Sex Selection Abortion: A Constitutional Analysis of the Abortion Liberty and a Person's Right to Know

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NOTES

Sex Selection Abortion: A Constitutional Analysis of the Abortion Liberty and a Person's Right to Know

Jane Doe is pregnant and wants a baby boy. She goes to her gynecologist and asks her to perform a medical test which will reveal the fetus' sex. The test results indicate the fetus is female. Doe has an abortion to dispose of the unwanted female fetus.

As a result of the accessibility of abortion following the Supreme Court's decision in Roe v. Wade and the availability of sophisticated in utero testing to detect fetal sex, such "sex selection abortions" have occurred in recent years. Some doctors predict that sex selection abortions will become increasingly common in the near future. Although no jurisdiction has yet prohibited this practice, members of Congress have

1 410 U.S. 113 (1973).
3 Washington Post, Sept. 6, 1979, § A, at 1, col. 1. One observer thinks it could become common in 1981 or 1982. See id., at 5, col. 3.; note 19 infra. Some physicians do not foresee sex selection abortion becoming a widespread practice in the long run because of anticipated development of pre-conception sex selection techniques. See, e.g., L. Karp, Genetic Engineering 123 (1976). It is not clear, however, how soon such techniques will become widely available. Even when such pre-conception methods are developed, sex selection abortions would continue to be wanted in three situations. First, in those cases where the pre-conception technique had failed, abortion would be used as a backup method of sex selection. Second, abortion would still be used in a case of an unplanned pregnancy, where a woman decides after becoming pregnant she wants to bear the child only if it is the "right" sex. Third, some women might prefer taking a 50-50 chance of the fetus being the "right" sex and then rely on sex selection abortion rather than use the artificial insemination required by the most promising pre-conception techniques for sex selection. The clinical procedure of artificial insemination is unpleasant and it often must be repeated numerous times in order to attain fertilization. See G. Williams, The Sanctity of Life and the Criminal Law 115 (1957). See generally Largey, Reproductive Technologies: Sex Selection, in 4 Encyclopedia of Bioethics 1439, 1440-41 (1978). Thus, while availability of pre-conception sex selection may reduce the demand for sex selection abortions, it will not eliminate the practice. In fact, one could argue that the widespread use of pre-conception techniques would increase the demand for sex selection abortions by increasing public awareness and acceptance of sex selection generally. See notes 19 & 158 infra. Also, the number of sex selection abortions is likely to increase "considerably" when first trimester fetal sex determination becomes technically feasible. Powledge & Fletcher, Guidelines for the Ethical, Social and Legal Issues in Prenatal Diagnosis, 330 NEW ENG. J. MED. 168, 172 (1979).
condemned it⁴ and a legislative prohibition is possible.⁵ Such a prohibition would be subject to attack on two major constitutional grounds: first, as an interference with the abortion liberty enunciated in *Roe* and its progeny; and second, as an abridgment of the first amendment freedom of speech interest in the free flow of information.⁶

*Roe* held that a woman has a fundamental constitutional right to an abortion which is free, for the most part, from state interference.⁷ Although it is clear under *Roe* that a woman need not state her reasons for a first or second trimester abortion,⁸ it is by no means clear that a woman has a constitutional right to terminate her pregnancy for whatever reason she alone chooses. The contours of a woman's "freedom of choice" regarding the abortion decision have not been fully developed by the Court thus far and the practice of sex selection abortion raises issues which it has not yet confronted in its analysis of the abortion


⁵ The vociferous debates over federal funding of abortion in each session of Congress demonstrates a continuing legislative opposition to abortion. See, e.g., *id.* at S9854-70 (daily ed. July 19, 1979). Moreover, numerous states have enacted abortion laws which attempt to restrict abortion to the maximum degree permitted by *Roe* and its progeny, see, e.g., ILL. REV. STAT. ch. 38, § 81-21 (Supp. 1980), while some states have gone even further and had their abortion statutes struck down. See, e.g., PA. STAT. ANN. tit. 35, § 6605[a] (Purdon 1977), held unconstitutional in *Colautti v. Franklin*, 439 U.S. 379 (1979). Thus, some legislatures desire to restrict access to abortions to the maximum extent permitted by the courts. This legislative attitude appears to enjoy public support. A recent Gallup Poll on the issue reveals that 53% of the population think abortion should be "legal only under certain circumstances," 18% believe it should be "illegal under all circumstances" and 25% maintain it should be "legal under all circumstances." *Washington Post*, Aug. 17, 1980, § A, at 16, col. 1. Given the condemnation of sex selection abortion, see note 18 infra, and these legislative and public attitudes, prohibition of sex selection abortion is possible if the constitutionality of the prohibition is at least arguable.

⁶ The prohibition could also be attacked more generally as an infringement of the "right of privacy" enunciated in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). However, as the Court in *Roe* explicitly states, the privacy interest of a pregnant woman respecting abortion is "inherently different" from the privacy interests recognized in those cases. 410 U.S. at 159. Thus, the constitutionality of a prohibition of sex selection abortion must be analyzed in terms of the abortion liberty itself, rather than the general right to privacy the Court discovered in "emanations from penumbras." Nonetheless, it should be noted that just as the courts in *Roe* concluded without any explanation that the right to privacy was "broad enough" to cover abortion generally, see *id.* at 153, it similarly could state by fiat that this privacy right is broad enough to cover a woman's decision to select the sex of her children.

The right of privacy was not really involved in *Roe* at all; rather, the Court merely used the phrase "right of privacy" to obfuscate the substantive due process foundation of the opinion. See *id.* at 172-73 (Rehnquist, J., dissenting); note 45 infra. Such a substantive due process approach, by its very subjective nature, naturally is beyond legal analysis.

⁷ 410 U.S. at 153-58.

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liberty. Moreover, recent Supreme Court decisions have substantially modified the nature of the abortion liberty announced in *Roe* and provide that the state may regulate abortions so long as the regulations are not "unduly burdensome" to a woman's right to seek an abortion.9 The practice of sex selection abortion presents a paradigm case for determining whether the Court is willing to permit government to impose any significant limitations on a woman's freedom of choice respecting the abortion decision.

Whether or not a state prohibition of sex selection abortion is unconstitutional as an infringement on the abortion liberty, such a prohibition also can be challenged on first amendment freedom of speech grounds. The only effective way of preventing a woman from having a sex selection abortion is to keep her ignorant of her fetus' sex by prohibiting the performance of medical tests to reveal fetal sex.10 A series of Supreme Court cases indicate that an individual has a first amendment interest in the "free flow of information" which could render such a prohibition constitutionally infirm.11 However, the nature of this first amendment interest is circumscribed by the "legitimacy" of the information sought. Moreover, an individual's interest in the free flow of information must be balanced against the state interests in restricting the dissemination of the information. Thus, whether a woman has a constitutional right to discover the sex of the fetus she is carrying turns on the strength and legitimacy of the state interest in preventing sex selection abortions.

After a brief discussion of the use of abortion for sex selection and the possible sociological effects of the practice, this note will examine whether prohibition of sex selection abortion interferes with a woman's constitutional right to seek an abortion. The note proposes that a prohibition of sex selection abortion could withstand constitutional scrutiny, indicating that the judicially created abortion liberty has judicially cognizable limits not recognized previously. The note then will analyze whether a prohibition against the use of medical tests to determine fetal sex for purposes of sex selection abortion interferes with a woman's right to receive information. Building on the thesis that the state may restrict the flow of certain information when it can demonstrate significant justifications for doing so, the note concludes that a woman does not have a first amendment right to discover the sex of the fetus she carries.

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10 See notes 32 & 158 infra.
AMNIOCENTESIS AND SELECTIVE ABORTION

A woman's ability to discover her fetus' sex is a condition precedent to a sex selection abortion. Fetal sex can be revealed through a medical technique called amniocentesis. This technique involves withdrawing a sample of amniotic fluid through a needle inserted into the intrauterine sac in which the fetus is contained. It is performed as an outpatient procedure in the second trimester of pregnancy and an analysis of the fluid, through which fetal sex is detected, is normally not available until Largey, supra note 3, at 1441. See generally Nelson & Emery, Amniotic Fluid Cells: Prenatal Sex Prediction and Culture, in 1 BRIT. MED. J. 523 (1970). Cases concerning amniocentesis thus far have arisen in the form of malpractice against physicians for "wrongful life" or "wrongful birth." See, e.g., Gildner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978). See generally Note, The Abortion Alternative and the Patient's Right to Know, 1978 WASH. U. L.Q. 167; Note, Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling, 87 YALE L.J. 1488 (1978); see also Capron, Tort Liability in Genetic Counseling, 79 COLUM. L. REV. 618 (1979); Comment, "Wrongful Birth": Should Liability be Imposed Upon a Physician Who Fails to Warn Parents of the Risks of Defects in Their Unborn Children?, 14 GONZ. L. REV. 891 (1979). Courts have been willing to award damages to parents who had a defective child which would have been aborted had the parents been informed of the option of amniocentesis or if the test itself had not been negligently interpreted. See, e.g., Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807 (1978). See generally Annot., 83 A.L.R. 3d 15 (1968). It may be difficult to envision a court holding that a physician has a duty to inform pregnant women of the option of sex selection abortion, yet perhaps several years ago it would have been equally unforseeable that a doctor had a duty to disclose the option of aborting infants with genetic abnormalities. However, given the bases of damage awards in tort actions, see W. PROSSER, THE LAW OF TORTS 6 (4th ed. 1971), recognition of a "wrongful sex" action is possible. The plaintiffs, however, might find it difficult to obtain more than nominal damages. Recognition of a "wrongful sex" action could be challenged on constitutional grounds. Cf. Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenant held violative of equal protection). See also notes 29 & 189 infra.

13 NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT, U.S. DEPT OF HEALTH, EDUCATION AND WELFARE, ANTE NATAL DIAGNOSIS: REPORT OF A CONSENSUS DEVELOPMENT CONFERENCE I-4 (National Institutes of Health Pub. No. 79-1973, 1979) [hereinafter cited as ANTE NATAL DIAGNOSIS]. Amniocentesis is usually performed between the sixteenth and eighteenth weeks of pregnancy. Id. Although it can be performed a few weeks earlier, id. at I-187, physicians should wait until the sixteenth week to assure that a sufficient amount of amniotic fluid is present. Fletcher, Prenatal Diagnosis: Ethical Issues, in 3 ENCYCLOPEDIA OF BIOETHICS 1386, 1343 (1978). The major risk of amniocentesis is injury to the fetus, but this rarely occurs. Mulinsky, Prenatal Diagnosis: Clinical Aspects, in 3 ENCYCLOPEDIA OF BIOETHICS 1392, 1335 (1978). It should be noted that techniques for detecting fetal sex in the first trimester are now being developed. See note 3 supra. In addition, a "do-it-yourself" method of sex determination, involving mixing a pregnant woman's urine with a commercial drain cleaning product, has been discussed in the popular press. See, e.g., Louisville Times, Dec. 29, 1979, (Scene), at 6, col. 1. This method is suspect, to say the least.

14 "Fetal sex determination is best done by complete karyotyping [a method of analyzing the cultured amniotic cells]." Milunsky, supra note 13, at 1333. While fluid analysis is accurate in almost all cases, ANTE NATAL DIAG NOSIS, supra note 13, at I-4, I-5, errors in sex determination are possible. Milunsky, supra note 13, at 1335. Thus, a woman could have a child of the "wrong" sex even after amniocentesis due to possible negligence. For a discussion concerning possible judicial recognition of a "wrongful sex action," see note 12 supra.
till late in the second trimester when the fetus is close to viability. 15

Amniocentesis is usually performed to detect fetal abnormalities 16 and most physicians have been reluctant to use it solely for fetal sex determination. 17 Physicians' reactions to requests for sex selection abortion

15 See Antenatal Diagnosis, supra note 13, at I-187. Analysis of the amniotic fluid currently takes two to four weeks. Id. at I-77. Thus, sex selection abortion would usually be performed anywhere from the eighteenth to twenty-second week of pregnancy. While fetal viability normally occurs at the twenty-fourth week at the earliest, 410 U.S. at 156, a particular fetus could achieve viability as early as the twentieth week. 51 Chi-Kent L. Rev. 227, 241 (1974). See also J. Pritchard & P. MacDonald, Williams Obstetrics 143 (15th ed. 1976); Special Project—A Survey of Abortion Law, 1980 Ariz. St. L.J. 67, 130-33. Moreover, a culture is successfully grown from the first fluid sample 98% of the time. Antenatal Diagnosis, supra note 13, at I-85. Thus, in the remaining 2% of the cases, a second amniocentesis would be required. It would be performed at around the twentieth week and the fluid analysis would not be available until close to the twenty-fourth week when the fetus is even more likely to be viable. See also Fletcher, supra note 13, at 1343.

