly therapeutic. Furthermore, it is possible that prospective parents might choose a certain skin color for a combination of reasons, some conventionally viewed as therapeutic, and others conventionally viewed as non-therapeutic – or, prospective parents might articulate a therapeutic reason as a pretext to achieve a non-therapeutic goal. Characterizing skin-color selection as definitively therapeutic or non-therapeutic is, therefore, problematic.

A similar analysis can be applied to sex selection. Prospective parents might select a female or male child for either therapeutic or non-therapeutic reasons. Choosing a female child to avoid an X-linked disease would conventionally be viewed as therapeutic, while choosing a female to “balance” one’s family or to create a certain social status would conventionally be viewed as non-therapeutic. Yet, again building on Rabbi Popovsky’s observation, one could argue that being of a certain sex might, in certain social contexts (e.g., a family that desperately wanted a child of that certain sex, or a society that consistently privileged that certain sex), confer such significant advantages that being of that sex would improve a child’s health far more than the absence of any particular disease. Characterizing sex selection as definitively therapeutic or non-therapeutic is, therefore, also problematic.

While similar arguments can be used to illustrate the problems of characterizing selections related to skin color and sex, a different set of arguments is necessary to illustrate the problems of characterizing selections related to disability. While selecting against disability is relatively common and generally viewed as therapeutic, selecting for disability is relatively uncommon and generally viewed as non-therapeutic – as well as, in the eyes of some, unethical. Yet defining the term disability can be quite problematic, since many prospective parents who wish to select for traits that have conventionally been understood as disabilities would not themselves characterize those traits as disabilities. When parents of a child with Down syndrome wish to select for Down

\(^{192}\) Mark Popovsky, *Jewish Perspectives on the Use of Preimplantation Genetic Diagnosis*, 35 J.L. MED. & ETHICS 699, 709 (2007) (“[O]ne can argue convincingly that the line between traits affecting health and those that do not is impossible to draw. For example, the advantages that may follow in our society from a lighter shade of skin color or from being straight could potentially affect someone's overall health and well-being far more than the presence or absence of one specific genetic disease.”).
syndrome,\textsuperscript{193} or when achondroplasic parents wish to select for achondroplasia\textsuperscript{194} or when deaf parents wish to select for deafness,\textsuperscript{195} they will not necessarily characterize themselves as selecting for disabilities. A deaf father, when questioned about his desire to select a deaf child, explained: “Being deaf is not about being disabled. It’s about being part of a linguistic minority. We’re proud of the language we use and the community we live in.”\textsuperscript{196} For such parents, selecting for deafness is a means not of imposing a disability but of sharing an identity, and ensuring the continued presence of that identity in the general population. Due to the problems with defining the term disability, it is difficult to say whether selecting for or against a trait that has conventionally been understood as a disability is definitively therapeutic or non-therapeutic.\textsuperscript{197}

One could argue, for the above reasons, that a ban on non-therapeutic PGD could not survive rational basis review, inasmuch as it could not be rationally related to any legitimate governmental interest.\textsuperscript{198} While the government may have legitimate interests in, first, protecting prospective children and, second, preserving the existing gene pool, these interests – when effectuated through a ban on non-therapeutic PGD – arguably rest upon moral judgments. While the government, under rational basis review, is permitted to solve problems incrementally,\textsuperscript{199} it is not permitted to base legislation solely upon moral judgments.\textsuperscript{200} Yet one could argue that a ban targeting non-therapeutic PGD would rest on such judgments, inasmuch as it would, first, protect prospective children based on a moral judgment that what is non-therapeutic is less beneficial and, second, preserve the gene pool by singling out non-therapeutic PGD as an immoral means of altering that pool. Somewhat similar interests have, on past occasions, failed rational basis review.\textsuperscript{201} It should be noted that the

\textsuperscript{193} See Smolensky, supra note 60, at 305.
\textsuperscript{194} See id.
\textsuperscript{195} Baruch, supra note 65, at 5.
\textsuperscript{196} See Gray, supra note 46.
\textsuperscript{197} Even assuming that we could reach general consensus on the list of “disabilities,” the fact that selecting against disabilities is common and selecting for disabilities is uncommon creates inequality. This argument will be discussed below, in Part III(b).
\textsuperscript{199} See Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (“[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.”) (internal citations omitted).
\textsuperscript{200} See Lawrence v. Texas, 529 U.S. 558 (2003) (Scalia, J., dissenting) (reading the majority opinion as holding that morality cannot suffice as a legitimate state interest).
inability to definitively characterize a given use of PGD as therapeutic or non-therapeutic would also render a ban targeting non-therapeutic PGD unconstitutionally vague under the Due Process Clause. 202

