

ANONYMOUSLY PROVIDED SPERM AND THE CONSTITUTION

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INTRODUCTION

Obtaining sperm to use in Assisted Reproductive Technology (“ART”) is relatively simple.¹ Hospitals, clinics, and sperm banks throughout the United States are in the business of selling sperm from literally thousands of men.² This does not mean, however, that becoming a sperm provider is easy. When a man decides to sell his sperm, he must first undergo an involved screening process to test for genetically inheritable and infectious diseases that could be transmitted through his sperm.³ The screening process is purposefully rigorous, and sperm banks boast that the effect of these stringent guidelines is to eliminate ninety-nine percent of potential providers.⁴ Once a man is approved to provide sperm, he contracts with the sperm bank to supply sperm for a specified period of time and designates

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1 ART, broadly speaking, encompasses any means to achieve pregnancy other than sexual intercourse.

2 For instance, the sperm bank offering the world’s largest selection of sperm providers presents a nine-page catalog, advertising 274 sperm providers that represent the “highest caliber of sperm donations possible.” *Donor Selection*, CAL. CRYOBANK, <http://www.cryobank.com/Why-Use-Us/Donor-Selection> (last visited July 7, 2011); see also CAL. CRYOBANK, DONOR CATALOG – JULY, AUG, SEPT 2011 (2011), available at http://www.cryobank.com/_resources/pdf/catalogs/print-catalog.pdf (last visited July 7, 2011); *Sperm Banks Location*, SPERMBANKDIRECTORY.COM, <http://www.spermbankdirectory.com/sbmap.htm> (last visited July 7, 2011) (providing a national directory of dozens of sperm banks).

3 NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 51 (2009); see also *Donor Qualification*, CAL. CRYOBANK, <http://www.cryobank.com/How-It-Works/Donor-Qualification> (last visited July 7, 2011) (listing infectious disease testing that is performed during initial screening and every three months thereafter).

4 See, e.g., *Donor Screening*, CRYOGENIC LABS., <http://www.cryolab.com/screening.shtml> (last visited Aug. 10, 2011); *Donor Screening*, FAIRFAX CRYOBANK, <http://www.fairfaxcryobank.com/donorscreen.shtml> (last visited Aug. 10, 2011); *Donor Selection*, CAL. CRYOBANK, *supra* note 2.

himself as either an anonymous or open-identity sperm provider.⁵

Open-identity sperm providers contractually consent to be contacted by any offspring that result from their sperm. Contact protocols vary between sperm banks but, in general, when a provider-conceived child turns eighteen, he or she can contact the sperm bank and obtain the identity of and contact information for the sperm provider.⁶ When a man chooses to provide his sperm anonymously, however, both the sperm provider and intended parents⁷ agree to complete anonymity—that is, the sperm provider can never know the parents or any offspring, and vice versa.⁸ Anonymous sperm providers make up the vast majority of men selling sperm.⁹

Several commentators have argued that the use of anonymously provided sperm causes significant harm to provider-conceived children.¹⁰ There are four main concerns

5 This so-called “double track” approach gives sperm providers the choice between being known to sperm recipients or remaining anonymous. Guido Pennings, *The “Double Track” Policy for Donor Anonymity*, 12 HUM. REPROD. 2839, 2839 (1997). Sperm providers and recipients are encouraged to make binding contractual agreements so both parties’ wishes are honored. *Id.*; see also Christopher De Jonge & Christopher L.R. Barratt, *Genetic Donation: A Question of Anonymity*, 85 FERTILITY & STERILITY 500 (2006) (recommending a dual-track system that respects the intended parents’ choice as to using anonymous or open-identity sperm).

6 *Identity-Release Program*, THE SPERM BANK OF CALIFORNIA, <http://thespermbankofca.org/pages/page.php?pageid=45&cat=12> (last visited July 7, 2011).

7 Throughout this Article, we use the term “parents” rather than “parent.” By doing so, we do not assert that every child must have two legal parents. Our use of “parents” merely simplifies the text and reflects the fact that two parents are currently considered the norm in child rearing.

8 Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 MICH. J. GENDER & L. 217, 264 (2009). Anonymity gives sperm providers certainty that they will neither be responsible for child support nor receive unwanted contact from the future children. *Id.* at 264–65.

9 As high as eighty percent of a sperm bank’s donors are anonymous. CAL. CRYOBANK, INC., DONOR CATALOG – JULY, AUG, SEPT 2011, *supra* note 2 (listing 220 out of the 274 California Cryobank donors as anonymous); see also *Search Results*, CRYOGENIC LABS., <http://www.cryogeniclab.com/search.cfm> (highlight “ID Options Donors” on the right sidebar to view just those donors who agree to share their identity) (last visited July 11, 2011) (listing eighty-five out of the 101 Cryogenic Laboratories donors as anonymous (non-CLI ID Option)); *Search Results*, FAIRFAX CRYOBANK, <http://donorsearch.fairfaxcryobank.com/search.cfm> (highlight “ID Options Donors” on the right sidebar to view just those donors who agree to share their identity) (last visited July 11, 2011) (listing 137 out of the 179 Fairfax Cryobank donors as anonymous (non-ID Option)). Because of this imbalance, open-identity donors’ sperm can cost between twenty-one and twenty-four percent more than anonymous donors’ sperm. See *Services Fees*, CAL. CRYOBANK, <http://www.cryobank.com/Services/Pricing> (last visited July 11, 2011).

10 This article focuses on anonymously provided sperm, but the arguments for and against regulating such donations apply equally to egg donation.

advanced by these commentators. First, there is concern that provider-conceived children suffer emotional and psychological harm.¹¹ These commentators assert that many provider-conceived children experience an identity crisis as the result of not knowing “where [they] came from.”¹² Second, commentators assert that the use of anonymously provided sperm violates children’s right to know their genetic parents.¹³ This argument suggests that the children—and not the parents or sperm providers—should decide whether there will be any contact between the sperm provider and his offspring. Third, there is concern that the use of anonymously provided sperm will lead to unintended romantic relationships between genetic half-siblings. Here, commentators point to the lack of regulatory limits on the number of offspring that can be conceived using a given provider’s sperm as causing an increased chance of incest between provider-conceived offspring.¹⁴ Finally, commentators are concerned that provider-conceived offspring are unable to adequately monitor their health and treat medical conditions because they are denied access to genetic information

11 Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 16–18 (2008) (arguing that biological and genetic information is essential to a child’s mental health); Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation*, 36 LAW & SOC’Y REV. 257, 274 (2002) (reasoning that the child deserves to know who his or her legal as well as genetic parents are so he or she does not feel like the child of “‘nobody’ or of ‘anybody’”). *But cf.* CAHN, *supra* note 3, at 126 (stating that provider-conceived children appear to be as well adjusted as other children, while noting that some provider-conceived children experience a sense of loss or confusion about their identity).

12 Vardit Ravitsky, “Knowing Where You Come From”: *The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness*, 11 MINN. J. L. SCI. & TECH. 665, 675 (2010); *see also* CAHN, *supra* note 3, at 218 (“Knowing the identity of a biological progenitor may help the [provider-conceived] child in his or her identity development, but it is certainly not the only factor in that development”); Dennison, *supra* note 11, at 17–18 (analogizing the emotional struggles of adoptees concerning their desires to know their biological origins to that of provider-conceived individuals); Amy Harmon, *Hello, I’m Your Sister. Our Father is Donor 150.*, N.Y. TIMES, Nov. 20, 2005, <http://www.nytimes.com/2005/11/20/national/20siblings.html> (relating stories of provider-conceived individuals who feel incomplete).

13 Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUM. REPROD. 818, 820–21 (2001); Shanley, *supra* note 11, at 268–69; Jennifer A. Baines, Note, *Gamete Donors and Mistaken Identities*, 45 FAM. CT. REV. 116, 118, 121 (2007) (contending that scholars agree to some extent that provider-conceived individuals have a right to “truth concerning their conception and origins”); *see also* Dana Moyal & Carolyn Shelley, *Future Child’s Rights in New Reproductive Technology*, 48 FAM. CT. REV. 431, 438–39 (2010) (asserting that a child in the United States has the constitutional right to know her “biological antecedents”).