16 Delgado & Keyes, Parental Preferences and Selective Abortion: A Commentary on Roe v. Wade and Doe v. Bolton, and the Shape of Things to Come, 1974 Wash. U. L.Q. 203, 210 n.31. Since 1968, the procedure has been used in over 40,000 cases. Antenatal Diagnosis, supra note 13, at I-4. Amniocentesis and fluid analysis can detect essentially all chromosomal abnormalities in the fetus, about 75 serious inborn metabolic disorders and fetal neural tube defects. Id. When a fetus is found to be "defective," in virtually all cases the only "treatment" available is the destruction of the fetus through abortion. See id. at I-2, I-3. "With the available option of abortion, intrauterine diagnosis of hereditary disease or congenital defect in the fetus provides an acceptable, albeit imperfect, alternative in the prevention of such conditions for many families." Id. at I-31. Experts hope, however, that methods of in utero treatment will be found in the distant future, but until that occurs "such a 'prevention' option can have substantial effect on reducing the incidence of such disorders and on the profound impact which the births of children with such conditions may have on their families." Id. However, the seriousness of the disorders which can be detected through amniocentesis varies greatly, from those which are readily treatable to those which condemn their victims to extreme suffering and early death. Id. at I-190. If the state may prescribe sex selection amniocentesis, it is also possible the state may have a role in regulating the use of amniocentesis for minor fetal abnormalities. While an analysis of the full ramifications of this issue is outside the scope of this note, it can be observed that many of the justifications for finding a state's prohibition of sex selection abortion constitutional also are applicable to state regulation of abortion performed for other, perhaps even more "trivial," reasons. Concern, for example, has been expressed that eugenic abortions may contribute to the stigmatization of handicapped individuals and may decrease society's tolerance of such individuals. See id. at I-132, I-135, I-190. See generally Ethical Issues in Human Genetics (B. Hilton, D. Callahan, M. Harris, P. Conditte & B. Berkley eds. 1973); Callahan, Abortion and Medical Ethics, Annals, May, 1978, at 116, 122-23; Friedman, Legal Implications of Amniocentesis, 123 U. Pa. L. Rev. 92 (1973). The government, by reserving access to amniocentesis fluid analyses to those cases in which a severe abnormality is indicated, could prevent the abortion of fetuses with only minor defects. The justifications for such state action—protection of maternal health, interest in the fetus, preventing stigmatization of a class of citizens and preventing the amniotic fluid analysis laboratories from becoming overburdened—would be similar to the justifications for regulation of sex selection abortion. See notes 184-89 & accompanying text infra.

17 L. Karp, supra note 3, at 123; Fletcher, Ethics and Amniocentesis for Fetal Sex Identification, 301 New Eng. J. Med. 550 (1979); Washington Post, Sept. 6, 1979, § A, at 1, col. 1. Amniocentesis performed solely for sex preference must be distinguished from those cases in which fetal sex is diagnosed to predict the likelihood of an x-linked genetic defect. Some genetic diseases are sex-linked. In such cases, amniocentesis is performed to ascertain the fetus' sex. While a female may be a carrier of such a disease, she would not be inflicted
range from "mild distaste" to "frank revulsion." However, evidence indicates that these attitudes toward the procedure may be changing.

A woman's "private choice" to have a sex selection abortion is not

with it. "If a maternal carrier of an X-linked disorder is found to be carrying a male fetus, then that fetus has a fifty percent chance of being affected." Milunsky, supra note 13, at 1353-34. A male fetus is then aborted "recognizing that termination of pregnancy with a male fetus in these cases will yield a normal abortus in fifty percent of such cases." Id. The possible state prohibition of sex selection abortion analyzed in this note would not prohibit abortions desired because of X-linked genetic disease.

L. KARP, supra note 3, at 123. Four basic reasons have been given for these negative attitudes toward the practice: first, sex is not a disease and a physician's role is to treat disease; second, the practice can be viewed as sexist; third, sex preference is a "trivial" or "frivolous" reason for an abortion and abortion is a serious moral issue; and fourth, amniocentesis is a scarce resource and use of it for sex selection would overburden the system. Fletcher, supra note 17, at 550-51. Most physicians probably discourage the practice because of their belief that "abortion for sex choice is morally unjustifiable." Id. at 551. See also ANTE NATAL DIAGNOSIS, supra note 13, at 1-187; Largey, supra note 3, at 1442-43. However, sex selection "might facilitate familiar adjustments." Id. at 1443. Moreover, the desire of women to have children of each sex is not at all unusual. A woman with three girls, for example, might want another child only if it is a boy. On the other hand, some women might want children of a particular sex. Some lesbians, for example, who employ artificial insemination to become pregnant, might prefer to have girls.

Tabitha Powledge, of the Hastings Center and Institute for Science, Ethics and Life Studies, said that as more private obstetricians learn to do amniocentesis in their offices, there will be "lots of obstetricians who are willing [to perform sex selection amniocentesis], for a price." Washington Post, Sept. 6, 1979, § A, at 5, col. 3; see Milunsky, Medico-Legal Issues in Prenatal Genetic Diagnosis, in GENETICS AND THE LAW 53, 61 (A. Milunsky & G. Annas eds. 1976). Moreover, a well-known government bioethicist has endorsed a woman's right to dispose of a fetus of the "wrong" sex. Fletcher, supra note 17, at 551, 553. Dr. Fletcher is a bioethicist at the National Institute of Health. Washington Post, Sept. 6, 1976, § A, at 5, col. 1. Although previously he had opposed the practice of sex selection abortion, he now argues that the very legality of abortion under Roe ethically obligates a doctor to accede to his patients' requests for sex selection amniocentesis. See Fletcher, supra note 17, at 551-53. "[T]he issue does not turn on the validity of opposition to abortion for sex choice. The issue turns on the validity of the legal rules on abortion defined by the Supreme Court . . . ." Id. at 551. Roe is thus viewed as an ethical imperative encouraging abortions for whatever reason the woman alone chooses. Although Fletcher asserts he does not view the Supreme Court decision as an "ethical consideration" itself, he says "the legal guideline on abortion points beyond itself to [ethical] principles . . . ." Id. He concludes: "Physicians who agree with the social-ethical perspective that informs the legal rules on abortion will finally want to keep faith with the moral intent of the law." Id. at 553. Fletcher also argues that "one must be willing to accept the fact that some abortions will be performed for trivial reasons." Id. at 551. Fletcher's reliance on the moral force of Roe is quite ironic in light of the repeated statements in Roe that abortion is a medical decision for the physician. See 410 U.S. at 163-65; See also notes 49, 56-67 & accompanying text infra. See generally Marcin & Marcin, The Physician's Decisionmaking Role in Abortion Cases, 35 THE JURIST 66 (1975).

Furthermore, the view of medicine in general, and amniocentesis in particular, as a commodity to increase a patient's happiness is gaining greater acceptance in the medical community. See generally J. Pritchard & P. Macdonald, supra note 15, at 2; see also ANTE NATAL DIAGNOSIS, supra note 13, at 1-194. George Will reports that this view of medicine is not confined to the abortion area. He argues that various medical practices, including sex selection abortion, "aim not at the patient's health but rather at satisfying his . . . wishes. They are not acts of medicine but of gratification: for consumers, not patients." Washington Post, June 25, 1978, § D, at 7, col. 5, reprinted in 125 CONG. REC. S9865 (daily ed. July 19, 1979).
without potential public consequences. The quantitative and qualitative impact sex selection abortion will have on the sex ratio in society is unknown. Studies do reveal a general preference for male offspring that is particularly evident in sex selection abortion cases. In addition to the preference for males among all offspring, many parents prefer the first child to be a boy. Widespread use of sex selection abortion could yield a higher ratio of males in the population, and some scientists see a number of adverse sociological consequences of such a result. According to some estimates, the number of women willing to use amniocentesis to select the sex of their children could increase as the service.

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20 E.g., Cutright, Belt & Scangoni, Gender Preferences, Sex Predetermination, and Family Size in the United States, 21 SOC. BIOLOGY 242 (1974); Washington Post, Jan. 18, 1980, § A, at 3, col. 1 (early ed.). “Many students in the past 30 years have shown that parents prefer sons . . . [and] a 1978 study found no evidence that son preference is declining.” Id. This preference for males is especially evident in sex selection abortion cases: the vast majority of aborted fetuses are female. “In one series of women who were tested and told [fetal sex], 46 were told it was a girl and 29 chose to abort. Of 53 shown to be boys, only one was aborted.” C. RICE, BEYOND ABORTION 98 (1979); see 125 CONG. REC. E4376 (daily ed. Sept. 10, 1979). The preference for male children is not a recent development and infanticide was practiced in primitive and ancient cultures to control the sex ratio. L. GORDON, WOMAN’S BODY, WOMAN’S RIGHTS 32, 34 (1979). Female babies were routinely killed in Tahiti, Formosa, India and North Africa at various times. Id. at 34; see C. DARWIN, THE DESCENT OF MAN 288-91 (2d ed. 1874). Moreover, one author asserts: “If infanticide is not suitable in most of today’s societies, it is because we have found better methods of birth control, not because we are morally superior.” L. GORDON, supra, at 35; accord, Tooley, Abortion and Infanticide in THE RIGHTS AND WRONGS OF ABORTION 52 (M. Cohen, T. Nagel & T. Scanlon eds. 1974). Tooley, a philosopher, submits that both abortion and infanticide are “morally acceptable” practices. Id.

21 See Largey, supra note 3, at 1439, 1442.

22 However, some sociologists and demographers think that any imbalance in the sex ratio would be short-lived. See, e.g., L. KARP, supra note 3, at 158.

23 Among the possible consequences some scientists predict are: first, an increase or decrease in population growth; second, increased crime and wars; third, increased male homosexuality; fourth, increased polyandry; and fifth, increased occurrence of first-child personality traits in males and later-child traits in females. Largey, supra note 3, at 1442; Washington Post, Jan. 8, 1980, § A, at 3, col. 1 (early ed.). Furthermore, the views of one social scientist on pre-conception sex selection techniques may also be applicable to sex selection abortion: “Now, as a statistical majority, women have little or no control over the development of this technology and are virtually powerless to prevent it from being used against them. What will happen when women become a dwindling minority?” Id. To say that abortion is different because the decision to have an abortion rests solely with the woman ignores reality. Women, perhaps even more than men in contemporary society, are subject to the pressures of their spouses or others, and certainly it is not uncommon that women are pressured into having abortions by husbands, putative fathers or parents. See J. NOONAN, supra note 8, at 48-50; Duffy, The Abortion Decisions—How Will the United States Supreme Court Define “Necessary”? 64 WOMEN’S LAW. J. 3, 16 (1978). Such pressure, in fact, might account for the marked preference for males, and the aborting of females, in most sex selection abortion cases. See note 29 supra.

24 The number of sex selection abortions currently being performed is unknown. Nevertheless, the director of prenatal diagnosis at Yale University said he believes “lots of obstetricians all over the country . . . are already quietly doing amniocenteses for sex determination.” Washington Post, Sept. 6, 1979, § A, at 5, col. 3. See also note 3 & accompanying text supra.
becomes more widely available and publicized, especially in light of the present concern for the “perfect child” and the increasingly permissive attitude toward elective abortion.

Aside from the more demonstrable sociological effects of sex selection abortion, the practice may have an even more profound impact on society. The practice can be viewed as the ultimate expression and manifestation of sexism in society, for it determines who will live on the basis of sex. A society which recognizes an individual’s right to abort a fetus solely because of his or her sex might be hard-pressed to condemn far less drastic forms of sexist behavior by individuals.
STATE PROHIBITION OF SEX SELECTION ABORTION: SEX SELECTION AND THE ABORTION LIBERTY

In part because of the societal dangers of sex selection abortion, private individuals and government officials condemn the practice\(^1\) and thus it is a potential candidate for state regulation.\(^2\) Three major factors make it difficult to assess the constitutionality of governmental regulation of sex selection abortion under Supreme Court cases concerning abortion.