If the first marginalized equality argument were to fail, the second could be raised to attack discrimination between those who wish to use non-therapeutic PGD (or any PGD, for that matter) 203 and those who wish to use donor sperm or ova. This argument asserts that discrimination between non-therapeutic PGD users and sperm or ova bank users is irrational because any danger of skewing the gene pool that arises from the use of PGD is far less than that which arises from the use of donor sperm or ova. Thus, a ban targeting PGD but continuing to allow the unrestricted selection of donor sperm and ova could not survive rational basis review.

The use of donor sperm and ova is, like the use of PGD, relatively unregulated. 204 Individual clinics may, but are not required to, limit the number of times a donor can donate or the number of recipients who can receive that donor’s sperm. 205 Many clinics, however, report “most-requested” donors, 206 and some donors have over 150 children, potentially all in the same geographical area. 207 English philosopher Mary Warnock, known for her contributions to the Warnock Report on human fertilization and embryology, recently observed, “It is quite unpredictable what the ultimate effect on the gene pool of a society might be if donors were permitted to donate as many times as they chose.” 208 In addition to single donors skewing the gene pool, consistent preferences in favor of one race or another might also skew the gene pool. Many clinics, indeed, make it easy for prospective parents to select donors based on their race. 209 Yet it

202 See, e.g., Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990) (challenging a law that banned experimentation unless it was therapeutic to the fetus on vagueness grounds).

203 The distinction between non-therapeutic and therapeutic uses is less relevant within the context of this argument.

204 Michelle Dennison, Revealing Your Sources: The Case for Non-Anonymous Gamete Donation, 21 J.L. & HEALTH 1, 10, 15 (2008) (“there is very little federal or state regulation in the donor industry”). Dennison explains, “[E]xisting laws almost exclusively center around the parentage of children born through ART methods, providing in almost all cases that the recipients of the donated gamete are the legal parents of the donor-conceived offspring and that the donor has no parental rights or obligations.” Id. at 10. But see 42 U.S.C.A. § 263a-1 (2009).

205 Id. at 15.

206 Id.


208 Id.

209 Dov Fox, Choosing Your Child’s Race, 22 HASTINGS WOMEN’S L.J. 3, 3-4 (2011) (“[T]wenty-three of the twenty-eight sperm banks currently operating in the United States provide aspiring parents with the sperm donors' self-reported racial identity. The largest
should be noted that Ole Schou, director of the world’s largest sperm bank, has indicated that most prospective parents favor donors who resemble themselves.\textsuperscript{210} If the drive to self-replicate diminishes concerns about the use of donor material skewing the gene pool, it must further diminish concerns about the use of PGD skewing the gene pool. The possibility of skewing is, indeed, much greater when prospective parents select from large banks of donor material than when they select from among several pre-embryos created from one man’s sperm and one woman’s ova. While prospective parents might, of course, use donor sperm and ova to create pre-embryos and then use PGD to select among those pre-embryos, the greatest danger of skewing the gene pool derives from the selection of the donor material rather than from the selection of the pre-embryos. It is, therefore, irrational to ban the use of non-therapeutic PGD but allow the largely unregulated use of donor material. Although one might argue that banning all forms of pre-natal testing could resolve the problem of discriminating between various forms, many forms – e.g., chorionic villus sampling and amniocentesis – are so deeply engrained in our current practices that a ban would be unreasonable.

Finally, according to one of the dominant equality arguments, allowing non-therapeutic PGD could have the negative result of exacerbating existing socio-economic inequalities. Because IVF and PGD are so expensive, only the wealthy can realistically afford them – which, due to the correlation between wealth and race, means that whites are more likely than African Americans to utilize them.\textsuperscript{211} It should be emphasized, however, that concerns about socio-economic inequality could be addressed either by banning non-therapeutic PGD or by subsidizing it. Professor Maxwell Mehlman, who has warned that lack of equal access to the technology necessary for genetic enhancement (which, again, raises concerns similar to those associated with genetic selection) could create a “genobility,”\textsuperscript{212} has argued for government subsidies.\textsuperscript{213} He