14 Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 68 (2009) [hereinafter Cahn, *Accidental Incest*]; Dennison, *supra* note 11, at 15–16 (noting that there is very little regulation in the ART industry and, accordingly, sperm clinics are left to self-regulate); Neroli Sawyer, *Who’s Keeping Count? The Need for Regulation is a Relative Matter*, 92 FERTILITY & STERILITY 1811, 1811 (2009) (stating that regulations are necessary because industry guidelines are commonly ignored).

about their sperm provider.¹⁵

In an effort to address these concerns, commentators have made two recommendations. First, they have called for a ban on anonymously provided sperm.¹⁶ They argue that only sperm from open-identity providers should be available for use in ART. Second, some of these commentators have also called for mandatory disclosure to inform provider-conceived children that they were conceived with purchased sperm.¹⁷

This article takes issue with both of these proposed regulations for two reasons. First, a ban on anonymously provided sperm and a requirement that parents inform their provider-conceived children of the details of their conception implicate constitutionally guaranteed fundamental rights. For such legislation to be constitutional, it would presuppose that the fundamental rights to procreate and to raise one's child are less robust for persons who conceive via ART than they are for persons who conceive through sexual reproduction. Currently, commentators advocating for these regulations implicitly presume that persons who conceive via ART have lesser rights. Second, as a policy matter, such regulations are unnecessarily broad. A more tailored legislative response in the form of a national registry would address the legitimate concerns over the use of anonymously provided sperm without threatening the fundamental rights of ART parents.

Part I of this article analyzes the constitutional issues that would arise if these legislative policies were adopted. This Part argues that such legislation, if applied to

15 See Dennison, *supra* note 11, at 14–15 (noting that provider-conceived children should have access to their provider's information for easier diagnosis and treatment of diseases); Glenn McGee et al., *Gamete Donation and Anonymity: Disclosure to Children Conceived with Donor Gametes Should Not Be Optional*, 16 HUM. REPROD. 2033, 2034–35 (2001) (pointing out that not only will provider-conceived children not have genetic information about their sperm provider, but that they may be misdiagnosed based on their false assumption that they share a genetic history with their non-biological parent).

16 E.g., CAHN, *supra* note 3, at 228–29; Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 205, 223 (2009) [hereinafter Cahn, *Necessary Subjects*] (advocating for a mandatory registry that would collect sperm provider information, including provider identity); Angela Cameron & Vanessa Gruben, *De-Anonymising Sperm Donors in Canada*, 26 CAN. J. FAM. L. 95, 143–44 (proposing Canada ban sperm provider anonymity to meet health and psychological needs of provider-conceived children); Dennison, *supra* note 11, at 3, 24–25 (arguing that a ban on anonymous donations will benefit everyone involved in the donation process); Baines, *supra* note 13, at 126.

17 E.g., CAHN, *supra* note 3, at 230–31 (recommending a special birth certificate for provider-conceived children that discloses the fact that they were provider-conceived to ensure such children eventually learn that one or both of their legal parents are not their biological parents); Cahn, *Necessary Subjects*, *supra* note 16, at 219–20 (suggesting both special birth certificates for provider-conceived children as well as a government controlled registry); Dennison, *supra* note 11, at 3–4 (stating that the decision to disclose whether a child was provider-conceived should be left to the legal parents of the child).

everyone, would violate the fundamental rights to procreate and to raise one's child. Therefore, implementation of the proposed ban on anonymously provided sperm and the accompanying disclosure mandate would be constitutional only if persons who conceive via ART have weaker constitutional rights to procreate and to raise their children than other persons. This Part also asserts that children, whether conceived via reproduction or ART, do not have a right to know their genetic parents. Part II advocates for a more measured and carefully tailored legislative response to the concerns regarding anonymously provided sperm. Regulation that requires clinics to track sperm providers' information, but not their identities, can effectively address the legitimate concerns surrounding the use of anonymously provided sperm without compromising the constitutional rights of persons who conceive via ART.

I. The Constitutionality of Regulating Anonymously Provided Sperm

The ban on anonymously provided sperm and its attendant disclosure mandate implicate both the fundamental right to procreate and the fundamental right to raise one's child. Whether these fundamental rights apply equally to persons that procreate via ART as to those that procreate via sexual reproduction, however, has not been directly addressed by the Supreme Court. This question has been debated by others and we do not join that debate here.¹⁸ Instead, this article analyzes the ban on anonymously-provided sperm and the accompanying disclosure mandate and concludes that, if ART parents have the same fundamental rights as parents that conceive via sexual reproduction, then such regulations would violate the fundamental rights of ART parents to procreate and raise their children. As such, advocating for such legislation presupposes a conclusion that persons who conceive via ART do not share the same fundamental rights as persons who conceive through sexual

¹⁸ Many argue that constitutional protection of procreative liberties should extend to the use of ART. See JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 38–39 (1994) (arguing that principles underlying a constitutional right to reproduce would apply equally to all couples regardless of fertility; as such, the right includes access to a wide range of technologies to assist reproduction); John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 454–55 (2003) (arguing that access to non-sexual means of reproduction may be a protected liberty interest and the full implication of Supreme Court precedent supports extending constitutional protections to ART); see also Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 413 (2004) (suggesting that the law has followed a “laissez-faire approach” in regards to ART, leaving the individuals involved to make their own decisions about assisted reproduction); Kimberly Mutcherson, *Feel Like Making Babies? Mapping the Boundaries of the Right to Procreate in a Post-Coital World*, (forthcoming); Lucy R. Dollens, Note, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, 224 (2001) (arguing that artificial insemination, whether the sperm provider is known or anonymous, should be protected under the constitutional right of privacy which protects family autonomy from state intrusion in matters of conception and childrearing).

reproduction.¹⁹

A. A Ban on Anonymously Provided Sperm Would Violate the Fundamental Right to Procreate

A growing number of commentators support a legal ban on anonymously provided sperm that would prohibit anonymity between sperm providers, intended parents, and offspring regardless of any wishes of these parties to the contrary.²⁰ Commentators assert that such an open-identity policy would advance the interests of provider-conceived children.²¹ Specifically, they argue that a ban on anonymously provided sperm is necessary to allow proper identity development in provider-conceived children,²² to protect children's right to know their genetic fathers,²³ to prevent unintentional half-sibling relationships,²⁴ and to facilitate adequate medical care of provider-conceived children.²⁵ Although addressing such concerns is well-meaning, the effect of a ban on the constitutional rights of ART users would be devastating. Ultimately, a ban on anonymously provided sperm would threaten the fundamental right of ART users to procreate.

The right to procreate was first recognized as a fundamental right in *Skinner v. Oklahoma*.²⁶ In declaring an Oklahoma sterilization statute unconstitutional, the Court identified procreation as a basic civil liberty, one fundamental to the existence of

19 If the constitutional right to procreate is in fact weaker for people who conceive via ART than for people who conceive via sexual reproduction, under the low and deferential standard of rational basis, the government would likely be permitted to ban anonymously provided sperm. Arguably, a ban is a rational way for the state to attempt to improve provider-conceived children's access to genetic information for improvement of medical treatment and to prevent unintended half-sibling relationships. While a ban is not a necessary, or even an effective, way to tackle these concerns (the explanation for which will be detailed later in this section), arguments can be made that a ban could satisfy rational basis review.

20 See *supra* note 16.

21 E.g., CAHN, *supra* note 3, at 218 (supporting a ban on anonymously provided sperm because it is best for the ART industry and best for provider-conceived children); Dennison *supra* note 11, at 3 (positing that banning anonymously provided sperm is in the best interest of all parties involved in the process: sperm provider, recipient, and resulting child).

22 See *supra* note 11.

23 See *supra* note 13.

24 See *supra* note 14.

25 See *supra* note 15.

26 316 U.S. 535 (1942).

humankind.²⁷ After *Skinner*, the Supreme Court made it clear that the right to procreate not only includes the right to have children, but also the right of individuals to make decisions concerning reproduction.²⁸ In *Eisenstadt v. Baird*, the Court explained: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁹ While the Court relied on this rationale to recognize the right of individuals to purchase and use contraceptives, the underlying principles stand for more. The Court recognized that the privacy right of women and men to control their reproductive autonomy includes the ability to choose whether and when to have a child.³⁰

Consequently, the fundamental right to procreate protects from governmental interference a number of personal procreative decisions; many of which society takes for granted. For example, it is axiomatic that prohibiting certain individuals from having children would violate the fundamental right to procreate. Single women, unmarried couples, older women, people with genetic diseases, people with physical or cognitive disabilities, rich people, poor people, and people with criminal records are all free to procreate. Likewise, regulations dictating when, where, or with whom a person can procreate would result in societal outrage. In general, any regulation that unnecessarily impacts decisions concerning whether to have a child would violate the right to procreate and deeply offend societal expectations of reproductive autonomy.