First, the Court has not yet directly confronted the peculiar question posed by this practice.\(^3\) Indeed, "[t]he Supreme Court justices probably did not imagine in 1973 that their decision on abortion [Roe] was related to the right of parents to choose the sex of children through amniocentesis."\(^4\) Legislatures have not yet attempted to prohibit sex selection abortion, perhaps at least in part because of a belief that Supreme Court pronouncements on abortion would render such legislative action futile.\(^5\) However, the statutes invalidated in Roe v. Wade\(^6\) and Doe v. Bolton\(^7\) were broad prohibitions which permitted abortion in only a few circumstances and not statutes which prohibited only a narrow class of abortions. Since the issues examined by the Court in these cases are distinguishable from those raised by sex selection, they are not dispositive of the sex selection abortion issue.\(^8\)

Second, the Supreme Court's recognition of an abortion liberty has been severely criticized as lacking in any doctrinal basis\(^9\) and thus the is irrelevant to the issue of sexism, for the reason a woman has a sex selection abortion is that she does not want a particular individual to come into existence solely because of his or her sex. A fetus is, after all, a human being, if not a "person," with the characteristic of sex.

\(^2\) See notes 4 & 18 supra.

\(^3\) State prohibition of sex selection abortion through the regulation of amniocentesis, see text accompanying note 10 supra, could take one of two basic forms. It could make sex selection amniocentesis a criminal offense or it could deny funding to laboratories which perform such testing. Withholding government funding could be very effective because as of 1979 complete amniocentesis and analysis of the fluid is performed at only 125 medical centers in the United States. ANTENATAL DIAGNOSIS, supra note 13, at I-59. Most of these centers are affiliated with major universities, see id. at I-153, which receive substantial federal and state funding. Although the constitutional issues concerning regulation of sex selection amniocentesis are essentially the same irrespective of which method of regulation is used, use of the criminal sanction might be more suspect. See notes 129, 155 & accompanying text infra. See also Delgado & Keyes, supra note 16, at 222-23.

\(^4\) See Delgado & Keyes, supra note 16, at 104. Delgado and Keyes, in addition to discussing sex selection abortion, deal with similar abortion practices such as the possibility of racially selective abortion.

\(^5\) Fletcher, supra note 17, at 551.


\(^7\) 410 U.S. 113 (1973).

\(^8\) 410 U.S. 179 (1973). Roe v. Wade and Doe v. Bolton were companion cases.

\(^9\) Delgado & Keyes, supra note 16, passim; see notes 63-69 & accompanying text infra.

\(^{10}\) E.g., J. NOONAN, supra note 8, at 20-32; Epstein, Substantive Due Process by Any
result in any abortion case may have more to do with the individual Justices' subjective values concerning abortion than with substantive constitutional issues.\textsuperscript{46} The result is a series of conceptually inconsistent decisions which are not conducive to precise or rigid analysis. As Mr. Justice White laconically lamented: "[The] normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion."\textsuperscript{41}

Third, Supreme Court pronouncements on the scope of the abortion liberty and the actual practice of the liberty in the real world are often impossible to reconcile. Although the Court insists that \textit{Roe} does not give a woman the right to an "abortion on . . . demand,"\textsuperscript{2} as a practical matter any woman with sufficient funds\textsuperscript{4} has such a right. This indicates a lack of candor in the Court's declarations.

The absence of doctrinal foundation for the abortion liberty and the apparent disingenuousness of some language in the opinions must be kept in mind so that the significance of a particular holding or passage is not overemphasized. At the same time, the judicially created abortion liberty is only as vital as the Court is willing to make it. Consequently, a textual analysis of the Court's remarks concerning the liberty will define its legal limits.

\textit{The Genesis of the Abortion Liberty: The Analytic Foundations of Roe and Doe}

The abortion liberty was established in \textit{Roe v. Wade} and \textit{Doe v. Bolton}.\textsuperscript{44} In \textit{Roe}, the Court decided that the "right of privacy" it had discovered in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."\textsuperscript{45} How-

\textsuperscript{46} See J. NOONAN, supra note 8, at 32.
\textsuperscript{47} Planned Parenthood v. Danforth, 428 U.S. 52, 96 (White, J., concurring & dissenting in part).
\textsuperscript{48} Doe v. Bolton, 410 U.S. at 189.
\textsuperscript{49} See note 59 infra.
\textsuperscript{50} See generally J. NOONAN, supra note 8, at 5-7.
\textsuperscript{51} 410 U.S. at 153. The Court never attempts to explain why this right of privacy is broad enough to encompass the abortion decision, it merely says that it is. Nor does the Court give any hint as to what other activities this right is broad enough to encompass, what factors are relevant to making such a judgment nor how the Court determines what these factors are. Probably the reason the Court did not even attempt such an explanation is that the abortion liberty is not rooted in a right of privacy at all. Rather, the Court actually is engaging in the substantive due process analysis of \textit{Lochner v. New York}, 198 U.S. 45 (1905). \textit{See} note 6 supra. As Mr. Justice White has noted, "The task of policing this limitation on state police power is and will be a difficult and continuing venture in substantive due process." Planned Parenthood v. Danforth, 428 U.S. 52, 92 (1976) (White, J., dissenting & concurring in part). The sole guidance provided by the Court in this regard was the
ever, the Court ostensibly created a limited abortion liberty when it "emphatically" rejected the contention that "the woman's right to an abortion is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." Although this language indicates there may be reasons for an abortion which the Court would reject as impermissible, the Court has never elaborated on the language, nor has it even remotely suggested what such reasons might be.

A possible explanation of the language's import is the Court's view in Roe that until "state interests provide compelling justifications for intervention ... the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." Thus, when the Court says that a woman does not have a right to an abortion "for whatever reason she alone chooses," it may mean simply that a doctor must exercise his independent medical judgment.

This position assumes there is a medical judgment to be made. It is true that abortions are sometimes "medically indicated," but Roe struck down statutes which permitted abortions only for medical reasons. Though some doctors think an abortion is medically indicated...
whenever a woman wants one, this is a misuse of the phrase which obliterates the distinction between therapeutic and elective abortion.

Indeed, the Court explicitly stated that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand" and further noted that "[if an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available]."

Furthermore, the Chief Justice, concurring in Roe and Doe, asserted that "the vast majority of physicians . . . act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand."

If these statements had been taken seriously, Roe would have merely stood for the constitutional right to a therapeutic abortion. Such statements are, however, impossible to reconcile with reality seven years after the abortion liberty appeared on the constitutional scene, for a woman now can obtain a first or second trimester abortion on demand, provided she can pay for it.

Doctors are not exercising any

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53 A director of an abortion clinic has stated, "I feel there is a medical indication to abort a pregnancy where it is not wanted." 125 Cong. Rec. S9890 (daily ed. July 19, 1979).

54 Under the policy established by the American College of Obstetricians and Gynecologists, therapeutic abortions may be performed: first, when continued pregnancy threatens the woman's life or may seriously impair her health; second, when health impairment is evident in cases of rape or incest; or third, when birth will likely result in a child with grave physical deformities or mental retardation. J. Pritchard & P. MacDonald, supra note 15, at 499. "Elective or voluntary abortion is the interruption of pregnancy before viability at the request of the woman but not for reasons of maternal health or fetal disease." Id.

55 Roe v. Wade, 410 U.S. at 189.


57 A woman has no right, of course, to force a particular physician to perform her abortion, just as no one has a right to compel a doctor to take one as a patient. See, e.g., Olson v. Molzen, 558 S.W.2d 429 (Tenn. 1977). However, there surely are more than enough physicians willing to perform elective abortions, for a price, to accommodate the demand. Abortions are less conveniently available in some geographical regions than in others.

58 The Court has held that the state is not required to fund abortions. See text accompa-
"medical judgment" whatsoever in the one million elective abortions performed each year. Roed actually held that a woman has a right to an elective abortion which, by definition, does not call for any judgment by the physician concerning the decision to abort. However, assuming the Court was being forthright when it stated that a woman does not have a right to abortion on demand, there must be some judicially recognizable limits to this judicially created liberty.

The task of defining these limits begins with identifying the interests of pregnant women which are infringed by state prohibition of elective abortion. If prohibition of sex selection abortion does not intrude upon these same interests, the state constitutionally may prohibit this practice. In concluding that a woman has a right to an elective abortion, the Court was centrally concerned with the physical and psychological detriments which would be imposed on a pregnant woman "by denying [the abortion] choice altogether." Prohibition of sex selection amniocentesis would not prevent a woman from obtaining an abortion "altogether." She would still be free to obtain one. It would merely prevent her from discriminating on the basis of sex in making the decision to abort. Furthermore, the factors which the Court concludes "the woman and her responsible physician necessarily will consider in consultation" in making an abortion decision are inapplicable to the preference a woman might have for a child of a particular sex. The detriments listed by the Court include the burdens and risks of pregnancy and childrearing and the stigma of unwed motherhood. Since a woman seeking a sex

notes 128-38 infra. However, several states do fund elective abortions. ANTENATAL DIAGNOSIS, supra note 13, at 1-239; Washington Post, Jan. 9, 1980, § A, at 10, col. 1. While selective abortion of severely deformed fetuses may be considered a therapeutic abortion, sex selection abortion seems entirely elective. See notes 53-54 & accompanying text supra.

The physician does, of course, decide on which technique to use in performing the abortion, but this is not a judgment concerning the decision to abort. The decision to abort was for the physician under Roe:

[T]he attending physician, in consultation with his patient, is free to determine, without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free from interference by the State [during the first trimester].

410 U.S. at 163. The Court later noted that in Roe, "[t]he participation by the attending physician in the abortion decision, and his responsibility in that decision ... were emphasized." Planned Parenthood v. Danforth, 428 U.S. 52, 61 (1976).

In 1978, the most recent year for which reliable estimates are available, there were 1,347,000 legal abortions, up 54,000 from 1977. Washington Post, Jan. 9, 1980, § A, at 10, col. 1. The vast majority of abortions are elective abortions. See Nathanson, supra note 51, at 1189.

Roe v. Wade, 410 U.S. at 153 (emphasis added).

Id.

See Delgado & Keyes, supra note 16, at 221.

Roe v. Wade, 410 U.S. at 153. The Court also mentions psychological harm. For a discussion of the issues raised by this factor, see note 93 infra. "In describing the nature of the mother's interest in terminating a pregnancy, the Court in Roe v. Wade mentioned only
selection abortion does not wish to avoid these detriments of pregnancy, the Court's analysis provides no constitutional basis for her to claim a right to an abortion decision free from state interference.

Essential to this argument is the fact that Roe "rejected a [constitutional right] based on [a woman's] interest in controlling her own body during pregnancy," and instead based the right on a balance the Court struck between the burdens and risks of pregnancy and childrearing, and the state interest in protecting maternal health and the unborn child's "potentially" life. Were the right based on bodily autonomy, it is evident that state regulation of sex selection amniocentesis would invade that right because the regulation would prevent the woman from having a medical test performed on herself.

Rejecting the argument that a woman has a constitutional right to do with her body as she pleases, the Court acknowledged:

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\text{[The State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman ... and ... still another important and legitimate interest in protecting the post-birth burdens of rearing a child ...] Planned Parenthood v. Danforth, 428 U.S. 52, 94 (1976) (White, J., concurring & dissenting in part). A significant omission in the Court's analysis is its assumption that the burdens it perceived must inherently follow the birth of an unwanted child. The assumption is obviously faulty. A woman who has an unwanted child can put it up for adoption or it could become a ward of the state. All the burdens, save the stigma of unwed motherhood, vanish when one considers this simple alternative. There would be emotional distress attendant with putting a child up for adoption, but there is also emotional distress accompanying abortion. The psychological aspects of abortion passim (D. Mall & W. Watts eds. 1979). Note further that experimentation attempting artificially to mature aborted fetuses ... [makes it] possible that a woman might seek an abortion to rid herself of ... a child only to find the child subsequently adopted by others. The psychological impact of such an occurrence would be considerable; indeed, the possibility of the fetus surviving the abortion may obviate entirely the mother's reason for the operation.}
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\text{Note, Fetal Experimentation: Moral, Legal, and Medical Implications, 26 STAN. L. REV. 1191, 1204 (1974). Thus, it is not surprising that [it] is preposterous to many [abortion] advocates ... that the state should simultaneously permit abortions and require resuscitation of abortuses. The very purpose of many of these abortions is the destruction of the fetus, and this act seemingly is endorsed socially by the legal right to seek abortion. The fact of expulsion from the womb seems insufficiently significant to change permission to kill into a duty to save.}
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\text{Wikler, Ought We Try to Save Aborted Fetuses?, 90 ETHICS 58, 60 (1979).}
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66 A woman seeking a sex selection abortion wishes to have a child of a particular sex. She is willing to endure the pregnancy and endure the burdens of childrearing. The stigma of unwed motherhood also does not enter into her concerns—she is willing to give birth to a child, if it is the "right" sex.