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\item Interview with Ole Schou, PRI’s The World, \textit{No Redheads orBlonds Wanted at Sperm Bank}, \url{http://www.theworld.org/2011/09/redheads-sperm-bank/} (Sept. 20, 2011) ("The heterosexual couples always look for a donor who could look like the male partner. If it’s lesbians, they try to match as close as possible to one of the females. And then we have the single segmentation, they do not have a husband or partner to match it, so they probably try to find something close to themselves and their dream prince in life."). \end{itemize}
\item See supra Part II(b(ii).
\item Mehlman, \textit{supra} note 130, at 120, citing M\textsc{axwell} J. M\textsc{ehlman} & J\textsc{effrey} B\textsc{otkin}, A\textsc{ccess to the Genome: The Challenge to Equality} 99 (1998).
\item Mehlman, \textit{supra} note 130, at 120.
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has written that “everyone should be able to access technologies that significantly enhance human capabilities, and . . . the government should subsidize access if need be for those less well-off.” 214 While the Supreme Court has consistently declined to require subsidies for the exercise of even fundamental rights, 215 legislatures could elect to provide them.

III.b. Interpreting Liberty and Equality to Promote Diversity

Just as postmodern literary theory can help us to identify multiple meanings of liberty and equality, postmodern political theory can help us to select among those meanings. As described in Part I(a)(ii), postmodern political theory reveals the diverse array of identities that always already exists within our public forum. Rather than reifying the traditionally “dominant” and “marginalized” identity categories – e.g., white/black, male/female, able/disabled – postmodern political theory exposes their inherent fallacy. It illustrates that identity is never so singular or so stable that it can be definitively categorized, and that identity-based hierarchies are so never simplistic that the terms “dominant” and “marginalized” can serve as adequate descriptors. An individual is never merely white, male, or non-disabled, and an identity group is never absolutely dominant or absolutely marginalized. Individual identity is multi-faceted, and dominant identity groups depend for their continued dominance (and, indeed, existence) upon multiple marginalized identity groups. On both individual and social levels, then, postmodern political theory reveals that identity categories are always incomplete. They obscure and, in some cases, even diminish existing diversity. 216 Yet democracy can succeed only when diverse identities are both expressed and represented. 217 Debates are rarely robust when diverse opinions are not expressed, and policies are rarely just when diverse identities have not been represented in their formulation. Ensuring that the diverse identities that populate our public forum are expressed and represented is, in short, crucial to the success of our democracy. Part III(b), thus, assesses the full spectrum of liberty and equality arguments, and attempts to determine those most conducive to recognizing diversity.

214 Id. Professor Mehlman adds the somewhat radical sentiment that, “This should apply as well to directed evolutionary techniques that parents employ to give their children significant social advantages.” Id.
215 See, e.g., Harris v. McRae, 448 U.S. 297 (1980).
216 Binary identity categories can diminish existing diversity by causing people to conform with social norms and fit into one of the two common categories rather than expressing their own unique identities.
217 See supra Part I(a)(ii).
The liberty and equality arguments set forth in Parts II(b) and III(a) suggest at least three possible policy outcomes. First, one might focus on the fact that allowing non-therapeutic PGD could deprive racial minorities and women of equality, and prospective children of liberty, and conclude that it should be banned. Second, one might focus on the fact that banning non-therapeutic PGD could deprive prospective parents of liberty and non-therapeutic PGD users of equality, and conclude that it should be allowed. Third, one might focus on the fact that allowing non-therapeutic PGD could deprive the poor (and, by extension, the racial minorities that are most likely to experience poverty) of equality, and conclude that it should be affirmatively subsidized. This section will assess how each of these policies could enhance or impede the expression of diverse identities and, accordingly, enhance or impede the functioning of our democracy.

Banning non-therapeutic PGD could potentially diminish diversity: While there is little evidence to suggest that a ban would affect genetic diversity (except insofar as it would likely eradicate certain “disabilities” from the population, as will be discussed below), there is good reason to think that it might diminish ideological diversity. The dominant concerns about genetic diversity relate to the marginalization of racial minorities and women. As discussed in Part II(d), one might argue that non-therapeutic PGD should be banned in order to prevent prospective parents from consistently selecting against certain racial markers – e.g., dark eyes, dark hair, and dark skin – and against females. Yet there is little evidence to suggest that prospective parents would, if given the opportunity, make such selections.