A ban on anonymously-provided sperm would impact the ability of persons to choose whether, when, and how to have a child. Therefore, if the fundamental right to procreate does extend to ART, a ban on anonymously provided sperm would be subject to the same

27 *Id.* at 541 (stating that procreation is "fundamental to the very existence of the race"). Although the Court invalidated the law on equal protection grounds, it avoided a substantive due process analysis not because it was impertinent, but because it was politically unpopular. What is important moving forward from *Skinner* is the Court's determination that the right to procreate enjoys "fundamental" status.

28 See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (recognizing familial privacy as including the right of married couples to use contraceptives). Later, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court extended *Griswold* by recognizing the right of all individuals to control reproduction.

29 *Eisenstadt*, 405 U.S. at 453.

30 Most of the Supreme Court decisions on the fundamental right to procreate concern the right to *not* procreate; this is merely a product of the kind of issues that have come before the Court. The reasoning driving these decisions, however, sheds light on the autonomy afforded individuals in choosing to have, or attempting to have, children. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt*, 405 U.S. 438; *Griswold*, 381 U.S. 479.

constitutional analysis as other regulations impacting the right to procreate.³¹ As such, the ban would be constitutional only if it survives strict scrutiny; that is, if it does not infringe the fundamental right to procreate or is necessary to serve a compelling government interest.³² As discussed *infra*, however, the ban would fail this strict analysis.

1. A Ban on Anonymously Provided Sperm Infringes the Fundamental Right to Procreate

Under a constitutional analysis of the fundamental right to procreate, the first question is whether a ban on anonymously provided sperm would infringe procreative freedom. The Supreme Court has held that a complete bar to the exercise of a fundamental right constitutes infringement.³³ Presumably then, a ban on anonymously provided sperm would infringe the fundamental right to procreate, as it would constitute a complete bar to procreation using anonymously provided sperm.

It could be argued, however, that the proposed regulation is not a complete bar to procreation because one could choose to have children by other means. For example, persons could exercise their right to procreate using sperm from an open-identity provider. Under Supreme Court precedent, however, a complete bar is not necessary to constitute an “infringement” of a fundamental right.³⁴ Specifically, the Court has invalidated laws that merely unduly limit the exercise of a fundamental right. In *Zablocki v. Redhail*, the Court determined that even a “direct and substantial” interference with the exercise of a

31 While we address this proposed ban under substantive due process doctrine, we recognize that it could also be taken up under equal protection. Generally, a substantive due process analysis will be used to assess the permissibility of broad-based governmental infringement of a fundamental right, whereas governmental discrimination amongst individuals as to the exercise of a fundamental right is more likely to elicit an equal protection analysis. The doctrine on which the Court relies is not dispositive; whether conducted under substantive due process, equal protection, or both, infringement of a fundamental right always triggers strict scrutiny.

32 The requirement under strict scrutiny that a law be “necessary” to achieve its purpose is sometimes described as “narrowly tailored.” While these terms are often used interchangeably, we think “necessary” is a more accurate articulation of the strict scrutiny analysis. “Narrowly tailored” does not readily signify, as does “necessary,” that to survive strict scrutiny a law must be no more and no less restrictive than is required to achieve its purpose. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 554 (4th ed. 2011).

33 *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *see also Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”).

34 *Zablocki*, 434 U.S. 374.

fundamental right constitutes infringement and will trigger strict scrutiny.³⁵ The Court also held that a regulation “directly and substantially” interferes with a fundamental right when the exercise of that right is unduly burdened³⁶ or when one is deterred from exercising that right.³⁷ A ban on anonymously provided sperm infringes the right to procreate because it both burdens and deters the exercise of the fundamental right to procreate.

A ban on anonymously provided sperm burdens the exercise of the right to procreate because it limits the reproductive methods available to ART users. As soon as the government dictates what procreative methods are available to individuals, the freedom of decision-making attached to that fundamental right by *Skinner* and *Eisenstadt* is unduly burdened. As such, a ban on anonymously provided sperm would constitute an unconstitutional government intrusion into the private decision of whether and how to procreate.

A ban also interferes with the right to procreate because it might deter individuals from procreating altogether. Some individuals may be deterred from procreating if only open-identity sperm were available, because of the worry that, in the absence of anonymity, providers may become unwelcomingly involved in their children’s lives. Such concern, even if tempered through contractual agreement or parentage statutes, may nevertheless have a deterring effect on individuals and couples who want to or need to use ART to create a family. In addition, other countries that have banned anonymously provided sperm have experienced a decline in the number of willing sperm providers.³⁸ In this country, any resulting scarcity of sperm, or an accompanying increase in the cost of sperm or related

35 *Id.* at 386–87.

36 The Court has held that serious intrusion into the freedom of decision-making in the exercise of a fundamental right constitutes infringement. *Id.* at 387.

37 The Court has also held that pressuring persons to forego exercising a fundamental right constitutes infringement. *Id.*

38 Evidence from other countries has shown that a ban on anonymity lowers the number of sperm providers. Pasquale Patrizio et al., *Disclosure to Children Conceived with Donor Gametes Should be Optional*, 16 HUM. REPROD. 2036, 2037 (2001) (citing a two-thirds post-ban decrease in sperm providers and fifty percent in sperm banks; additionally, wait periods for sperm in excess of two years in the Netherlands). Some commentators assert that although these countries experienced an initial decline in the number of sperm providers, after time they rose to pre-ban levels. Dennison, *supra* note 11, at 20. There is evidence, however, that suggests otherwise. Gaia Bernstein, *Regulating Reproductive Technologies: Timing, Uncertainty, and Donor Anonymity*, 90 B.U. L. REV. 1189, 1207–13 (2010) (revealing an ultimate decrease in the number of sperm providers in Sweden and Victoria, Australia, and explaining why data about post-ban sperm providers in the U.K. is misleading).

clinical services, may deter some individuals and couples from starting a family.³⁹

These burdens and deterrents created by a ban on anonymously provided sperm would directly and substantially interfere with procreative freedom under *Zablocki* by intruding upon the freedom of decision-making that attaches to the fundamental right and possibly pressuring persons who conceive via ART to forego procreation altogether. Thus, if the government were to ban the use of anonymously provided sperm, and ART users have a fundamental right to procreate, such action would infringe that right and would only survive judicial scrutiny if proven necessary to achieve a compelling governmental interest.

2. A Ban on Anonymously Provided Sperm is Not Necessary to Achieve a Compelling Government Interest

Presuming that persons who conceive via ART have the same right to procreate as persons who conceive via sexual reproduction, a ban on anonymously provided sperm infringes that right. As such, a ban would only be constitutional if it served a compelling interest and is necessary to achieve that interest. Commentators assert four interests that would be advanced by a legal ban on anonymously provided sperm. Those interests are: 1) preventing emotional and psychological harm that might result from not knowing the identity of one's genetic father; 2) protecting a provider-conceived child's right to know her genetic parents; 3) preventing unintended romantic relationships between genetic half-siblings; and 4) improving provider-conceived children's ability to monitor their health and treat medical conditions. It is our contention that these interests are not compelling and a ban is not necessary to address them. Therefore, a ban on anonymously provided sperm would violate the fundamental right of ART users to procreate, provided they have such a right.

Broadly speaking, it is impossible for any of the four asserted interests to be compelling. Although it is unarguable that the government can assert a compelling interest in the well-

39 In *Zablocki*, 434 U.S. 374, the Supreme Court invalidated a Wisconsin statute that prohibited persons with outstanding child support obligations from marrying, unless they first proved to the court that such support obligations were met. The Supreme Court concluded that the cost of having to discharge one's child support debts infringed the right to marry even for those persons who *could* make the payments but who would be so burdened by doing so that they would effectively be "coerced into forgoing their right to marry." *Id.* at 387. The Court went yet a step further, holding that the payment requirement infringed the right to marry even for those who would be persuaded to make the payments because such persuasion seriously intruded the freedom of decision-making that surrounds the exercise of fundamental rights. *Id.* Similarly, here, if a ban on anonymously provided sperm were to inflate the cost of sperm, or make access to sperm significantly difficult, the ensuing pressure to forego the use of sperm and the intrusion into the intimate decision of whether to procreate would infringe this fundamental right.

being of children, during the process of purchasing and using anonymously provided sperm there is no child whose interest the government can protect. The Supreme Court has held that the government interest in the life of the child becomes compelling at viability,⁴⁰ but it has never suggested that there is a compelling interest prior to conception.⁴¹ As such, a ban on anonymously provided sperm would fail strict scrutiny for lack of a compelling government interest and, assuming that persons who conceive via ART have a fundamental right to procreate, would be unconstitutional.