67 Planned Parenthood v. Danforth, 428 U.S. 52, 94 (1976) (White, J., concurring & dissenting in part). Indeed, the Court in Roe, favorably citing Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination upheld), and Buck v. Bell, 274 U.S. 200 (1927) (compulsory sterilization upheld), rejected the notion that "one has an unlimited right to do with one's body as one pleases ..." 410 U.S. at 154.

tality of human life [i.e., the fetus]. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling." 69

Balancing these factors, the Court found the compelling points divide pregnancy into three parts (trimesters) for constitutional purposes. 70 This analytic division of the pregnancy state constitutes a constitutional rule of law which determines the extent to which the government may regulate abortion.

Implications of the First Trimester Rule

During the first trimester the state may assert its interest in maternal health only by prohibiting abortion by unlicensed physicians. 71 State interference with the woman's right to an abortion is most severely circumscribed in the first trimester because the Court was persuaded that the maternal mortality rate for first trimester abortions is lower than the maternal mortality rate of pregnancies carried to term. 72 This ra-

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69 Id. at 162-63. It is important to recognize that the Court acknowledges that these state interests exist throughout pregnancy, even though they do not become sufficiently compelling to warrant the sanction of the criminal law until certain points in the pregnancy. However, as later cases demonstrate, see notes 101-57 & accompanying text infra, even these "compelling" points are not permanently fixed and may vary according to a balancing by the Court of the nature of a woman's right and the state's interference with that right.

70 See 410 U.S. at 163. The first trimester ends at the twelfth week of pregnancy, the second at the twenty-fourth week.


72 Roe v. Wade, 410 U.S. at 163. This relative mortality rate is "established medical fact." Id. However, the Court fails to take account of the fact that "[t]oday it is possible for almost any patient to be brought through pregnancy alive, unless she suffers from a fatal illness... and if so, abortion would be unlikely to prolong life much less save life." A. Guttmacher, Abortion—Yesterday, Today, and Tomorrow, quoted in 125 Cong. Rec. S9860 (daily ed. July 19, 1979). Moreover, those few cases where abortion would be necessary to preserve life are identifiable by the physician, see J. PRITCHARD & P. MACDONALD, supra note 15, at 497, 499, 608-09, and in some of those cases, e.g., tubal and other ectopic pregnancies, the fetus is doomed anyway, id. at 431-36. Thus, the Court's classification of first trimester pregnancies on the basis of a general statistical mortality rate is overbroad. The Court offers no reason why the state could not regulate abortion in those first trimester pregnancies in which the risk of maternal death is not greater than carrying the infant to term. Under the Court's analysis, the state should be able to regulate such first trimester pregnancies to the same extent it may regulate second trimester pregnancies.

Moreover, it is not entirely clear that there is a significant difference in mortality rates between first trimester abortions and childbirth. Note first that figures for maternal mortality "include deaths from abortion" which must, of course, be subtracted for comparison purposes. D. Reid, K. Ryan & K. Benirschke, Principles and Management of Human Reproduction 273 (1972). In addition, it has been contended that death certificates are inaccurate in abortion cases and fail to note abortion as the cause of death. See, e.g., Duffy,
tionale, however, has no application to sex selection abortion. In the typical case of sex selection abortion, the woman intends to carry a child to term if it is the desired sex; if it is not, she has an abortion which entails a risk of death. She then becomes pregnant again and again until she "come[s] up with a lucky throw of the genetic dice." Therefore, by repeatedly becoming pregnant and having abortions, the risks to the woman's life are greater, even for first trimester abortions, than if she had carried the first child to term. Thus, applying the Court's reasoning, the state should be able to assert its interest in maternal health to the same degree it can in second trimester abortions—for the relative mortality rate is the only factor Roe uses to distinguish the first and second trimesters of pregnancy.

Application of the Second Trimester Reasoning

The Court in Roe held that during the second trimester the state "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." The Court did not, however, intend what it said. Although second trimester abortions are more dangerous to a woman's life than carrying the infant to term, the opinion does not explain why the state may not, therefore, prohibit second trimester abortion. Instead, the Court only permits the state to regulate the type of facility in which the abortion may be performed and other similar matters. Thus, Roe acknowledges that the state has a compelling interest in the health of the mother in the second trimester and that the very reason it is compelling is because second trimester abortions are more likely to cause maternal death than carrying to term, and yet, the Court only permits

supra note 23, at 13-14. Also, one of the risks of abortion is miscarriage in subsequent pregnancies, and the maternal mortality figures include deaths from such miscarriages. Id. See also J. Pritchard & P. MacDonald, supra note 15, at 512.

First trimester sex selection amniocentesis is not technically feasible yet, but may become so in the near future. See note 13 supra.

L. Karp, supra note 3, at 151. In some cases, however, especially in unplanned pregnancies, the woman could decide to bear the child only if it were a particular sex; and if it were not, she would abort that fetus and not become pregnant again.

The second trimester ends at 24 weeks, but the real distinction, for constitutional purposes, between the second and third trimesters turns on the viability of the fetus. When the Court refers to the second trimester, it refers to that period after the twelfth week of pregnancy until fetal viability.

410 U.S. at 163.

The Court admits as much in distinguishing between first and second trimester abortions on the basis of relative mortality rates. Id. The risk of death from second trimester abortion is significantly greater than the risk from carrying to term. See J. Pritchard & P. MacDonald, supra note 15, at 3, 512 (maternal mortality rate for live births one in 6,900 compared to rate of one in 4,700 for second trimester abortions).

See 410 U.S. at 163-64.
this interest to be forwarded by hospital regulation. It does not allow
the state to take the action which would logically advance the compel-
ing interest that permits the state to assert its authority—prohibition
of this dangerous procedure. However, this apparently anomalous posi-
tion cannot be divorced from the conceptual framework of Roe. The
Court’s premise regarding second trimester abortions is that a woman
has the right to incur the greater risk of death by having a second tri-
semester abortion because the continued burdens of pregnancy and child-
rearing, and the stigma of unwed motherhood can be so significant that
the state may not decide for her that the risk of abortion is not worth
taking.79 The state’s interest in maternal health is not viewed as being
sufficiently compelling for the state to prohibit the woman from obtain-
ing an abortion, even where childbirth is the safer alternative.

Sex selection abortion, however, can be distinguished on two grounds
and state prohibition of sex selection abortion can be viewed as reason-
ably related to maternal health. First, the risk of death in a typical sex
selection abortion situation, already higher than risk of death from
childbirth since these abortions are necessarily performed in the second
trimester, is compounded because the woman probably will incur the
risks of a second pregnancy following the abortion of the unwanted
fetus.80 Second, the burdens enumerated by the Court which give the
woman a constitutional right to risk her life are nonexistent.81 Instead of
weighing the increased risk of death from abortion against potentially
significant burdens, the balance for sex selection abortions must be
struck between the increased risk of death from abortion and the possi-
ble benefits of having a child of a desired sex.

The benefits of sex selection abortion in most cases consist simply of
the happiness of the woman or perhaps the child’s father.82 It cannot be

79 Given the fact that the Court rejected the argument that one has a constitutional right
to bodily autonomy, see note 67 & accompanying text supra, it is difficult to discern any
possible constitutional foundation to the Court’s unexpressed premise that a woman has a
right to risk her life in this regard. Were this rationale extended to other areas of the law,
state police power would be severely circumscribed because many health laws prohibit one
from endangering one’s life or health.

80 In addition, the state interest in the health of a woman presumably includes her
psychological and emotional well-being. See text accompanying note 69 infra. Abortion
causes serious psychological problems for some women. Liebman & Zimmer, The
Psychological Sequelae of Abortion: Fact and Fallacy, in THE PSYCHOLOGICAL ASPECTS
OF ABORTION 127 (D. Mall & S. Watts eds. 1979). Depression has been notably
evident in women after second trimester abortions performed for genetic reasons. Fletcher, supra
note 17, at 552. The state, thus, could also assert prevention of psychological trauma as
another factor showing that the prohibition of sex selection amniocentesis is reasonably
related to maternal health.

81 The only burden mentioned by the Court which might apply is psychological distress.
See Roe v. Wade, 410 U.S. at 153. Presumably even this concern is not broad enough to
cover the emotional distress associated with not having the ability to ensure the birth of
either a boy or girl. But see text accompanying note 93 infra.

82 “Familial adjustment” might also be considered a benefit of preventing the birth of a
child that is unwanted because of his or her sex. Such concerns could also be stated in the
seriously contended, however, that the state is constitutionally impo-
tent to protect an individual's health by prohibiting her from engaging
in a certain activity simply because she would rather pursue a potential-
ly self-destructive course of action that makes her "happy." The state's
police power to protect the health of its citizens would evaporate were
such a proposition to gain constitutional stature.\(^8\)

Moreover, the state's "important and legitimate" interest in the fetus,
which exists and grows \textit{throughout} pregnancy\(^4\) and nearly reaches the
compelling point in the late second trimester when sex selection abor-
tion occurs,\(^5\) also must be balanced against the mother's interest in the
sex of her offspring. While this state interest is constitutionally subor-
dinate to a woman's interest in avoiding the burdens of childbirth and
childrearing, it may be considered sufficiently important to outweigh a
woman's interest in the sex of her children.

A balancing of all of these factors indicates that a prohibition of sec-
ond trimester sex selection abortion could withstand constitutional
scrutiny. The procedure encourages women recklessly to endanger their
lives and the state may protect them from their own improvidence. Fur-
thermore, the procedure encourages the termination of potential life
and the state may protect potential life so long as doing so does not im-
pose significant burdens on the pregnant woman.

Third Trimester Abortions (Post-Viability Abortions)

A fetus normally achieves "viability" at the beginning of the third

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\(^8\) Perhaps the most obvious example of such health laws is the prohibition of numerous
mind-altering substances. Other regulations in this category are occupational health rules.


\(^5\) The State has a valid and important interest in encouraging childbirth. We
expressly recognized in \textit{Roe} the "important and legitimate interest in protecting
the potentiality of human life" . . . . That interest alone does not, at least
until approximately the third trimester, become sufficiently compelling to
justify unduly burdensome state interference with the woman's constitution-
ally protected privacy interest. But it is a significant state interest existing
throughout the course of the woman's pregnancy.

\textit{Id.}

\(^6\) Although the Court in \textit{Roe} says that state interest in the fetus does not become comp-
elling until viability, and thus cannot justify state prohibition until that point, it said this
in the context of weighing the burdens of denying the abortion choice altogether. In later
cases, the Court recognized that the state interest in the fetus can justify some state
policies regarding abortion even before fetal viability. \textit{See} notes 101-57 & accompanying
text \textit{infra}. 
trimester. When the fetus becomes viable, that is, "potentially able to live outside the mother's womb, albeit with artificial aid," the state may prohibit abortion unless "it is necessary to preserve the life or health of the mother." While this language appears to permit states to prohibit elective abortions such as sex selection abortions during the third trimester, the Court's view of "health" is broad: "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." The state interest in the viable fetus is not very "compelling" if it can be overridden by the "emotional well-being" of the woman. Under such an interpretation it could be argued that a sex selection abortion, being necessary for the woman's emotional well-being, may not be prohibited by the state even after the fetus is viable. Once again, however, the Court does not mean what it says, for if the post-viability distinction has any substance at all, it must mean that the state may prohibit elective abortions during the third trimester. An examination of the sex selection abortion issue vividly illustrates this point.

At least some sex selection abortions probably have been, and will be, performed after the fetus has achieved viability. If a woman does not want a child of a particular sex and is willing to abort it, her emotional well-being, or at least her "familial" preferences, would be impaired if she were prohibited from determining the sex of her fetus. However, such a broad view of health, which the Court overtly embraces, is inconsistent with its distinction between pre-viability and post-viability abortions. Of course, any woman who is denied an abortion that she desires would have her emotional well-being thereby impaired to some degree. If this is all that is meant by "health," however, there would be no distinction between an elective third trimester abortion and a therapeutic one. Yet this is the very distinction which the Court must have intended to make when it used the language "necessary to preserve the life or health of the mother." Assuming the Court's recognition of a compelling state interest in the viable fetus has any significance at all,

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86 See note 15 supra.
87 Roe v. Wade, 410 U.S. at 160. The Court also described a viable fetus as one presumably capable of "meaningful life outside the mother's womb." Id. at 163. "Meaningful" in this context evidently means prolonged, or more than momentary.
88 Id. at 164.
89 Doe v. Bolton, 410 U.S. at 192. Although the quoted language was extracted from a passage in which the Court was not speaking specifically about third trimester abortions, the language nonetheless summarizes the Court's view on health in the abortion context.
90 At least one writer has indicated that the post-viability distinction the Court makes has no substance, and that the restriction on third trimester abortions the Court seems to permit is "illusory." See, e.g., J. Noonan, supra note 8, at 12.
91 See Friedman, supra note 16, at 114-15; note 15 supra.
something more than mere emotional upset must be necessary to over-
ride the interest.93

The Roe analysis of pre-viability abortions emphasizes the burdens of
childrearing and unwanted children.94 Until viability, these interests
override the state's interest in the fetus;95 upon viability, the state's in-
terest in the fetus becomes sufficiently compelling to override these in-
terests of the woman in not bearing the burdens of childrearing, but not
the woman's interest in her health for the duration of the pregnancy.
The distinction is crucial. A woman's interest in her immediate and
short term health is always paramount and at any point during preg-
nancy when an abortion becomes necessary to preserve that health—
that is, whenever her health is impaired by the actual state of pregnancy
itself—then she may obtain an abortion. On the other hand, the woman's
interests which are interfered with only if an unwanted birth occurs are
strong enough to give her a constitutional right to abort a nonviable
fetus, but not a viable one.96

93 Before Roe, "mental health abortions" which were elective in all but name were per-
formed on a massive scale in the District of Columbia following the Supreme Court's deci-
District of Columbia's abortion statute, D.C. CODE § 22-20 (1967), permitted abortions
necessary for the woman's health and Vuitch held the word "health" included mental
health. California and other states also permitted mental health abortions with similar
results. J. NOONAN, supra note 8, at 83.