With respect to racial markers, no clinics presently allow selection on the basis of eye, hair, or skin color. And, if they started allowing such selections, there is nothing other than prevailing norms about beauty and attractiveness – which are, of course, far from monolithic – to suggest that a significant proportion of prospective parents would actually use non-therapeutic PGD to select against children with dark eyes, hair, and skin. Indeed, some evidence illustrates that prospective parents who utilize sperm banks favor donors who resemble themselves.218 There is, therefore, no existing evidence to substantiate concerns that allowing non-therapeutic PGD would cause racial marginalization. Yet, since prospective parents’ preferences regarding eye, hair, and skin color have not been fully studied, new studies could alter this analysis.

There is similarly little evidence to suggest that a significant proportion of prospective parents would use non-therapeutic PGD to select against females – and sex preferences, unlike eye, hair, and skin color preferences, have been extensively studied. One study found that, while

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218 Interview with Ole Schou, supra note 210.
PGD patients of Chinese, Indian and Arab/Muslim origin were indeed inclined to select against females, those of Western origin exhibited a “slight but not significant preference for females.” The authors therefore concluded that “sex selection by PGD in an ethnically diverse Western society, like the USA, does not have any significant effect on population sex ratio [and] does not discriminate against female embryos.” Other studies have found that many prospective parents who select for sex are acting to “balance” their families rather than because they want all male or all female children. If this is accurate, then allowing sex selection might actually help to maintain the current gene pool.

One might nevertheless argue that, even though current users of PGD do not exhibit a preference for males, a preference could emerge if PGD became more widely available and affordable. A 2011 Gallup Poll lends some credence to this concern, but ultimately fails to substantiate it. When asked whether, if they could have only one child, they would prefer a boy or girl, 40% of Americans indicated that they would prefer a boy, and 28% indicated that they would prefer a girl. There are, however, two reasons why this does not prove that allowing sex selection would marginalize women. First, the poll asked which sex respondents would prefer if they could have only one child, whereas most Americans who have any children have more than one, and perceive the “ideal” number of children to be 2.5. Coupled with the preference for “balanced” families, this suggests that Americans would not consistently favor males. Second, the poll did not ask whether respondents would actually use PGD

219 Colls, P; Silver, L; Olivera, G; Weier, J; Escudero, T; Goodall, N; Tomkin, G; Munne, S. Preimplantation genetic diagnosis for gender selection in the USA, REPRODUCTIVE BIOMEDICINE ONLINE, Vol. 19, Issue: Date: 2009, pp. 16-22, at 21 (emphasis added) (studying parents who had used PGD in 2007 or 2008).
220 Id. at 18, 20.
221 Id. at 17 (“[S]everal studies have demonstrated that . . . gender preferences are usually the result of a desire to have a family with children of both genders (family balancing)[.]”).
222 A 2011 Gallup Poll asked “Suppose you could only have one child. Would you prefer that it be a boy or a girl?” Forty percent of respondents said they would prefer a boy; 28% said they would prefer a girl; 26% said it didn’t matter; and the remainder were unsure or had no opinion. The slight preference for boys is driven entirely by men: 49% of men said they would prefer a boy and 22% of men said they would prefer a girl; in contrast, 31% of women said they would prefer a boy and 33% said they would prefer a girl. Gallup Poll, Americans Prefer Boys to Girls, Just as They Did in 1941, June 23, 2011, http://www.gallup.com/poll/148187/Americans-Prefer-Boys-Girls-1941.aspx.
to achieve their preferences, and other studies report that “only a marginal percentage of the population has expressed willingness to deploy technology in order to select the sex of the embryo.” Concerns that allowing sex selection would marginalize women, thus, similarly remain unsubstantiated.

There is, in sum, little evidence that a ban on non-therapeutic PGD would diminish genetic diversity with respect to racial markers or with respect to sex. It is, however, possible that a ban on non-therapeutic PGD would diminish genetic diversity with respect to traits conventionally understood as disabilities, since prospective parents often select against – and only rarely select for – such traits. While there are deep ethical concerns about allowing prospective parents to select for disabilities, one could make the argument that allowing such selection has the potential to preserve genetic diversity and prevent the further marginalization of individuals with disabilities. Professor Dorothy Roberts has written that the “availability of prenatal diagnosis for a disorder may discourage government funding for research and social services for people who have the disorder.” Professor Judith Daar, who has expressed the same concern, has written that those “afflicted with a genetic disorder that was susceptible to detection by PGD will likely be part of a lower socioeconomic class.” Such individuals, she explains, having been born to parents who “lacked the resources to access PGD,” will themselves lack the resources to obtain “adequate health care to manage the disease.” If non-therapeutic PGD were banned, then, therapeutic PGD might be used to dramatically diminish or entirely eliminate the presence of disabilities from the population. While the elimination of some disabilities may be desirable, the elimination of others could be detrimental. One might also make the argument that preventing prospective parents from selecting in favor of disability would diminish ideological diversity, in the sense that it would prevent parents from making their own ethical decisions.