For the sake of argument, however, even if the government could assert a compelling interest in a “future child” prior to conception, a ban on anonymously provided sperm would still be unconstitutional because each of the four asserted interests ultimately fails strict scrutiny review.

a. Emotional and Psychological Harm

According to many commentators, children conceived with anonymously provided sperm may suffer emotional and psychological harm as a result of not knowing the identity of their genetic fathers. Specifically, they argue that these children will experience identity crises, suffer “genealogical bewilderment,” or feel incomplete as persons because they do not understand “where they come from.”⁴² Commentators point to recent articles in the

40 *Roe v. Wade*, 410 U.S. 113, 163–64 (1973) (holding that it is a violation of the Due Process Clause of the Fourteenth Amendment for the State to interfere with, or attempt to regulate, an abortion prior to the end of the first trimester); *see also* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 834 (1992) (reaffirming that the State only has the power to restrict abortions after viability per *Roe v. Wade*).

41 The notion that government could regulate reproduction based on the interests or rights of a future child has been heavily criticized by Professor Cohen. I. Glenn Cohen, *Regulating Reproduction: Beyond Best Interests* (forthcoming). He argues that any regulatory attempt to alter reproduction—including whether, when, or with whom one reproduces—cannot logically be justified on the basis that harm will, or could, come to the resulting child, because that child would not exist but for the use of ART. *Id.* Cohen further maintains that justifications for the regulation of reproduction based on the Best Interests of the Resulting Child (“BIRC” justifications) are detrimental to society because they are often veiled attempts to deter unpopular reproductive acts in order to maintain traditional family norms. *Id.*

42 *See, e.g.,* CAHN, *supra* note 3, at 126 (likening adoptees and provider-conceived children who both feel “confused about their identity” and “different from other children” due to having a lack of information about their biological origins); *id.* at 218 (“Knowing the identity of a biological progenitor may help the [provider-conceived] child in his or her identity development, but it is certainly not the only factor in that development”); Dennison, *supra* note 11, at 17–18 (analogizing the emotional struggles of adoptees concerning their desires to know their biological origins to that of provider-conceived individuals); Ravitsky, *supra* note 12, at 675 (“Lack of knowledge about the provider as a person could thus create a gap or void in the formation of personal identity, undermine a sense of continuity and grounding, and lead to troubling and disruptive feelings of incompleteness.”).

press and the popularity of the Donor Sibling Registry (DSR)⁴³ as evidence of emotional turmoil that is alleviated upon learning more about one's genetic past through meeting one's genetic half-siblings.⁴⁴

A small, but vocal group of provider-conceived children have publicly shared stories of the anger, confusion, and emptiness they experienced from growing up without knowing their genetic fathers.⁴⁵ One provider-conceived teenager explained: "I'm here to tell you that emotionally, many of us are not keeping up."⁴⁶ Another offspring condemned her mother's decision to use anonymously provided sperm as an unfair "manipulation" of her life.⁴⁷ For some provider-conceived children, learning that they were conceived with anonymously provided sperm was akin to realizing they were living a lie⁴⁸ or were fatherless.⁴⁹

These feelings of disenfranchisement have propelled many provider-conceived children to search for clues about their genetic fathers. One such teenager tracked down his sperm provider using a mail-order DNA kit and online searching.⁵⁰ Many others search for their sperm providers and genetic half-siblings through web-based portals like the DSR. Many of those who are successful in their search describe a resulting feeling of self-discovery and

43 DSR was founded in 2000 to help provider-conceived children find other provider-conceived children that share the same genetic ties. DSR also educates the general public through national media interviews and appearances about the issues, challenges and rights of the provider-conceived community. DSR members pool information about individual sperm providers and sperm banks by posting the provider number or other information in the hope of connecting with half-siblings and/or sperm providers. As of July 2011, DSR claims over 31,500 members. See THE DONOR SIBLING REGISTRY, <https://www.donorsiblingregistry.com/> (last visited July 25, 2011).

44 Katrina Clark, *My Father was an Anonymous Sperm Donor*, WASH. POST, Dec. 17, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/15/AR2006121501820.html>; Harmon, *supra* note 12.

45 See, e.g., Clark, *supra* note 44; Harmon, *supra* note 12.

46 Clark, *supra* note 44.

47 Robin Rowland, *The Social and Psychological Consequences of Secrecy in Artificial Insemination by Donor (AID) Programmes*, 21 SOC. SCI. & MED. 391, 395 (1985).

48 Harmon, *supra* note 12.

49 Clark, *supra* note 44.

50 Dennison, *supra* note 11, at 1–2.

express how meeting a half-sibling changed their sense of self.⁵¹ One offspring reported how long-held feelings of being “lopsided” or “half-adopted” were alleviated upon meeting genetic half-siblings.⁵² Likewise, others stress how locating information about their genetic roots has allowed them to feel whole.⁵³ Discovering the name, or even a photograph, of one’s sperm provider has been described as a puzzle piece snapping into place.⁵⁴

Anecdotes like these have prompted commentators to call for a ban on anonymously provided sperm. Yet, such claims of emotional and psychological strife, while they can be heart-wrenching, are merely anecdotal, and ultimately do not rise to the level of a compelling governmental concern. As it stands, the evidence of emotional and psychological harm suffered by provider-conceived children is incomplete and unpersuasive. There is no empirical evidence that provider-conceived children on the whole suffer “genealogical bewilderment.”⁵⁵ In fact, studies show no significant difference in the social and emotional development of ART children (including provider-conceived children) than children conceived via sexual reproduction. The former even demonstrate closer relationships with their parents when compared to the latter.⁵⁶ Additionally, some argue that genetic information is unnecessary for the development of self-esteem and positive self-image; and contend that the increasing emphasis on the role of genetic information in the development of self-identity, and the perceived harm resulting if such information is not received, is culturally manufactured.⁵⁷ Thus, because the only evidence of emotional and psychological harm is anecdotal, it is questionable how widespread the problem of emotional suffering in provider-conceived children really is, and, more importantly, how causal anonymity is

51 See, e.g., Clark, *supra* note 44; Harmon, *supra* note 12. Also, recent studies about the outcomes of these types of meetings show that, in nearly all cases, offspring reported that contact was a positive, rewarding opportunity to learn more information and even form friendships. Joanna E. Scheib & Alice Ruby, *Contact Among Families who Share the Same Sperm Donor*, 90 FERTILITY & STERILITY 33, 35–37 (2008).

52 Harmon, *supra* note 12.

53 *Id.*

54 Clark, *supra* note 44.

55 Iain Walker & Pia Broderick, *The Psychology of Assisted Reproduction—or Psychology Assisting its Reproduction?*, 34 AUSTL. PSYCHOLOGIST 38, 40 (1999) (citing several studies of provider-conceived children).

56 Alexina McWhinnie, *Gamete Donation and Anonymity: Should Offspring from Donated Gametes Continue to be Denied Knowledge of Their Origins and Antecedents?*, 16 HUM. REPROD. 807, 809 (2001).

57 Guido Pennings, *The Right to Privacy and Access to Information About One’s Genetic Origins*, 20 MED. & L. 1, 9–10 (2001) [hereinafter Pennings, *Right to Privacy*] (likening this development to a “self-fulfilling prophecy”: the more society treats genetic information as important, the more need there will be for it and the more dire the consequences when someone cannot access such information).

to these asserted harms.

Emotional harm, moreover, especially hypothetical future harm, is usually not a justification for infringing a fundamental right. Children are exposed to numerous potential psychological harms due to the circumstances of their birth that the government does not feel compelled to prevent. For example, the government does not have a compelling interest in preventing emotional harm that may someday result from children living in low-income or even high-income households. Similarly, the government cannot prevent couples from divorcing in order to protect children from potential emotional turmoil. Although the state may have a genuine interest in safeguarding children from imminent emotional and psychological harm, such as when the government removes a child from an unsafe home, it would be highly suspect for the state to interfere with the private decisions of families on the basis of hypothetical concerns over the mere possibility of future psychological harm. The state consistently stays out of family matters in the absence of significant, actual harm. It is inevitable that children suffer emotional hardships, often resulting from decisions made by their parents. Although some might consider some parental decisions to be selfish, misinformed, or even damaging, the government cannot dictate those decisions. For these same reasons, the government does not have a compelling interest in preventing emotional harm that may result from anonymously provided sperm.