94 See note 65 & accompanying text supra.

95 In other words, it is only before viability that Roe "values the convenience, whim, or
caprice of the putative mother more than the life or potential life of the fetus . . . ." Doe v.
Bolton, 410 U.S. at 221 (White, J., dissenting); see Note, supra note 65, at 1204.

96 A woman may have a legal right to abort even a viable fetus because the state is not
required to protect the fetus, even after it is viable. See Roe v. Wade, 410 U.S. at 163-64.
But, of course, the state is not required to protect anyone. Failure to recognize this fund-
damental concept of constitutional jurisprudence is a flaw in the Court's analysis. The
Court reasoned as follows. It declared that the "word 'person,' as used in the Fourteenth
Amendment, does not include the unborn." Id. at 158. It asserted that recognition of the
fetus as a person would constitutionally entitle it to state protection. Id. at 156-57. That is
simply false. The Constitution regulates interaction among branches of government and
limits the extent of government authority over individuals. It does not regulate interactions
among private individuals, with the exception of the thirteenth amendment and even
that provision is not self-executing. To say that a fetus is not a person only means that the
fetus is not protected from the exercise of governmental power. It says nothing regarding
whether the fetus can be protected by the government. Something does not have to be a
"person" for the state to protect it—indeed, it need not even be an animate object. It is
true that unless the state decides to extend its protection to a thing, be it a "person," a
stream or a fetus, individuals have a legal right to treat that thing any way in which they
choose. But that legal right disappears when the state extends its protection to the thing.
Moreover, even if the fetus were a "person," the only possible line of constitutional at-
tack which could require the state to extend protection to fetal life would be an equal pro-
tection clause analysis. The laws against homicide would be attacked on the distinction
made between the born and unborn, the state protecting the born and not the unborn.
Unless the Court were to hold that this is a "suspect" classification—something it would
hardly be compelled to do—the classification merely would have to withstand a rational
basis test. Surely there is a rational basis for distinguishing between the born and unborn; indeed, the Court itself makes such a distinction. See generally Atkinson, Persons in the
The reason for the distinction between pre-viability and post-viability abortion stems from the nature of a viable fetus. The viable fetus is an autonomous individual who, at the instant the abortion is to be performed, will be born alive unless some deliberate action is taken to kill it before delivery. Thus, the woman's interest in not having an unwanted child vanishes at viability because at that point she already has one, even though it is true that the child's health and potential for a lengthy life is enhanced by it remaining in utero until term. The Court is thus willing to permit the state to require the mother to care for this admittedly autonomous, albeit underdeveloped, individual in the best way possible, by carrying it to term, much as it would be willing to permit the state to impose penalties on parents who neglect their children who have already been born.

Viewed from this analytical framework, state prohibition of amniocentesis for the purpose of third trimester sex selection abortion would withstand constitutional scrutiny. The reason the woman wants the sex selection abortion has nothing to do with her physical state of pregnancy; it relates to the character of the child—he or she is unwanted. The mother's desire to abort a viable fetus because she does not want to care for it after birth does not render an abortion necessary to preserve her life or health in the context of Roe. Moreover, characterizing the practice of sex selection abortion as sex discrimination gives added, but

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Whole Sense, 22 AM. J. JURIS. 86 (1977); Gorby, The "Right" to an Abortion, The Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement, 1979 So. ILL. L.J. 1; Note, Live Birth: A Condition Precedent to Recognition of Rights, 4 HOFSTRA L. REV. 805 (1978); see also Wikler, supra note 65, at 61-63 ("personhood" of infants born alive following an abortion called into question).

Intraamniotic injection of hypertonic saline is a popular technique for borderline viability abortions. The expulsion of the fetus results from the fact that it is killed or severely injured by being immersed in a toxic saline solution. See J. NOONAN, supra note 8, at 87, 137-39, 176; J. Pritchard & P. MacDonald, supra note 15, at 504-05. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court struck down a ban on this method of abortion. See note 105 & accompanying text infra.

It is true that even a full-term fetus, while it is still in utero, is not a "[person] in the whole sense," Roe v. Wade, 410 U.S. at 162, under Court's analysis. Nevertheless, the Court permits the state to protect such a creature anyway because its continued existence is no longer dependent on the gravida. Even before viability, the mere fact that it is within a woman's legal power to destroy the fetus by aborting it does not necessarily mean the fetus is beyond state protection. See Note, The Right of the Fetus to Be Born Free of Drug Addiction, 7 U. CAL. D.L. REV. 45 (1974). Indeed, "legal personality is not synonymous with separate and vital existence within the womb . . . depending on the circumstances involved, public policy and other factors, legal personality will be accorded or withheld as these extrinsic considerations demand." Byrn v. New York City Health & Hosp. Corp., 38 A.D.2d 316, 329, 329 N.Y.S.2d 722, 734 (1972) (dictum).

It could be argued that the state should only be able to prohibit a woman from aborting a fetus until it is viable, for the very reason that it is no longer dependent upon her at that point. This would, of course, be just the reverse of the Court's reasoning. Wikler, supra note 65, at 62 n.7.
unnecessary, strength to the power that the Court recognizes states have to prohibit elective third trimester abortions.\textsuperscript{100}

An analysis of the abortion liberty in light of the cases which created it, \textit{Roe} and \textit{Doe}, shows that the state may prohibit sex selection amniocentesis at any stage of pregnancy without interfering with the fundamental constitutional right to an abortion described in those cases. However, since \textit{Roe} and \textit{Doe}, the character of the abortion liberty has been modified by the Court. Far from undermining the argument advanced above, recent abortion decisions further buttress the conclusion that state prohibition of sex selection abortions would be constitutional.

\textbf{Refinement of the Abortion Liberty: Unduly Burdensome Regulation}

In \textit{Planned Parenthood v. Danforth},\textsuperscript{101} the Court revised the trimester approach to analysis developed in \textit{Roe}. Although \textit{Roe} had held that first trimester abortions were essentially beyond state regulation, \textit{Danforth} held that a written consent requirement for an abortion, anytime during pregnancy, was not unconstitutional unless it "unduly burdens the right to seek an abortion."\textsuperscript{102} The Court upheld first trimester recordkeeping requirements as not unduly burdensome because it could "see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship."\textsuperscript{103} However, it held that a woman could not be required to obtain her husband's or parent's consent before obtaining an abortion\textsuperscript{104} and struck down a ban on a specific abortion technique\textsuperscript{105} because the ban was "designed to inhibit, and [had] the ef-

\textsuperscript{100} The fact that the "sex discrimination" in a sex selection abortion case is purely private and involves no state action merely indicates that there is no constitutional infirmity to the practice. The state, however, may, and does, prohibit private acts of sex discrimination. See note 30 supra. The constitutional status of the fetus as a "nonperson" provides greater, but not insuperable, conceptual problems. See note 189 infra.

\textsuperscript{101} 428 U.S. 52 (1976).

\textsuperscript{102} Bellotti v. Baird, 428 U.S. 132, 147 (1976) (stating the holding of \textit{Danforth}, 428 U.S. at 67). The extent to which a state may require that a woman be informed of all the possible consequences of abortion has been the subject of inconsistent rulings in the lower courts attempting to apply the unduly burdensome rule. \textit{Compare} Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978), and Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill. 1978), with Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976).

\textsuperscript{103} 428 U.S. at 81.

\textsuperscript{104} Id. at 69, 74. The Court indicated that the state could not delegate a veto power over the abortion decision to others (e.g., husbands, parents) which the state itself lacked. Id. at 70-71. The Court thus fails to distinguish between state recognition of the authority of other institutions, like the family, and state delegation of authority. The state is viewed as the root source of all authority. In addition, if the state is constrained from exercising power in a particular way for some reason, it may not recognize the authority of other societal institutions to exercise that power. The implications of this position are breathtaking, but outside the scope of this note.

\textsuperscript{105} The abortion technique that was prohibited was the saline infusion method. See note 97 supra.
fect of inhibiting, the vast majority of abortions [in the second trimester]. Thus, the Court upheld state regulation of abortion, irrespective of trimester, where the regulation did not unduly discourage or prevent abortions, but struck down regulations which had the effect of preventing abortions.

State prohibition of sex selection amniocentesis would not unduly burden a woman's right to seek an abortion because she still would be absolutely free to obtain one. For such a woman, however, the freedom to have an abortion would be an empty liberty; without knowledge of the unborn child's sex, she would not know whether she wanted an abortion. Accordingly, the state prohibition would leave her with a difficult choice; either she bears the child, assuming the risk it will be the "wrong" sex, or she has an abortion and risks destroying a child she really wanted. A state regulation of abortion is not constitutionally infirm merely because it makes the abortion decision more difficult. Indeed, the informed consent requirement upheld in Danforth was designed to influence a woman's abortion decision and could discourage a woman from having an abortion, but the Court did not consider this an undue burden. Although this key word in the Court's verbal formula is devoid of intrinsic meaning, an examination of further specific applications of the unduly burdensome concept will reveal what the Court intended.

The unduly burdensome concept was given additional substance in Bellotti v. Baird, where the Court invalidated a statute dealing with the difficult question of a minor's access to abortion. The statute required a minor seeking an abortion to obtain parental consent. If con-

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106 428 U.S. at 79. The Court reached this conclusion in part because the state had failed to prove to its satisfaction that the admittedly safer prostaglandin method of abortion was widely available in the state at the time of the trial. Id. at 76-79.

107 In either case, of course, the "odds" would be roughly 50-50. Currently, some women who are refused sex selection amniocentesis by physicians must face this choice. In fact, some physicians perform the procedure because women threaten to abort unless the amniocentesis is performed. Washington Post, Sept. 6, 1979, § A, at 1, col. 1.

In most cases . . . those doctors who agree to do amniocentesis only to determine a fetus's sex do so reluctantly. In the typical case, one or both parents are highly disturbed people who threaten to end the pregnancy in any case unless they can be sure the child is the desired sex. Id. Of course, it is unknown how many of these threats are acted upon.

108 See text accompanying note 102 supra.

109 Lower court applications of the unduly burdensome rule evidence its vagueness. See, e.g., West Side Women's Servs. Inc. v. City of Cleveland, 450 F. Supp. 796 (N.D. Ohio 1978) (holding ordinance prohibiting abortion clinic from operating in retail district did not unduly burden the right to seek an abortion).


111 Eight of the Justices thought the statute was unconstitutional based on past decisions. There were two major opinions, one by Mr. Justice Powell, the other by Mr. Justice Stevens. Each opinion commanded the support of four Justices.
sent were denied, the statute provided that a judge could authorize an abortion "for good cause shown.""\textsuperscript{112}

Although this particular statutory scheme was held unconstitutional, a majority of the Justices thought a legislative resolution of this issue could withstand constitutional scrutiny.\textsuperscript{113} Four members of the Court, in an opinion written by Justice Powell, took the position that a statute would not unduly burden a minor's right to seek an abortion if it provided for the following procedure.\textsuperscript{114} A minor must be given the opportunity to demonstrate to the state that she is "mature and well enough informed to make intelligently the abortion decision on her own . . . ."\textsuperscript{115} If she meets these criteria, she "must [be] authorize[d] . . . to [have the abortion] without parental consultation or consent."\textsuperscript{116} If she does not meet these criteria, "she must be permitted to show that an abortion nevertheless would be in her best interests."\textsuperscript{117} Then a state official would decide whether to authorize an abortion.\textsuperscript{118}


\textsuperscript{113} There was no majority opinion. Mr. Justice White, dissenting, saw no constitutional infirmity in the invalidated statute. 443 U.S. at 657 (White, J., dissenting). Mr. Justice Rehnquist also subscribed to this view; however, he joined in the Powell plurality opinion so that states would have some "guidance" regarding the constitutional rules in this area. Id. at 632 (Rehnquist, J., concurring). Five members of the Court, the four Justices in the Powell plurality and Mr. Justice White, maintained a statutory resolution of the issue of a minor's access to abortion could be constitutional.