While reasonable people could disagree on whether banning non-therapeutic PGD would have a detrimental impact on genetic diversity, it would clearly diminish ideological diversity. To prevent prospective parents from using non-therapeutic PGD would be to deprive them of the ability to act upon their diverse ideological (and ethical) viewpoints. Such a deprivation seems unwarranted, in light of the fact that those who have

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225 See Zafran, supra note 4, at 195.
226 See generally Baruch, supra note 65.
227 Roberts, Reprogenetics, supra note 169, at 1355.
229 Id. at 259-60.
230 Id. at 259-60.
used non-therapeutic PGD are aware of the ethical complexity of their decisions.\textsuperscript{231} Furthermore, the level of commitment to trait selection that some prospective parents have exhibited suggests that, if non-therapeutic PGD were unavailable, they might resort to abortion as an alternative.\textsuperscript{232} Allowing non-therapeutic PGD, like allowing abortion, would permit individuals to operationalize their ideologies and thus promote ideological diversity. While ideological diversity should certainly not be promoted at all costs – e.g., if its promotion would lead to a decrease in another form of diversity – it should be promoted in the absence of costs.

One might counter this argument about ideological diversity by pointing out that, while allowing non-therapeutic PGD might promote ideological diversity among prospective parents, it might diminish ideological diversity among their prospective children, who will be forced to live out (or, in some cases, defy) the stereotypes associated with their selected traits. But it seems highly unlikely that banning non-therapeutic PGD will substantially impact the lives of children whose parents would use the technology if it were available. It is, indeed, odd to think that prospective parents, if \textit{allowed} to engage in trait selection, would force their children to live out the stereotypes associated with their traits, while the same parents, if \textit{barred} from selecting their children’s traits, would allow their children to self-determine. While one may think that allowing parents to standardize their children by forcing them to live out or defy stereotypes is problematic, banning non-therapeutic PGD will not independently resolve this problem.\textsuperscript{233}

It therefore appears that the first policy option – banning non-therapeutic PGD – would be undesirable. Yet further inquiry is necessary to determine whether the second or third policy options – allowing non-therapeutic PGD or subsidizing it – would in fact be preferable. While allowing non-therapeutic PGD would promote ideological diversity, it would not do so on an equal basis. Due to the high cost of IVF and PGD, only the wealthy can realistically engage in trait selection; the poor (as with abortion) are left unable to operationalize their ideologies and express their diversity. Subsidizing non-therapeutic PGD, though inconsistent with a substantial amount of existing doctrine, would address this concern. This is not to say that subsidies are unequivocally the best policy, simply that they appear most likely to enable the expression of genetic and ideological diversity. If future studies revealed that these were not accurate – because prospective parents were, for example, consistently selecting against given

\textsuperscript{231} See Sharp, \textit{supra} note 74, at 844-45.
\textsuperscript{232} See, \textit{e.g.}, the achondroplasic parents discussed in Part II(a)(ii), \textit{supra}.
\textsuperscript{233} Resolving this problem would, indeed, require greater respect for children’s rights.
CONCLUSION

This article draws on postmodern theory to develop a framework for analyzing debates in which liberty and equality appear to conflict, such as the debate over whether to ban non-therapeutic PGD. If concerns about liberty cause legislatures to allow non-therapeutic PGD, wealthy white couples might select non-disabled, light-skinned, blond-haired, blue-eyed males, and equality might be diminished. Conversely, if concerns about equality cause legislatures to ban non-therapeutic PGD, individuals will be prevented from making decisions about procreation and childrearing, and liberty might be diminished. While these dominant views of liberty and equality are in conflict, other currently marginalized views are fully compatible. And the fact that the Fourteenth Amendment protects both rights suggests that we ought to choose the latter (compatible) views. We should, when selecting among compatible views, choose those most likely to promote diversity because, in so doing, we promote democracy.

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234 There would, of course, be no constitutional concerns unless the procedures were performed in state-funded facilities. See also Part II(b)(ii).