Even if the government could assert a compelling interest in preventing the hypothetical emotional and psychological harm to children that results from not knowing one's genetic father, banning anonymously provided sperm would fail the second prong of the strict scrutiny analysis. To withstand strict scrutiny, legislation must not only serve a compelling government interest, but must also be necessary to achieve that interest. Legislation is deemed "necessary" when it is *required* to solve the exact problem at which it is aimed.⁵⁸ As such, legislation must proscribe no more and no less conduct than is needed to adequately address the compelling government interest. A law that is "under-inclusive" in that it addresses the government interest only in part fails to be necessary.⁵⁹ Therefore, a ban on anonymously provided sperm would not be necessary because it seeks to prevent the emotional and psychological harm that may result from not knowing one's genetic father in only a narrow subset of children.

58 *E.g.*, *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (holding that under strict scrutiny curtailment of a constitutional right "must be actually necessary" to solving the problem the government had identified).

59 Constitutional jurisprudence is replete with cases that fail strict scrutiny for under-inclusiveness. *E.g.*, *id.* at 2740, 2742; *Republican Party of Minn. v. White*, 536 U.S. 765, 783 (2002); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993); *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978).

A ban on anonymously provided sperm is dramatically under-inclusive because only children conceived via anonymously provided sperm would be protected from the emotional harm that may result from not knowing one's genetic father. The ban would do nothing to serve the same interest of children conceived via sexual reproduction or with open-identity sperm. A child conceived via open-identity sperm, for example, may suffer emotional turmoil if unable to ever meet her genetic father or, perhaps, from being disappointed or spurned when meeting him. Similarly, a child conceived via sexual reproduction whose parents decide not to tell their child the truth about her conception would also be subject to the possible emotional harm of not knowing her genetic father. Currently, parents of children conceived via sexual reproduction during a one-night stand, an extra-marital affair, or any number of other circumstances are permitted to have children despite their intention to lie to their child about the identity of her genetic father. These children face the same risk of emotional and psychological harm as children conceived via anonymously provided sperm, yet the proposed ban would do nothing to address the risk of harm to them. Thus, banning anonymously provided sperm fails to meet the stringent requirements of strict scrutiny—that the regulation be neither over- nor under-inclusive in serving the government's compelling interest.

b. The Right to Know Your Genetic Parents

Other commentators assert that children have a right to know their genetic parents and that a ban on anonymously provided sperm is necessary to protect this right.⁶⁰ Most commentators make this assertion without discussion or support, so it is unclear whether they think this “right to know” is a moral right or a legal right. Also, even if it is a legal right, it is unclear whether it is a fundamental right, like liberty, or if the right is actually more of an interest that warrants some type of legal protection.⁶¹ Considering first whether there is a fundamental right to know your genetic origins, the Supreme Court has not held that such a right exists and recognizing it would be unprecedented. Such a right has never even been remotely considered by the Court, nor does any similar right to know information exist under the Constitution. Furthermore, even in other arguably more liberal

60 One commentator characterizes the “right to know” as the right to know of one’s conception through provided sperm and the right to know the provider. CAHN, *supra* note 3, at 232–33. Such rights-based arguments rely heavily on Article 7 of the United Nations Convention on the Rights of the Child to affirm, in the context of ART, that provider-conceived children should be able to know the identity of their provider. The Convention, which has not been ratified by the United States, sets out the right of every child “to know and be cared for by his or her *parents*.” Convention on the Rights of the Child, G.A. Res. 44/25, art. 7, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (emphasis added).

61 Ravitsky, *supra* note 12, at 669–70 (discussing whether the “right to know one’s genetic origins” is a fundamental human right that requires no empirical support, “such as the right to life or liberty”).

countries that have banned anonymously provided sperm, not one has found a legal right to know your genetic parents.⁶² As such, it is at the very least premature to assert that there is a fundamental right to know your genetic parents and is more likely just plain false.⁶³

Even if the “right to know” refers not to a constitutionally protected right, but to a legal interest or moral right that the child possesses—such as a right to a good education—the ban still fails strict scrutiny because the government cannot seek to protect an “interest” at the cost of infringing a fundamental right. In other words, a child’s interest in knowing her genetic father is not enough to “trump” the parents’ freedom to exercise their fundamental right to procreate. At times the Supreme Court has had to weigh and balance conflicting rights—such as when a minor’s right to abortion conflicts with the parents’ right to raise their child—but the Court has never suggested that an “interest” needs to be balanced against a fundamental right, especially an “interest” of a child that is yet to be conceived.⁶⁴

Even if the government had a compelling interest in ensuring that not-yet-conceived children have the chance to know their genetic parents, a ban on anonymously provided sperm would still fail strict scrutiny because it is not necessary to achieve that interest.⁶⁵

62 Eric Blyth & Lucy Frith, *Donor-Conceived People’s Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity*, 23 INT’L J.L. POL’Y & FAM. 174, 175, 185 (2009) (noting that, of the jurisdictions banning anonymously provided sperm, none actually grant provider-conceived children a right to know about their conception or to discover their sperm provider’s identity; due to privacy concerns, parents are not required to disclose this information to their provider-conceived children).

63 And we are open to recognizing new fundamental rights. See Mary Patricia Byrn & Jenni V. Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305 (2010) (arguing that children have a fundamental right to legal parents at birth).

64 An assertion that children have a moral right to know their genetic parents is easier to support. Still, even assuming such a moral right exists, a legal mandate that infringes the right to parent is not an acceptable means to protect that moral right. Other moral rights have similarly gone unprotected under the United States constitutional framework. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education is not one of the fundamental rights protected under the Federal Constitution).

65 It is noteworthy that there currently exist mechanisms through which provider-conceived children can learn more about their providers short of having provider identity disclosed. Clinics are moving in the direction of offering more complete provider histories that include personal information such as the provider’s hobbies, his favorite subjects, where he grew up, and other personal anecdotes. While it is arguable that having personal information about one’s sperm provider, without his name, may not fully satisfy the desire of some provider-conceived children to know about their genetic fathers, it is equally arguable that supplying children with the name of their sperm provider, without additional information or the opportunity to meet him, does little to vindicate their interest in knowing him. Pennings, *Right to Privacy*, *supra* note 57, at 11–12 (asserting that if there is a right to know one’s genetic origins then knowing the identity of one’s provider often falls short of vindicating this right).

If the government's interest is truly to vindicate the right of children to know their genetic parents, then the proposed ban is drastically under-inclusive because it would fail to address the interests of sexually reproduced children to know their genetic parents. Just as some provider-conceived children may never learn the nature of their conception or the identity of their genetic father, many sexually reproduced children face the same reality. This proposed legislative scheme would do nothing to advance the interests of children conceived via sexual reproduction who, for example, are told that the father raising them is their genetic father, when in fact someone else they will never know, or even know of, is their true genetic parent. Similarly, there are other children—such as adopted infants or children born in connection to a surrogacy arrangement—whose right to know their genetic parents is not served by a ban on anonymously provided sperm. Thus, protecting a child's interest in knowing her genetic parents is not compelling and a ban on anonymously provided sperm is so under-inclusive as to not be considered necessary under strict scrutiny.

c. Unintended Romantic Relationships Between Half-Siblings

Many commentators also assert that a ban on anonymously provided sperm is necessary to prevent unintended romantic relationships between half-siblings. This concern often focuses on the lack of any governmental regulatory cap on either the number of times a sperm provider may sell sperm or on the number of offspring that can be born from his sperm.⁶⁶ These regulatory deficiencies raise concerns about the risk of what has been called "accidental incest."⁶⁷ Specifically, it is feared that a single sperm provider could have a high concentration of offspring in a small geographical region, thereby increasing the likelihood that unwitting half-siblings may engage in romantic relationships with one another. For example, the sperm of one particularly popular provider at the Fairfax Cryobank was used to conceive at least fifty-nine children in a mere seven-year span at a single facility.⁶⁸ Even though some sperm banks do limit the number of offspring attributable to a single

66 Sperm banks are only required to report pregnancy success rates as an abstract number of live births; there are no laws that limit the number of births attributed to a single provider in an area. 42 U.S.C.A. § 263a-1 (2011).