\textsuperscript{114} See id. at 648-50 (Powell, J., concurring in the judgment).

\textsuperscript{115} Id. at 647 (Powell, J., concurring in the judgment).

\textsuperscript{116} Id. (Powell, J., concurring in the judgment).

\textsuperscript{117} Id. at 647-48 (Powell, J., concurring in the judgment).

\textsuperscript{118} Id. at 648 (Powell, J., concurring in the judgment). The other major opinion in the case criticized the Powell group for speculating as to the constitutionality of this hypothetical scheme. Id. at 656 (Stevens, J., concurring in the judgment). This hypothetical system is useful for purposes of analyzing the sex selection abortion issue. Suppose in the course of a hearing to determine whether a minor is "mature and well enough informed" to make an abortion decision, it is learned that the reason she wants the abortion is that she wants a baby girl, but has discovered she is carrying a boy. An official would have to decide whether this reason indicated sufficient maturity, and in making that decision, the official's subjective value preferences regarding sex selection would color, if not determine, his decision. See id. at 655 (Stevens, J., concurring in the judgment). If the official decides this reason for an abortion indicates a lack of maturity, then he would have to decide whether the "abortion nevertheless would be in her best interest." Several problems would then present themselves. First, it is far from clear that the state constitutionally could order an abortion based on the semi-suspect classification of sex. See note 189 infra. Second, the judge could decide that the abortion would be in the minor's best interest because she would be unhappy with a child of the wrong sex, but this would be tantamount to admitting she was mature enough to make the decision in the first place. Third, if the official decides to deny the abortion because sex selection is not a permissible reason for an abortion, though this could be phrased in terms of the child's "best interest," the proposition is established that the state may make the judgment that this reason for abortion can be legally condemned. Again, the official's subjective value preferences would color his decision and at least some judges would refuse to order what they might consider to be a sexist practice. If an administrative official can determine that sex selection abortion is impermissible in an individual case, then the legislature constitutionally may proscribe the prac-
A majority of the Court therefore embraces the idea that the state may veto a minor's decision to have an abortion, but it must do so on a case-by-case basis. If a minor is unable to obtain parental consent, and if a state official decides she is immature and that an abortion would not be in her best interests, she may be prohibited from obtaining one. Significantly, the state official who can exercise the veto power over the minor's decision does not have to be a judge. The Powell plurality specifically states that the legislature could delegate this function to "an administrative agency or official." Thus, the legislature may establish an extra-judicial system which has the power to review the abortion decisions of an entire class of individuals.

_Bellotti_ sheds light on the constitutionality of prohibiting sex selection abortion because it indicates that the state may impose great burdens on the right to seek an abortion without infringing on the abortion liberty. The Justices admit that a minor has a right to seek an abortion without undue state interference. However, forcing a minor to obtain the consent of either her parents or the state before obtaining an abortion, as a practical matter, imposes a tremendous burden on many minors. Yet a majority of the Court would not consider this to be an undue burden. Furthermore, the state in some cases may go so far as to deny a minor an abortion without unduly burdening her right to seek one. These constraints may be placed on the minor even though the burdens of pregnancy and childrearing may be especially acute for a minor._ Bellotti _then suggests that the state may interfere significantly with an abortion decision if the specific situation justifies the state intervention._

The legislature, through its surrogate officials, may veto the abortion decision of a minor because she only has a right to seek an abortion, not a right to obtain one. The right to seek an abortion is circumscribed by the nature of her interests in the particular circumstances.

Within this conceptual structure, sex selection amniocentesis practice generally. The same state interests which would constitutionally legitimize the decision of an administrative officer in this regard would also be available to the legislature.

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119 See note 113 supra.

120 Note that "[the best interest of the child] standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores ..." _Bellotti_, 433 U.S. at 655 (Stevens, J., concurring in the judgment).

121 _Id._ at 643 n.22 (Powell, J., concurring in the judgment).

122 _Id._ at 639-47 (Powell, J., concurring in the judgment).

123 _Id._ at 655 (Stevens, J., concurring in the judgment). Mr. Justice Stevens suggests that the burden of going to the state official may be even greater than the burden of obtaining parental consent. _Id._ (Stevens, J., concurring in the judgment).

124 _Id._ at 642 (Powell, J., concurring in the judgment).

125 In the case of a minor, the state has significant interests in the abortion decision, including ensuring the minor is fully informed about the consequences of abortion, protecting the minor from her own improvidence and safeguarding the family unit and parental authority. Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).
sents a specific situation which justifies state intervention. A prohibition of this practice would not deny the abortion alternative completely; rather, it would constitute state interference in the decisionmaking process. However, this intrusion in the abortion decision is moderate compared with the burdens which may be imposed under Bellotti. While according to Bellotti a minor's abortion decision is subject to a potentially complete review and veto by the state, a prohibition of sex selection amniocentesis would deny a woman knowledge of only one fact that might influence her abortion decision.

Admittedly, Bellotti is limited in its applicability to other abortion issues because the Court was confronted with the special legal problems posed by minors. When read in conjunction with other recent abortion decisions, however, Bellotti indicates that a majority of the Court is willing to allow increasingly burdensome state interference with the abortion liberty.

The Abortion Funding Cases: Government Obstacles to Abortion and State Encouragement of Normal Childbirth

In Maher v. Roe, the Court held that the state need not fund elective abortions simply because it provides funds to indigent women for childbirth, explaining that the abortion liberty can be understood only by considering both the woman's interest and the nature of the State's interference with it. Roe did not declare an unqualified "constitutional right to an abortion ..." Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

The Court concluded that the state funding arrangement was different from abortion provisions previously invalidated in that it "places no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion."

Similarly, a ban on sex selection amniocentesis places no obstacle in the pregnant woman’s path to an abortion; she is still free to obtain one.

127 For a discussion of these decisions, see notes 127-34 & accompanying text infra.

128 Id. at 473-74; accord, Committee to Defend Reproductive Rights v. Myers, 156 Cal. Rptr. 73 (Cal. App. 1979) (holding same principle applies under state constitution).

129 432 U.S. at 474. "Although a state created obstacle [to abortion] need not be absolute to be impermissible ... a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.'" Id. at 473 (citations omitted). Contra, id. at 481 (Burger, C.J., concurring) (Roe and Doe "simply require that a State not create an absolute barrier to a woman's decision to have an abortion").
Yet it would prevent some women—those who decide to bear the child and have one of the “wrong” sex—from having abortions that they otherwise would have had. However, this may not be the kind of influence on the abortion decision that the Court would reject, for it noted in *Maher* that the state may have a legitimate interest in demographics which could be asserted in an abortion case. The demographic ramifications of sex selection thus could influence the Court in determining whether a ban on sex selection amniocentesis is unduly burdensome. Moreover, the *Maher* opinion conceded that the state funding scheme “may have made childbirth a more attractive alternative, thereby influencing the woman’s [abortion] decision” and held that it is “abundantly clear that a State is not required to show a compelling interest for its policy choice to favor normal childbirth . . . .” The same reasoning applies to state prohibition of sex selection amniocentesis. The state may have made childbirth a more attractive alternative and therefore influenced the woman’s decision, but under the rationale of *Maher* this does not render state action constitutionally infirm. Furthermore, it is not necessary for the state to show a compelling state interest for its policy choice favoring normal childbirth which results in a balanced sex ratio.

While *Maher* held that the state may refuse to fund elective abortions, in *Harris v. McRae* the Court retreated further from an expansive reading of *Roe* and upheld a congressional scheme (the Hyde Amendment) funding childbirth expenses but prohibiting the use of

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130 Id. at 478 n.11 (majority opinion). The Court specially mentions population growth rates and says “[s]uch concerns are basic to the future of the state . . . .” Id.; see id. at 489 n.* (Brennan, J., dissenting).
131 See note 23 & accompanying text supra.
132 492 U.S. at 474.
133 Id. at 477. Furthermore, in upholding special requirements for government funded abortions, the Court said that “[t]he simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life.” Id. at 480. Mr. Justice Brennan noted that “[s]ince only the first trimester of pregnancy is involved in this case, that justification [the state interest in the fetus] is totally foreclosed if the Court is not overruling the holding of *Roe v. Wade* [that this interest becomes compelling at viability].” Id. at 489-90 (Brennan, J., dissenting).
134 100 S. Ct. 2671 (1980).
government funds to pay for medically necessary abortions during any trimester of pregnancy. As in *Maher*, the Court rejected the argument that since such funding discourages abortions, it unconstitutionally interferes with a woman's decision to obtain an abortion: applying the *Maher* analysis which distinguished between government imposed obstacles to abortion and government encouragement of normal childbirth, the majority held that the funding scheme "does not impinge on the due process liberty recognized in [*Roe*]."126 The majority reached this conclusion accepting, arguendo, the proposition that the interest of a woman in protecting her health during pregnancy is at the "core of the constitutional liberty identified in [*Roe*]."127 The funding scheme upheld in *McRae* is, of course, at odds with this interest of the woman; it not only denies her assistance for medically necessary abortions, it also encourages her to continue her pregnancy to term—and thereby damage her health—by funding childbirth expenses.138 Nevertheless, this government action conflicting with the interest of a woman in protecting her health during pregnancy was found not to violate the abortion liberty.

The Court thus views as crucial the distinction between government imposed obstacles to abortion and government interference in the abortion decision. The abortion liberty only forbids imposition of obstacles to obtaining an abortion, and then only where the obstacles are unduly burdensome. Governmental actions which merely influence the abortion decision do not impinge on the due process liberty recognized in *Roe*.

A prohibition of sex selection amniocentesis would not impose an obstacle to obtaining an abortion; it would merely represent a government attempt to influence the abortion decision. Certainly this government interference in the abortion decision is less intrusive than that upheld in *McRae*. The Hyde Amendment, "both by design and in effect ... serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have"139 and thereby causes such women to damage, in some cases severely, their health.140 In contrast, a prohibition of sex selection amniocentesis would promote maternal health.141

In order to uphold the Hyde Amendment against the argument that it constituted a denial of equal protection, the Court had to find that it was "rationally related to a legitimate governmental objective."142 The Court held that "the Hyde Amendment, by encouraging childbirth except in

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126 100 S. Ct. at 2689.
127 *Id.* at 2688.
128 See *id.* at 2702-04 (Brennan, J., dissenting).
129 *Id.* at 2702 (Brennan, J., dissenting).
130 *Id.* at 2706 (Marshall, J., dissenting).
131 See notes 77-80 & accompanying text supra.
140 100 S. Ct. at 2692.
the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life." Protection of the potential life of the fetus was recognized as a legitimate governmental interest in Roe. However, Roe "squarely held that the [government] may not protect that interest when a conflict with the interest in a pregnant woman's health exists." Thus, McRae represents a significant retreat from the analytical basis of Roe. The government now may pursue its interest in the fetus—during any trimester of pregnancy—even when doing so harms the woman's health. After McRae, the only limitation on the state's power in this regard is the method by which it can accomplish this objective.

It could be argued that a prohibition of sex selection abortion, by declaring a certain reason for abortion to be impermissible, affects a woman's freedom of choice more significantly than does the Hyde Amendment. However, the Court's holding in McRae implicitly rejects this reasoning. One version of the Hyde Amendment upheld in McRae permitted government funded abortions in cases of rape or incest. The government, by making the value judgment that these reasons for abortion are justifiable, is making a value judgment that other reasons for abortion are not permissible. The Court thus upheld a scheme which discriminates on the basis of the reason for which a woman seeks an abortion. Accordingly, the government may encourage abortions sought for some reasons, and discourage abortions sought for less compelling reasons.

On the other hand, Maher and McRae distinguish between "direct state interference with a protected activity and state encouragement of an alternative activity [because] constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." State compulsion is thus a primary concern. By denying a woman access to amniocentesis for sex determination, the state does not compel her to bear a child, but it does prevent her from ensuring that the child she does bear is of the desired sex. The prohibi-

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114 Id. at 2713.
115 Id. at 2680; see Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979).
116 100 S. Ct. at 2687 (quoting Maher v. Roe, 432 U.S. at 475-76).
117 [This] distinction between active state interference versus passive refusal to assist in the exercise of a constitutional right would have been more convincing if the state refused to fund childbearing as well. While it may be true that the State can encourage childbearing for a valid reason, e.g., a need for population growth, it is questionable whether, as attempted here, it can do so because it morally disapproves of abortion.

tion would, in effect, compel her either to risk bearing an unwanted child or risk aborting a wanted one. Viewed from this perspective, the prohibition might appear to be constitutionally infirm. However, when one assesses the practical results of *Maher* and *McRae* on indigent women, a different conclusion is apparent.

The dissenting Justices in the abortion funding cases referred to them as “new law” which “seriously erodes the principles that *Roe* and *Doe* announced to guide the determination of what constitutes an unconstitutional infringement of the . . . right of a . . . woman to be free to decide whether to have an abortion.” Rejecting the majority’s distinction between compulsion and state encouragement of childbirth, Justice Brennan pointed out: “[The discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.” Justice Marshall stated that as a practical matter the regulations upheld by the Court “are little different from a total prohibition [of abortion] from the viewpoint of the poor” and that the “predictable result of the Hyde Amendment will be a significant increase in the number of poor women who will die or suffer significant health damage . . . .” The dissenters further noted that the regulations were the result of a “deliberate policy based on opposition to . . . abortions on moral grounds by [government] officials.”

Whatever else a ban on sex selection amniocentesis would cause, it would not deny the abortion choice altogether to an entire class of citizens, nor would it cause health damage to pregnant women. Yet the

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147 E.g., *Maher v. Roe*, 432 U.S. at 487 (Brennan, J., dissenting). Mr. Justice Harlan's words that "one in dissent is sometimes prone to overdraw the impact of a decision with which he does not agree," *Russell v. United States*, 369 U.S. 749, 793 (1962) (Harlan, J., dissenting), should be kept in mind when reading the dissenters' characterizations of the abortion funding cases. Moreover, it has been noted that "[i]t is more realistic to regard [the abortion] funding cases as a reflection of the political delicacy of the Court's interfering in Congress' appropriating function, rather than as a retreat from the principles of [Roe and Doe]." C. RICE, supra note 20, at 102. But see notes 155-56 & accompanying text infra.

148 *Maher v. Roe*, 432 U.S. at 484 (Brennan, J., dissenting). Indeed, Mr. Justice Brennan asserts that "[n]one can take seriously the Court's assurance that its 'conclusion signals no retreat from Roe or the cases applying it.'" Id. at 483 (Brennan, J., dissenting) (citations omitted). *Contra*, Framingham Clinic, Inc. v. Board of Selectmen, 373 Mass. 279, 288, 367 N.E.2d 605, 612 (1977) (maintaining that the abortion funding cases did not overrule the principles of *Roe* that the state may not interpose material obstacles to a woman's right to seek an abortion).

149 *Harris v. McRae*, 100 S. Ct. at 2704 (Brennan, J., dissenting).

150 *Beal v. Doe*, 432 U.S. 438, 457 (1977) (Marshall, J., dissenting). Indeed, Mr. Justice Marshall was "appalled at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children." Id. at 456-57.

151 *Harris v. McRae*, 100 S. Ct. at 2706 (Marshall, J., dissenting).

Court in *Maher* and *McRae* upheld regulations which had these effects. Thus, even though a prohibition of sex selection amniocentesis, as a practical matter, would prevent some women from having abortions that they otherwise would have, under the abortion funding cases this fact is not enough to render the scheme unconstitutional.

Perhaps the underlying reason the effective prohibition of abortions for indigent women was not held unconstitutional in *Maher* and *McRae* was that the Court was having second thoughts about its latest “venture in substantive due process” which began with *Roe*. In *McRae*, the Court essentially rejected the interest balancing analysis which was the basis of its holding in *Roe*, stating that a court goes “beyond the judicial function” when it makes an independent appraisal of the competing interests of preserving a fetus and protecting maternal health. The Court in *Maher* found that the decision to fund abortions is “fraught with judgments of policy and value over which opinions are sharply

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153 The analogy may be attacked on the ground that in the case of abortion funding, the state does not “prevent” the woman from having an abortion, it only “encourages” her not to have one. The fact that precisely the same could be said of a state prohibition of sex selection amniocentesis does not end analysis, however. For a state prohibition of sex selection amniocentesis would prevent certain kinds of abortions—sex selection abortions. The strength of the analogy, while diminished by this fact, still remains. Throughout the abortion cases, the Court is vitally concerned with practical effects—the effects of childbearing, unwed motherhood and unwanted pregnancies. These practical effects are just as real to indigent women as they are to those who can afford abortions, but the Court permits the state to deny abortions to the indigent by leaving the marketplace undisturbed.

154 Planned Parenthood v. Danforth, 428 U.S. 52, 92 (1976) (White, J., dissenting & concurring in part). As the abortion funding controversy and the 13 state petitions calling for a constitutional amendment on abortion demonstrate, the abortion issue remains an intensely political one. See J. Noonan, *supra* note 8, at 180. The Court’s apparent change in direction might be a response to this political reality. As Mr. Dooley said, “No matter whether th’ constitution follows th’ flag or not, th’ supreme coort follows th’ iliction returns.” F. Dunne, *Mr. Dooley on Everybody and Everybody* 160 (1963).

155 100 S. Ct. at 2653. The district court in *McRae* had concluded that “[t]he interests of ... the federal government ... in the fetus and in preserving it are not sufficient, weighted in the balance with the woman’s threatened health, to justify withdrawing medical assistance unless the woman consents ... to carry the fetus to term.” Id. The Supreme Court responded that “[i]n making an independent appraisal of the competing interests involved here, the District Court went beyond the judicial function. Such decisions are entrusted under the Constitution to Congress, not the courts.” *Id.* *Roe*, of course, made just such an appraisal. It concluded that the interest of the state in the fetus is not sufficient, weighed in balance with the woman’s health, to justify prohibiting abortion—even in the third trimester. The Court fails to explain adequately why its balancing is permissible and that of the district court is not. Surely the presence in *Roe* of a criminal sanction cannot be a principled basis for distinguishing the situations. The abortion statute in *Roe* was held unconstitutional because of its effect—causing women to carry to term where they would have chosen abortion—and not because of its punitive nature. *See* *Maher* v. *Roe*, 432 U.S. at 472-73. The funding scheme in *McRae* has the same effect. Moreover, that the Court’s repudiation of interest balancing was made while discussing the rational basis of the legislation for equal protection purposes does not diminish its relevance to a due process analysis, for rational basis analysis has been the traditional test for determining the constitutionality of legislation under the due process clause. *See* *Roe* v. *Wade*, 410 U.S. at 171, 173 (Rehnquist, J., dissenting). *See generally* Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955).
divided . . . when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature."\textsuperscript{156} Thus, the Court explicitly recognizes in \textit{Maher} and \textit{McRae} that at least some controversies surrounding abortion are not amenable to a judicial resolution. These cases indicate that the Court is unwilling to liberally interpret \textit{Roe} in order to strike down government actions which merely interfere with the abortion decisionmaking process. Instead of an expansive view of the abortion liberty, the Court seems content to let \textit{Roe} stand only for its narrow result— that the state may not outlaw abortion generally. Given this conception of the abortion liberty, a prohibition of sex selection amniocentesis should survive constitutional challenge. Such a prohibition would constitute, at most, governmental interference in the decisionmaking process of a woman considering the option of abortion; it would not prohibit the abortion alternative entirely.

In \textit{Maher} and \textit{McRae}, the Court upheld statutory schemes which effectively denied the abortion alternative to millions of indigent women and in \textit{Bellotti} a majority of the Justices indicated they were prepared to uphold a statute that would have a similar effect on millions of minors.\textsuperscript{157} If the Court is willing to uphold such schemes, it would be incongruous for it to strike down a prohibition of sex selection amniocentesis which would not deny the abortion alternative to women, but would only prevent a woman from ensuring the birth of a child of a particular sex.

\textbf{SEX SELECTION AMNIOCENTESIS AND THE FIRST AMENDMENT}

Under \textit{Roe} and its progeny, it appears that the state constitutionally may prohibit sex selection abortion. Such a prohibition would neither be inconsistent with the Court's balancing of interests in \textit{Roe} nor would it unduly burden a woman's right to seek an abortion as that right was discussed in recent cases. However, this conclusion does not end the inquiry into the constitutionality of a state prohibition against the use of amniocentesis for the purpose of sex selection abortion.

The only practical way of preventing sex selection abortions is by prohibiting the use of medical testing for determining a fetus' sex when

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\item \textsuperscript{156} 432 U.S. at 479. Given the substantive due process basis of \textit{Roe}, the significance of the quoted passage cannot be overemphasized. The Court's attitude toward the propriety of judicial resolution of questions related to abortion will likely color future abortion decisions far more than the narrow holdings of past cases.
\item \textsuperscript{157} Compare Mr. Justice Marshall's perspective: "When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless." \textit{Beal v. Doe}, 432 U.S. at 462 (Marshall, J., dissenting).
\item \textsuperscript{157} See notes 110-43 & accompanying text \textit{supra}.\end{itemize}
these tests are sought for the sole purpose of identifying fetal sex. Such a prohibition would make an exchange transaction between a woman and a laboratory illegal. Many laws proscribe exchange transactions; however, in this case, the purchaser ultimately seeks, not an ordinary product, but rather, information about the fetus she carries. Thus, while technically the performance of a specific medical test is prohibited, the purpose of this prohibition is to keep the pregnant woman ignorant of a fact she wants to know. Although a person does not have a constitutional right to buy any information he or she wants, in a series of cases the Supreme Court has protected an individual's interest in the free flow of commercial information. A prohibition of sex selection amniocentesis can be attacked on the ground that it constitutes an unconstitutional infringement of this first amendment interest.

These first amendment concerns led the Court in Bigelow v. Virginia to hold unconstitutional a law restricting advertisements of

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138 Even with this approach, enforcement problems can be anticipated. For example, on the pretext that she is concerned about possible x-linked genetic disease, see note 17 supra, a woman could ask for information regarding fetal sex. But such enforcement problems would not be insurmountable. First, it is unlikely that many individuals would be so knowledgeable about genetic engineering and the different uses of amniocentesis. Second, even if this information were to become widely known, documentation to prove a medical history of x-linked disease could be required. Third, most physicians now oppose sex selection abortion, see note 18 supra, and prohibition of the practice would encourage their own inclinations to be skeptical of such requests, in light of the fact that only 2% of amniocenteses are now performed for x-linked genetic reasons, Antenatal Diagnosis, supra note 13, at I-41. Prohibition would prevent individuals from pointing to the very legality of the practice as an ethical reason for doctors to perform the procedure. See note 19 supra. In addition, the law, reflecting society's condemnation of the practice, would discourage some women from seeking the procedure which would otherwise perhaps be considered socially acceptable. See generally Frankel, The Moral Environment of Law, 61 MINN. L. REV. 921, 942-46 (1977).


141 The prohibition could also be attacked as an interference with the doctor-patient relationship. Mr. Justice Douglas maintained that "[t]he right to privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship." Doe v. Bolton, 410 U.S. at 219 (Douglas, J., concurring). However, these concerns, in the abortion context, must be analyzed in terms of Roe and the first amendment interest in the free flow of information that has been recognized by the entire Court. While Roe emphasized the role of the physician in the abortion decision, later cases made clear that the doctor-patient relationship was not a determinative factor in the Court's reasoning. See note 49 supra. Moreover, amniocentesis services are more properly regarded as exchange transactions, as would be the dispensing of medication or the performance of a medical procedure which may be regulated by the states. But see Wynn v. Scott, 449 F. Supp. 1302, 1310 (1978) (suggesting in dicta that "live, oral communication between a physician and patient" may raise different constitutional concerns than other forms of communication).

abortion services. Distinguishing prior cases on "commercial speech," the Court said that the advertisement in this case "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message, most prominently the lines, 'Abortions are now legal in New York. There are not residency requirements,' involve the exercise of the freedom of communicating information and disseminating opinion." Although the Court noted that "the activity advertised pertained to constitutional interests," i.e., abortion, this factor was not central to the Court's analysis.

Sex selection amniocentesis also involves the communication of information of interest to the recipient and it pertains to the constitutional right of abortion. Thus, a similar first amendment interest is suggested. Ascertaining the existence of such an interest, however, merely begins analysis, for the "First Amendment interest at stake [must be weighed] against the public interest allegedly served by the regulation."