67 See generally Cahn, *Accidental Incest*, *supra* note 14.

68 DONOR SIBLING REGISTRY, <http://www.donorsiblingregistry.com> (last visited Dec. 31, 2011) (follow "Search the Registry" hyperlink, then enter "1476" after "Donor ID#" to see the offspring of donor number 1476 from Fairfax Cryobank that have been voluntarily registered with the Donor Sibling Registry).

provider as recommended by the American Society for Reproductive Medicine (ASRM),⁶⁹ providers are free to sell their sperm at as many clinics as they wish. Because clinics do not necessarily share information with each other, a provider that has reached the donation maximum at one clinic is able to donate at other clinics in the same geographic area. While the likelihood that two provider-conceived children born of sperm from the same provider will meet, fall in love, and have children together may in fact be slim, the mere possibility remains alarming to many commentators.⁷⁰

It is interesting, however, that commentators who support a ban on this basis do not point to an increase in half-sibling relationships between provider-conceived children, but only to the possibility of such. While the media in recent years has covered stories of siblings dating and even marrying without knowledge of their shared genetics, each of these stories involved individuals conceived via sexual reproduction.⁷¹ Indeed, the problem of unintended half-sibling relationships is not unique to the use of anonymously provided sperm. Nonetheless, because the government ultimately has an interest in preventing incest, it could be argued that it has a compelling interest in decreasing half-sibling relationships between provider-conceived children.

Still, even if the government could assert that an interest in preventing “accidental incest” in “future children” was compelling, the ban would still fail strict scrutiny because it is not necessary to meet this assumed governmental interest. Preventing half-sibling relationships does not require knowing the identity of one’s sperm provider. Reducing the risk of unwanted half-sibling relationships turns on the ability of provider-conceived children to determine if their genetic fathers are the same person without knowing the

69 The ASRM does suggest that sperm banks limit the number of births to twenty-five live births per sperm provider for a population area of 800,000, but sperm banks are under no legal obligation to track live births, let alone limit them. Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation is Not the Answer*, DUKE J. GENDER L. & POL’Y 379, 387 (2009) (citing Am. Soc’y for Reprod. Med., *2002 Guidelines for Gamete and Embryo Donation: A Practice Committee Report*, 11 FERTILITY & STERILITY S1, S5 (2002)).

70 See Lisa M. Luetkemeyer, Note, *Who’s Guarding the Henhouse and What Are They Doing with the Eggs (and Sperm)? A Call for Increased Regulation of Gamete Donation and Long-term Tracking of Donor Gametes*, 3 ST. LOUIS U. J. HEALTH L. & POL’Y 397, 416–17 (2010) (detailing how anonymity and lack of regulation in gamete donations raises cause for concern over half-sibling mating).

71 See Valerie Hanley, *Couple Discover They Are Siblings: Child Courts Blamed After Strangers Fall in Love, Have A Son—And Then Find Out They Are Half-Brother and Sister*, DAILY MAIL (U.K.), May 30, 2010, <http://www.dailymail.co.uk/news/article-1282575/Couple-discover-siblings-Child-courts-blamed-strangers-fall-love-son-half-brother-sister.html>; see also Steven Hoffer, *After 30 Years Apart, Brother and Sister Reunite on Bizarre Blind Date*, AOL NEWS, Mar. 28, 2011, http://www.aolnews.com/2011/03/28/after-30-years-apart-brother-and-sister-george-bentley-and-sara/?a_dgi=aolshare_email.

names of their genetic fathers. As long as the offspring have some information that specifies their sperm provider—such as a non-identifying tracking number—that would suffice to serve the government’s interest. Knowing the identity of the sperm provider is unnecessary. In fact, imposing reporting and tracking standards on clinics would do more to prevent half-sibling relationships than merely banning anonymity—and would do so without threatening ART parents’ fundamental right to procreate.

d. Treating Medical Conditions

Finally, some commentators support a ban on anonymously provided sperm in order to increase provider-conceived children’s access to genetic information about their sperm providers in order to monitor their health and treat medical conditions.⁷² Although ART parents often receive some health or medical information about their anonymous sperm provider, situations could arise when provider-conceived children want to obtain more genetic information than initially provided to their parents for medical purposes.

Curiously, when arguing that a ban is necessary to improve the medical monitoring and treatment of provider-conceived children, commentators have pointed to instances where ART families have reported problems with the sperm they received as opposed to instances where ART families were seeking additional information about the sperm provider. For example, commentators have cited as examples a family notifying a sperm bank that their child was born with a genetic condition;⁷³ a case where a cryobank sold 1,500 vials of sperm provided by a carrier of a serious kidney disorder;⁷⁴ and a suit brought against a sperm clinic for giving false assurances that the sperm purchased by a couple underwent genetic testing.⁷⁵ Each of these instances, however, reveals problems stemming from

72 See Pi, *supra* note 69, at 390.

73 The mother warned her sperm clinic that her child, conceived with anonymously provided sperm, carried a congenital disorder. Yet the clinic continued to sell that provider’s sperm and later denied any adverse reports associated with that provider. Luetkemeyer, *supra* note 70, at 398. In another matter, a sperm provider passed a rare and serious condition to five children born from his sperm. The clinic that sold his sperm lost contact with him and, consequently, could not encourage him to refrain from selling any more sperm. Ravitsky, *supra* note 12, at 673 (citing Laurence A. Boxer et al., *Strong Evidence for Autosomal Dominant Inheritance of Severe Congenital Neuropenia Associated with ELA2 Mutations*, 148 J. PEDIATRICS 633 (2006)).

74 Steven Kotler, *The God of Sperm: In an Industry Veiled in Secrecy, a Powerful L.A. Sperm Peddler Shapes the Nation’s Rules on Disease, Genetics—and Accidental Incest*, L.A. WEEKLY, Sept. 26, 2007, <http://www.laweekly.com/2007-09-27/news/the-god-of-sperm/>.

75 Johnson v. Superior Court, 80 Cal. App. 4th 1050, (Cal. Ct. App. 2000). The court held that the provider’s identity and related information may be disclosed under certain circumstances as long as the provider’s identity is protected to the fullest extent possible. *Id.*

the clinical practices currently employed by sperm clinics rather than from a provider-conceived child's inability to access her sperm provider's identity. Commentators have yet to cite an actual case in which a provider-conceived child sought information about her sperm provider for improved medical monitoring or treatment. Presumably, however, such a case may arise in the future and the government could arguably assert an interest in protecting a provider-conceived child's access to medical information.

Again, even assuming the government could assert a compelling interest in ensuring access to genetic information for medical treatment, a ban is ultimately unnecessary to advance that interest. Disclosure of sperm providers' identities to sperm recipients does not facilitate improved genetic testing or access to genetic information for later use. Procedures could be enacted that allow provider-conceived children to access health and medical information without learning the provider's identity; such as through a non-identifying tracking number. In addition, a ban would do nothing to ensure that clinics collect, maintain, and distribute genetic information to ART families over time. For these reasons, a ban is patently unnecessary to improve provider-conceived children's access to information for the monitoring of their health or for treating medical conditions.

In sum, if ART parents have a fundamental right to procreate, a ban on anonymously provided sperm would violate that right because the ban is not necessary to serve a compelling interest.⁷⁶ As it stands, the government cannot assert a compelling interest in a child's life prior to conception. Yet, even assuming the government could assert a compelling interest in protecting "future children," protecting children from emotional harm or vindicating their "right to know" are not compelling, nor would a ban be necessary to address these interests. In addition, even if the asserted interests in preventing "accidental incest" and improving medical treatment are compelling, a ban is not necessary because knowledge of the sperm provider's identity is not needed to achieve these interests. As such, a ban on anonymously provided sperm would be constitutional only if ART parents do not have the same fundamental right to procreate as persons who conceive via sexual reproduction. While commentators supporting the ban have not expressly based their arguments on a lack of a fundamental right to procreate for persons who conceive via ART, their proposals are implicitly based on this damaging assumption.

76 Banning anonymously provided sperm may also violate the privacy rights of sperm providers. Sperm providers have a negative privacy right to remain anonymous—that is, a right to restrict the flow of information about themselves to others. Even if a child has a positive right to obtain information about his or her genetic background, it has been argued that the privacy rights of sperm providers outweigh this right. See Pennings, *Right to Privacy*, *supra* note 57, at 11.