In Bigelow, the regulation's purpose was "to ensure that pregnant women in Virginia who decided to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder." However, the Court dismissed this purpose on a special ground; it held that a state "may not, under the guise of exercising internal police powers, bar a citizen from another State from disseminating information about an activity that is legal in that State." By so grounding its decision, the Court left open the question as to how the issues would have been resolved in a purely intrastate context. That the territoriality proposition the Court forwarded rests on such a weak doctrinal ground suggests, however, that the Court's real concern was a woman's right to relevant information regarding the abortion decision. If this was the Court's true rationale, it lends great weight to the position that prohibition of sex selection amniocentesis would be an unconstitutional infringement of a pregnant woman's constitutional interest.

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163 Id. at 818-22.
164 Id. at 822.
165 Id.
166 The Court agreed with the lower court that this was "a First Amendment case [and] not an abortion case." Id. at 815 n.5. "[I]n this case, . . . First Amendment interests coincided with the constitutional interests of the general public." Id. at 822.
167 Id. at 826.
168 Id. at 814 (quoting Virginia v. Bigelow, 213 Va. 191, 196, 191 S.E.2d 173, 176 (1972)).
169 421 U.S. at 824-25.
170 Id. at 829-31, 834-36 (Rehnquist, J., dissenting). Problems arise in applying the Court's territoriality rationale. For example, the Court has noted in dicta that a state could prohibit an advertisement for prostitution. Pittsburgh Press Co. v. Pittsburgh Comm'n Human Relations, 413 U.S. 376, 388 (1973). However, prostitution is legal in Nevada and thus, under the Court's holding in Bigelow, Nevada brothels ostensibly could launch a nationwide advertising campaign. See 61 CORNELL L. REV. 640, 644 n.15 (1976). Such a result further suggests the lack of doctrinal strength of the territoriality holding of Bigelow.
woman's first amendment rights. However, this was not the Court's stated rationale and Bigelow is limited in its constitutional application by its facts since the Court expresses no opinion on whether a state could prohibit such advertisements in a purely intrastate context.

An intrastate situation was involved in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,111 in which the Court held a prohibition of advertisements for retail drug prices unconstitutional. In this context, the Court said that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."112 Similar concerns led the Court in Linmark Associates v. Township of Willingboro113 to strike down a local ban on "For Sale" signs posted in front of residential homes. The ban was intended to curtail "white flight" from integrated neighborhoods.114 The Court found that the basic constitutional defect in the ordinance was that it prevented

residents from obtaining ... information ... of vital interest to [them] ... bearing on one of the most important decisions they have a right to make: where to live and raise their families. The [local government] has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the [government] views as the homeowners' self-interest and the [government's interest]: they will choose to leave town.115

Similarly, a sex selection abortion statute would prevent women from obtaining information of interest to them, bearing on a most important decision they have a recognized right to make: whether to have an abortion. In addition, a state which prohibited sex selection amniocentesis would be suppressing dissemination of truthful information fearful of the information's effect: that women would choose to have sex selection abortions.

Bigelow, Virginia State Board of Pharmacy and Linmark Associates thus suggest that a woman may have a first amendment right to information of interest to her in exercising her constitutional right to seek an abortion. However, these cases address the issues of public speech. Although a recent case suggests individuals' private speech has similar protection,116 the constitutional concerns in the two areas are not the

112 Id. at 773.
114 Id. at 87-88.
115 Id. at 96 (alternative holding).
116 Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979). Even in Givhan, however, while the communication of the speech occurred in private, it was related to public, governmental issues. In contrast, the speech in a sex selection abortion context is a private matter.
same and the degree to which these cases' broad declarations are applicable at all to private speech is far from clear. More importantly, the government is entitled to suppress the flow of information which forms the basis for certain kinds of "unlawful" decisions. In *Virginia State Board of Pharmacy*, the underlying commercial transaction, prescription drug sales, was an "entirely lawful activity"; the state could not suppress truthful information about that activity because it had no legitimate interest in doing so. Thus, the distinction between protected and unprotected commercial speech turns on the nature of the underlying commercial transaction and the state's interest in prohibiting such an activity. For example, if the ordinance in *Linmark Associates* had prohibited signs which stated a preference for sales to whites, the statute would have withstood constitutional scrutiny. Likewise, in a private speech context, a job interviewer may be discouraged from asking numerous questions regarded as sexist, even though the information he or she seeks would be used in formulating a decision. When the Court refers to the flow of truthful and legitimate information, it implies that there are limits on the right to listen and that the state has the authority to restrict the flow of some kinds of information.

*Pittsburgh Press Co. v. Pittsburgh Commission of Human Relations* recognized this authority. The Court upheld an ordinance prohibiting newspapers from running separate classified advertisement columns for men and women job-seekers. A companion ordinance outlawed sex discrimination in employment. The Court said: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." Job-seekers have no constitutional right to know the potential employer's sex preferences for workers, the employer had no right to communicate that information and, under the Court's holding, a government agency may "enter a composing room of a newspaper and dictate the layout and makeup of the newspaper's pages . . . in order to carry out [the] governmental policy" of eliminating sex discrimination. Indeed, the state interest in

177 See id. at 415 n.4.
179 See generally Kaplowitz v. The Univ. of Chicago, 387 F. Supp. 42, 47-48 (N.D. Ill. 1974);
181 Id. at 388-89.
182 Id. at 389.
183 Id. at 402-03 (Stewart, J., dissenting). Of course, the constitutionality of prohibiting sex discrimination in employment was not even challenged, although in the substantive due process era of *Lochner v. New York*, 198 U.S. 45 (1905), such a prohibition could have been held an unconstitutional infringement of the fourteenth amendment's concept of personal liberty.
eradicating this form of sexism was so strong that it outweighed, to an extent, the first amendment freedom of the press, in addition to whatever interest the employer and job-seekers had in the free flow of legitimate commercial information. By analogy, the government may prevent a woman from finding out the sex of her fetus if it has a similar legitimate state purpose.

State prohibition of sex selection amniocentesis and abortion could be justified on several grounds. First, amniocentesis is a scarce resource and “requests for fetal sex identification could swamp” the system which arguably should be reserved for those who intend to use it to prevent the birth of children with serious defects. This position finds support in *Maher v. Roe*, which emphasized the state’s power to allocate scarce resources in accordance with a legislatively determined set of priorities. Second, while amniocentesis itself is now relatively safe, expanded use would lead to more numerous complications than heretofore experienced. More importantly, however, from the perspective of maternal health, late second trimester abortion is a serious procedure—more dangerous than carrying the infant to term—and the state could assert its interest in maternal health.

Third, the state could assert its interest in maintaining a balanced sex ratio in order to prevent a surplus of males in society. Fourth, the state has legitimate interests in discouraging sexism in society.

184 L. Karp, *supra* note 3, at 123. "Laboratory facilities and manpower are not sufficient to handle the volume of work that would accrue if sex determination on request were to become routine." *Id.* "Requests for fetal sex identification could swamp an already overloaded system or delay laboratory work in cases of serious genetic diseases." Fletcher, *supra* note 17, at 551; see *Antenatal Diagnosis, supra* note 13, at 1-131, 1-187; Milunsky, *supra* note 19, at 61.

185 See 432 U.S. at 478-79.

186 See Miller, *An Overview of Problems Arising from Amniocentesis*, in *Early Diagnosis of Human Genetic Defects* 23, 27-28 (M. Harris ed. 1970). "Estimates of the hazards of amniocentesis that are based on carefully controlled studies by experienced obstetricians may be far too low when less experienced individuals carry out the procedure." *Id.* at 28; see *Antenatal Diagnosis, supra* note 13, at 1-154 to -155.

187 See text accompanying note 76 *supra*.

188 See notes 22-23 & accompanying text *supra*.

189 See notes 29-30 & accompanying text *supra*. If sex selection abortion is considered a sexist practice, the fact that the fetus is not recognized as a “person” under the Constitution is irrelevant to the legitimacy of this state interest. In this regard, it should be noted that the government could decide to promote or encourage sex selection, rather than prohibit it. A thorough discussion of the constitutionality of state promotion or facilitation of sex selection abortion is outside the scope of this note. However, several observations regarding this issue are pertinent since, in some cases, the same constitutional factors which may permit the state to proscribe a given activity may also prevent the state from supporting that activity.

Government support of sex selection abortion could take the form of: first, specific funding of sex selection amniocentesis; second, part of a larger program funding all amniocenteses, aimed primarily at reducing the incidence of prenatally diagnosable disease, but including sex determination as well; third, part of a program funding all health services (*e.g.*, national health insurance); fourth, transfer payments to indigent women (*e.g.*, national health insurance).
basis for state action, but further call into question the "legitimacy" of the information sought by a woman who desires a sex selection abortion—identification of fetal sex.

Although it might appear that by employing a balancing test in the first amendment area the Court would inevitably reach the same result that it would under the balancing test in the abortion area, this is not necessarily the case. While it is true that a woman's possible right to information concerning her fetus' sex is connected with her abortion liberty, the former would not have to owe its existence to the latter. A woman could have an interest in knowing the sex of her child before its birth even if she did not intend to obtain an abortion. Moreover, the balancing test the Court employs in the abortion area is more structured, linked as it is to certain specified interests of the woman and state. The balancing test in the first amendment area is more general, the Court weighing the legitimacy of the information sought against the state interest in restricting access to the information.

Any constitutional interest a woman may have in discovering the sex of her fetus would seem to be outweighed by the countervailing state interests. The state interests in preserving the scarce resource of amniocentesis, protecting maternal health, preventing a skewed sex ratio and discouraging sexism can be perceived as powerful justifications for state action. A woman's interest in discovering her fetus' sex rests on less firm ground. The very legitimacy of the information she seeks is suspect if one characterizes the practice of sex selection abortion as sex-

Medicaid) either for all amniocenteses or just for sex selection; fifth, indirect support by funding facilities which perform sex selection amniocentesis; or sixth, judicial support of sex selection abortion through recognition of "wrongful sex" tort actions.

Any of these state actions facilitating sex selection could be attacked as a violation of the equal protection clause, since sex-based distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives." Califano v. Webster, 430 U.S. 313, 317 (1977).

Although the Supreme Court has declared that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," Roe v. Wade, 410 U.S. at 158, it has recognized an "important and legitimate" state interest in the unborn, id. at 162. The state is not constitutionally required to recognize that interest. See id. at 163-64. But by providing funding for amniocentesis, it is asserting a state interest in the unborn. While it is true that the interest the state thus asserts is to prevent the fetus from being born, the fetus is nonetheless an object of the state's interest. Given this premise, it is contended that when the state chooses to assert its influence over the unborn, the fetus is endowed with those constitutional rights which are not inconsistent with the state of being unborn. This proposition finds support in Roe, which itself noted that the unborn had been afforded rights in the past, but were not "persons in the whole sense." Id. at 162 (emphasis added). There is, however, no reason why a fetus, a human being with the attribute of sex, cannot be considered a person for the limited purpose of protecting it against state sponsored sex discrimination. "[D]epending on the circumstances involved, public policy and other factors, legal personality will be accorded or withheld as these extrinsic considerations demand." Byrn v. New York City Health & Hosp. Corp., 38 A.D.2d 316, 329, 329 N.Y.S.2d 722, 734 (1972) (dictum).

See notes 62-69 & accompanying text supra.
ist and the importance of the information to her is difficult to assess. While a balancing of these interests suggests that the state may prohibit sex selection amniocentesis, the conclusion one reaches using such a general balancing test is inescapably judgmental.

CONCLUSION

A legislative prohibition of sex selection abortion could withstand constitutional scrutiny. A woman does not have a constitutional right to an abortion "for whatever reason she alone chooses."101 Under Roe, a woman has a right to an abortion to avoid significant burdens; she does not have a right to an abortion to ensure the birth of a child of a certain sex. In addition, the Court's reassessment of the nature and scope of the abortion liberty in recent cases suggests that the Court is willing to give legislatures greater latitude in resolving particularly difficult questions concerning abortion. The state may influence the decisionmaking process of a woman seeking an abortion so long as the state does not unduly burden her right to seek one. The Court has upheld statutory schemes which burden a woman's ability to seek an abortion much more significantly than would a prohibition of sex selection abortion; thus a prohibition of sex selection amniocentesis would not unduly burden a woman's right to seek an abortion.

Furthermore, an analysis of an individual's interest in the free flow of legitimate information indicates that a prohibition of sex selection amniocentesis could not be successfully challenged as an infringement of first amendment rights. The state has strong and legitimate interests in discouraging the practice of sex selection abortion. These interests would appear to outweigh a woman's interest in discovering the sex of the fetus she carries.

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