B. A Mandate Requiring Disclosure to Provider-Conceived Children Would Violate the Fundamental Right to Raise One's Child

In addition to advocating for a ban on anonymously provided sperm, some commentators have also called for legislation requiring disclosure to offspring that they were conceived using purchased sperm. Such a mandate is a necessary corollary to a ban on anonymously provided sperm because little would be accomplished by requiring parents to use open-identity sperm if the parents could simply not inform their child that she was conceived using purchased sperm. Without such information, the child would not know that she lacked information about her genetic father. One mechanism for ensuring that provider-conceived children know the details of their conception is to require that parents tell their children they were provider-conceived.⁷⁷ Such an approach would constitute unprecedented involvement of governmental interests in typically private family affairs. In her book, Professor Naomi Cahn offers two other methods through which provider-conceived children could be informed of the details of their conception. She posits these methods would be less intrusive on the family. First, Cahn recommends a system whereby the birth certificates of provider-conceived children are stamped with the words “by donation.”⁷⁸ Second, Cahn suggests that the disclosure mandate could be effectuated by what she calls a “shadow birth certificate.” A shadow birth certificate is a second birth certificate that would include the name of the sperm provider and would be made available to provider-conceived children at the age of eighteen.⁷⁹ The benefit of both of these approaches, according to Cahn, is that they ensure provider-conceived children discover the nature of their conception and the

77 See Cahn, *Necessary Subjects*, *supra* note 16, at 219 (describing requirements that parents tell their provider-conceived children of their conception as “highly problematic,” intrusive, and difficult to enforce, and offering birth certificate annotation as a way around this problem). Interestingly, another commentator promotes legislation requiring annotation of provider conception in provider-conceived children’s birth records, but such annotation would not list the actual identity of their provider. Luetkemeyer, *supra* note 70, at 422–23.

78 CAHN, *supra* note 3, at 230. Prior commentators have offered a similar approach. See Frith, *supra* note 13. Interestingly, in 1984 and again in 2007, a committee within British Parliament recommended a similar proposal to ensure provider-conceived individuals found out about their conception. This controversial recommendation was never enacted. See generally Eric Blyth et al., *The Role of Birth Certificates in Relation to Access to Biographical and Genetic History in Donor Conception*, 17 INT’L J. CHILD. RTS. 207 (2009) (detailing British Parliament’s proposal to annotate provider-conceived children’s birth certificates and advocating reconsideration of the proposal).

79 CAHN, *supra* note 3, at 231. This mechanism informs provider-conceived children of their provider’s identity, and further allows the individual the option of using either birth certificate based on their personal preference. *Id.* The “shadow birth certificate” would not be automatically sent to the provider-conceived children on their eighteenth birthday, but would be available if they requested a new birth certificate after their eighteenth birthday. *Id.*

identity of their provider without having to require parents to share that information.⁸⁰ Even using these supposedly less intrusive mechanisms, however, a disclosure mandate would still violate the fundamental right to raise one's child, unless ART parents' constitutional rights are in some way lesser than the rights of other parents.⁸¹

The Supreme Court has clearly established the fundamental right to raise one's child. Since 1923, the Supreme Court has repeatedly held that legal parents have a constitutionally protected right to make decisions on behalf of their children.⁸² The right to raise one's child, like the right to procreate, is a privacy right rooted in the Fourteenth Amendment. The Supreme Court cases regarding procreation, parenting, marriage, and sexual intimacy have created a zone of privacy around families that the government cannot penetrate except in very limited circumstances.⁸³ This zone of privacy protects many decisions that parents take for granted. Whether to give birth at home or in a hospital, whether to circumcise a child, whether to breast or bottle feed an infant, and whether to send a child to public or private school are examples of decisions parents make on behalf of their children that are protected by the fundamental right to raise one's child.

Some people have criticized the deference the Court has given to parental decisions and argue that parents have too much authority when it comes to raising children. For example, in *Wisconsin v. Yoder*, the Court deferred to Amish parents' wishes to remove their children

80 *Id.* at 230–31.

81 Again, we are open to recognizing new fundamental rights. See Byrn & Ives, *supra* note 63 (arguing that children have a fundamental right to legal parents at birth). Put more simply, encompassed in the fundamental right to raise one's child is a fundamental right to lie to your children. Indeed, parents have been lying to their children since the beginning of time even about such an important issue as how they were conceived. As such, requiring ART parents to be honest with their children about how they were conceived would be unprecedented.

82 *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also *Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

83 See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that it is a violation of the Due Process Clause of the Fourteenth Amendment for the State to interfere with, or attempt to regulate, an abortion prior to the end of the first trimester); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing the right of all individuals to control reproduction); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. . . . Under our constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing familial privacy as including the right of married couples to use contraceptives); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (stating that "procreation [is] fundamental to the very existence and survival of the race").

from mandatory schooling at age thirteen, three years earlier than the law required.⁸⁴ Critics have argued that, because education constitutes a significant government interest, the state is justified in requiring children to attend school against their parents' wishes. Children's rights activists have also criticized the Court's opinion in *Parham v. J.R.*⁸⁵ In that case, the Court held that parents who choose to institutionalize their minor child are presumed to be acting in the best interest of the child; state intervention would therefore violate the parents' rights. Critics have argued that when it comes to a decision as substantial as placing someone in an institution, the government need not presume that parents always act in their child's best interests. It is worth noting, however, that in both of these cases the critics take issue with the decision made by the parents, not with the parents making the decision. No one has suggested that Amish parents should not be allowed to make decisions on behalf of their children, but only that Amish parents' decisions regarding school attendance do not require governmental deference. Similarly, no one has suggested that parents of mentally ill children should not have the same constitutional right to raise their children as other parents. Instead, critics argue that government involvement in decisions regarding placing a child in an institution did not violate the fundamental right to raise one's child. These criticisms of specific parental decisions notwithstanding, the fundamental right to parent is robust and presumably belongs to all parents.

As a result, if ART parents, as a group, are somehow less competent or more suspect than other parents—including Amish parents and parents of mentally ill children—then perhaps ART parents do not have the same fundamental right to raise their children, as other parents. If, however, ART parents should be treated like other parents, then the proposed mandate to inform their provider-conceived children of the particulars of their conception would need to endure the same strict scrutiny analysis applied to the ban on anonymously provided sperm in the previous section.

The first question in that analysis is whether the disclosure mandate infringes the fundamental right to raise one's child. Certainly requiring ART parents to tell their children the details about their conception would be an infringement of a parent's right to make decisions on behalf of her child. There is very little parents are required to do for their children and there is not any precedent for requiring a parent to provide their children information. The government, for example, cannot require parents to tell their children that smoking is bad for their health, or that car emissions cause global warming, or that President Barack Obama is a U.S. citizen. Similarly, the state cannot mandate that parents not lie to their children. Parents routinely lie to their children about the tooth fairy, about

84 406 U.S. 205 (1972).

85 442 U.S. 584 (1979).

whether they actually played well at the piano recital, about whether they have enough money to pay for their college education, and, even, about the identity of their genetic father.

A more difficult question may be whether the government stamping a birth certificate with “by donation” or providing a “shadow birth certificate,” disclosing information about the sperm provider when the offspring turns eighteen, would be an infringement of the fundamental right to raise one’s child. Presumably, the right to raise one’s child ends when a child turns eighteen and can make decisions on her own behalf. Providing a child with a new birth certificate at age eighteen, however, would be an end-run around the parents’ rights. Merely waiting until the child is eighteen to intrude on a constitutionally protected family decision does not immunize the government’s infringement of the fundamental right to raise one’s child as the government’s decision to intrude on the parents’ fundamental right was made long before the child turned eighteen. Lurking behind the scenes of the family, essentially extorting an admission by the parents to the child, lest the government do it for them when the child turns eighteen, can hardly be described as respecting family autonomy. Despite the fact that the child has become a legal adult, the government would be acting as if it knew what was in the child’s best interest better than the parents. Absent extreme circumstances, the government cannot impose its will onto a child at the expense of the parents’ wishes, even if the government waits eighteen years to do it.

Seeing as a disclosure mandate would infringe the right to raise one’s child, such legislation would be constitutional only if it is necessary to serve a compelling government interest. The four interests put forth in support of a disclosure mandate are the same interests asserted in favor of the ban, so the analysis would be the same as discussed in Part A, *supra*. Therefore, if ART parents have the same constitutional rights as other parents, the mandate would be unconstitutional because none of the government’s interests are compelling.

Let us suppose, however, that a mandate requiring ART parents to tell their offspring that they were conceived using anonymously provided sperm did serve a compelling government interest. If this were true, then the disclosure mandate would only be necessary if it could be shown not to be under-inclusive. Currently, parents of children conceived via sexual reproduction are not required to tell their children details about their conception such as whether their conception was planned, or was the result of nonconsensual sex, or of an extra-marital affair. Moreover, sexual reproductive parents are not required to tell their children the true identity of their genetic fathers. Such choices are made within privacy of the family without state interference and are presumed to be in the best interests of the child. Certainly children who are conceived via sexual reproduction who do not know the

identity of their genetic fathers suffer the same psychological and medical harms and face the same risk of half-sibling marriage as that of provider-conceived children. Requiring all parents to provide their children such information, however, would provoke social outcry and would, without question, be challenged on constitutional grounds. It follows, then, that if requiring all parents to tell their children the details of their conception would be unacceptable, and if ART parents have the same parental rights as other parents, then a disclosure mandate would violate the fundamental right to raise one's child.

The question then becomes whether requiring parents to tell their child that she was conceived using anonymously provided sperm is somehow substantively different than requiring parents to tell their children other details of their conception. It is without debate that children have an interest in information about their family history; perhaps they even have a moral right to the information. Requiring ART parents to tell their child this information, however, while not requiring the same of other parents, raises serious concerns about the rights of ART parents. Are we prepared to say that ART parents are somehow more suspect than other parents and therefore need to be more closely regulated, or that provider-conceived children are somehow more fragile than other children and therefore have a greater need for the truth? While these questions have yet to be answered by a court, it is true that proposals for a ban on anonymously provided sperm or a mandate that provider-conceived children discover the nature of their conception would undermine the rights of ART parents. Such proposals, though apparently well meaning, in fact presume that ART parents possess lesser rights than other parents. Such presumptions may elicit unwanted yet lasting influence on how ART parents are treated in both legal and social contexts. Indeed, if ART parents have lesser constitutional right than other parents, any use of ART could presumably be banned. As such, these dramatic legislative proposals need to be avoided. Instead, the legitimate concerns associated with anonymously provided sperm should be addressed with a more considered and less intrusive legislative response.

II. Addressing the Legitimate Concerns Over Anonymously Provided Sperm

Preventing romantic relationships between half-siblings and increasing provider-conceived children's access to medical information are legitimate concerns regarding anonymously provided sperm. Addressing these concerns by banning anonymously provided sperm, however, is unnecessarily broad and threatens the constitutional rights of ART parents. Instead, an alternative approach has already been suggested that would protect both provider-conceived children's interests and their parents' rights. Several commentators have called for a national registry that would serve as a databank of information about

sperm providers and provider-conceived births.⁸⁶ Such a registry would track and preserve the genetic and medical information provider-conceived children need, without tracking the provider's name or revealing his identity. Sperm clinics could track and provide medical information of every sperm provider to the national registry. In addition, all sperm providers—whether anonymous or open-identity—could be required to update their file with any relevant changes to their medical history. In order to address the concern regarding romantic relationships between half-siblings, the information kept by the registry would be available across clinics so that they could monitor whether their sperm providers have also provided sperm to other clinics. In addition, if both offspring consent, information regarding genetic relationships would be available between half-siblings. Furthermore, relevant medical information would be available to provider-conceived children so that they could monitor their health and treat medical conditions.

Most supporters of a ban on anonymously provided sperm also support the creation of a national registry. They too see a need for increased access to provider information to address concerns about children's health and romantic half-sibling relationships. Some of these supporters, however, also advocate using the registry as a mechanism for sharing the provider's identity. Such identifying information, however, is not necessary for the registry to work.⁸⁷ Providers in the registry can be organized by non-identifying tracking numbers, just as they currently are within individual clinics, and information can be shared with reference to these numbers.

One issue that will need to be addressed is who will create and maintain the registry. Some commentators have asserted that federal or state governments should pass legislation requiring the registry and should pay for its creation and maintenance. This seems highly unlikely considering the current financial situation of government at every level in the United States. Although other countries have created publicly funded registries, the lesson we can learn from them is that registries can work—not that governments are needed to

86 Jean Benward et al., *Maximizing Autonomy and the Changing View of Donor Conception: The Creation of a National Donor Registry*, 12 DEPAUL J. HEALTH CARE L. 225, 230 (2009) (discussing the need for a registry that preserves provider information and ensures its availability after clinics cease operating); Luetkemeyer, *supra* note 70, at 422; Pi, *supra* note 69, at 398 (arguing a registry would alleviate concerns about half-sibling mating); Sawyer, *supra* note 14, at 1814. Naomi Cahn, a vocal advocate of banning anonymously provided sperm, also supports a national, mandatory registry to improve the tracking and sharing of provider information to children. See Cahn, *Necessary Subjects*, *supra* note 16, at 205, 217. In contrast Michelle Dennison, who also calls for banning anonymity, does not promote a single registry. Instead she suggests individual clinics should be required to internally keep more complete records. See Dennison, *supra* note 11, at 24.

87 *Contra* Cahn, *Necessary Subjects*, *supra* note 16, at 223 (arguing that clinics should be required to track and report information about donated gametes, including provider identity).

fund them.

A more likely source of funding for a national registry is from the sperm banks themselves. Clinics have already demonstrated their willingness to respond to the increasing demand for more information about sperm providers. Most clinics now offer several options when it comes to sperm. In addition to selling anonymously provided sperm with little information about the provider, some clinics now offer anonymously provided sperm packages that include extensive information about the provider, such as baby pictures or the staff's impressions of the provider. Moreover, many banks now offer open-identity sperm for parents that would like to provide their offspring with the opportunity to contact their genetic father. As additional concerns about anonymously provided sperm have surfaced regarding half-sibling relationships and future medical treatment, sperm banks have begun discussing creating a national registry. Four of the largest private clinics have already put forth seed money to create a registry. Unlike any level of government in the United States, sperm banks have already shown an interest in creating a registry and the willingness to fund it.

Some have questioned whether a registry created by the sperm banks would really protect the interests of children. In the vein of a "putting the fox in charge of the hen house" argument, some have suggested that the sperm banks will create a registry that protects primarily their own interests. It is our contention that the interests of the parties—sperm banks, ART parents, and provider-conceived offspring—line up quite well. Sperm banks want a stable industry that meets the needs and desires of their clients and avoids bad publicity. As such, sperm banks' interests would allow for a national registry that: 1) facilitates the flow of information to which ART parents wish their offspring to have access and 2) prevents bad publicity that would result from incidents of accidental incest or an inability of a provider-conceived child to treat a medical condition. It is true that if provider-conceived children had a legal right to know the identity of the sperm provider, government involvement may have been necessary to protect those rights. However, because provider-conceived children do not have a legal right that needs to be protected, their interests are the same as the sperm banks: to prevent romantic half-sibling relationships and provide access to relevant medical information about the provider. Government involvement in the form of legislation requiring the sperm banks to collect and maintain information, however, could be productive. Although sperm banks have shown an interest in creating a registry, a legislative requirement would ensure that the registry is created and that all sperm banks participate.⁸⁸

88 Pi, *supra* note 69, at 387 (stating that ASRM has published several useful guidelines, but the guidelines are "non-binding and merely suggestions").

Although provider-conceived children do not have a legal right to know their genetic father, that does not mean they do not have interests regarding information about their romantic partners and ability to treat medical conditions. The vast majority of commentators, provider-conceived children and industry spokespersons want to serve those interests. A national registry that does not provide access to an anonymous sperm provider's identity can protect those interests without threatening the fundamental rights of ART parents to procreate and raise their children.

CONCLUSION

The decision of whether to have children is a highly personal one. So too are the decisions of when, with whom, and how to have children. The Supreme Court has created a zone of privacy around these decisions in which parents are free to create their families as they choose. It has yet to be decided, however, whether these fundamental rights to procreate and raise one's child extend to parents that conceive via ART.

Even in the absence of clear constitutional rights, thousands of parents have used ART to create their families—some using anonymously provided sperm. As the number of children conceived using anonymously provided sperm increases, so too does the concern over the impact that not knowing one's genetic father may have on these children. Commentators, seemingly supportive of the availability of ART in general, have recommended a ban on anonymously provided sperm and a mandate requiring disclosure to children that they were conceived using purchased sperm to address these concerns. This recommended legislation, however, presupposes that ART parents have lesser constitutional rights than other parents.

It is unnecessary to allow for such a foregone conclusion regarding ART parents' rights in order to address concerns over anonymously provided sperm. The legitimate concerns over anonymously-provided sperm can be addressed through a national registry that does not reveal the identity of the sperm provider. A national registry presents a more measured and carefully tailored legislative response that protects the interests of all those involved, and, more importantly, does not threaten the constitutional rights of ART parents or access to ART in general.